THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPELLATE CASE NO. 2019-001594

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

WCC FILE NO.: 1517220

Janice McCutcheon, Employee..... Respondent,

v.

Greenwood Mills, Inc., and Greenwood Mills/Self-Insurer, Employer/Carrier.....Appellant.

FINAL BRIEF OF APPELLANT

Roy R. Hemphill, Esquire (SC Bar #15142)
McDonald Patrick Poston
Hemphill & Roper, LLC
414 Main Street
P.O. Box 1547
Greenwood, SC 29646
Attorneys for Appellant

Other Counsel of Record:

Jimmy R. King, Esq.
King Law Firm, PC
2203 North Main Street
Anderson, SC 29621
(864) 225-9155
Attorney for Respondent

TABLE OF CONTENTS

Table of Authorities iii
Statement of Case 1
Statement of Issues on Appeal 3
Standard of Review 3
Argument I 4

I. DID THE SINGLE COMMISSIONER ERR IN AWARDING COMPENSATION PURSUANT TO S.C. Code Ann. § 42-9-10, BECAUSE RESPONDENT ONLY INJURED HER LEFT UPPER EXTREMITY, THEREFORE, HER COMPENSATION SHOULD HAVE BEEN CONFINED TO A PERMANENT PARTIAL DISABILITY AWARD UNDER S.C. CODE ANN. § 42-9-30?

Argument II 11

II. DID THE COMMISSION ERR IN AWARDING COMPENSATION PURSUANT TO S.C. CODE ANN. § 42-9-10, BECAUSE RESPONDENT ONLY INJURED HER LEFT UPPER EXTREMITY, AND THEREFORE, HER COMPENSATION SHOULD HAVE BEEN CONFINED TO A PERMANENT PARTIAL DISABILITY AWARD UNDER S.C. CODE ANN. § 42-9-30?

Conclusion 17

TABLE OF AUTHORITIES

Cases

Bass v. Kenco Group, 366 S.C. 450, 622 S.E.2d 577 (Ct. App. 2005).....4

Colonna v. Marlboro Park Hospital, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013).....3, 4, 9, 10

Dozier v American Red Cross, 411 S.C. 274, 768 S.E.2d 222 (Ct. App. 2014),.....16, 17

Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981).....3

Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960).....4, 5, 10

Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003).....4, 5

Statutes

S.C. Code Ann. § 1-23-380.....3, 4

S.C. Code Ann. § 42-9-10.....2, 3, 4, 5, 8, 9, 10, 11, 16, 17

S.C. Code Ann. § 42-9-20.....5

S.C. Code Ann. § 42-9-30.....3, 4, 5, 9, 11

STATEMENT OF THE CASE

The Respondent was a registered nurse that worked as Appellant's plant nurse at its lone plant for approximately twenty-nine years. On November 5, 2015, Respondent was injured in an admitted accident when she tripped on a step and fell sustaining a fracture to her left wrist. She began treating with Dr. Anthony Timms, a Greenwood orthopaedist, who performed surgery on her left wrist approximately three weeks after her fall. Respondent remained out of work until December 27, 2015. Thereafter, she returned to light duty work for five hours a day. Respondent engaged in physical therapy in early 2016. At her February 10, 2016 visit with Dr. Timms, it was determined that she was showing signs of reflex sympathetic dystrophy (RSD). Appellant referred her to Piedmont Comprehensive Pain Management Clinic where Dr. Loudermilk performed a series of four stellate ganglion blocks in April 2016. (Record on Appeal, pp. 134-143). These blocks were successful and Dr. Loudermilk placed Respondent at maximum medical improvement (MMI) on June 22, 2016, and referred her to his partner, Dr. Carol Burnette, for an impairment rating. (Record on Appeal, p. 145). Dr. Loudermilk continued to reassure Respondent that her RSD was resolved in subsequent visits of August 17, 2016 and October 5, 2016. (Record on Appeal, pp. 146-147). Dr. Burnette performed an impairment evaluation on July 21, 2016 where the Respondent was found to be at MMI with a 5% left upper extremity impairment rating. Dr. Burnette assigned permanent work restrictions of no repetitive wrist movement and no lifting with her left hand greater than five pounds. (Record on Appeal, pp. 181-184). During this initial treatment with Piedmont Comprehensive Pain Management Clinic, Respondent continued to work five hours per day. By September 2016, she returned to working a full eight-hour shift within Dr. Burnette's restrictions.

Respondent also concurrently treated with Dr. Timms through August 31, 2016. As of that visit, Dr. Timms indicated Respondent was at MMI and only needed a fifteen-pound lifting

restriction. According to his report, Respondent agreed that was a reasonable restriction and repetitive movements at work were not an issue for her. (Record on Appeal, p. 120). Dr. Timms also completed a Form 14B on January 11, 2017 that acknowledged those same restrictions and assigned a 5% impairment rating to Respondent's left upper extremity. (Record on Appeal, p. 121).

By early 2017, Respondent had received exhaustive medical treatment for her left wrist injury and was determined to be at MMI by two treating physicians. By that time, Respondent had been assigned a 5% left upper extremity rating by those same physicians, and she had returned to working full eight-hour days within the restrictions placed by those physicians. The parties went to an informal conference to explore resolution of the claim. (Record on Appeal, p. 72). For some reason, the case was not resolved. Respondent requested that she be able to resume treatment with Dr. Loudermilk. Dr. Loudermilk's second round of treatment began with him completing a Form 14B on March 2, 2017 which affirmed that Respondent had a 5% left upper extremity rating and may need periodic medications for residual pain. (Record on Appeal, p. 149). Thereafter, Dr. Loudermilk's treatment records resumed on March 9, 2017 where Respondent was reassured again that her RSD was completely resolved. However, Dr. Loudermilk began treating her for mild left neuralgia due to a radial nerve injury. Dr. Loudermilk's resumed treatment in March 2017 consisted of relatively low doses of pain medication, anti-depressants, and anti-anxiety medication. In March 2017, Respondent resigned from Appellant.

In March 2018, the Respondent filed a Form 50 claiming that she was permanently and totally disabled and entitled to compensation pursuant to S.C. Code Ann. § 42-9-10. Appellant responded with a Form 51 denying that Respondent was permanently and totally disabled, but was, instead, entitled to a determination of permanent partial disability under S.C. Code Ann. § 42-9-30. The case was heard by Single Commissioner Campbell on March 20, 2019. The Single

Commissioner issued an order dated April 22, 2019 which found Respondent was permanently and totally disabled and entitled to 500 weeks of compensation pursuant to S.C. Code Ann. § 42-9-10. Appellant requested Full Commission review by timely filing a Form 30. By order dated August 20, 2019, an Appellate Panel of the Workers' Compensation Commission affirmed the Single Commissioner and found Respondent was permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10. Respondent appeals the Commissioner's order. (Record on Appeal, pp. 1-21).

STATEMENT OF ISSUES ON APPEAL

1. The Appellate Panel erred as a matter of law in awarding compensation pursuant to SC Code Ann. § 42-9-10, because the Respondent only injured her left wrist and no other body parts were affected. Therefore, her compensation should have been confined to a permanent partial disability award under SC Code Ann. §42-9-30.

2. The Appellate Panel erred in awarding compensation pursuant to SC Code Ann. § 42-9-10, since there is no substantial evidence of record that Respondent was permanently and totally disabled.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs appeals from decisions of an administrative agency. S.C. Code Ann. § 1-23-380; Colonna v. Marlboro Park Hospital, 404 S.C. 537, 544, 745 S.E.2d 128, 132 (Ct. App. 2013); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse when the decision is affected by an error law. S.C. Code Ann. § 1-23-380(5). If the findings, inferences,

conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on whole record[,]" a reviewing court may reverse or modify. Id.; Colonna, 404 S.C. at 544, 745 S.E.2d at 132. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Bass v. Kenco Group, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

ARGUMENT I

DID THE COMMISSION ERR IN AWARDING COMPENSATION PURSUANT TO S.C. CODE ANN. § 42-9-10, BECAUSE RESPONDENT ONLY INJURED HER LEFT UPPER EXTREMITY, AND THEREFORE, HER COMPENSATION SHOULD HAVE BEEN CONFINED TO A PERMANENT PARTIAL DISABILITY AWARD UNDER S.C. CODE ANN. § 42-9-30?

In Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960), our Supreme Court determined that compensation is confined to the scheduled member under S.C. Code Ann. § 42-9-30 when there is no impairment of any other part of the body because of the injury. The Singleton rule was extensively reviewed in Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Supreme Court in Wigfall reaffirmed Singleton and deferred to the Legislature as to the interplay between S.C. Code Ann. § 42-9-10 and § 42-9-30 in light of the Singleton case being in existence for forty years. In reaffirming Singleton, the Supreme Court acknowledged that the Workers' Compensation Act is comprised of two competing models for determining permanent compensation as between the statutes. The first is an "economic model" which defines disability and incapacity in terms of the Respondent's loss of earning capacity as a result of the injury. S.C. Code Ann. §§ 42-9-10 & -20. The second is a "medical model" which

provides awards for disability based upon degrees of medical impairment to specific body parts. Id. § 42-9-30; see also Wigfall, 354 S.C. at 104, 580 S.E.2d at 102. The Wigfall Court stated as follows:

> Singleton stands for the exclusive rule that a claimant with one scheduled injury is limited to recovery under § 42-9-30 alone. The case also stands for the rule that an individual is not limited to scheduled benefits under § 42-9-30 if he can show additional injuries beyond a lone scheduled injury. This principal recognizes "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., at 106, 580 S.E.2d at 103 (quoting Larson's Workers' Compensation Law, 87.05 at 87–8).

The Court also found that "South Carolina has never recognized that a claimant can suffer a single scheduled injury and as a result become totally, permanently disabled." 354 S.C. at 109, 580 S.E.2d at 104.

In light of the above, Respondent alleges that, in addition to her left wrist injury which affected her left arm, she also injured her left shoulder. The credible evidence of record simply does not support that she also injured her left shoulder when she fell on November 5, 2015.

First, Respondent was a registered nurse who has twenty-nine years of experience. She has training and experience as a healthcare provider in having dialogue with patients about their physical complaints. She undoubtedly understands the importance of receiving a thorough history of patients' physical complaints in order that she can properly render care. By like measure, when Respondent is a patient herself, she should know the importance of expressing all of her physical complaints to her healthcare providers. Respondent did not complain of left shoulder pain for twenty-two months following her accident.

Respondent sustained an admitted left wrist fracture on November 5, 2015. She had surgery on her left wrist on November 23, 2015 by Dr. Timms. She had physical therapy

following her surgery through May 2, 2016. (Record on Appeal, pp. 333-372). At no time did she complain of left shoulder pain to her physical therapists. Dr. Timms continued to follow Respondent post-operatively on a monthly basis through August 31, 2016. At no time did she complain to Dr. Timms about her left shoulder hurting her in any way. (Record on Appeal, pp. 110-121).

When Respondent began treatment for her RSD with Dr. Loudermilk on March 28, 2016, none of his records show that she complained of, and received treatment for, any shoulder complaints during his initial round of treatment from March 31, 2016 through October 5, 2016. During this six-months of treatment, Respondent never sought active treatment for her left shoulder, even though she is a registered nurse. Respondent points to Dr. Loudermilk's initial pain assessment dated March 28, 2016 which references that she has experienced pain in her left shoulder and also has a pain diagram with two small "tick marks" on her left shoulder. (Record on Appeal, p. 133). However, during six months of active and aggressive treatment by Dr. Loudermilk, she never again brought to his attention that her left shoulder was bothering her and requested that her pain be addressed. At the hearing, Respondent acknowledged that the first time she addressed her left shoulder complaints and asked that Dr. Loudermilk provide treatment was in September 2017. (Record on Appeal, p, 71).

Respondent was found to be at MMI at varying dates in 2016. Respondent returned to eight hour per day duties within her restrictions in September 2016. Respondent went to an informal conference in February 2017 prepared to resolve her case without having had any treatment for any left shoulder problems. (Record on Appeal, p. 72). It was not until after the case did not settle at the informal conference, that she decided to retire from Appellant in March 2017. (Record on Appeal, p. 64).

Respondent again resumed treatment with Dr. Loudermilk in March 2017. Dr. Loudermilk saw Respondent on the following dates without any mention of shoulder pain: March 9, 2017, May 25, 2017, and August 29, 2017. (Record on Appeal, pp. 150-152). It was not until September 21, 2017, over twenty-two months following her initial injury, that Respondent referenced left shoulder pain with any healthcare provider. Since Appellant had no notice of Respondent injuring her left shoulder, treatment was denied. In his deposition, Dr. Loudermilk acknowledged that he treated Respondent for eighteen months before she made reference to any left shoulder pain, and that it is certainly his practice to record and treat all complaints related to an injury. (Record on Appeal, p. 203).

Even after Respondent complained about left shoulder pain in September 2017, Dr. Loudermilk did not address the left shoulder as being an impaired body part when he completed a Form 14B on October 6, 2018. (Record on Appeal, p. 233). Like he had done on March 2, 2017, he only found that the body part which was injured was the Respondent's left wrist. He again affirmed a 5% left upper extremity rating (Record on Appeal, pp. 232-233). When asked in his deposition, Dr. Loudermilk discussed the left shoulder as follows:

> "...I really don't know what is going on there. It could be something as simple as some bursitis or some tendonitis, just from irritation." (Record on Appeal, p. 204).

As set forth above, there is no credible evidence that Respondent also injured her left shoulder when she fell and broke her wrist on November 5, 2015. It is perhaps understandable that her immediate focus was her fractured wrist and the RSD which appeared. However, her RSD was successfully treated by June 2016. Thereafter, she was repeatedly reassured by Dr. Loudermilk that her RSD was resolved in his follow-up visits with her through October 2016. The Respondent returned to a full eight-hour shift in September 2016. Two treating physicians

found that she had reached MMI with the only body part affected being her left wrist with a resulting 5% impairment to her left upper extremity. Respondent then proceeded to an informal conference without any complaints about her left shoulder. She then resumed treatment with Dr. Loudermilk for an additional six months before she made any reference to her shoulder. Again, it is important to note that Respondent was a registered nurse with twenty-nine years of experience. In addition to treating health conditions for plant employees, she is also very knowledgeable about the workers' compensation claims process. However, despite her experience and training, she did not actively seek treatment for her shoulder until twenty-two months had elapsed. In light of the overwhelming clinical evidence, Respondent's testimony is simply not credible that she had been having ongoing left shoulder problems since the time of the accident.

The Commission also erred in finding Respondent's preexisting depression and anxiety were aggravated by her physical injury and entitled her to seek compensation under S.C. Code Ann. § 42-9-10. Respondent admitted at the hearing that she suffered from anxiety before her accident (Record on Appeal, p. 61). Respondent's family physician, Dr. Samuel Burnett had prescribed anti-depressant and anti-anxiety medications as early as 2013. (Record on Appeal, pp. 235-245). The records of Dr. Burnett show that Respondent was placed on Lexapro, 20mg, for anxiety and depression as early as November 14, 2013 – two years before her injury. (Record on Appeal, p. 237). As late as March 19, 2015, that medication in the same dosage is shown as continuing. Thereafter, when Respondent began her second period of treatment with Dr. Loudermilk in March 2017, he took over prescribing these medications from her family physician, Dr. Burnett. Dr. Loudermilk started her on Ativan, 0.5mg per day. By February 21, 2018, Dr. Loudermilk added Lexapro, 10mg per day, which is actually one-half the dose Respondent was on

pre-accident. (Record on Appeal, p. 160). Since Dr. Loudermilk simply continued the same medications as prior to the accident, there has not been an aggravation of Respondent's preexisting anxiety and depression. There is no substantial evidence to support the Commission's finding Respondent suffered a mental injury to entitle her to compensation beyond S.C. Code Ann. § 42-9-30.

It is not enough for Respondent to allege that a body part has been affected by pain. There must be a further showing that the body part was impaired or injured for S.C. Code Ann. § 42-9-10 to apply. Colonna, 404 S.C. at 546, 745 S.E.2d at 133. In Colonna, the claimant alleged entitlement to permanent and total disability in the context of a second body part – her back – being affected due to the implantation of a spinal cord stimulator. The Court of Appeals found that the medical evidence showed that, despite the surgical procedure to her back, her spine was stable and had full range of motion. Id. at 547-8, 745 S.E.2d at 133-4. Despite the claimant's complaints of back pain, her only "impaired or injured" body part was her ankle. Id. at 546-8, 745 S.E.2d at 133-4. As such, her compensation was limited to permanent partial disability under S.C. Code Ann. § 42-9-30.

Respondent received exhaustive medical treatment for her left wrist – the only body part which was affected by her injury of November 5, 2015. Respondent made a fleeting complaint of left shoulder pain in her new patient questionnaire with Dr. Loudermilk on March 28, 2016. (Record on Appeal, p. 131). Respondent then engaged in exclusive treatment for her left wrist for approximately six months with Dr. Loudermilk. After a six-month break, she then requested for, and resumed, treatment with Dr. Loudermilk. In this second treatment, she made no mention of left shoulder pain to Dr. Loudermilk until another six months had passed. It is extremely important to realize that Respondent was a registered nurse with a twenty-nine year history of

treating patients in a clinical setting. She knew the importance of relating to a healthcare provider all symptoms. Respondent did not seek active medical treatment from Dr. Loudermilk for her alleged left shoulder pain for eighteen months. It should also be noted that Respondent was prepared to resolve her case in February 2017 without having had any treatment to her left shoulder. The only reasonable inference that can be drawn from Respondent not seeking treatment for her alleged shoulder pain for twenty-two months following her accident is that such alleged pain was insignificant or trivial and did not rise to the level of an impairment of that particular body part. As such, the Commission erred in awarding her permanent and total disability benefits pursuant to S.C. Code Ann. § 42-9-10. Also, as in Colonna, the substantial evidence of record requires a finding that Respondent's compensation should be confined to her left upper extremity, as required by Singleton. The Forms 14B that have been generated in this case have all been uniform that the Respondent's only affected body part is her left wrist which has rendered a 5% left upper extremity rating. (Record on Appeal, pp. 228-233).

Based on the above, the Commission erred as a matter of law in including either the Respondent's left shoulder or a mental injury as being a second body part in order to allow Respondent to even be considered an award for compensation under S.C. Code Ann. § 42-9-10. Respondent's exclusive remedy under the Workers' Compensation Act should be S.C. Code Ann. § 42-9-30 (13).

ARGUMENT II

EVEN IF RESPONDENT COULD PURSUE A WAGE LOSS CLAIM, DID THE COMMISSION ERR IN AWARDING HER PERMANENT AND TOTAL DISABILITY BECAUSE SHE HAD DEMONSTRATED HER ABILITY TO WORK AS A PLANT NURSE?

As argued above, since the only affected body part was the Respondent's left upper extremity due to her left wrist fracture, she should not have been able to assert a claim under S.C. Code Ann. § 42-9-10. However, assuming she had a second injured body part and could pursue a wage loss claim, the evidence clearly shows that Respondent's work as a plant nurse was, at most, sedentary in nature. The credible medical evidence and lay testimony received at the hearing abundantly show that she returned to work and satisfactorily performed her duties. Her decision to resign in March 2017 had nothing to do with her inability to perform her job. As such, she should not have been found to be totally disabled as a result of her injuries.

After exhaustive medical treatment to her left wrist, Respondent was found to be at MMI within nine months of her accident. The most extensive medical examination that was performed on Respondent was by Dr. Carol Burnette of Piedmont Comprehensive Pain Management Clinic on July 21, 2016. After a lengthy session with the Respondent, it was determined that she had a 5% left upper extremity impairment and would need permanent work restrictions, which included no repetitive motion of her left wrist and no lifting greater than five pounds. It was further recommended that she transition back to work from six hours per day to eight hours per day over the next two to three months. (Record on Appeal, pp. 181-184). Respondent agreed that Dr. Burnette was the physician who spent the most time in assessing her impairment. (Record on Appeal, p. 84). Respondent had already been working five hours per day from late December 2015 until that time. Respondent then returned to a full eight-hour shift

but working within her restrictions, beginning in the fall of 2016. (Record on Appeal, pp. 74-75). On August 31, 2016, Respondent had her final visit with her orthopedic surgeon, Dr. Anthony Timms of Greenwood. Dr. Timms found as follows:

> "...we reviewed the IME she obtained and I do agree with the overall impairment rating. I do think she can lift up to 15 lbs. I do not think it needs to be as low as 5 lbs. I do think the repetitive activities needs to be restricted, but at this point, I think she is at MMI. I will release her to full activities with her specific job as above. The 15 lbs. lifting restriction does not really seem to apply, she does not think, but I still think it needs to be there and again repetitive issues of which she feels like are not too much of an issue. So, I think she is at MMI. We will release her and check her back as needed." (Record on Appeal, p. 120).

Dr. Timms' Form 14B, dated January 11, 2017, affirmatively sets forth those restrictions and indicated that she did not need future medical care. (Record on Appeal, p. 121). Obviously, these two qualified physicians thought Respondent could continue in her work as a plant nurse within the above lifting restrictions. Specifically, on August 31, 2016, Respondent agreed that her job did not require repetitive wrist motion and the five pounds lifting restriction could be relaxed to fifteen pounds. Indeed, Respondent worked a full eight-hour shift with these restrictions from September 2016 until she resigned in March 2017. There is no evidence that she complained about pain or the inability to perform her job. Appellant called her successor to the position, Nurse Janet Howle, as a witness at the hearing. Nurse Howle testified that she and Respondent worked together for a couple of months in early 2017. After Respondent left, she resumed her job as plant nurse. This witness testified to the plant nurse's suite of offices where she worked with two other nurses in close quarters. (Record on Appeal, p. 92). She further testified that the plant nurse's job was mostly clerical with a lot of record-keeping for hearing and pulmonary function testing. (Record on Appeal, p. 93). She testified that there was little lifting required in the job and it was mostly "sitting." (Record on Appeal, p. 96). Also presented

in the Appellant's APA submissions was the plant nurse's job description. (Record on Appeal, pp. 217-221). This job description sets forth the sedentary nature of the work to be performed, including, but not limited to, record keeping, supplies, scheduling and training.

At the hearing, Respondent weakly attempted to assert that she occasionally had to lift large objects, including a printer. (Record on Appeal, pp. 78-80). She did, however, admit that she was a member of management and that her work was not like any of the production jobs in the plant. (Record on Appeal, p. 76). She also attempted to assert that certain blood pressure cuffs that she worked with exceeded her lifting restrictions. (Record on Appeal, p. 81). She was paid her full salary at all times. (Record on Appeal, p. 82).

Despite the above evidence that Respondent reached MMI within nine months of her accident and being assigned only a 5% impairment rating by all of her treating physicians, the Commission disregarded this objective medical evidence and found her to be totally disabled. In so finding, the Commission further overlooked the fact that Respondent worked her sedentary job on a part-time basis for approximately nine months following her accident, and then worked a full shift for six to seven months once she reached MMI. The Commission seems to have placed greater weight on the opinions of Dr. Eric Loudermilk and Robert Braham, Ph.D. The Commission found that this physician and vocational rehabilitation consultant's opinions were "uncontradicted." (Record on Appeal, p. 5). To the contrary, their opinions were fraught with contradictions when the record is reviewed as a whole.

First, Dr. Loudermilk treated Respondent for two separate periods. The first was from April 2016 through October 2016 when Respondent was diagnosed with RSD. Dr. Loudermilk successfully treated that condition with four stellate ganglion blocks. When she was determined to be at MMI, Dr. Loudermilk referred Respondent to his partner, Dr. Carol Burnette, to assess her

upper extremity function and assign a rating. In his deposition, Dr. Loudermilk was quick to defer to Dr. Burnette because she had special training in impairment rating and disability evaluations, which he did not. (Record on Appeal, p. 200). He explained the difference as follows:

> "I think there are special courses for learning how to do the percentage of impairment. It's all very specific and complicated. That's not my field. I am not a jack of all trades. That's why we have her do that. Just like she does nerve conduction studies and EMG's, that is her specialty so she does those for us quite a bit too." (Record on Appeal, p. 200).

At the time of his treatment and at the time of his deposition, Dr. Loudermilk could not even state what job Respondent performed for Appellant. He also did not review any job description or determine what was required of her at her work. He was quick to defer those matters to Dr. Burnette. (Record on Appeal, p. 201). Prior to Respondent returning to Dr. Loudermilk for her second treatment period in March 2017, Dr. Loudermilk completed a Form 14B dated March 2, 2017. He reiterated Dr. Burnette's rating from July 21, 2016 of 5% to Respondent's left upper extremity and the repetitive work and lifting restrictions set forth therein. (Record on Appeal, p. 232). Approximately one year later, he met with the Respondent's attorney in a private session. (Record on Appeal, p. 205). At that private meeting, Dr. Loudermilk was presented with ten questionnaires, all of which he answered in the affirmative. (Record on Appeal, pp. 161-170). Despite having given Respondent a good prognosis throughout his treatment and reaffirming Dr. Burnette's 5% impairment rating and restrictions, Dr. Loudermilk accommodated Respondent's counsel in "checking the boxes" in order to paint a gloomy picture that does not comport with his treatment records. Dr. Loudermilk first stated that Respondent still had RSD. (Record on Appeal, p. 162). On cross-examination in his deposition, he was forced to acknowledge that the RSD had been successfully treated. (Record on Appeal, p. 206). Dr. Loudermilk went on to opine that the Respondent could not perform her work as a plant nurse and would be unable to do any other

successful gainful activity as a result of her injuries. (Record on Appeal, pp. 167-168). When he was cross-examined on this opinion, he was constrained to acknowledge that a plant nurse's job was mostly sedentary. (Record on Appeal, pp. 207-208). Interestingly, he gave this opinion after he acknowledged that impairment and disability were matters for his partner, Dr. Carol Burnette. After a good bit of cross-examination in his deposition, his opinion in the questionnaires came across as being baseless in light of his numerous treatment records, as well as those of other healthcare providers. To top it off, Dr. Loudermilk completed a final Form 14B on October 6, 2018, approximately six months after he completed the questionnaires for Respondent's attorney, which stated that Respondent still had only a 5% impairment to her left upper extremity. (Record on Appeal, p. 233). As such, her condition had remained unchanged since Dr. Burnette's thorough medical examination on July 21, 2016 - two years prior.

Although Dr. Loudermilk had been Respondent's treating physician, he gave very contradictory testimony as to her ability to return to work. First, he deferred to his partner on such matters. Dr. Loudermilk's own Forms 14B (Record on Appeal, pp. 232-233) affirmed those of Dr. Burnette verbatim. However, he answered questionnaires for Respondent's counsel that cannot be reconciled with his treatment records. (Record on Appeal, p. 4). The Commission seems to have given weight to Dr. Loudermilk's questionnaires without taking into account how those questionnaires directly contradict his treatment records. Appellant argues the Commission viewed this evidence blindly from one side and argues that those questionnaires be viewed in context of the Respondent's job description, her job performance, and her true medical condition.

The Commission also shockingly gave weight to the opinion of Robert Brabham, Ph.D., a hired vocational rehabilitation consultant. (Record on Appeal, p. 4). Dr. Brabham's report fails to analyze the true nature of Respondent's job as a plant nurse. (Record on Appeal, pp. 186-195). He

simply reviewed the dictionary of occupational titles for a registered nurse and found that it required medium level capacity. He went further to say that Respondent had never held an office job which would be sedentary and, thus, has no readily transferrable skills. (Record on Appeal, p. 189). This is not consistent with the job she did for Appellant for twenty-nine years. Further, his April 14, 2018 opinion, does not account for her actually returning to work as a plant nurse post-accident and successfully completing her sedentary job. Dr. Brabham's opinion reads as if it is referring to a manufacturing production worker. It should not have been afforded any degree of credibility or weight by the Commission.

A claimant is only entitled to permanent and total disability benefits "when the incapacity for work resulting from the injury is total." S.C. Code Ann. §42-9-10(a). In Dozier v American Red Cross, 411 S.C. 274, 768 S.E.2d 222 (Ct. App. 2014), the Court of Appeals dealt with a nurse contending that she was totally disabled due to bilateral carpal tunnel syndrome. She had been assigned 5% impairment ratings to each hand/arm, and there was some question as to whether she had ongoing RSD. The Single Commissioner and Appellate Panel found that, based upon a labor market survey, work existed in the economy to accommodate her restrictions. As such, she was not permanently and totally disabled. As it related to the claimant's ability to recover under S.C. Code Ann. § 42-9-10, the Court of Appeals found "the relevant question for the Appellate Panel was whether Dozier had the ability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist." Id. at 287, 768 S.E.2d at 228. The Court of Appeals deferred to the Appellate Panel's findings of fact in concluding that the claimant had ample employment opportunities available to her.

In this case, Respondent's left wrist fracture and RSD were successfully treated within nine months of her accident. She was found to be at MMI and assigned a 5% impairment rating by all

three treating physicians in this case. Further, Respondent demonstrated that she was able to return to her former position as a plant nurse and worked a full shift for approximately six months before she independently decided to retire. Even more so than the Respondent in Dozier, Respondent was afforded the opportunity to return to work and did so without complaint to anyone in management. Since Appellant provided work within her restrictions, which she successfully completed, it was error for the Commission to find that she was totally disabled based upon some random questionnaires signed by one of her treating physicians which cannot be reconciled with the record as a whole. As such, the Commission erred in finding that Respondent was entitled to a finding of permanent and total disability under S.C. Code Ann. § 42-9-10.

CONCLUSION

Since the Commission's findings that Respondent is permanently and totally disabled are clearly erroneous in view of the reliable probative and substantial evidence of record, the Court of Appeals should reverse.

Respectfully Submitted,

McDONALD PATRICK POSTON
HEMPHILL & ROPER, LLC

By: _____

Roy R. Hemphill
414 Main Street (29646)
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 388-1006
Email: rhemphill@mcdonaldpatrick.com
Attorneys for Appellant

March 2, 2020
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPELLATE CASE NO. 2019-001594

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

WCC FILE NO.: 1517220

Janice McCutcheon, Employee..... Respondent,

v.

Greenwood Mills, Inc., and Greenwood Mills/Self-Insurer, Employer/Carrier.....Appellant.

CERTIFICATE OF COMPLIANCE

This is to certify that the final brief of appellant is in compliance with SC Appellate Court Rule 211(b).

McDonald Patrick Poston
Hemphill & Roper, LLC

By: _____
Roy R. Hemphill
414 Main Street (29646)
Post Office Box 1547
Greenwood, South Carolina 29648
(864) 388-1006
Email: rhemphill@mcdonaldpatrick.com
Attorneys for Appellant