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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ATTORNEYS FOR APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I. Cindy Dozier is permanently and totally disabled as there are no jobs available to someone with permanent restrictions of no more than occasional lifting up to 5 pounds [In reply to Respondents' Argument at pages 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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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 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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