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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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Appellate Panel erred as a matter of fact and law in failing to find Claimant was permanently and totally disabled under § 42-9-10 when there is no evidence "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."

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

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[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.

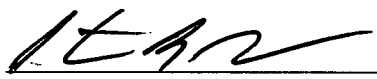
Furthermore, the Appellate Panel relies on its own diagnosis of CRPS, rather than relying on the medical experts. The Panel based its opinion on what constitutes CRPS on its own diagnostic criteria – disregarding Dr. Zgleszewski's unrefuted opinion as to the diagnostic criteria used by medical experts. [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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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 11, 2013**, addressed as follows:

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