THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Opinion No. 5117 (S.C. Ct. App. filed April 17, 2013)

Loida Colonna, ... Appellant,

v.

Marlboro Park Hospital, Employer, and
Gallagher Bassett Services, Inc., Carrier, ... Respondents.

PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

The Appellant, by and through her undersigned attorney, hereby files this Petition for Rehearing and Rehearing en banc. On April 17, 2013, this Court issued an opinion affirming the Decision and Order of the South Carolina Workers' Compensation Commission. Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47).

As grounds for granting her Petition, Appellant would respectfully show the Court may have overlooked or misapprehended the evidence and arguments raised on the issues of (1) additional disability caused by the surgical implantation of the spinal cord stimulator to her spinal cord; (2) RSD is by definition a disabling condition of the central and sympathetic nervous systems; (3) that

even if the back surgery and/or RSD do not constitute an effect on a second or unlisted body part, that the achilles tendon surgery and RSD caused additional partial disability to Colonna's left leg.

ARGUMENT

1. The fact Colonna required a spinal stimulator to treat her work-related RSD and/or that she suffers pain, weakness and limitations in her back as a result conclusively proves her injury affected two body parts [in Reply to Respondents' arguments at pages 6-13].

The Court affirmed the Circuit Court and Appellate Panel, holding there was "substantial evidence in the record to support the circuit court's decision that Colonna did not suffer additional injury or impairment to her back as a result of the spinal cord implantation." Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 54). The Court overlooked and did not address the additional point that RSD itself is an injury to the sympathetic and central nervous systems – a fact confirmed by the implantation of the spinal cord stimulator. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002)("Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain."). *Cf.* Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa 1995)(finding that reflex sympathetic dystrophy, now known as CRPS, which is a dysfunction of the sympathetic nervous system is compensable as an unscheduled injury). Appellant respectfully requests that the Court grant rehearing to consider the actual evidence of additional disability caused by the implantation of the spinal cord stimulator itself, as well as the fact that RSD is a disabling condition of the central nervous system – which itself is an unscheduled member.

A. Additional disability resulting specifically from the implantation of the spinal cord stimulator.

The Court treated the spinal cord stimulator as if it were entirely beneficial, overlooking the fact that the spinal cord stimulator comes with its own list of restrictions and complications. The stimulator requires surgical implantation of electrodes in the spinal canal. These electrodes in turn are wired to a subcutaneous battery pack. The equipment itself prevents patients from undergoing MRI's and other types of imaging – as well as avoiding electrical and magnetic fields which can cause malfunctions (similar to the issues faced by pacemaker patients).

Colonna herself addressed two specific limitations from the spinal cord stimulator. She testified:

> And also, sir, I – I cannot drive. I cannot drive because the – I have a spinal cord stimulator. I – the reason – the company who makes the spinal cord stimulator, Science – Research Scientific advised me to shut it off for safety[1] but if I shut it off only after a few minutes I'm already in significant pain; so, I – I have no choice but to turn it back on. [R. Page 104, lines 16-23].

Before the manifestation of the RSD and implantation of the spinal cord stimulator, Colonna was able to drive herself, albeit for short distances. [R. Page 84, lines 3-10]. Now – thanks to the spinal cord stimulator – she cannot drive at all.

Colonna also testified "I can't lift twenty (20) pounds without straining and hurting my right foot and right ankle as well as my back. Since I have a spinal cord stimulator in my back and I can't lift twenty (20) pounds." [R. page 103, lines 10-14]. She specifically attributed her inability to lift

---

[1]The spinal cord stimulator made by Boston Scientific has a similar restriction: "Automobiles and Other Equipment. Patients should not operate automobiles, other motorized vehicles, or potentially dangerous machinery/equipment with therapeutic stimulation switched on. Stimulation must be turned off first. Sudden stimulation changes, if they occur, may distract patients from attentive operation of the vehicle or equipment." http://www.controlyourpain.com/prescriptiveinformation.cfm

twenty pounds to the spinal cord stimulator in her back. This is direct evidence of pain ("hurting . . . my back); weakness ("straining"); and limitation ("I can't lift twenty (20) pounds.") resulting from the spinal cord stimulator.

Inability to lift 20 pounds and inability to drive because of increased pain are unquestionably impairments as the term is commonly understand – and as it is used in workers' compensation. As the Supreme Court stated in Wigfall, "The Singleton Court intended 'impairment' to encompass a physical deficiency." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Lifting and driving restrictions are patently physical deficiencies.

An impairment rating may be a tool used to quantify impairments for use in the medical model, but the failure of a physician to address an impairment rating one way or the other cannot be treated as a proxy for no impairment, no injury or no affect on a body part. The Commission can and must rely on the evidence before it – which plainly includes testimony of the worker (as well as applying at least a modicum of common sense when presented with a change of condition due to RSD severe enough to require a spinal cord stimulator). The Appellate Panel completely overlooked Colonna's testimony. The failure to consider her testimony and the *actual physical deficiencies directly associated with implantation of the spinal cord stimulator*, shows there is no substantial evidence to support the Commission's findings on no indirect injury to the back.

Furthermore, the Court overlooked this same evidence in distinguishing Haley v. ABB, Inc., 621 S.E.2d 180, 185 (N.C.App. 2005)("plaintiff's back condition resulted from the implantation of the spinal cord stimulator [to treat his RSD] and was a natural and probable result of the compensable injury by accident and resulting pain."). The distinction is not whether the implantation of the spinal cord stimulator was successful or unsuccessful – the distinction is whether the

implantation "caused Colonna back pain or impairment." Colonna has back pain preventing her from lifting over 20 pounds. She cannot drive. These two specific impairments are the natural and probable result of the implantation of a spinal cord stimulator to treat the RSD which resulted from her compensable injury.

As Colonna did in fact prove the spinal cord stimulator itself caused physical impairments and injury, the Court should reconsider and reverse the decision below.

B. Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system

Respectfully, the Court appeared to have overlooked or misapprehended Appellant's argument concerning the RSD and the fact RSD *per se* constitute an injury to the sympathetic nervous system. Indeed, just as a stroke is a brain injury and a heart attack is a heart injury, RSD is by definition an injury to the sympathetic and central nervous systems. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002)("Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain."). *Cf.* Collins v. Department of Human Services, 529 N.W.2d 627 (Iowa 1995)(finding that reflex sympathetic dystrophy, now known as CRPS, which is a dysfunction of the sympathetic nervous system is compensable as an unscheduled injury).[2]

---

[2]Colonna has argued at every level that her leg injury caused an indirect injury to her back via the mechanism of the RSD and attendant spinal stimulator. See Brief of Appellant pages 12-15. Before the Appellate Panel, Colonna argued "Now, the Defendants concede that they have to provide for the spine stimulator. I think that concession showed that the spine and nervous system are affected body parts." [R. Page 115, lines 11-14].[R. pages 4-7 (Form 59 - Appellant's Informal Brief); R. pages 53-55 ("Appellant contends that due to her right ankle injury, she developed RSD prompting a need for a spinal stimulator."); R. page 114, line 17-page 115, line 17].

This Court concurred with the circuit court's conclusion that: "The spinal cord stimulator was implanted for the sole purpose of deriving a benefit to nerve deficits in her right leg. The spinal cord stimulator was not implanted to diagnose, remedy or treat any condition in her spine." Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 53). With respect to both tribunals, this finding is incorrect. Cf. Burnette v. City of Greenville, Op. No. 5059 (S.C.Ct.App. filed December 5, 2012)(Shearouse Adv.Sh. No. 44 at 29)(medical opinion of commissioner is not substantial evidence).

The spinal cord stimulator was implanted to treat CRPS/RSD. It was not implanted for a mere foot/ankle injury – it was specifically implanted to treat the severe intractable pain resulting from a condition defined by our State's highest court as "a rare condition affecting the sympathetic nervous system." See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002).

The sympathetic nervous system itself is part of the central nervous system. It is localized in the thoracic and lumbar areas of the spinal cord. As to CRPS/RSD, "It is now generally believed that a central nervous system abnormality is present based on the autonomic changes of abnormal sweating and skin blood flow." AMA Guides to Permanent Impairment (5th Edition), page 343.

Dr. Pasi confirmed Colonna has all the signs of CRPS/RSD: allodynia; skin color changes; coldness; hair growth changes; and atrophy. [R. Page 345]. These signs do not result from a mere twisted ankle. They are specific to RSD — and specifically result from abnormalities in the central and sympathetic nervous system.

The Court and Respondents put great stock on the allegation that Colonna perceives her pain

to be largely in the injured leg.[3] The distinction is between *normal* sensations of pain and *abnormal* sensations of pain. The mechanism of CRPS renders a normally innocuous stimulus, such as light touch, excruciatingly painful ("allodynia"). In the unaffected person, an injury to the foot might be painful – but the pain would be concordant with the injury. To the person with CRPS, the pain is beyond belief – well out of proportion to the injury. The explanation lies in the abnormal processing of the stimulus – a processing problem within the sympathetic and central nervous systems. See Simms v. State Compensation Ins. Fund, 116 P.3d 773 (Mont. 2005)("RSD is a malfunction of the central nervous system which involves the sending of abnormal pain signals from non-painful stimulae.").

Both the medical evidence and the definitions previously adopted by our highest court in Mizell confirm that RSD/CRPS is a condition of the sympathetic and central nervous systems. As the RSD/CRPS is by definition an injury to a separate (unscheduled) body part and substantially increases Colonna's disability, the Circuit Court and Commission erred in holding Colonna was limited to a single member disability award. This Court should reconsider its original opinion in light of this unaddressed argument and reverse.

2. The Commission is required to apply whichever statute would result in the greatest disability award to the disabled worker.

The Court held "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

---

[3]The record shows Colonna complains bitterly of back pain as well as "chronic pain in her neck, upper back and arms which is not controlled with any conservative treatment including PT." [R. Page 343]. This is not surprising as 92% of CRPS patients report their pain spreading to other parts of the body. Robert J. Schwartzman, MD, Kirsten L. Erwin, BS, and Guillermo M. Alexander, PhD, *The Natural History of Complex Regional Pain Syndrome*, Clinical Journal of Pain,Volume 25, Number 4, May 2009.

award for permanent and total disability under section 42-9-10 is misplaced." Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 56). Appellant agrees that if the Appellate Panel correctly held that she is limited to the scheduled member statute, then she has not met the essential predicate to proceed under the general disability statute. Having so found, it was not necessary for the Court to address this issue.

Appellant is concerned that the Court misapprehended her position. Simply put, if the evidence supports a disability award under either Section 42-9-10 or Section 42-9-30, the Commission must apply whichever statute would result in the greatest compensation. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994); McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy). Appellant requests that the Court reconsider and reverse its holding regarding the "two-body part rule" as elsewhere in this Petition and the briefs. Should the Court reverse its holdings, Appellant requests that the Court instruct the Commission to apply North Carolina's *Doctrine of Munificent Remedy.*

3. As the evidence showed Colonna suffered additional impairment to her left leg as a result of the second surgery and the RSD, there is no substantial evidence supporting the Commission's finding of no additional permanent partial disability.

In the Opinion, the Court affirms the Commission's finding that Colonna suffered no additional permanent partial disability to her left leg and back.

A. Issue Preservation.

The Court initially notes the issue is not preserved for appellate review. Respectfully,

Appellant believes the issue is preserved.

Respondents never raised a preservation issue – nor was it raised by the Court at oral argument.

It appears the Court based its preservation finding on the semantics of naming the injured body part. The Court noted Colonna raised the issue as to her "left leg and back," whereas the circuit court referenced the "right ankle/foot." Appellant is not sure if the Court is concerned that she admittedly referenced the wrong leg or that she referenced the leg at all. The reference to the left leg is a simple scrivener's error. As to referencing the leg rather than the ankle/foot, the Court may have overlooked the fact that the original disability award made by the Commission in 2007 was "50% loss of use of her *right lower extremity*, or 97.5 weeks of permanent partial disability benefits." [R. Page 28 (emphasis added)]. This disability award was to the leg. See S.C. Code Ann. § 42-9-30 (15)(1996)(*amended by* 2007 Act No. 111, Pt I, Section 18, eff July 1, 2007, applicable to injuries that occur on or after that date) ("for the loss of a leg, sixty-six and two-thirds percent of the average weekly wages during one hundred ninety-five weeks.").

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. Liberal construction of issue preservation is particularly important in workers' compensation cases as there is no mechanism to rescue an issue raised but not ruled upon by a commissioner. See Nettles v. Spartanburg School Dist. #7, 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000)("The commission's failure to explicitly rule on an issue raised to it in a Form 30 does not create an error preservation problem although a similar omission in a civil proceeding would be fatal.") If the Court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386

S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)("it is inferable from the record that [claimant] raised this issue before the single commissioner"). This Court has held issues are preserved where "it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order." Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, this Court has ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. Appl. 1994)("On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.").

There is no question Colonna raised the issue of additional permanent partial disability at all levels – for her leg, for her back, and for her RSD. As the above cases show, the Court should treat issue preservation liberally in workers' compensation cases. To hold this issue not preserved based on a hyper-technical reading of a conflict in wording between the circuit court and the commission is, respectfully, an unfair and unnecessarily strict application of issue preservation rules – particularly when the appeal is based on the Commission's original award of disability to the leg. Therefore, Colonna respectfully requests the Court reconsider and delete its holding on preservation of this issue.

B. Permanent Partial Disability.

The Court affirmed the Commission's finding that: "Based on the evidence submitted by the

parties, as well as testimony presented at the hearing, Claimant has not suffered any additional permanent partial disability." [Finding of Fact 5, R. Page 44]. In analyzing this finding, the Court focused on two things: (1) "Colonna's impairment rating for her right ankle and foot decreased from 40% to 35% between her first surgery in 2006 and her second surgery in 2008, which indicates her disability would have decreased as well; and Dr. Pasi "did not assign Colonna with an impairment rating for her RSD." Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 57). Respectfully, neither of these observations constitute substantial evidence sufficient to support the Appellate Panel's finding.

The suggestion that Colonna's disability decreased after the change of condition is – to be candid – facially absurd. Her original surgery was a "right foot arthrodesis" performed by Dr. Easley on May 19, 2005. [R. Pages 71, lines 295]. Based on that surgery, Dr. Easley assigned an impairment rating of 40% to her right lower extremity – of which 50% was allocated to the injury and 50% to a preexisting condition. [R. page 324-325]. In 2007, the Commission found Colonna had reached maximum medical improvement on March 29, 2006 with a 50% permanent partial disability to her right lower extremity. [R. pages 21-29].

Shortly thereafter, Colonna's condition changed for the worse. The change covered two significant aspects: (1) a torn achilles tendon; and (2) development of RSD.

The torn achilles tendon required surgical repair in 2007. [R. Page 335]. Dr. Easely assigned Colonna a 35% impairment rating to Colonna's right foot on July 23, 2008 – specifically because of the achilles tendon repair. [R. Page 326].

The second surgery was to an entirely different part of the leg. As Colonna testified, "the first one the right foot and then the second one the right ankle." [R. Page 96, lines 13-19].

The original impairment rating was assigned following the right foot arthrodesis. That surgery fused the lower bones of the foot to address traumatically acquired "flat feet." *It had nothing to do with the achilles tendon.* The original impairment was still there after the second surgery. The rating following the second surgery only be interpreted as 35% additional impairment.

Furthermore, even though no specific impairment rating was assigned for the RSD, the RSD emphatically resulted in substantially increased disability.[4] See Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010)(proof that claimant's leg was affected by radicular symptoms from back injury was sufficient to establish "prima facie case for compensation for the injury to his leg pursuant to section 42-9-30 . . ." even though no separate impairment rating was assigned to the leg). Dr. Pasi observed Colonna had to wear a boot cast on her leg. [R. Page 345]. Colonna suffered from numerous symptoms specifically as a result of RSD. Dr. Pasi documented "allodynia, color changes and cold Rt. lower extremity. atrophy on Rt lower leg compared to left. Hair changes and loss on Rt leg below knee." [R. Page 345].

Colonna testified to specific restrictions from the RSD and resultant spinal cord stimulator. She cannot drive because of the spinal cord stimulator nor lift over 20 pounds; before the change of condition, she could drive short distances. [R. Page 84, lines 3-10; page 104, lines 16-23]. She suffers from "anxiety because I'm in significant pain. I'm always anxious from debilitating anxiety

---

[4]As the Court noted in discussing the policy underlying Singleton, "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 together." Colonna v. Marboro Park Hospital, Op. No. 5117 (S.C.Ct.App. filed April 17, 2013)(Shearouse Adv.Sh. No. 17 at 47, 52), *citing* Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 106, 580 S.E.2d 100, 103 (2003). Although this demonstrates why Colonna's RSD should entitle her to proceed under S.C. Code Ann. § 42-9-10 (2004) for general disability, it is also confirms that the RSD caused substantially greater disability to her right leg.

and depression. And the sleep, I can't sleep at night because I have lots of pain." [R. page 100, lines 7-11]. Her anxiety and pain, along with the medications required to treat those conditions, causes forgetfulness and a cognitive deficit. [R. page 98, lines 3-7]. Regarding her condition since the 2007 hearing, she testified "My condition, one day I can survive but the next day I'm lying in bed elevating my right leg on two to three pillows." [R. page 109, lines 3-5].

The Commission simply ignored all this evidence – evidence far too important to overlook. As did the Commission, the Court has a duty to consider all the evidence in the record. It is simply insufficient for the Court to zero in on two numbers and summarily conclude the decision below is supported by substantial evidence. The numbers alone mean nothing – particularly when a closer look shows the impairment ratings were assigned to two different and separate part of the foot/ankle (or leg). By the same token, neither the Commission nor the Court can overlook the RSD. It is a critically important part of this case – and was not present when the initial disability award to the leg was made. See Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct.App. 1995)(remanding for Commission to determine whether disability award should be revised to reflect additional disability resulting from condition not included by Commission in original award).

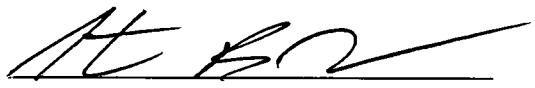
Respectfully, the Court overlooked the same evidence of disability which was overlooked by the Commission. The Court should grant rehearing and remand to the Appellate Panel for an entry of additional permanent partial disability based on the overlooked evidence of additional impairment and disability.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Rehearing and rehear the case *en banc*. This case raises significant issues regarding the application of the Supreme Court precedents in Mizell v. Glover to the workers' compensation system – significant enough to warrant consideration by the entire Court.

The Court should reconsider the earlier decision and vacate the Decision and Order below. This case should be remanded for a *de novo* hearing on all issues. The remand should include instructions to make an additional disability award under either § 42-9-10 (total disability) or 42-9-30 (additional partial disability to the leg and back), applying whichever statute would result in the greatest award to the Claimant.

Respectfully Submitted,



Stephen B. Samuels
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net
ATTORNEY FOR APPELLANT

Columbia, South Carolina
May 2, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Civil Action No. 2011-CP-21-00633

Loida Colonna, ... Appellant,

v.

Marlboro Park Hospital and Gallagher Bassett Services, Inc., ... Respondents.

PROOF OF SERVICE

I certify that I am the paralegal to Stephen B. Samuels and I have served the **Petition for Rehearing and Petition for Rehearing En Banc** 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 **May 2, 2013**, addressed as follows:

Weston Adams, III, Esquire
McAngus Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211

Helen F. Hiser, Esquire
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Mt. Pleasant, SC 29464

Mark A. Allison, Esquire
McAngus Goudelock & Courie, LLC
P. O. Box 2980
Greenville, SC 29602

Laura Sabo, Paralegal

Columbia, South Carolina

May 2, 2013