THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001249

Sarah Folston, Claimant, ... Appellant,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and
SC State Accident Fund, Carrier, ... Respondents.

INITIAL REPLY BRIEF OF APPELLANT

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

Attorney for Appellant

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1. The competent evidence shows Claimant is Permanently and Totally Disabled under § 42-9-10.

A. Application of the "Two-body part" rule.

At the outset, Respondents raise the issue that Folston did not satisfy the "two-body part" rule. Respondents argue that "Appellant's ability to recover under § 42-9-10 required her to establish an additional injury or impairment to at least two body parts." [Brief of Respondents]. Appellant does not disagree that she must satisfy the two-body part rule to proceed under § 42-9-10. As shown below, not only was the two-body part rule satisfied by previous stipulation of the parties, the evidence shows active radiculopathy into Folston's right leg – which itself is an affect on a second body part. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(affirming Court of Appeals holding that radiculopathy into a leg satisfies the two body part rule).

Respondents argued the two-body part rule was not met at the hearing before the Single Commissioner – despite the fact their pretrial brief listed "Right hip, right elbow, and low back." However, the Commissioner rejected this argument, holding that "Claimant sustained an admitted injury by accident to her right elbow, right hip, and back arising out of and in the course of her employment on March 22, 2011." [SC Order, Finding of Fact 4]. See, e.g., Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014)("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order."). Furthermore, a previous Consent Order provided "Upon further discovery and medical evaluation including a lumbar MRI, it was determined that Claimant had

injured her back causing sciatic pain into her right leg." [Consent Order]. "When counsel enter into an agreed stipulation of fact as a basis for decision by the court, both sides will be bound by such agreed stipulation, and the court will not go beyond such stipulation to determine the facts upon which the case is to be decided." Belue v. Fetner, 251 S.C. 600, 164 S.E.2d 753 (1968).

Even if the law of the case doctrine does not apply to prevent Respondents from relitigating the two-body part rule, the evidence overwhelmingly supports the Commission's finding of "admitted work-related *injuries.*" The Consent Order itself establishes injuries to multiple body parts.

The diagnosis of radiculopathy (sciatic pain) – both in the Consent Order and the medical records – confirms that at a minimum the back injury affects the right leg. This finding was omitted by the Commission when it limited the award to the back. The Commission also omitted the 2% impairment rating from Dr. Poletti for the radiculopathy into the right leg. [APA pages 170-173].

Dr. Poletti specifically opined "This lady has a diagnosis of lumbar radiculopathy secondary to a foraminal disc herniation at the L5-S1 level." [APA page 172]. Dr. Poletti is not alone in this diagnosis. Dr. Lamotta consistently diagnosed Folston with "L5 radiculopathy." [APA pages 81-113H]. Dr. Hutcheson concurred, diagnosing Folston with "right leg pain in L5 pattern to heel with right L5 protrusion . . . " [APA page 118].

Dr. Hutcheson attempted to treat the radiculopathy nonsurgically with nerve root blocks. The injection was not successful, so on July 14, 2015, she was referred back to Dr. Lamotta for reconsideration for surgery. [APA page 134]. Dr. Lamotta determined surgery was not indicated because "the pain is due to nerve irritation." He continued the diagnosis of L5 radiculopathy and referred Folston back to Dr. Hutcheson for pain management. He also continued her on sedentary

restrictions. [APA page 113C].

The treating physicians (Lamotta and Hutcheson) and the independent medical physician all agreed that Folston suffers from L5 radiculopathy into her right leg. This diagnosis appears consistently in every single medical report. There is no substantial evidence to support the Commission's finding that the partial disability award should be limited to the back.

Respondents point out that Folston underwent an EMG/NCS for which the Appellate Panel stated: "This is a diagnostic test to which we accord great weight. We give this objective study greater weight than her subjective complaints upon which her impairment rating was assigned." [FC Order, Page 8, Finding of Fact 6].

There are two legal problems with this finding. The first is that it contradicts the previous Consent Order ruling "Claimant had injured her back causing sciatic pain into her right leg." [Consent Order]. The Appellate Panel simply has no authority to reverse a previous finding in an Order.

The second problem is that the Commission is injecting its own medical opinion into its findings contradicting the opinions of the medical experts. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012) (a finding of fact based on a commissioner's own lay medical opinion is not substantial evidence and must be reversed). The EMG/NCS was done on May 5, 2014. [APA pages 103, 115]. Dr. Lamotta ordered both a CT myelogram and the EMG/NCS on March 27, 2014 "to see if the patient is a surgical candidate." [APA page 98]. Folston returned for follow up on May 29, 2014. Dr. Lamotta recorded that per the CT myelogram "L5-S1 reveals right-sided paracentral and foraminal disc protrusion which results in moderate right-sided stenosis." [APA page 105]. Dr. Lamotta continued the diagnosis of L5 radiculopathy.

In other words, the expert orthopaedic surgeon who ordered both the EMG/NCS and CT myelogram found that the CT myelogram *confirmed* his clinical diagnosis of L5 radiculopathy. It was up to Dr. Lamotta to weigh the results of the two tests; not the Appellate Panel. When the Appellate Panel interjected its own lay medical opinion contradicting the opinion of the doctor who interpreted both tests, it committed reversible legal error. See Burnette; Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016)(reversing commission for relying on MRI scans to reject opinions of medical doctors that claimant had sustained a change of condition).

Respondents further argue that this Court's holding in Hutson is distinguishable by Colonna v. Marlboro Park Hosp.. 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013). Colonna dealt with a woman who developed CRPS in her leg. She required a spinal cord stimulator to be implanted in her back to treat the CRPS. This Court rejected the assertion that the situs of a treatment modality could be considered an injury to a second body part. Colonna is simply not applicable here.

Hutson is the controlling case. In Hutson, the claimant suffered from the same condition suffered by Folston: a back injury resulting in radiculopathy into a leg. The Commission committed the same error it committed here when it limited the disability compensation to the back under Section 42-9-30. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(affirming Court of Appeals holding that radiculopathy into a leg satisfies the two body part rule). Indeed, the only significant difference is that Folston had a specific impairment rating to her leg from radiculopathy (2% from Dr. Poletti), whereas Hutson merely had a diagnosis of radiculopathy.

The Appellate Panel erred in limiting the award to the back, as Folston proved she met the threshold requirement to proceed under the economic model by satisfying the two-body part rule.

B. Permanent and Total Disability under § 42-9-10.

As to disability under the economic model, Respondents argue against total disability, instead proposing that the case be remanded for the Commission to address wage loss under § 42-9-20 as opined by their vocational expert. [Brief of Respondents, page 21]. Although Appellant contends Respondents opinion is incompetent on this issue as well, Appellant agrees that should the Court find Ms. Kennedy-Merritt's testimony to be competent, then such a remand is appropriate (although the remand should be for the Commission to address both § 42-9-10 and § 42-9-20).

Coleman sets out the 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." Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965). Any one of these methods will suffice.

Folston proved her total disability two ways. The first is the expert vocational testimony from Glenn Adams, wherein he opined "no stable labor market remains for Ms. Folston working in a "sedentary" work capacity. She has incurred a total loss of access to the competitive labor market. Ms. Folston is classified as **totally vocationally disabled** as a result of injuries sustained on March 3, 2011 while working for the S.C. Department of Disabilities and Special Needs." [APA page 202 (emphasis in original)]. The second was by a diligent work search, where Folston contacted every employer listed by Respondents' expert as willing to hire her.

Indeed, this is the fundamental dilemma. Expert testimony is designed to aid the trier of fact in reaching the correct decision. To serve its purpose, it must be reliable – not merely the musing

of a "hired gun" willing to advocate for any position so long as it helps the retaining party.[1] And this is the problem with Kennedy-Merritt's testimony. To be competent, an expert opinion must (1) be based on a solid foundation; and (2) be stated to the most probably standard.

The ostensible foundation for Kennedy-Merritt's opinion is that she identified seven "positions that fall within the guidelines of [Folston's] limitations physically and vocationally." [Defendants Exhibit A, page 10]. These seven positions are listed by position, company, brief description and salary. Nowhere does she list the physical demand levels, the education requirements, the transferable skills required, nor the hours. There is simply no information here for the trier of fact to determine whether Folston could be hired or perform these jobs. For that matter, there is no way to verify if these jobs or employers even exist. Kennedy-Merritt did not provide full names, phone numbers or addresses. She did not provide any source or documentation of where she got this information. If Coleman requires a claimant to produce the testimony of employers who would not hire the injured worker to prove disability, then a defense vocational expert should be held to the same requirement. There is simply no foundation for Kennedy-Merritt's ultimate opinion. See Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) ("It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value."); Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(rejecting employer's argument that requirement expert testimony be stated to a reasonable degree of certainty "applies only to claimants and not defendants.").

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[1]Kennedy-Merritt is an expert who admitted under oath that 100% of her work is for defendant employers. [Dep tr., page 15, line 18-page 16, line 6]. She could only recall "one report that I've written in regards to the individual not being able to maintain or sustain competitive employment." [Dep tr., page 16, lines 14-23]. This is the very definition of hired gun.

The lack of foundation in Kennedy-Merritt's opinion is further undercut by Folston's efforts to find employment with these supposed seven employers, as well as Kennedy-Merritt's admissions in her deposition that these jobs are not genuine opportunities. [Transcript]. Jobs outside Folston's geographic area; part time jobs; jobs outside sedentary restrictions; and jobs for which Folston does not qualify for are not viable options and cannot support the ultimate opinion given by Kennedy-Merritt. The further fact that Folston could not reach these supposed employers or obtain interviews when she tried confirms that Kennedy-Merritt's report is based on a specious foundation.

Even beyond the woeful lack of foundation is the central flaw in Kennedy-Merritt's testimony. She cannot legitimately state to a reasonable degree of vocational certainty that Folston is *most probably* able to obtain suitable gainful employment. Even though it was discussed in Appellant's Brief, this point is so significant it bears repeating. Her testimony spoke to *possible jobs*; not *probable jobs*. See Windham v. City of Florence, 221 S.C. 350, 70 S.E.2d 553 (1952)(it is not sufficient for an expert to say "possibly" or "might have" as experts have to go further and testify at least that the result in question must be stated "most probably."). Kennedy-Merritt testified:

> . . . my vocational opinion says that with the limitations that are provided, *these are possible jobs* that she can do . . . But on the other hand, she would need help going to these types of jobs. That's why I'm saying she can't just walk out the door and go get them. I believe, based on my vocational knowledge, education, experience, that with some help these jobs, *she could possibly do these jobs*.

[Kennedy-Merritt tr. page 78, line 16-page 79, line 5].

This is simply not sufficient to meet the requirements for expert testimony. As such, it was error of the Commission to give any weight to Kennedy-Merritt's incompetent testimony.

As a final note, Respondents argue that other evidence, including Folston's expressed desire to work, prove that she is not totally disabled. It is true that unlike Dr. Poletti, Dr. Lamotta did not

outright disable her.[2] He kept her on sedentary status – which disqualified her from all previous employment. [APA page 113F]. While doctors can order people completely out of work, more often they address physical demand levels and impairments, leaving the determination of disability up to vocational experts and the Commission. Even within this framework, it must be acknowledged that a limitation to sedentary duties (including the inability to sit over 30 minutes) is rather dramatically disabling to a person with no transferable skills or history in a sedentary environment and who reads at a 4th grade level (3rd percentile) and performs arithmetic at a 5th grade level (14th percentile), with an IQ in the 21st percentile. [Defendants Exhibit A. Page 7]. With these limitations, Folston's desire to work in some capacity is laudable, but unfortunately not realistic. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing commission's denial of disability based on testimony of claimant that he could operate a restaurant as "rank speculation.").

The Commission committed reversible error in denying Folston's claim for permanent and total disability. The error was in relying on incompetent expert testimony from Ms. Kennedy-Merritt and speculation regarding Folston's ability to obtain work within the open market.

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[2]Dr. Poletti opined: "It would be my opinion that she is potentially a candidate to pursue Social Security disability as she has a sedentary status and at this point is not capable of sitting for extended periods of time longer than 30 minutes." [APA page 173].

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should hold Claimant is permanently and totally disabled, entitling her to the balance of 500 weeks and lifetime medical treatment. In the alternative, the case should be remanded for the Appellate Panel to exclude Ms. Kennedy-Merritt's report from the record and make new factual findings based on the competent evidence in the record.

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
February 13, 2019

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Sarah Folston, Claimant, ... Appellant,

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PROOF OF SERVICE

I certify that I, Katherine R. Carter, paralegal for the Samuels Law Firm, LLC, have served the **Initial Reply Brief of Appellant** and **Supplemental Designation of Matter** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on February 13, 2019, addressed as follows:

Erin Farthing, Esq.
SC State Accident Fund
Post Office Box 102100
Columbia, SC 29221

February 13, 2019

Katherine R. Carter
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

February 13, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Sarah Folston v. SC Department of Disabilities and Special Needs, *et. al.*
Appellate Case No.: 2018-001249

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Initial Reply Brief of Appellant, Supplemental Designation of Matter** and **Proof of Service,** in the above referenced case.

Please have your staff clock in the Initial Reply Brief of Appellant, Supplemental Designation of Matter and Proof of Service and return the clocked copies in the enclosed self address stamped envelope.

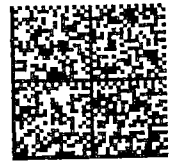
With kindest regards, I am

Respectfully,

Katherine R. Carter
Litigation Paralegal

/krc
Enclosure(s) as stated

cc: Erin Farthing, Esquire



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SAMUELS
LAW FIRM

1320 RICHLAND STREET
COLUMBIA, SC 29201

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The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211