THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1002925

Neal Beckman, Employee, ... Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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1. The Commission erred in limiting Beckman to a scheduled member disability award when the evidence showed disability should have been awarded under the loss of earnings capacity statute.

Respondents begin their argument with a discussion of Colonna v. Marlboro Park Hospital, Op. No. 5117 (S.C.Ct.App. withdrawn, submitted and refiled June 26, 2013)(Shearouse Adv.Sh. No. 29 at 16). However, Colonna provides no support for their argument and is easily distinguished.

First off, Colonna affirmed the general principle applicable here, to wit: "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Id., *quoting*, Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003). As Respondents themselves state, "an individual is not limited to scheduled benefits under section 42-9-30 if the individual can show additional injuries." [Brief of Respondents, pag 13]. Respondents omit the essential point made in Colonna which is "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." Id. (emphasis in original).

In Colonna, the claimant suffered from a foot and ankle injury, which ultimately required surgical implantation of a spinal cord stimulator to treat severe intractable felt in the foot due to the complication of Reflex Sympathetic Dystrophy (RSD). The Commission made a partial disability award to the leg under S.C. Code Ann. § 42-9-30 (2004). Colonna appealed, contending that the surgical implantation of the spinal cord stimulator in her back necessarily resulted affected her back – thus enabling her to seek a permanent and total disability award under S.C. Code Ann. § 42-9-30 (2004).

The issue framed by the Court was whether the *successful* implantation of a medical device (without additional injuries from surgical complications) constituted an affected body part within the meaning of Wigfall and Singleton. This Court found "Colonna's argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment." Colonna.

Colonna is distinguishable for two reasons: (1) it involved a medical device rather than an actual injury;[1] and (2) and there was no evidence of impairment or injury to any part of the body other than the foot. In the instant case, Neal Beckman suffers from a medically documented injury with permanent impairment and injury to his back, SI joint, and left leg. As such, this case involves a very different issue and very different level of proof than Colonna. Moreover, in Colonna, the Commission's orders never even acknowledged the existence of the RSD and the spinal cord stimulator. Here, the Appellate Panel found as a fact that "The authorized treating physician assigned a 15% combined impairment rating for the back and SI joint." [R. p. 26]. The Panel further found "Claimant is entitled to receive injections per the recommendation of the authorized treating physician, Dr. Zgleszewski." [R. p. 28]. As the injections are specifically "SI joint injections," the Commission must necessarily have found that the SI joint was injured in the accident.

A. SI Joint Injury.

Respondents are forced to concede that Dr. Zgleszewski opined Beckman "has a 10% impairment to the back/spine and a 5% impairment to the SI joint for combined rating of 15%."

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[1]Colonna did not reach the issue of whether the RSD that required implantation of the spinal cord stimulator was itself a separate injury. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) ("Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain.").

[Brief of Respondents, page 15]. Despite the explicit listing of two separate impairment ratings for two separate body parts, Respondents persist in arguing that "the SI joint is not required to be considered a separate body part as the sacrum is a portion of the spine located below the lumbar vertebral column." [Brief of Respondents, page 15-16]. This argument might have some appeal had the injury been confined solely to the *sacrum* itself. However, as John Adams famously stated, "Facts are stubborn things."[2] The stubborn facts here are that Beckman suffered injury and impairment to the sacrum *and* the illiac – each of which constitute injury and impairment to the back and pelvis, respectively. See Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995)(claimant not limited to scheduled member award because "as a matter of law the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes").

Respondents then contend that even though the analysis in Gilliam is identical, Gilliam does not apply because "although the hip socket is part of the pelvis, the SI joint was not specifically addressed." [Brief of Respondents, page 15-16]. This statement is effectively the unavoidable concession that anatomically the SI joint is indeed the joint encompassing the pelvis and the back, and that Gilliam *is* the controlling case. See Therrell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)(relying on Gilliam to hold "compensation for a torn rotator cuff [which "is a group of muscles, ligaments, and cartilage attaching the humerus (armbone) to the chest"] should not be limited to the scheduled recovery for the loss of an arm").

Respondents direct the Court to Sanders v. MeadWestvaco Corp., 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006), where this Court affirmed an award of "40% permanent partial disability to [the]

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[2]"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence." John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770.

lumbar spine and sacroiliac joint (SI joint)." Id. The key to Sanders is the procedural posture.

In Sanders, the Commission made two separate partial disability awards: 13% to the leg and 40% to the back. The employee did not appeal at all; the *employer* appealed the award of 40% to the back on the grounds that it was too high because it was "based upon impairment to functional units of the back, *i.e.*, the lumbar spine and SI joint which are not scheduled for compensation under section 42-9-30."[3] Id. at 289-290, 638 S.E.2d at 69. This Court rejected such a strained interpretation, noting the "argument that because the Appellate Panel's order was too specific in identifying the regions of the back where Sanders' loss of use occurred and that these regions are somehow separate from the back itself is without merit." Id.

The issue in Sanders was the propriety of increasing a scheduled member disability award to the back by including additional functional impairment located in the SI joint. Sanders involved a disability award under § 42-9-30; not under §§ 42-9-10 or 42-9-20.[4] The Sanders court was never asked to rule on the issue presented here – which is specifically whether the SI joint is an

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[3]The employer did not appeal the Appellate Panel's 13% disability award to the leg.

[4]At the hearing before the single commissioner, Sanders had claimed he was permanently and totally disabled. As he suffered injuries to two scheduled members (the back and the leg) and one unscheduled member (the SI joint), he met the legal threshold for the Commission to make an award under the economic model. See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960)(claimant can proceed under the general disability statutes if he can "show that some other part of his body is affected.").

The opinion does not record why the Commission made separate scheduled disability awards to the leg and back rather than a permanent and total disability award, nor was that question an issue before the Court. It can be safely inferred that Sanders failed to prove an *actual* loss of earnings capacity, so the award was made under the *presumed* disability statute. See Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003)(comparing the economic model of disability with the medical model's presumption of disability); Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994)("It is well-settled that an award under the general disability statutes must be predicated upon a showing of a loss of earning capacity, whereas an award under the scheduled loss statute does not require such a showing.").

unscheduled body part – and generally whether a scheduled injury (10% impairment to the back) and unscheduled injury (5% impairment to the SI joint) allow a claimant to prosecute a loss of earnings claim under § 42-9-20.

In the instant case, both parties presented expert testimony confirming that Beckman suffered an *actual* loss of earnings capacity. There remains a dispute over the *extent* of the earning loss – which must be resolved by the Commission on remand – but the *existence* of the earning loss is undisputed. [R. pp. 198-204; 207-220].

As the situs of the injury was to both the back and the SI joint, Beckman must be given "the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section." Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994). Therefore, the Court should reverse the Appellate Panel and remand with instructions to determine the extent of Beckman's loss of earnings capacity.

B. Radiculopathy.

Respondents argue "that substantial evidence in the record suggests that the Appellant does not have any impairment to any body part other than his low back." [Brief of Respondents, page 20]. Yet, they contradict themselves by also stating "there is substantial evidence to support the award of 35% permanent partial disability to the Appellant's back *including the alleged radiculopathy.*" [Brief of Respondents, page 20 (emphasis added]. This second statement is simply another way of stating that the Commission found as a fact that Beckman's left leg radiculopathy was a physical deficiency which contributed to his disability.

Respondents focus on a single medical report from April 11, 2011 as "the best indication of the Appellant's complaints immediately prior to his release from treatment." [Brief of Respondents,

page 19; R. p. 188]. If the standard of review were a scintilla of evidence, then it would be enough for the prevailing party below to find the one piece of paper that somewhat supports the decision and that would be the final answer. However, while substantial evidence is a relatively deferential standard of review, "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). See also, National Bank of Honea Path v. Thomas J. Barrett, Jr., & Co., 174 S.E. 581, 173 S.C. 1 (1934)("If it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence . . . nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury.") The role of the appellate courts is to meaningfully analyze the entire record evidence under this standard – not to mine the record for inconsequential nuggets.

To illustrate just how inconsequential this one report is, the Appellate Panel stated "At one point (post discectomy on April 2011), Claimant reported no leg pain at all." [R. p. 25]. The specific mention of this one report shows that it differed from *every other medical record.* Even more critically, the finding leads to the inescapable inference that the discectomy provided only temporary relief. It would be rank speculation to use that one report as a basis for the decision. See Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(reversing Court of Appeals because lay testimony relied on to affirm Commission was not only contrary to expert testimony but also rested solely on speculation, "thus, there is no evidence in the record supporting the commissioner's

order.").

Beckman's radicular complaints had returned by the next visit with Dr. Zgleszewski on May 2, 2011. In fact, his back and radicular pain was "worse than it was when he originally injured his back."[5] [R. p. 191]. Radicular symptoms were still present when he saw Dr. Boyd on February 27, 2012 when "His pain does occasionally radiate down into his left leg and he states that he has some numbness around his foot." [R. p. 205]. In the 14B dated September 9, 2011, Dr. Zgleszewski made a final diagnosis at MMI of "Sacroiliitis; lumbar disc injury & radiculopathy." [R. p. 193]. The Appellate Panel simply relied on a stale medical report.

The Appellate Panel also put undue reliance on an "imperfect diagnostic tool" for diagnosing radiculopathy. [R. pp. 33, 38]. The commissioners are not themselves qualified to interpret diagnostic testing and make diagnoses. A commissioner's own medical opinion is not evidence.

The one scintilla of evidence which arguably undercuts the radiculopathy diagnosis is the EMG/NCS study. This is obviously the basis for the Appellate Panel's finding as they state: "The Claimant also underwent an EMG/NCS study that revealed normal results with no objective evidence of radiculopathy." [R. p. 25].

The problem here is this statement is based on the Single Commissioner's own medical opinion – not that of Dr. Zgleszewski. Dr. Zgleszewski personally reviewed and interpreted the EMG/NCS study – and maintained his diagnosis of radiculopathy. He repeatedly stated that the test is an "imperfect diagnostic tool" for diagnosing radiculopathy. [R. pp. 33, 38]. This is exactly what

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[5]Dr. Zgleszewski's May 2, 2011 report also stated, "He is [status post Percutaneous Discectomy] at L4-L5, he notes return of the left lateral upper thigh pain and radiation down the left laterla thigh to the foot . . . He states his pain radiates to the left buttock; radiates to the left laterl thigh, extends past the knee into the posterior leg and foot and The calf pain feels lite 'it's on fire' when he stands." [R. p. 191].

happened in Burnette where this Court reversed the Commission because "We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy." Burnette v. City of Greenville, 737 S.E.2d 200, 206, 401 S.C. 417 (Ct. App. 2012).

The evidence here is overwhelming that Beckman's back injury caused left leg radiculopathy. There is no genuine conflict in the evidence nor is there substantial evidence to support the Commission's finding that the "greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident." [R. p. 28].

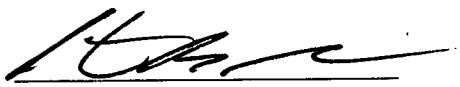
See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]").

The Appellate Panel repeated the error it made in Burnette when it substituted its own medical opinions for the opinions of the doctors. This is reversible error. Furthermore, the fact the 35% award to the back *included radiculopathy* confirms that the left leg radiculopathy was a compensable second body part. This Court should reverse the finding that the injury is limited to the back and remand to the Appellate Panel for a determination of Beckman's loss of earnings capacity.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel and remand for a determination of Beckman's loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007).

Respectfully Submitted,



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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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T. Scott Beck, Avery B. Wilkerson, Derrick L. Williams, Appellate Panel

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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Final Reply Brief of Appellant** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **September 12, 2013**, addressed as follows:

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