RECEIVED

Oct 24 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From the South Carolina
Workers' Compensation Commission

Opinion No. 5925 (S.C. Ct. App. Filed July 20, 2022

Patricia Pate, Employee, ... Respondent,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Max Sparwasser
MAX SPARWASSER LAW FIRM, LLC
665 Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 864-6444
max@maxlawsc.com

Attorneys for Respondent

INDEX

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that correctly reverse the Appellate Panel's finding that "Claimant has not met her burden of proving a psychological injury causally-related to her original injury," and given the one-sided medical evidence of psychological overlay caused by Pate's physical injuries, should this Court hold Pate proved her psychological overlay as a matter of law?

2. Did the Court of Appeals correctly reverse and remand with instructions to the Commission to address Pate's claim for general disability when Pate proved her back injury affected her legs, buttocks, hips and SI joint?

3. Did the Court of Appeals correctly affirm the Commission's finding that the pulmonary embolus was unrelated and could not constitute a subsequent intervening cause, particularly here when the disabling restrictions are entirely a result of Pate's compensable injury?

4. Did the Court of Appeals correctly reverse and remand the award for 40% to the back when the evidence showed Pate lost 50% of her back and should be deemed permanently and totally disabled?

5. Did the Court of Appeals err in failing find as a matter of law that Pate is permanently and totally disabled as no employer is able to accommodate the restrictions resulting from her work injury?

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].

Petitioners 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].

Pate 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].

Pate 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].

Pate timely appealed to the Court of Appeals. Oral argument was held on April 12, 2022. On July 20, 2022, the Court of Appeals issued an Opinion reversing and remanding with instructions for the Commission to address Pate's claim for general disability.

Petitioners timely filed a Petition for Rehearing on August 3, 2022, which was denied on August 12, 2022. Petitioners then filed a Petition for Writ of Certiorari.

ARGUMENT

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]. The Court of Appeals correctly reversed this finding as unsupported by substantial evidence. The court specifically found there is "[t]here is ample evidence Pate's back injury affects other parts of her body. It was thus legal error for the commission to reject Pate's request that she be allowed to consider an award under the 'general disability' regime by summarily stating her claim was limited to the back without providing any analysis." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23, 24). The court reversed and remanded with instructions "envision[ing] that, at a minimum, the commission will evaluate the substance of Pate's general disability claim." Id.

If there is any error by the Court of Appeals warranting a writ of certiorari, it is in being too circumspect regarding the Appellate Panel's findings of fact. To be sure, the panel's findings *are* unsupportable. Yet this is not from a lack of detail in the findings; it is the inevitable result of making findings without evidence. The Panel could not justify its limitation of the claim to "Claimant's lower back only" by reference to the evidence, hence its resort to conclusory and inaccurate characterizations of the medical opinions coupled with vague allusions to Pate's "personal history, prior medical history, and current unrelated medical conditions . . ." [R.P. 62-63, Finding of Fact 7].

Although there are times when a remand is necessary, parties should not be "trapped in a cycle of remands for years." Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 826 S.E.2d 863 (2019). See, also Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2016)("If under the

circumstances presented here, the Commission's order is allowed to stand, a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission."). The inquiry for the Court of Appeals was whether the Panel's factual findings were correct and supported by substantial evidence; not whether the findings was legally sufficient. That inquiry – indeed both inquiries – require the appellate court to examine the evidence. The Court of Appeals did just that – and found "ample evidence" of other affected body parts, including depression.

In the instant case, the evidence is *all one way.* "If the evidence is all one way, . . . the issue becomes one of law for the Courts and not of fact for the Commission." Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949). See, also Randolph v. Fiske-Carter Constr. Co., 240 S.C. 182, 189, 125 S.E.2d 267, 270 (1962) (holding where there is absolutely no evidence to support the Commission's findings, the question becomes a question of law), *cited in* Clemmons v. Lowe's Home Ctrs., Inc., 420 S.C. 282. 803 S.E.2d 268,(2017).

The Court of Appeals declined to follow this rule, stating "we hold it is not appropriate for us to evaluate the merits of this argument before the commission has spoken." Yet, the court held additional body parts were affected, as on remand it "envision[ed] that, at a minimum, the commission will evaluate the substance of Pate's general disability claim." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23, 24).

The ultimate issue determining whether the writ should be issued is whether the Court of Appeals was correct in remanding for further proceedings as to general disability or whether the court should have explicitly reversed on these issues as a matter of law. The one-sided nature of the evidence – both as to affected body parts and total disability – compels reversal as a matter of law, thus limiting remand to merely complying with the court's opinion. A remand to make additional

(and unnecessary) findings – in an 11-year old case remanded once already -- seems to run afoul of Hilton and Russell. If this Court holds the Court of Appeals correctly remanded for further proceedings, then the Petition should be denied. Conversely, if the Court of Appeals should have reversed the Commission's factual findings as a matter of law, then the Court could consider issuing the writ.

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

The Court of Appeals was correct in finding that Pate's physical injury to her back affected her psychological state and her legs. The court did not specifically address the injury to the SI joint, nor did it rule, as requested by Pate, that the vocational evidence and her restrictions rendered her permanently and totally disabled as a matter of law

A. Psychological Overlay.

The Court of Appeals reversed the Appellate Panel's finding that "Claimant has not met her burden of proving a psychological injury causally-related to her original injury." [R.P. 62, finding of fact 7]. The Appellate Panel completely ignored the evidence, overlooking the opinions of Dr. Lowndes-Rosen and Dr. Kee, as well as the multiple references of psychological overlay from Dr. Nolan.[1] The Court of Appeals correctly observed that "references to complications in other parts

[1]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

of Pate's body show up in records throughout her multi-year course of treatment, and two physicians—Dr. Nolan and Dr. Kee—diagnosed Pate with depression." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23, 25). This finding does not invade the Commission's fact-finding role as the medical evidence of psychological overlay caused by the injury is one-sided and uncontradicted. 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. Dr. Nolan 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.

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

---

injury or accident." S.C. Code Ann. § 42-1-160 (C)(2007).

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 Petitioners' 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).*[2] 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 uncontradicted 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 Clark v. Philips Electronics/Shakespeare, 433 S.C. 186, 195, 857 S.E.2d 378, 382 (S.C. App. 2021)(reversing commission's denial of psychological overlay claim because "the objective medical evidence of the existence, causation, and degree of Clark's depression and anxiety is uncontradicted."); Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)("Dr. Bamashmus testified that Getsinger's work-related physical injury precipitated his

---

[2]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.

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.").

Petitioners try to deflect from the straightforward opinions of Drs. Lowndes-Rose, Kee and Nolan, instead asking the Court to focus on irrelevancies. Petitioners' argument seems to be threefold: (1) the Appellate Panel's finding that "no physician opined that Claimant has any disability or work restrictions as a result of any alleged psychological condition;" (2) that other stressors caused the depression; and (3) that Dr. Nolan's reports are not his opinions because they were allegedly authored by a nurse practitioner.

Pate was already severely restricted and disabled from her physical injuries. Additional restrictions or disability are not essential elements for proving psychological overlay. The employee merely need prove a psychological injury caused by the physical injury. Most workers' compensation claims are considered medical only cases, where the employee receives treatment but no compensation.[3] There are many injuries and conditions which do not warrant work restrictions, yet require treatment under workers' compensation because they are caused by a work accident. See

---

[3] A *medical only* claim is a work-related injury which causes no compensable lost time and no permanent disability. Lost time claims are denominated as compensable claims. The Workers' Compensation Commission allows employers and carriers to provide medical treatment in such cases without the need to formally file the claim with the Commission. See S.C. Code Ann.Regs. 67-411 (2008) (describing procedure for 'medical only' claims). Medical only claims are discussed in Mauldin v. Dyna-Color/Jack Rabbit, 416 S.E.2d 639,308 S.C. 18 (1991)(holding provision of medical treatment under medical only claim tolled the statute of limitations until claimant "knew or should have known of her compensable injury.")

e.g., Dykes v. Daniel Constr. Co., 262 S.C. 98,202 S.E.2d 646 (1974)(claimant entitled to additional medical treatment for eye even though he had returned to work and been compensated for 100% loss of eye); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574,514 S.E.2d 593 (Ct. App. 1999)("an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement"). See also, Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)(awarding treatment for depression occurring five years after injury).

As to other stressors, there is no medical evidence that factors other than the pain and disability resulting from the physical injury caused Pate's anxiety and depression. Dr. Lowndes-Rosen pointedly described Pate as a "victim of chronic pain syndrome . . ." noting "She recognizes her emotional symptoms are a *direct result* of her pain and limitations." [R.P. 367-368 (emphasis added)]. That statement – from Petitioner's retained expert witness – is dispositive.

Petitioner would have the Court reject Dr. Nolan's diagnosis and referral to Dr. Kee because, they contend, the reports may have been "authored by a Nurse Practitioner, Allison Davis." [Brief of Respondents, page 22]. This argument is, well, silly. The reports are "Electronically signed by JOSEPH NOLAN, MD." [R.P. 131, 133]. They are "medical records of an authorized physician." See S.C. Code Ann. § 42-1-160 (D)(2)(2007).

The argument that Dr. Kee's report is not written by a physician is a red herring. There is no substantial evidence to support the Commission's finding that "Claimant has not met her burden of proving a psychological injury causally-related to her original injury." [R.P. 62, finding of fact 7].

Therefore, this Court should either deny the Petition or grant the Petition and hold the psychological claim was proven as a matter of law.

B. Radiculopathy from the back affecting the buttocks, hips and legs.

The Court of Appeals observed "[t]he commission's decision simply proclaims '[t]his is a single-member injury affecting Claimant's lower back only' and that Pate was limited to the scheduled recovery statute." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23). After summarizing the evidence, the court stated: "There is thus *no doubt* that the record contains ample markers of a colorable claim that the effects of Pate's back injury extend beyond her back." Id. (emphasis added). The Court of Appeals is correct. There is *no doubt* that Pate's injury caused leg and hip radiculopathy.

It is well-established law that radicular symptoms from a back injury are considered an "affect" on the legs. 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.[4]

Petitioner argues without citation to authority that "intermittent subjective complaints are legally-insufficient to support a general disability claim under S.C. Code Ann. § 42-9-10." [Petition for Writ of Certiorari, page 15]. Petitioners mischaracterize the opinion (and omit much of the relevant evidence). Petitioners state:

> According to Pate's own testimony, the substance of her leg injury is that pain "sometimes . . . leads down to [her] – into [her] right thigh through [her] buttocks."

---

[4]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 an even higher Category IV impairment.

[Petition for Writ of Certiorari, page 15 (emphasis added by Petitioners)].

To read Petitioner's argument, one would assume Pate based her case entirely on this one line of testimony. Petitioners state "According to Dr. Nolan (Pate's pain management physician, the location of Pate's pain was repeatedly stated to be simply 'lower back.'" [Petition for Writ of Certiorari, page 16]. This is manifestly not the case, as Pate's buttock, hip and leg symptoms are verified throughout the medical records. Once again, the devil is in the details, for one need only read the reports to see that Petitioners (and the Commission) omitted, ignored or overlooked multiple consistent references to radicular effects in the legs and SI joint pain.

Pate was seen by Dr. Nolan forty-six times from May 14, 2013 through May 28, 2015. Each report begins with the notation Reason for Appointment. Twenty-five of the reports list some combination of back pain and leg pain (sometimes with buttocks pain). Other reports list "lower back pain" or "low back pain" under *Reason for Appointment*, but then go on to describe radiculitis, SI joint pain, pain over the iliac crest or other conditions. [R.P. 1-6, 22- 24, 36-3 7, 42-44, 51-53, 58,-59, 69-70, 72-74, 80-81, 84-85, 100-101, 245-246, 251-252], Still others list planned injections (for radiculopathy) at the L4 and LS nerve roots. [R.P. 81-82]. Some other reports note physical examination was conducted on the previous visit and the patient is here for an injection only. [R.P. 90-91, R.P. 105-107, 170-172, 327-329].

Dr. Nolan consistently treated Pate for back pain radiating into her hip and leg, and for SI joint pain – all of which was approved by Petitioners. On November 26, 2013, he noted a lumbar injection had given relief, albeit temporarily, of "low back pain and leg pain." 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)]. This continued from the outset up to the hearing. [R.P. 190].

As much as one hates to belabor the contents of these reports, the Court should not be mislead into believing substantial evidence supports the Commission's 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 most, three or four of the forty-six reports from Dr. Nolan make no mention of any other body member or system. And these are followed by other reports showing the radiculitis, leg pain and numbness, and SI joint pain returned after the injections had worn off.[5] The Court of Appeals recognized this, observing "The record indicates *no less than forty physician notes* about Pate having nerve pain in places other than her back." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23, 26)(emphasis added).

Petitioners also argue "there is no competent evidence that the work-related back injury caused any physical deficiency or impairment of the legs, much less evidence of any 'disabling effect' on her legs." [Petition for Writ of Certiorari, page 18]. To the contrary, there is extensive evidence of a disabling effect (even if such proof were necessary). On June 19, 2015, Dr. Nolan

---

[5]Other providers documented the affect on the legs and SI joint. Dr. Marzluff operated on Pate for "back pain and discomfort with associated dysesthesias of the legs." [R.P. 150]. He testified "We sent her to pain management to try an epidural steroid injection on the left side. . . . She was having more left-sided buttocks pain and thigh, and we decided to try her with an epidural." [R.P. 473, line I-page 474, line 8]. In the functional capacity evaluation done on "March 11, 2014, the therapist documents "weakness in bilateral hips left greater than right; . . . a constant dull, ache in low back left> right that intermittently radiates in left lower extremity from her back to her knee that she describes as a numbness/tingling." Following the test, she "demonstrated a slight increase in antalgic gait demonstrating decreased stance time on left LE post-test secondary to pain." [R.P. 339, 341, 346]. On September 22, 2014, her psychologist, Dr. Kee documented "Ms. Pate presents with constant left-sided low back pain, left hip and leg pain following an on the job injury in December 2011." [R.P. 237]. Dr. Lowndes-Rosen recorded on December 10, 2014 that she was admitted for surgery because she was "continuing to be symptomatic particularly concerning her legs;" that "it has been Dr. Nolan's report that she has also had bilateral radicular leg pain;" and that "she has bilateral radiculopathy." [R.P. 364-368].

assigned permanent work restrictions of "No bending, squatting or crawling." [R.P. 200]. These restrictions absolutely limit use of the legs. "A functional capacity evaluation reported that Pate exhibited an altered gait secondary to pain." Pate at 26.

Pate herself testified to the disabling effects of pain "into my right thigh through my buttocks." She testified it affects her daily activities to the point where she has to "to sit down or lay down or take more medication . . ." She added "Sometimes I get more involved than I should, and I pay the consequences for that, and that's about it." [R.P. 497, lines 11-25].

In reversing and remanding, the Court of Appeals recognized there was ample evidence the back injury caused "various symptoms radiating from Pate's back to her knee, diminished sensation throughout her left lower extremity, and stabbing pain in her buttocks and thigh." Pate at 26. The evidence detailed herein (and in more detail in the briefs) confirms that, as with the psychological overlay, the evidence the back injury affects other body parts is all one-way. Therefore, the Petition should be granted only if the Court believes it necessary to clarify the long-established rule that "If the evidence is all one way, . . . the issue becomes one of law for the Courts and not of fact for the Commission." Otherwise, the Petition should be denied.

2. The Court of Appeals correctly affirmed the Appellate Panel's holding that the pulmonary embolus was not an intervening accident as a matter of law.

The Court of Appeals held "We respectfully reject the College's argument that Pate's blood clots in her lungs are an intervening cause of her present ailments as a matter of law and that we can avoid Pate's claim for permanent and total disability." Pate v. College of Charleston, Op. No 5925 (S.C. Ct. App. Filed July 20, 2022)(Howard Adv.Sh. No. 26 at 23, 29). The court is correct.

Petitioners base their argument on Geathers, yet Geathers does not stand for the proposition

propounded by Petitioners. In Geathers, the Supreme Court adopted the "last injurious exposure rule." The *last injurious exposure* rule:

> places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. Consistent with the rule that an employer takes its employee as it finds her, the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition.

The *last injurious exposure* rule is simply a rule to avoid apportionment and put liability on the carrier covering the most recent injury. It has absolutely no application to the facts of this case. It cannot be used as a means to deny further benefits when there is no subsequent carrier nor any later injurious exposure. *There is no second accident in this case.*

The fundamental principle applying to this case is "that a nonwork-related condition is not a superseding, intervening event that breaks the causal connection between a work-related injury and a claimant's disability."[6] Brockel v. N.D. Workforce Safety & Ins., 843 N.W.2d 15, 23-24 (N.D. 2014). This rule was followed in South Carolina in Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448 (Ct. App.1996). In Orr, the claimant unexpectedly became pregnant following back surgery for her injury. Due to the pregnancy, she was unable to participate in physical therapy, spurring the carrier to seek to suspend her compensation. The Court of Appeals rejected this argument, reasoning "The fact that Orr's pregnancy indirectly prolonged the period during which she

---

[6]A majority of jurisdictions – including South Carolina – follow this rule. See, e.g., Thurston v. Guys With Tools, Ltd., 217 P.3d 824 (Alaska 2009); Moore v. Component Assembly Sys., 158 Md.App. 388, 857 A.2d 549 (2004); Schock v. Morristown Mem'l Hosp./Atlantic Health Sys., 2010 WL 2793949 *6 (N.J.Super.A.D. July 2, 2010); Thomas v. Burggraf Restoration, 31 P.3d 402 (Okla.Ct.Civ.App.2001); Workmen's Comp. Appeal Bd. v. Chamberlain Mfg. Corp., 336 A.2d 659 (1975); Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448 (Ct.App.1996); Wood v. Fletcher Allen Health Care, 739 A.2d 1201 (1999).

was unemployable does not change the fact that *her injury, not her pregnancy, rendered her unable to work.*" Id. at 449 (emphasis added).

The Alaska Supreme Court addressed a factual situation somewhat similar to the instant case in Thurston v. Guys With Tools, Ltd., 217 P.3d 824 (Alaska 2009). In Thurston, the claimant sustained an admitted knee injury. She then was diagnosed with unrelated lung cancer and underwent radiation treatment and chemotherapy. She was a candidate for a knee replacement, but was unable to undergo the surgery due to the cancer. The Alaska Workers' Compensation Board found that the combination of Thurston's knee disability and cancer rendered her totally disabled.

In Thurston, the Alaska Supreme Court set out the rule for deciding this case. In cases involving a "subsequent independent condition — in this case Thurston's cancer — the employee must show that the work-related condition is a substantial factor in the overall disability. . . . To be eligible for TTD or PTD benefits Thurston needs to show that her work-related disability is a substantial factor in her total disability, without regard to whether her cancer could independently have caused the total disability. The test does not require the Board to pretend that Thurston does not have cancer." Id. at 828. The court added "to deny coverage to an employee in such circumstances would 'create a windfall to employers simply because of the employee's misfortune in developing an independent medical condition.'" Id. at 829, *citing* Estate of Ensley v. Anglo Alask Const. Inc., 773 P.2d 955 (Alaska 1989)(reversing denial of compensation for injured worker who developed cancer because "The Board did not make the factual finding that his back condition no longer prevented him from returning to work; rather the Board relied on the fact that he subsequently underwent cancer treatment to justify its decision that he was no longer disabled.").

It was error of the Single Commissioner to deny ongoing medical treatment and disability

compensation under the theory that the pulmonary embolus was an intervening cause. The rule she appeared to be following is "Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954).

The case law consistently requires an intervening cause to be a subsequent *accident* attributable to the *claimant's own intentional conduct*. See, e.g. Tims v. J.D. Kitts Constr., 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 2011)(rejecting argument that heatstroke suffered by quadriplegic from being left in his attributable's car was an independent intervening cause because "neither Claimant's decision to ride in his caregiver's car nor his caregiver's negligence was an independent, intervening cause sufficient to break the chain of causation."), *citing* 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 10.01, 10-1 (2010) (stating that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the claimant's own intentional conduct).

In the instant case, Pate is not seeking treatment for the pulmonary embolus nor is she contending the pulmonary embolus aggravated her compensable injury. She is simply seeking disability compensation and treatment for her original back injury (along with treatment for causally related radiculopathy and psychological overlay). To the extent that her disability was arguably increased by the temporary restriction on epidural steroid injections occasioned by her use of Xarelto, use of this medication does not constitute an intervening cause.

Pate's need for medical treatment and disability must be analyzed in light of her overall

condition. She only "needs to show that her work-related disability is a substantial factor in her total disability, without regard to whether her [pulmonary embolus] could independently have caused the total disability." Thurston v. Guys With Tools, Ltd., 217 P.3d 824 (Alaska 2009). She has no restrictions from the pulmonary embolus. As all her restrictions and all of her treatment are directly related to her workplace injury, she should be found permanently and totally disabled. At a minimum, the Court of Appeals should be affirmed on this issue, either by denying the Writ or, should the Petition be granted, by a written opinion of the Court.

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

Petitioners argue that the Court of Appeals should have affirmed the award of 40% to the back. Petitioners contend the Court of Appeals misunderstood § 42-9-30 where the court used the term "percentage of disability" while the statute refers to "loss of use."

It is not entirely clear how the court ruled on the 40% award. The court noted the 40% award was "the precise amount of her impairment rating [from Dr. Marzluff]," yet couch their comments with a caveat, to wit: "*Even if* we found it was error to limit Pate's award to the precise amount of her impairment rating . . ." Pate. It appears the court concluded they could not address this issue or they reserved it for a later finding once the Appellate Panel addressed general disability on remand.

Petitioners are correct that the statute uses the term "loss of use of the back." S.C. Code Ann. § 42-9-30 (21)(2007). The important here is that the legislature did not base awards under the medical model on impairment ratings; they based them on loss of use.

This point is often confused in the case law where the courts erroneously conflate *impairment ratings* with *disability* or *loss of use* awards. The rule is that while an impairment rating may not rest

on "surmise, speculation or conjecture . . . it is not necessary that the percentage of *disability* or *loss of use* be shown with mathematical exactness." Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957). This passage demonstrates that *permanent partial disability* and *loss of use* mean the same thing – and are not synonymous with impairment. Further confirmation lies in the Appellate Panel's order, where the panel held "Claimant is entitled to a lump sum award for *permanent partial disability* of 120 weeks based on a loss of use of the back." [R.p. 64 (emphasis added). In the same order, the panel quotes the original decision of Commissioner Taylor stating "I find Claimant has sustained a 40% permanent *loss of use* of the back as a result of her work injury. [R.p. 56 (emphasis added].

The legislative intent is thus to consider each case individually taking into account not just the impairment rating but also 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. The rationale behind this is explained in the AMA Guides to 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.

There are numerous examples showing that disability awards generally exceed the impairment ratings.[7] Linen is particularly instructive because the claimant in that case had a lower

[7]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.");

impairment rating than the rating Dr. Marzluff assigned to Pate. These cases show Pate's loss of use – 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 the 40% impairment rating assigned by Dr. Marzluff.

The point to remember is that disability awards are tailored to the individual. Impairment ratings are tailored to the medical condition. Thus, every worker who undergoes a single-level fusion at L4-5 will be placed in DRE Category IV with an impairment ranging from 20-23% of the whole person.[8] Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.) at 384. This means that a worker with a perfect surgical result – who returns to work with no or minimal restrictions, no medication and no need for followup beyond periodic x-rays will have the same impairment rating as someone like Pate who is left with chronic pain, severe restrictions limiting her to 4 hours per day, and requires constant medication, injections and therapy to function at a very low level.

Bundrick v. 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); Cropfv. 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).

[8]Dr. Marzluff was questioned about his impairment rating. He testified he put Pate in DRE Category V which allows a 25-28% whole person rating. He testified he "added an additional ten percent or so because of the chronic pain she is having." [R.p. 466-467].

This leaves the commission and the courts tasked with awarding loss of use at a level that truly reflects the injured worker's disability. It cannot be the legislature's intent that one must have an impairment rating greater than 50% for, if so, it would be impossible for a person disabled by a lumbar injury to reach that level, given that the highest DRE whole person rating is 28%. See Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) ("In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature."). And while the conversion works well for cervical injuries, it completely fails with lumbar injuries.[9]

The question raised in the Petition for Writ of Certiorari is whether this Court should use this case to address judicial review of permanent partial disability/loss of use awards. There are significant problems with the Appellate Panel's award. As the Court of Appeals noted, if one works backwards from the overwhelming evidence that Pate is totally disabled due to her back injury (in conjunction with the depression and affect on her legs), then can one conclude that she has lost 50% or more of her back? It seems one could, for this approach does not require a precise mathematical finding – which is more likely to invade the Commission's factfinding role. Here, the analysis is broader, more akin to the court ordering a new trial nisi additur to a woefully inadequate damages award from a jury.

---

[9]In Clemmons v. Lowe's Home Ctrs., Inc., 803 S.E.2d 268, 420 S.C. 282 (2017), this Court converted a 25% whole person rating to a 71% cervical spine rating, thus reversing the Commission's award of less than 50% to the back. Under the conversion factor in the Guides, a 25% whole person rating would convert to a 28% lumbar spine rating. Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* (5th ed.) at 427. This anomaly shows that consideration of multiple factors beyond the impairment rating is necessary to effectuate the legislative intent in creating a presumption of total disability for loss of use of 50% of the back.

The Court of Appeals was asked to 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. The court declined to so rule, instead remanding to the Commission to address general disability.

The Court should not grant the Petition merely to affirm the Commission's 40% award, as requested by Petitioners. Should the writ be issued, the Court should consider the above analysis.

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

The Court of Appeals wrote: "There is certainly evidence of permanent and total disability in the record. The restrictions are extensive, and total disability does not require helplessness." Nonetheless, the court remanded to the Commission to make a finding on general 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 evidence shows 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." [R.p. 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.

Should the Court issue the Writ of Certiorari, the Court should take the opportunity to address this issue. The Decision and Order of the Appellate Panel should be reversed and Pate should be awarded total disability as a matter of law.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied. In the event it is granted, the Court should consider the deeper issues raised by Respondents in this Return, including the additional sustaining grounds. 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,

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorneys for Respondent

Max Sparwasser
MAX SPARWASSER LAW FIRM, LLC
665 Coleman Blvd.
Mt. Pleasant, SC 29464
(843) 864-6444
max@maxlawsc.com

October 24, 2022
Columbia, South Carolina