

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-213267
(Trial Court Case No. 2011-CP-43-02181)

Joseph C. Coonce,.....Appellant,

v.

Fleet Source, Inc., and The South Carolina Uninsured Employers' Fund,Defendants,

Of whom The South Carolina Uninsured Employers' Fund is theRespondent.

INITIAL BRIEF OF THE RESPONDENT

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COURT OF APPEALS

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ISSUE ON APPEAL

- I. DID THE CIRCUIT COURT ERR IN AFFIRMING THE COMMISSION'S HOLDING THAT THE APPELLANT WAS NOT ENTITLED TO PERMANENT AND TOTAL DISABILITY BENEFITS BECAUSE HIS WORK INJURY WAS TO HIS LEFT ARM ONLY AND THE EFFECTS OF THAT WORK INJURY WERE MANIFESTED ONLY IN HIS LEFT ARM?

STATEMENT OF THE CASE

The Appellant, who injured his left arm at work, sought an award of permanent and total disability benefits under S.C. Code Section 42-9-10. A hearing on permanent benefits was held, resulting in an order of the Single Commissioner that awarded the Appellant a one hundred (100%) percent disability to the left arm and future medical care. (Single Commissioner Order of March 11, 2011). The Appellant appealed to the Full Commission, which affirmed with certain clarifying amendments to the conclusions of law of the Single Commissioner. (Full Commission Order dated October 25, 2011). An appeal was made to the Circuit Court which affirmed by its order dated September 24, 2012 and filed on October 2, 2012. (Circuit Court Order). The present appeal followed.

FACTS

The Appellant sustained an injury by accident to his left arm at work on February 2, 2004. He subsequently developed RSD/complex regional pain syndrome which compounds the problems with his left arm. (Full Commission Order, Finding of Fact No. 1). The employer and the South Carolina Uninsured Employers' Fund (Fund) were held to be liable for this claim and there was a later order finding that this injury by accident was compensable as to the left arm only. (Order of July 29, 2009). The Appellant did not appeal that order limiting his compensable injuries to his left arm. (Full Commission Order of October 25, 2011). After receiving additional medical care as provided by the 2009 order the Claimant reached maximum medical improvement and was given an impairment rating of forty-nine (49%) percent to his left arm by his physician. (December 20, 2010, Form 14B). That impairment rating specifically accounted for the Appellant's left arm RSD/complex regional pain syndrome. (Id.). There is no medical evidence, or any testimony or other evidence in the record, that the Appellant's symptoms and limitations from his work injury manifest themselves anywhere other than his left arm. (Full Commission Order).

STANDARD OF APPELLATE REVIEW

This workers' compensation appeal to the Court of Appeals is governed by the "substantial evidence rule" under the Administrative Procedures Act. Liberty Mutual Ins. Co. v. SC Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005). Essentially, that standard of review mandates that the Court of Appeals affirm a decision of the Full Commission/Circuit Court unless there is shown to be some legal error in the ruling below, or that the decision below is not supported by substantial evidence. Id. Under this standard of review a factual finding of the Full Commission resolving a conflict in the evidence is deemed to be conclusive. Brunson v. American Koyo Bearings, 395 S.C. 450, 718 S.E.2d 755 (Ct. App. 2011). The Appellant's statement in his initial brief as to the standard of review (at page 6) reveals that there is no conflict between the parties as to the appropriate standard of review.

ARGUMENT

- I. THE CIRCUIT COURT DID NOT ERR IN AFFIRMING THE FULL COMMISSION'S DETERMINATION THAT THE CLAIMANT WAS NOT PERMANENTLY AND TOTALLY DISABLED.

The Appellant contends that the Full Commission (and Circuit Court) committed reversible error in awarding disability benefits to only the left arm. The Appellant argues that he was entitled to permanent and total disability per Section 42-9-10 based upon the combination of his left arm injury and his diagnosed condition from that injury of RSD/complex regional pain syndrome. The Fund contends that the Full Commission (and Circuit Court) decision should be affirmed because (1) a work injury that manifests itself in only one body part is only entitled to a recovery for that body part, (2) there was

substantial evidence in the record to support the decision to limit the award to the left arm only, and (3) there was a prior unappealed order limiting the claim to the left arm only.

A. THE FACTS OF THIS CASE FALL WITHIN THE SINGLETON RULE PRECLUDING PERMANENT AND TOTAL DISABILITY WHEN THERE IS AN INJURY TO ONLY ONE BODY PART.

The Appellant's initial argument is that the Circuit Court (and Full Commission) failed to properly interpret the established case law that limits compensation when there is a work injury to only one body part. (Appellant's initial brief at pages 7 -13). Nevertheless, an injury to the left arm alone would clearly not entitle the Appellant to permanent and total disability benefits, even assuming a total loss of earning capacity from that arm injury. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) (holding that an injury to a single body part, in that case, the leg, limits a claimant to recovery under the schedule of recovery found in Section 42-9-30). The Wigfall decision basically reiterated the earlier Singleton case that held "[w]here the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of the injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837 (1960).

The Appellant acknowledges that the "two body part rule" for permanent and total disability followed in Wigfall and Singleton is the law, but argues that the diagnosis of RSD/complex regional pain syndrome takes his claim out of the rule stated in those cases. Basically, he contends that the left arm injury plus the RSD/complex regional pain syndrome equals two body parts for purposes of permanent and total disability under Section 42-9-10. Essentially, the Appellant argues that the mere diagnostic involvement of the central nervous system standing alone, even if all the symptoms are limited only to

the left arm, provides the requisite second body part that entitles him to permanent and total disability benefits. (Appellant's initial brief at page 9).

The Respondent, however, asserts that the Appellant has himself misinterpreted the Wigfall and Singleton as both of those cases explicitly limit the availability of permanent and total disability to those situations where there is an actual physical effect and actual symptoms in more than one body part. In Wigfall, the employee sustained a broken femur that resulted in an award of ninety (90%) percent permanent disability to the leg by the Commission. 354 S.C. at 102. The Commission found that the employee, in light of his age, education and employment, was totally disabled as a result of his leg injury. Id. Nevertheless, the Commission ruled that the employee was not entitled to permanent and total disability benefits under Section 42-9-10 because there was an awardable injury to only one body part. Id. In affirming the Commission, the Supreme Court specifically rejected the employee's argument that an injury to a single body part, taken together with proof of loss of earning capacity, would support an award of permanent and total disability under Section 42-9-10. The Supreme Court held "[b]ecause the Legislature's intent is clear from the statute's language and the decision by the Legislature not to statutorily overturn Singleton, we affirm the rule that where a claimant has only one scheduled injury his recovery is pursuant to Section 42-9-30." Id. at 109. The Singleton court much earlier reached a similar result using the same reasoning in the context of a permanent injury to that claimant's foot/leg. Singleton, supra, 236 S.C. at 457.

Significantly, as regards application of the "two body part rule" to the case at bar, Appellant's counsel recently advanced almost the exact same argument to this Court in

the case of Colonna v. Marlboro Park Hospital, (Op. No. 5117, filed April 17, 2013). In Colonna, this Court held that the successful implantation of a spinal stimulator did not create a compensable injury to the back, when that procedure was done to relieve RSD symptoms in the claimant's lower extremity. It is also clear from that holding that the existence of a diagnosis of RSD/complex regional pain syndrome does not equate to an injury to a separate body part when the symptoms are manifested in just one scheduled body part. This Court specifically held in Colonna that there must be some type of actual impairment or injury to the other body part to qualify for permanent and total disability benefits. In Colonna, this Court gave a common sense interpretation of what it means for an injury to "affect" another body part so as to allow for a recovery under Section 42-9-10. This Court logically ruled that the "affect" language used in Singleton and Wigfall means that there must be some injury or impairment to the other body part.

The impairment rating provided to the Appellant by Dr. Zgleszewski on December 20, 2010 specifically states that the medical impairment was limited to the LUE (left upper extremity). (Form 14B). That physician left blank that portion of the form assigning a percentage of medical impairment to any "other affected body part(s)." (Id.). That medical form makes clear that although the central nervous system may have been implicated in the diagnosis of RSD/complex regional pain syndrome there was no medical impairment that manifested itself in any body part other than the left arm. The only restriction noted on that form was "No use of the left upper extremity." (Id.). The determination of how much weight to give this medical evidence, and how to construe this medical evidence to resolve disputed factual issues in light of the other evidence, is within the Commission's sole discretion. Brunson, supra.

The simple fact is that the RSD/complex regional pain syndrome experienced by the Appellant limits itself to manifestation in his left arm only. Whether or not the injury was limited to one body part was a disputed factual issue, and the Commission's determination on disputed factual issues is deemed to be conclusive under the "substantial evidence rule." Brunson, supra. Counsel for the Appellant conceded at the Circuit Court hearing that all the symptoms from this injury are manifested in the Claimant's left arm:

"Now I think to go to the point made by Mr. Cook in the particular finding of fact, that the symptoms and problems alluded to manifested solely in the left arm of the Plaintiff. Now that's correct in that, he feels it there."

(Circuit Court hearing transcript at page 29, lines 19-23).

The Respondent acknowledges that the Appellant had a very bad outcome resulting from the injury to his left arm. That left arm injury, however, was provided the maximum recovery available, which was an award of 220 weeks of benefits reflecting a 100% disability to that arm. Despite the admittedly bad injury to that arm, there are no symptoms manifested anywhere but the left arm, as a matter of undisputed fact, and this case falls directly within the ambit of the Singleton, Wigfall and Colonna line of cases precluding permanent and total disability for an injury to a single body part.

B. THE LAW OF THE CASE LIMITS THIS CLAIM TO THE LEFT ARM ONLY.

At pages 13-16 of his initial brief the Appellant contends that the Circuit Court erred in holding that the July 29, 2009 order of the Single Commissioner limits this claim to the left arm only. (Circuit Court Order at pages 5-6). The Circuit Court noted that there was never any appeal of that earlier order, which found the left arm to be the only

compensable injury, and that there had not been any subsequent application by the Appellant to include other body parts into his claim by way of a change of condition. (Id.). Simply put, it was the law of the case that this claim is limited to the left arm only, despite the Appellant's argument otherwise. Colonna v. Marlboro Park Hospital, supra (failure to appeal an order that rules on whether or not a body part is included in the claim precludes subsequent re-litigation of that issue). The Circuit Court did not err in ruling that this was an additional substantial ground for affirming the Commission. I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

C. THERE IS NO REQUIREMENT TO AWARD PERMANENT AND TOTAL DISABILITY BENEFITS UNDER SECTION 42-9-10.

The Appellant's third argument at pages 16-17 of his initial brief is that the Full Commission (and Circuit Court) erred in failing to award him the maximum compensation available, which would be permanent and total disability benefits under Section 42-9-10. Without citing any case law or statute, the Appellant baldly states at page 16: "The Commission is required to apply whatever statute provides the greatest benefits for the Claimant." This is not only an inaccurate statement of the law, but it is premised upon a faulty understanding of the evidence and the factual findings of the Commission.

Counsel for the Appellant also recently made that very same argument before this Court in Colonna, supra. In deciding that case, and in rejecting that same contention by Appellant's counsel, this Court held:

Generally, an injured employee may proceed under either the general disability statutes, i.e., sections 42-9-10 and 42-9-20, or under the scheduled member statute, i.e., section 42-9-30, to maximize recovery under the South Carolina Workers' Compensation Act. However, the scheduled recovery is exclusive only when a scheduled loss is not accompanied by additional complications affecting

another part of the body. Although Colonna may proceed under the general disability statutes to maximize her recovery, we find Colonna's argument that the Commission is "required" to make an award for permanent and total disability under section 42-9-10 misplaced. As the aforementioned case law demonstrates, Colonna's ability to recover under section 42-9-10 is premised on her ability to establish an additional injury or impairment to a second body part. Because Colonna failed to sustain her burden of proof on this issue, we find the circuit court properly limited Colonna's recovery to section 42-9-30.

Id. (internal citations and quotations omitted).

The Appellant's assertion that there is a requirement to make an award under Section 42-9-10 is, in a word, wrong. It is directly contrary to the established law of this state and is also directly opposed to this Court's decision to the contrary in Colonna, supra. Further, and as discussed directly below, the Appellant failed to prove, as a factual matter, that he was permanently and totally disabled as a result of his work injury and there is substantial evidence supporting the decision of the Commission (and Circuit Court) finding that he was not permanently and totally disabled.

D. THERE WAS SUBSTANTIAL EVIDENCE THAT THE APPELLANT WAS NOT PERMANENTLY AND TOTALLY DISABLED AS A RESULT OF HIS WORK INJURY.

The Appellant more or less restates his previous arguments at pages 17-19 of his initial brief under the guise of an argument heading contending that his compensable injuries make him permanently and totally disabled. There really is not any medical evidence tending to show a compensable injury to any body part other than the left arm for purposes of awarding benefits under Section 42-9-10. The medical records show that the Appellant has been diagnosed with RSD/complex regional pain syndrome, but there is nothing in the record (including the Appellant's testimony) to show that the symptoms from that condition manifest themselves anywhere other than the left arm. (Finding of Fact No. 10 of the Full Commission order).

The Physician's Statement by Dr. Zgleszewski explicitly provided that his overall impairment rating to the left arm incorporated the central nervous system involvement within the impairment rating for the left arm. (Form 14B). Thus, while the origin of the RSD/complex regional pain syndrome may come from the central nervous system, the actual residual functional effect of that diagnosis is limited to the left arm. The Full Commission was free to hold, as the ultimate finder of fact, that the evidence showed that the injury itself was limited, for purposes of permanent disability benefits, to the left arm only and that the involvement of the central nervous system by way of RSD/complex regional pain syndrome did not constitute a separately awardable injury to another body part. Brunson, supra (holding that the Full Commission, as finder of fact, is free to interpret or reject medical evidence in light of other evidence in the record); see also, Colonna, supra (RSD not a separately awardable injury).

This conclusion is supported by the medical records themselves, which describe the effect of the RSD/complex regional pain syndrome as being located only in the left arm. See the January 18, 2007, and September 3, 2009 reports from Dr. Zgleszewski that provide the following diagnosis: "possible left upper extremity complex regional pain syndrome," (with both reports also noting "probable non-work-related rheumatoid arthritis"). The medical records do not mention any body part other than the left upper extremity being treated as a result of the work injury. In fact, counsel for the Appellant himself described the symptoms experienced by the Appellant as all being manifested in the left arm, for example, light touch on the hand being excruciating and painful (allodynia), thinning of the skin, coarsening of the hair, brittle nails, muscle atrophy, and hand clubbing. (Circuit Court hearing transcript at pages 10 and 11). At the hearing

below, the Appellant testified that it was his left arm alone that was keeping him from being able to work and described the symptoms of his injury as all being limited to his left arm. (Single Commissioner hearing transcript at pages 8-17). Based upon those medical records, and the Appellant's own testimony, there was substantial evidence in the record to support the holding of the Commission (and Circuit Court) that the Appellant was not entitled to permanent and total disability benefits.

Additionally, the expert vocational evidence supports the conclusion that the Appellant was not entitled to permanent and total disability benefits. The order of the Full Commission at Finding of Fact No. 5 indicates that the Appellant's vocational expert was not able to definitively state which of certain various vocational profiles would apply to the Appellant and at least one of those vocational profiles precluded a finding of permanent and total disability. The Appellant testified that his inability to work resulted solely from his left arm injury, thereby negating the claim that it was an injury to multiple body parts that resulted in his alleged inability to work. (Single Commissioner hearing transcript at page 17, lines 17-22). The Full Commission did not find that the Appellant was permanently and totally disabled from his work injury based upon the medical evidence and the Appellant's own testimony. (Finding of Fact No. 5). It should also be noted that the Appellant has significant health problems unrelated to his work injury. (July 29, 2009 Single Commissioner Order). There was substantial vocational evidence to support the Full Commission's (and Circuit Court's) conclusion that the Appellant was not entitled to permanent and total disability benefits as a result of his work injury.

It is possible to construe portions of the medical evidence, the vocational evidence and the Appellant's testimony as supporting a claim for permanent and total disability.

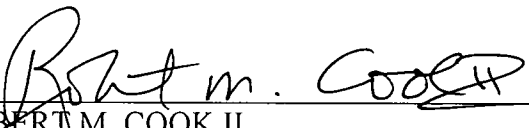
However, that evidence, such as it may be, was controverted by other evidence and testimony in the record. It is uniquely the job of the Full Commission to resolve disputed factual issues, including determinations of credibility. In Brunson, supra, this Court noted, “when the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive.” 395 S.C. at 455. The issues of injury to more than one body part and whether or not the Appellant was permanently and totally disabled were disputed facts with conflicting evidence and conflicting inferences to be drawn from that evidence. The Full Commission simply reached a decision on these conflicting factual issues different from that sought by the Appellant. There was no factual or legal error in their doing so, or in the Circuit Court order affirming that decision.

CONCLUSION

For the reasons discussed above, and as may be presented at oral argument, the Fund requests that the order of the Circuit Court be affirmed.

Respectfully submitted,

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