

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
SINGLE COMMISSIONER & APPELLATE PANEL

WCC FILE NO. 0905998 & 0901428
TRACKING NO. 2013-001669

Katherine L. Haines, Employee, Respondent,

v.

Dollar Tree Stores, Inc., Employer, and ARCH Insurance Company, Carrier
Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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DEC 16 2013
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ARGUMENT..... 1

 A. The Commission erred in its determination that Respondent suffered injuries to multiple body parts. 1

 B. Appellants do not concede or stipulate that Respondent has sustained fifty percent loss of use of her back. 3

 C. The Commission erred in its determination that Respondent’s incapacity to work is total. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Case Law

<u>Colonna v. Marlboro Park Hosp.</u> , 745 S.E.2d 128 (Ct. App. 2013)	1-2
<u>Simmons v. City of Charleston</u> , 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002)	1
<u>Singleton v. Young Lumber Co.</u> , 236 S.C. 454, 114 S.E.2d 837 (1960)	2

Statutes and Regulations

S.C. Code Ann. § 42-9-10 (Supp. 2012)	2
S.C. Code Ann. § 42-9-30 (Supp. 2012)	6

ARGUMENT

A. The Commission erred in its determination that Respondent suffered injuries to multiple body parts.

Respondent cites Simmons v. City of Charleston, 349 S.C. 64, 562 S.E.2d 476 (Ct. App. 2002) in its discussion concerning a general disability award where additional body parts are affected by an injury. Simmons is distinguishable from the case at hand. In Simmons, the claimant underwent three skin graft surgeries on his right leg after he sustained a brown recluse spider bite. Id. at 68, 562 S.E.2d at 478. Thereafter, his leg continued to be swollen and painful. The Commissioner found that the claimant continued to suffer injury and impairment to his right leg. Id. at 75, 562 S.E.2d at 481. Moreover, due to the increased weight and pressure on his left leg, in addition to other health problems that led to an infection, the claimant was forced to amputate his left leg below the knee. His doctor assigned 100 percent disability to the claimant's left leg. Id. at 68, 562 S.E.2d at 478.

In Simmons, the claimant's work injury impaired another body part. One of the claimant's legs had to be amputated, and he underwent three surgeries on the other. Appellants submit, in the instant case, that the radicular pain Respondent experiences as a result of her neck injury does not rise to the requisite level of impairment necessary to support the Commission's conclusion that Respondent suffered an injury to five body parts.

Moreover, Respondent attempts to distinguish this Court's decision in Colonna v. Marlboro Park Hosp., 745 S.E.2d 128 (Ct. App. 2013) from the facts of this case, noting that the claimant in Colonna alleged her back was affected by a spinal cord stimulator, thereby triggering the two body part rule. This Court framed the question of whether the claimant in Colonna was permanently and totally disabled as "whether her initial injury had a 'disabling effect' on other parts of her body." Id. at 133. Unlike the situation in Simmons, in which the claimant's initial

injury had a disabling effect on the other leg, the claimant's initial injury in Colonna did not have a disabling effect on her back. Appellants submit that the reasoning in Colonna is also applicable to the case of radiculopathy in the case at hand.

Respondent correctly notes in her Initial Brief that this Court italicized "affected," when quoting the Singleton decision. See Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) ("To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected.") However, this Court in Colonna italicized "affected" in this passage in order to emphasize the *claimant's* argument that the two body part rule was triggered, an argument that was ultimately rejected by this Court. Id. at 133.

Respondent also correctly notes in her Initial Brief that Appellants quoted a portion of the Singleton decision that supports their argument. Appellants point out, however, that the portion of the Singleton decision cited in their Initial Brief is also the portion of the Singleton decision cited in Colonna to support this Court's reasoning that another body part must be impaired or injured for section 42-9-10 to apply. Id., Singleton at 471, 114 S.E.2d at 845 ("[wh]ere the injury is confined to the scheduled member and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation.")

Appellants maintain that there is no impairment to or physical deficiency of additional body parts other than Respondent's neck. As such, the Commission erred in its seventh conclusion of law that Respondent suffered an injury to five body parts.

As part of her argument regarding her alleged injuries, Respondent discusses the opinion of Dr. Johnson regarding the length of time between the patient's injury and her ultimate surgery. Appellants provided treatment with Dr. Burnworth at Moore Orthopaedics and Dr. Lembo at

Carolina Spine & Sport prior to Respondent's referral to Dr. Boyd at Columbia Neurosurgical Associates. Respondent also underwent an extensive period of physical therapy with The Sports Rehab Center. Respondent's treating physicians treated her conservatively before suggesting surgery. To the extent Respondent implies that Appellants delayed treatment, such an implication is simply inaccurate.

B. Appellants do not concede or stipulate that Respondent has sustained fifty percent loss of use of her back.

Appellants do not dispute that Respondent has sustained a significant injury to her cervical spine. Indeed, Respondent underwent surgery for her condition, and Appellants acknowledge that Respondent's injury limits her physical activity and requires her to take pain medication. However, Appellants do dispute that their acknowledgement of a significant injury equates to a concession that Respondent has sustained fifty percent loss of use to her back.

Appellants cited numerous facts in their Initial Brief from which reasonable minds could conclude that Claimant did not sustain fifty percent loss of use of her back. Appellants' Initial Brief is replete with evidence of Respondent's physical abilities. The Appellants further request in their Initial Brief that this Court remand the case for a determination of permanent disability pursuant to South Carolina Code Section 42-9-30. Moreover, Appellants' eighth ground for appeal was that the Commission erred "concluding as a matter of law that claimant is permanently and totally disabled under § 42-9-30(21) in that she has experienced 50% loss of use or disability to her back" To the extent that the language used in Appellants' Initial Brief was unclear, Appellants maintain that the Commission erred in the determination that Respondent sustained fifty percent loss of use of her back.

C. The Commission erred in its determination that Respondent's incapacity to work is total.

Even if this Court agrees with the Commission's determination that Respondent has sustained injuries to multiple body parts and/or a fifty percent loss of use of her back—both contentions which Appellants contend they have rebutted—the reliable, probative, and substantial evidence in the record establishes that Respondent may still return to gainful employment in the competitive marketplace. Appellants rely on their Initial Brief for evidence and arguments concerning Respondent's ability to return to work.

With respect to several statements made by Respondent in her Initial Brief, she asserts that Jan Westmoreland/The Directions Group “did not consider the impact of having to take narcotic drugs on the ability to get a job and work” Appellants respectfully submit that The Directions Group certainly took into account the fact that Respondent takes narcotic medication, evidenced by the section of The Directions Group's report labeled “Medications.” (R. p. 314)

Respondent further asserts The Directions Group gave no consideration to the restrictions ordered by Dr. Redmond nor to those listed by Dr. Johnson. In fact, Ms. Westmoreland's report specifically notes that she reviewed the restrictions ordered by Dr. Redmond. (R. p. 312) Ms. Westmoreland may not have had the benefit of Dr. Johnson's report because Dr. Johnson was not an authorized treating physician, but rather performed an independent medical evaluation on Respondent's behalf. (R. p. 312)

J. Adger Brown responded to The Directions Group's listing of potential jobs for Respondent, noting “all of them appear to require at least the capacity to work at the full range of sedentary, if not sedentary to light level of physical demand.” (R. p. 297) He went on to note that there was “no indication that any employers were ever contacted to determine Ms. Haines' particular suitability or to discuss Ms. Haines' specific limitations.” (R. p. 297) There is no

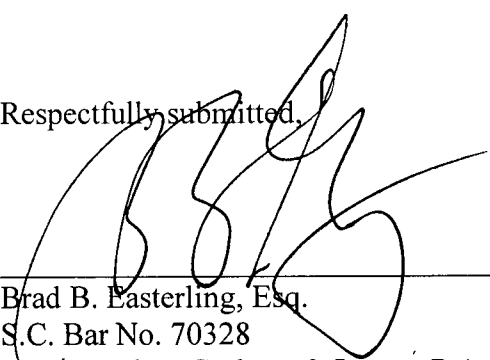
indication that *Mr. Brown* ever contacted these employers to confirm the physical demands of such positions either. Appellants submit, therefore, that he only speculated as to the physical demand levels. Furthermore, Respondent likely would not be able to speculate as to which occupations in the market may be suitable for her because she has made no attempt to look for other work since leaving Dollar Tree's employment. (R. p. 91, lines 24-25-p. 92, lines 1-4.) Claimant was referred to vocational rehabilitation by Dr. Redmond. (R. p. 282) He honored her request for a referral, but Respondent never made contact with the agency. (R. p. 91, lines 12-23, R. p. 317)

Ms. Westmoreland is a vocational expert. Appellants maintain that the assumptions and facts upon which she relied in making her report were certainly not inaccurate. Indeed, they seem to be substantially the same facts that were submitted to Mr. Brown. While Respondent may not agree with her *conclusions*, these conclusions are not "patently incorrect" as Respondent describes or "at odds with the overwhelming weight of the evidence" as the Commission found. (R. p. 5) All of the experts that discussed Claimant's physical demand restrictions discussed sedentary duty, as Ms. Westmoreland did as well. Ms. Westmoreland's report, in addition other reliable, probative, and substantial evidence in the record shows that Respondent has the capacity to return to work and is not permanently and totally disabled.

CONCLUSION

For all of the foregoing reasons, as well as for those reasons set forth in Appellants' Initial Brief, Appellants respectfully submit that the Commission's conclusion that Respondent was permanently and totally disabled was erroneous in light of the reliable, probative, and substantial evidence in the record. As such, Appellants respectfully request that this Honorable Court reverse the decision of the South Carolina Workers' Compensation Commission and find that Respondent is not permanently and totally disabled. Appellants further request that the case be remanded to the Commission for a final determination of permanent partial disability under Section 42-9-30.

Respectfully submitted,



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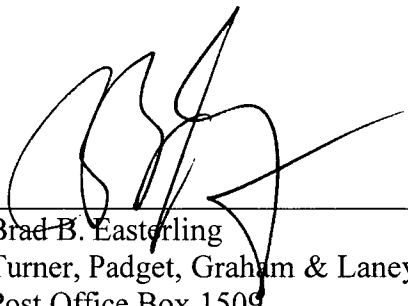
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CERTIFICATE OF COUNSEL

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

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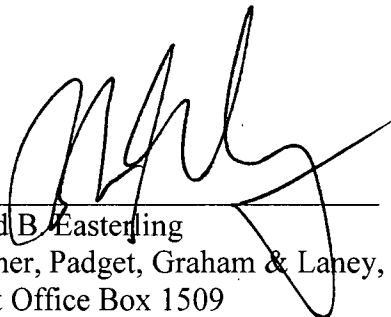
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