THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-001064

Patricia Pate, Employee/Claimant, ... Appellant,

v.

College of Charleston, Employer, and
State Accident Fund, Carrier, ... Respondents.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Whether Appellate Panel erred as a matter of law in finding this is a single member case such that the benefits are limited to S.C. Code Ann. § 42-9-30(1), when Appellant's work injury resulted in (1) radiculopathy affecting her left leg; (2) an SI joint injury which is an injury to her back and pelvis; and (3) suffered psychological injury as a direct result of her pain and disability.

2. Whether the Appellate Panel erred in failing to find Appellate permanently and totally disabled when the restrictions and limitations from her work injury prevent her from obtaining suitable gainful employment.

3. Whether the Appellate Panel erred in awarding 40% permanent loss of use of the back when the evidence shows Claimant is presumed permanently and totally disabled due to 50% loss of use of her back and there is no evidence to rebut the presumption.

STATEMENT OF THE CASE

This is an appeal from the Appellate Panel of the Workers' Compensation Commission.

This case arises out of an admitted injury occurring on December 14, 2011. The Claimant, Patricia Pate, underwent back surgery which resulted in ongoing treatment and permanent restrictions. The Employer, University of Charleston, accommodated Pate's restrictions up until her treating physician further limited her to 4 hours per day, 4 days per week. She was placed on an indefinite leave of absence without pay on January 29, 2015 when the Employer could no longer accommodate her restrictions. She began receiving temporary total disability compensation.

Pate filed a Form 50 (Request for Hearing) seeking compensability of her back injury with radiculopathy and SI joint injury, along with psychological overlay. She sought an award of permanent and total disability with lifetime medical treatment. [R.P. 72].

Defendants filed a Form 51 (Employer's Response to Request for Hearing) admitting a lumbar spine injury, but denying all other injured or affected body parts. Defendants further alleged Pate had suffered an intervening accident when she was hospitalized for a pulmonary embolus. Defendants alleged the pulmonary embolus ended their obligation to provide medical treatment and limited to Pate's disability compensation to the equivalent of the impairment rating. [R.P.73].

The case was tried on July 14, 2015 before Commissioner Aisha Taylor. On May 16, 2016 Commissioner Taylor issued a Decision and Order finding *inter alia* that:

- the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body part or system.
- Claimant's multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it related to Claimant's disability and continued medical treatment.

- Claimant has not met her burden of proving a psychological injury causally-related to her original injury.

- Claimant has sustained a 23% permanent loss of use of her back as a result of her work injury [based] on the impairment rating issued by Dr. Nolan . . .

- Claimant is not entitled to future medical treatment.

[R.P. 10-11].

Appellant timely filed and served her Form 30 (Notice of Appeal) on May 27, 2016. Oral argument was heard before the Appellate Panel on August 16, 2016.

By Decision and Order dated December 22, 2016, the Appellate Panel Affirmed in Part, Reversed in Part, and Remanded. The Appellate Panel affirmed the finding that the injury did not affect any other body part, including psychological overlay. The Panel reversed the findings that the pulmonary embolisms were an intervening accident and "remanded to the Single Commissioner to determine the compensation due for Claimants's causally related permanent disability and causally related medical treatment . . ." [R.P. 31].

The Parties entered into a Consent Order confirming that an immediate appeal was interlocutory. [R.P. 32-33].

On May 24, 2018, Commissioner Taylor issued a Decision and Order on Remand. The Order held:

- Claimant is entitled to a lump sum award for permanent partial disability of 120 weeks based on a loss of use of 40% of the back.
- Claimant is entitled to causally-related future medical treatment pursuant to Section 42-15-60 to include SI joint injections, trigger point injections, epidural steroid injections, A TENS unit, pain medication (currently OcyContin, Percocet, and Tizanidine) and a lumbar back brace.
- Defendants shall pay for causally-related medical expense incurred during the period the Single Commissioner's order was in effect and no treatment was authorized.

[R.P. 41-42].

Appellant timely filed and served her Form 30 (Notice of Appeal) to the Full Commission on June 7, 2018.. Oral argument was held before the Appellate Panel on October 22, 2018. The Appellate Panel affirmed in a Decision and Order on Remand on May 31, 2019. [R.P.43-65]. This appeal followed.

STATEMENT OF THE FACTS

The Appellant, Patricia Pate, was employed as an assistant manager at the Copy Center at the University of Charleston. Pate suffered an admitted injury by accident to her back and legs on December 14, 2011.

Pate underwent an instrumented lumbar fusion surgery by Dr. Joseph Marzluff on May 15, 2012. [R.P. 209]. Pate returned to work at the Copy Center with restrictions following her surgery. Dr. Marzluff assigned a 40% impairment rating to the spine – based on 30% whole person DRE Category V with an additional 10% for chronic pain. [R.P. 236]. Dr. Marzluff noted she was suffering from increasing pain and bowel incontinence. He opined "A lot of the problems that she was having were related to the stuff she was doing at work aggravated her back." [R.P. 462, lines 1-13].

Dr. Marzluff retired. Dr. Edward Nolan of the Trident Pain Center took over Pate's long-term pain management on December 17, 2013. He treated Pate with sacroiliac (SI) joint injections, trigger point injections, epidural steroid injections, a TENS unit, and medications (OxyContin, Percocet and Tizanidine). He also ordered a lumbar back brace. On February 28, 2014, Dr. Nolan opined Pate was at MMI. He opined she would require ongoing palliative treatment including all these modalities. [R.P. 81-82]. Dr. Nolan assigned a 23% whole person rating based on DRE Category IV. [R.P. 201].

On April 23, 2014, Dr. Nolan reported:

> [s]he has returned to work full time with no restrictions on 4/11/14 but reports that **her pain and anxiety are elevated. She reports that the getting up and down and standing for prolonged periods** of time are a major issue. Her FCE showed that she could perform medium work however pt does report that her pain was elevated after the FCE and she cannot do this type of work daily. **In order to keep pt working, pt cannot stand more than 1 hour at a time then must sit for at least 2 hours. She may require breaks during these times to change positions for a short period of time (5-10 minutes). She cannot lift more than 15 pounds.** [R.P. 103 (emphasis added)].

Pate continued seeing Dr. Nolan for treatment once a month. Her pain consistently ranged from 5-7 out of 10. She remained on narcotic pain medication and received injections about every two months. Dr. Nolan referred Pate to psychologist, Dr. Kee, on August 21, 2014. He specifically wrote:

> Patient is significantly depressed due s/t pain and increased pressures/stressors. I would like to refer her to Dr. Kee for psychological workup. She states that she feels work is "trying to push her out, that they don't want her there anymore". She does not appear to be coping well. Will see if she can work with Dr. Kee to develop/improve these skills. Will also start her on Effexor 50 mg BID and see how she does. Will have her back in 2 weeks to assess her response.

[R.P. 55].

Dr. Nolan's referral specifically relates the depression due to pain and increased pressures/stressors – explaining that this is from not coping with work and her job pushing her out.

Dr. Kee confirmed the diagnosis of major depressive disorder, as well as "problems with anxiety and going to sleep because of worrying about work." Testing showed a "depression score in the severe range." He recorded "the pain interferes in recreational and social activities and affects her mood." [R.P. 239]. Dr. Kee opined Pate "could benefit from eight sessions of individual psychotherapy to work on cognitive and behavioral techniques for management of depression, anxiety stress, and pain." He also recommended a "trial of sedating antidepressent" and other

modalities. [R.P. 240].

Pate temporarily stopped working on September 15, 2014 when she was hospitalized for an unrelated pulmonary embolism. On the last visit before she stopped working, Dr. Nolan noted "Pt was referred for a low back brace 2/21/14 but has yet to receive it. Will again request this from her w/c today as we have already identified that this would be highly beneficial for her during her work hours." Dr. Nolan also noted she was scheduled to see her psychologist, Dr. Kee, for further discussion regarding her depression. [R.P. 133].

On September 22, 2014, Pate returned to Dr. Nolan. Dr. Nolan reported:

> Pt has recently been hospitalized for blood clots in the lungs. Will now be on Xarelto [anti-coagulent] for the next 3-6 months. Percocet has been d/c'd however she is not getting as much relief from the Oxydodone IR 5 mg therefore we will ask her to start doubling what she has to 10 mg and provide her with a new prescription at this time. Also pt will not be eligible for injections for the next 3-6 month period. [R.P.66].

On October 23, 2014, Dr. Nolan wrote:

> She states the increase of OxyContin to BID has helped but she is ultimately unable to perform her job duties as required. Due to her inability to receive needed injection therapy until 2/2015 due to pulmonary embolisms we recommend she be placed out of work at this time and a letter will be drafted to this effect. I will continue to monitor her work status at each visit. Medication management and trigger point injections will be her treatment options at this time. [R.P. 144].

On November 24, 2014, Dr. Nolan reported:

> She continues to remain out of work per our last letter requesting 2 months out. She reports improvement in ability to cope with pain since she has been out of work. She has provided an accommodation request from her employer which we will complete and send back. At this point, we recommend pt to plan for return to work after 12/03/14 at 4 hours per day for 2 weeks with accommodations which will be available per her paperwork brought to be filled out today and then we will re-evaluate her work status 2 weeks after that. [R.P.155, 157].

Pate returned to work at the Copy Center with these restrictions on December 4, 2014. Even

with the restrictions, she called out on December 5, 12, 16 and 17. [R.P. 386].

On December 22, 2014, Dr. Nolan continued the restrictions of 4 hour per day, 4 days per week, with "No bending, squatting or crawling, no lifting greater than 15 pounds, and no pushing or pulling heavy objects." [R.P. 167].

On January 21, 2015, Dr. Nolan performed a Caudal Epidural Steroid Injection. This was the first LESS performed since the injections were suspended due to the pulmonary embolisms. [R.P. 170-172].

On February 5, 2015, Dr. Nolan continued Pate on sedentary restrictions of 4 hours per day, 4 days a week. [R.P.175].

The Copy Center ultimately determined it could not accommodate Pate's restrictions. She was placed on LOOP (leave without pay) on January 29, 2015. [R.P. 387-388]. The College of Charleston looked into other accommodations for her elsewhere at the College, but ultimately determined"there are no available positions at this time." [R.P. 248].

Pate underwent a vocation evaluation by vocational expert Jean Hutchinson. The evaluation showed there were no jobs available for her in the national economy. Hutchinson opined Pate was permanently and totally disabled. [R.P.241-246].

Pate remains disabled and unable to work.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

1. Appellant's injury was not limited to her back as the evidence shows she suffered from radiculopathy into her left leg, injury to her SI joint and psychological overlay resulting from chronic pain and disability.

The Appellate Panel found "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [R.P. 61, Finding of Fact 1]. This was error, as Pate's accident resulted in radiculopathy and SI joint injury along with major depressive disorder.

A. Radiculopathy into the left leg.

It is well-established law that radicular symptoms from a back injury are considered an "affect" on the legs. This is so even in the absence of a separate impairment rating. See Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010), *reversed on other grounds,* 732 S.E.2d 500, 399 S.C. 381 (2012)(affirming Commission's finding that radicular symptoms in the right leg showed an injury to the back "with affects to the right leg."). This makes sense as the AMA Guides incorporate radiculopathy into the whole person ratings given for spine injuries.[1]

Pate testified that she has pain "in my lower back, and sometimes it leads down to my – into my right thigh through my buttocks. I have more pain on the left side than what it is on the right." [R.P. 497, lines 11-15]. This is borne out by the medical records.

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[1]The AMA Guides provide five categories for whole person impairments arising out of back injuries. DRE Lumbar Category III provides for a 10-13% whole person rating for multiple conditions, one of which is "signs of radiculopathy." Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.) p. 384, Table 15-3. Dr. Nolan assigned a 23% whole person rating, which is a Category IV impairment. Dr. Marzluff's rating of 40% lumbar/36% whole person is higher than the 25-28% whole person ratings in Category V. In addition to the lumbar ratings, the Guides provide for additional impairment due to station and gait disorders – which is consistent with Pate's condition. Id., Page 396, Table 15-6.

Dr. Nolan treated Pate for back pain radiating into her hip and leg, and for SI joint pain. On November 26, 2013, he noted a lumbar injection had given relief, albeit temporarily, of "low back pain and leg pain." From that point, he wanted to "see how treating her low back in conjunction with her SI joint provides relief. [R.P. 324-325]. Dr. Nolan continued treating Pane's back, legs and SI joint. He consistently characterizes her pain as "Lower back, buttocks, leg." On August 21, 2014, Dr. Nolan wrote "**Radiating symptoms: moderate to severe lumbar radiculitis pain with ROM in the left L5 nerve distribution and S1 nerve distribution to the knee.**" [R.P. 129 (emphasis added)]. He assigned a 23% whole person rating for DRE Category IV. This continued from the outset through the last records presented at the hearing. [R.P. 190].

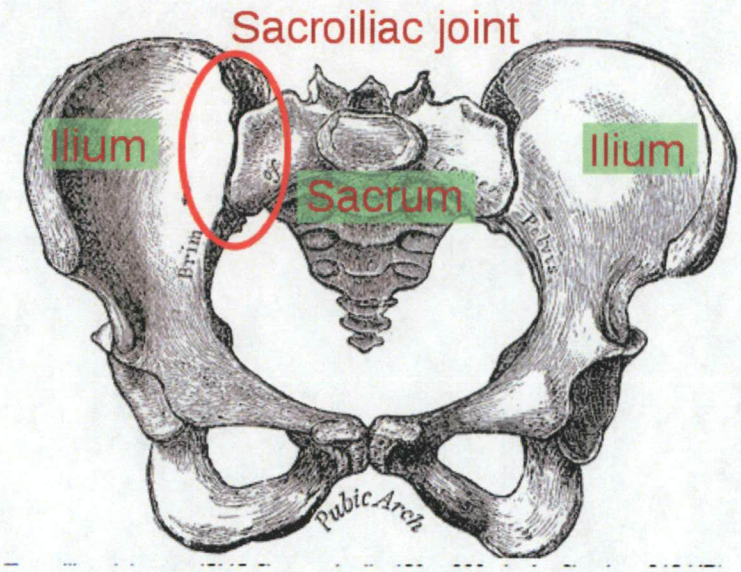
B. Injury to the sacroiliac joint.

In addition to radiculopathy, Pate injured her SI joint – as evidenced by the need for Dr. Nolan to perform SI joint injections. Indeed, the Appellate Panel specifically ordered "SI joint injections" as part of the "causally-related future medical treatment" Respondents are required to provide to Pate. If a particular body part requires treatment, then it must necessarily have been injured.

The SI joint is by definition an unscheduled body part. Virtually the same issue presented here was definitively addressed in Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995). In Gilliam, the employee injured her hip and required a hip replacement. She had no other injuries. The Commission refused to made a general disability award, instead holding that Gilliam was limited to a scheduled member award because the hip socket was part of the leg. The Supreme Court reversed holding "the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes." Id. The Supreme Court held the issue was one of law – expressly rejecting

the employer's contention that it was a substantial evidence issue. As the injury was to an unscheduled member, the Court remanded to the Appellate Panel for a determination of disability under the general disability statute.

The SI joint is the articulation between the sacrum and the ilium of the hip bone. The sacrum supports the spine and is supported in turn by an ilium on each side. The illustration below shows the exact location of the SI joint:



In 2007, the Legislature amended the Act to add the *hip* as a scheduled member. S.C. Code Ann. § 42-9-30 (17)(2007). This does not change the fundamental analysis because the SI joint is either unscheduled, part of the pelvis, or part of the hip – thus satisfying the two-body part rule under any possible finding.

Gilliam commands reversal in the instant case. The evidence is overwhelming that the SI joint was permanently injured in the accident. The Appellate Panel's finding that Pate's injury was limited to her back should be reversed.

C. Psychological Overlay.

The Appellate Panel held "Claimant has not met her burden of proving a psychological injury causally-related to her original injury." [R.P. 62, finding of fact 7]. This was error. The Appellate Panel overlooked the evaluations by Dr. Lowndes-Rosen and Dr. Kee, as well as the multiple references of psychological overlay from Dr. Nolan.[2] See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission for relying on other factors when "The only evidence of causation is that Claimant's [injury was caused by her work activities as] stated by [her doctor]"); Therell v. Jerry's Inc., 633 S.E.2d 893, 370 S.C. 22 (2006)("Though the workers' compensation commission carries the duty to determine how an injury is compensable, the commission makes this decision based on submitted evidence, not out of thin air.").

Pate was referred to Dr. Kee by Dr. Nolan on August 21, 2014. He specifically wrote:

> Patient is *significantly depressed due s/t pain* and increased pressures/stressors. I would like to refer her to Dr. Kee for psychological workup. She states that she feels work is "trying to push her out, that they don't want her there anymore". She does not appear to be coping well. Will see if she can work with Dr. Kee to develop/improve these skills. Will also start her on Effexor 50 mg BID and see how she does. Will have her back in 2 weeks to assess her response.

[R.P. 129 (emphasis added)].

Dr. Nolan's referral specifically relates the depression due to pain and increased pressures/stressors.

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[2]Although Pate did not have a diagnosed preexisting psychological condition, even if she had, she met her burden under three of the four methods of proof set forth in the statute. Dr. Nolan "noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition." Respondents' psychiatrist, Dr. Lowndes-Rosen, "found [the *Somatic Symptom Disorder with Predominant Pain* to be causally related or connected to the accident or injury after evaluation . . ." And Dr. Kee "noted [the depression and anxiety] in a medical record or report . . . as causally related or connected to the injury or accident." S.C. Code Ann. § 42-1-160 (C)(2007).

Dr. Kee confirmed the diagnosis of major depressive disorder, as well as "problems with anxiety and going to sleep because of worrying about work." Testing showed a "depression score in the severe range." He recorded "the pain interferes in recreational and social activities and affects her mood." [R.P. 239]. Dr. Kee opined Pate "could benefit from eight sessions of individual psychotherapy to work on cognitive and behavioral techniques for management of depression, anxiety stress, and pain." He also recommended a "trial of sedating antidepressant" and other modalities. [R.P. 240].

Further confirmation of the casual connection between Pate's depression and the pain from her injury comes from Respondents' examining psychiatrist, Dr. Dyana Lowndes-Rosen. Dr. Lowndes-Rosen noted "Claimant reports depression since W/C accident. She is on Paxil 25mg CR. by her LMD Dr. Hanner." [R.P. 365]. Dr. Lowndes-Rosen diagnosed Pate with *Somatic Symptom Disorder with Predominant Pain (300.82).*[3] She wrote "She recognizes her emotional symptoms are a direct result of her pain and limitations." [R.P. 367]. Dr. Lowndes-Rosen concluded:

> Ms. Pate presented as a pleasant lady who is victim of chronic pain syndrome due to lumbar post laminectomy syndrome. She is maintained by her personal physician on an antidepressant drug. I have no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. She also expressed her belief that she has no need for mental health involvement. She is faced with chronic pain syndrome and is a pain management patient.

[R.P. 368].

This medical evidence confirms that Pate suffered a psychological overlay with major depressive disorder as a result of the pain and disability resulting from her workplace injury. See Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)("Dr.

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[3]The number refers to a diagnostic billing code for "Disorders characterized by bodily symptoms caused by psychological factors." 2015 ICD-9-CM Diagnosis Code 300.82.

Bamashmus testified that Getsinger's work-related physical injury precipitated his depression, that work was important to Getsinger, and that Getsinger's suicidal thoughts were 'related to the fact that he is sitting at home, thinking about not being able to work anymore; related to the depression; related to the fact that he's been actively working all his life and here he is sitting at home doing nothing.' This evidence sufficiently establishes that Getsinger's foot injury caused his depression.").

In the instant case, the doctors do not disagree about the diagnosis; only the extent of treatment needed. Drs. Nolan and Kee recommend counseling; Dr. Lowndes-Rosen does not believe it would be of substantial benefit because Pate suffers "real physical pain." On the critical issue, there is no disagreement among the doctors that the psychological condition resulted from the injury and resulting disability, and that antidepressant medication is appropriate.

Therefore, the Appellate Panel's denial of the psychological claim should be reversed.

D. Two-Body Part Rule.

The Appellate Panel made its disability award under the medical model to a single body part: the back. The award was necessarily limited to the back because of the erroneous finding that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [R.P. 61, Finding of Fact 1].

At the Commission, Pate consistently argued her injury was not limited to her back – such that the disability award should have been made for permanent and total disability under S.C. Code Ann. § 42-9-10 (2007). Pate adduced proof that she injured an unscheduled body part – the SI (sacro-iliac) joint – and that her back injury caused radiculopathy in her left leg. She produced uncontradicted proof of psychological overlay related to the pain of her injury and resulting disability. This proof, combined with the definitive proof of an actual total loss of earnings capacity,

confirm that the Appellate Panel erred in limiting her disability award to a single member under S.C. Code Ann. § 42-9-30 (2007).

The Workers' Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Commission is required to apply whichever statute provides the greatest benefits for the Claimant.

The policy behind the general disability portion of the act provides the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). This concept is practically identical to North Carolina's *Doctrine of Munificent Remedy*. It would defeat the purposes of the Act to deny a Claimant the opportunity to establish a greater disability than he would receive under the scheduled member statute.

Under the Munificent Remedy Doctrine, "where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable." Gupton v. Builders Transport, 357 S.E.2d 674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). In other words, where a claimant has established entitlement to a greater award under § 42-9-10 or 42-9-20 than he would receive under a scheduled member award, the Commission is required to make the most favorable award. See 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). If interpreted under the Brown framework, Pate would be entitled to an award for loss total disability under § 42-9-10.

In this case, the Commission made its disability award under the medical model. See S.C. Code Ann. § 42-9-30 (21)(2007)(providing compensation paid for loss of use to the back is 300 weeks). Had Pate not suffered the injury to her SI joint, radiculopathy into her left leg and psychological overlay, such that her injury was entirely limited to her back, then she would be limited to a maximum compensation of 300 weeks – not withstanding the fact she suffered a total loss of her pre-injury earning capacity. The basic rule set out in Singleton states, "Where 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." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). The principle espoused in Singleton 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." Wigfall, 354 S.C. 100, 106-07, 580 S.E.2d at 103. This rule is colloquially referred to as the "two-body part rule."

The part of Singleton relevant to this case states, "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." [Id.]. Even if the actual injury is confined strictly to one body part, the claimant can still proceed under the general disability statutes if he can "show that some other part of his body is affected." Id. See, also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002)

(injury to scheduled member that affected other parts of body compensable as general disability). It is enough that the other body part be *affected*. There is no requirement that a separate impairment rating be given. See Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010), *reversed on other grounds,* 732 S.E.2d 500, 399 S.C. 381 (2012)(remanding for award to the leg because radicular symptoms from back injury resulted in "affects to the right leg" even though there was no separate impairment rating to the leg). "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).

Pate satisfied the two-body part rule, such that she is entitled to have her disability award made under the economic model. The Court should reverse the Commission and find that no substantial evidence supports the finding that the "accident did not result in injury to, or otherwise affect, any other body member or system."

2. Pate is permanently and totally disabled as no employer is able to accommodate the restrictions resulting from her work injury.

At the hearing, Respondents argued "It's our position that the Claimant suffered a subsequent intervening injury in September of 2014 when she was hospitalized for multiple pulmonary embolisms, which are unrelated to her employment and unrelated to this injury. . . . So any disability or loss of wage earning is proximally caused by these personal health problems, not by the accident." [R.P. 486, line 22-page 487, line 1; page 488, lines 2-4). In the original Order by the Single Commissioner, she ruled "The greater weight of the evidence indicates that Claimant is *currently out of work due to a non-work-related personal health problem* (pulmonary embolisms) and; therefore, any loss of wage-earning capacity is not the proximate result of the December 14, 2011

accident." [R.P. 13, Conclusion of Law 2]. This conclusion was reversed by the Appellate Panel. There is no evidence that Pate's condition, complaints, medical treatment and work restrictions were increased or aggravated by the now resolved pulmonary embolisms. It is her injuries that keep her out of work and render her disabled.

A. Work Restrictions and Disability.

Pate has always had substantial restrictions due to her work injury. On April 23, 2014 (before the pulmonary embolus), Dr. Nolan opined: "**In order to keep pt working, pt cannot stand more than 1 hour at a time then must sit for at least 2 hours. She may require breaks during these times to change positions for a short period of time (5-10 minutes). She cannot lift more than 15 pounds.** [R.P. 103 (emphasis added)]. Pate continued to work in what was essentially sheltered employment for as long as she could manage her pain.

Pate developed the pulmonary embolus on September 14, 2014. She was hospitalized for several days. During this time, Pate's back pain increased to a level where she was not able to work. Dr. Nolan wrote her out of work for two months – for back pain; not the blood clot. He then returned her to work with restrictions of 4 hour per day, 4 days per week, with "No bending, squatting or crawling, no lifting greater than 15 pounds, and no pushing or pulling heavy objects." [R.P. 167].

Pate returned to work at the Copy Center *on a temporary basis* with these restrictions on December 4, 2014. Even with the restrictions, she called out on December 5, 12, 16 and 17. [R.P. 386]. Ultimately, the Copy Center determined it could not accommodate Pate's restrictions. She was placed on LWOP (leave without pay) on January 29, 2015 – less than two months into the period of increased restrictions. [R.P. 308-309.

Notably, during the period Pate was working 4 hours per day, Dr. Nolan performed a Caudal Epidural Steroid Injection (on January 21, 2015). [R.P. 170-172]. This is important because it confirms her disabling increase in pain is due to the natural progression of her condition. Even if her pain had increased because she is not able to receive a certain type of injection due to taking anticoagulent medication, the pain and disability is from the injury; not the blood clot.

The test for permanent and total disability is whether the employee is unable to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118 S.E.2d 812 (1961). The disabled worker can meet this test under any one of three methods of proof: (1) expert vocational testimony; (2) testimony of employers who refused to hire the claimant; and (3) "diligent efforts to secure employment." Coleman v. Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965).

The fact Pate is permanently and totally disabled is not disputed by the evidence. Pate is disabled because no employer (including the College of Charleston) could accommodate her work restrictions. Pate's request for accommodation was denied "because it would be an undue hardship for the Copy Center." In fact, it is not just the Copy Center that could provide work for Pate – it is the entire College of Charleston. The College informed Pate "While the college has looked into whether there are any other positions for which you are qualified, and that could accommodate your request, unfortunately, there are no available positions at this time." [R.P. 248].

The vocational evaluation confirms that Pate's "impairments and lack of transferable skills prevent her from making an adjustment to any work that exists in significant numbers in the national economy. It is therefore concluded that Ms. Pate is and remains unemployable. She is unable to

compete on the open job market and is unable to perform substantial gainful work activity." [241-246].

The disabling work restrictions are directly due to the workplace injury – assigned by Dr. Nolan. *Pate has no restrictions from the pulmonary embolus.* As such, she has met her burden of proving total and permanent disability. The Decision and Order of the Appellate Panel should be reversed and Pate should be awarded total disability as a matter of law.

3. Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back.

On remand, the Single Commissioner found Pate had sustained permanent partial disability (loss of use) of 40% of the back. The Appellate Panel affirmed. The specific finding stated:

> I find Claimant has sustained 40% permanent partial disability as a result of her work injury. This finding is based on the evidence as a whole including Dr. Nolan's permanent impairment rating of 23% to the lumbar spine issued on March 10, 2014 as well as Claimant's work restrictions at the time of separation from her employer which included working 4 hours per day for 4 days per week, with specific restrictions of no bending, squatting, or crawling; no lifting greater than 15 pounds, and no pushing or pulling heavy objects.

[R.P. 38, finding of fact 2].

There are numerous concerns here which should result in an award of 50% or more loss of use of the back.

To begin with, Pate has two impairment ratings from authorized treating physicians. Her surgeon, Dr. Marzluff gave her a 40% spine rating and a 36% *whole person rating.* [R.P. 236]. This rating is not even mentioned in the Commission's finding of fact. [R.P. 62-63, Findings of Fact 11 and 6]. This demonstrates that the Appellate Panel did not consider Dr. Marzluff's rating. And while the Commission can *weigh* evidence, it cannot *ignore* evidence.

The second impairment rating is from Dr. Nolan. He is Pate's treating pain management

physician. Dr. Nolan's rating is 23% to the whole person (DRE Category IV). Dr. Nolan assigned this rating on February 25, 2014, noting it is inclusive of Dr. Marzluff's rating. [R.P. 201]. Under the AMA Guides and Clemmons, the whole person rating converts to a regional spine rating of 26%.

When Dr. Nolan assigned the ratings, he ordered an FCE to determine permanent restrictions. The FCE showed Pate could perform at a medium duty level.[4] When Dr. Nolan reviewed the FCE, he assigned restrictions of: "No lifting greater than 15 pounds." He wrote "Patient cannot perform medium workload daily. FCE increased their pain." [R.P. 335].

Pate returned to work at the bookstore with these restrictions. Unfortunately, her condition worsened, to the point where Dr. Nolan limited her to 4 hours per day, 4 days per week. These restrictions were referenced by the Single Commissioner.

On June 19, 2015, Dr. Nolan increased Pate's restrictions to:

- No lifting greater than 10 lbs.
- No bending, squatting, or crawling.
- No pushing/pulling heavy objects.

He continued to limit her hours to less than 4 hours per day, 4 days per week.

These restrictions are significant. There are no jobs available to someone with these restrictions. The bookstore had made every reasonable attempt to accommodate Pate's restrictions because she was such a valuable employee. However, her increased restrictions could not be accommodated, rendering her totally vocationally disabled. Not only has she lost the ability to even do sedentary work, she has lost 60% of her available time for work (based on going from 40 hours

[4]The FCE showed Pate could lift up to 25 pounds occasionally. This is actually a light performance level, as medium duty requires lifting 30 pounds.

to 16 hours).

If a back injury is severe enough to limit someone to less than sedentary duty for 16 hours per week, then the employee has lost 50% of the use of her back from a vocational standpoint. As such, the award should reflect this reality. A 40% impairment rating is not reflective of Pate's true disability and loss of use.

It is well established that *impairment* and *disability* are not synonymous. For that reason, disability awards are generally greater than impairment ratings. While impairment ratings are a starting point for the analysis, impairment is a different concept than disability or loss of use. A disability award does not directly correlate with medical impairment.[5] The disability award is an appraisal of the injured worker's "present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment." Beard, Poteat, Lamar, Sumwalt, *The Law of Workers' Compensation Insurance in South Carolina* (3rd ed. 2003), § 11-24.

There are numerous examples showing that disability awards generally exceed the impairment ratings. See, e.g. Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(substantial evidence supported an award for a 50 per cent loss of use of the back even though the medical testimony "established, at most, a 30 [per cent] impairment rating."); Bundrick v.

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[5]The AMA explains this distinction in the manual physicians use for determining permanent impairment:

> The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to use the Guides criteria or ratings to make direct estimates of work disability. Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.) at 9.

Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966)(50% loss of use of arm upheld even though medical experts testified to 10% and 20% impairment); Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% permanent partial *disability* to leg affirmed even though treating physician assigned 35% *impairment* rating to foot); Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)(30% loss of use of back with 10% impairment rating with no surgery and medium duty restrictions)*reversed on other grounds,* 732 S.E.2d 500, 399 S.C. 381 (2012); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct.App. 1992)(affirming award of 15% to back when treating physician assigned 5% impairment rating); Cropf v. Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986)(affirming Commission's award of 30% to the back where highest impairment rating was 15% to the neck). Linen is particularly instructive because the claimant in that case had a lower impairment rating than the rating Dr. Marzluff assigned to Pate.

These cases show Pate's impairment ratings – with the added complications of less than sedentary work restrictions and severely limited hours – plainly equates to more than 50% loss of use of the back. It was reversible error for the Appellate Panel to limit her award to 40% loss of use of the back.

The statute provides that an injured worker suffering "fifty percent or more loss of use of the back shall be presumed to have suffered total and permanent disability . . ." S.C. Code Ann. § 42-9-30 (21) (2007). As such, Pate is deemed to be permanently and totally disabled.

The above presumption can be rebutted on a showing by the Respondents that the employee is able to work under the same tests set applicable to § 42-9-10. The burden of proof is on

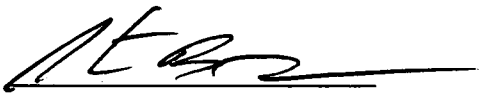
Respondents. Respondents failed to present any evidence to rebut the vocational evidence submitted by Pate. Indeed, the Employer admitted it could not accommodate Pate's work restrictions even though she was a valuable and long standing employee. See Hutson v. South Carolina State Ports Authority,732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability).

Therefore, the Court should hold the award must be greater than 50%, thus creating the presumption that Pate is permanently and totally disabled. As the Employer cannot accommodate these restrictions and the vocational evidence proves total disability, Pate should be deemed permanently and totally disabled.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed. The Court should hold: (1) Pate's back injury affected her left leg; (2) Pate injured her SI joint; (3) Pate suffered causally-related psychological overlay; (4) Pate is entitled to an award for permanent and total disability under § 42-9-10; (5) Pate sustained a 50% or more loss of use of her back such that she is entitled to an award for permanent and total disability under § 42-9-30.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-001064

Patricia Pate, Employee/Claimant, ... Appellant,

v.

College of Charleston, Employer, and
State Accident Fund, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

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

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