THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. 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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

Kirsten Leslie Barr. Bar #15525
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29464
(843) 881-1027
kbarr@trask-howell.com
Attorneys for Petitioners

Other Counsel of Record:

Stephen B. Samuels, Esq.
1320 Richland Street
Columbia, SC 29201

Max C. Sparwasser, Esq.
665 Coleman Boulevard
Mt. Pleasant, SC 29464

Attorneys for the Respondent

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III. Is Pate entitled to a new legal presumption, or finding of fact on appeal, that she is permanently and totally disabled under S.C. Code Ann. § 42-9-30(21) based on unrelated and irrelevant economic factors in contravention of well-settled precedent?

Arguments in Reply

I. The Court of Appeals failed to address the Workers' Compensation Commission's detailed finding of fact regarding Pate's depression claim and failed to apply the appropriate substantial evidence standard to review that finding.

Pate alleges that the Court of Appeals reversed the Workers' Compensation Commission's finding of fact regarding her claim for depression and went on to make its own finding of fact regarding the depression claim on appeal. This is incorrect. The Petitioners respectfully contend that the Court of Appeals failed to address the Commission's detailed finding regarding the depression claim, failed to properly address the evidence supporting that finding, and; therefore, failed to apply the appropriate "substantial evidence" standard of review. *See* Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). As such, the Petitioners request that

the Supreme Court grant the Petition and affirm the Commission's findings in accordance with the Administrative Procedures Act.

Pate's Return claims that 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.'" (emphasis added). Not only did the Court of Appeals *not* reverse the Commission's explicit, detailed finding regarding the depression claim (finding number seven)[1], but the Opinion of the Court of Appeals does not even acknowledge the existence of this finding. Instead of reviewing the Commission's finding and the evidence supportive of that finding, the Court of Appeals stated that it had "no idea why the commission rejected Pate's argument ... We cannot say whether the commission erred or was correct in its reasoning. The commission gave no reasoning in its order." Obviously, the Court of Appeals is mistaken in this regard because the Commission plainly explained its reasons for denying the depression claim, *i.e.,* Pate provided no competent evidence of causation, despite a prior personal medical history of non-work-related psychological problems. (R.p.52). This inexplicable oversight by the Court of Appeals not only contradicts Pate's contention that the Court of Appeals *reversed* the

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[1]The Commission's finding of fact number seven reads,

> "Claimant also alleges a psychological injury as a result of her original work injury. We find that Claimant has not met her burden of proving a psychological injury causally-related to her original injury. Her claim is not supported by the preponderance of the evidence. Specifically, no physician has opined that Claimant has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical certainty that Claimant's alleged psychological condition is causally-related to her original work injury to her lower back. Claimant's personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well." (R. p.52).

Commission's finding of fact regarding the depression claim, but underscores an important reason why the Petition should be granted: the Court of Appeals failed to even acknowledge the Commission's findings, much less apply the appropriate standard of review.

In her Return, Pate also claims that the "Court of Appeals was *correct in finding* that Pate's physical injury to her back affected her psychological state." (emphasis added). However, the Court of Appeals did not make any finding of fact regarding Pate's psychological (depression) claim, nor did it have the authority to do so under the Administrative Procedures Act. *See* Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2 392, 394 (1995) (holding that the "duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues) (citing Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962)).

Pate's Return further alleges that the Court of Appeals concluded that "the medical evidence of psychological overlay caused by the injury is one-sided and *uncontradicted.*" (emphasis added). Again, the Court of Appeals did not make any independent finding of fact or conclusion of law regarding the weight or sufficiency of evidence bearing on the depression claim, nor did it conclude that the evidence supporting the claim was "uncontradicted." Respectfully, not only is the record capable of more than one reasonable inference, but there is substantial evidence in the record to support the Commission's finding regarding Pate's depression claim. Therefore, instead usurping the fact-finding province of the Commission as Pate now suggests, the Petitioners contend that the Supreme Court should grant the Petition and affirm the Commission's findings in accordance with the Administrative Procedures Act. *See* Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999) (holding it is not

within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence).

Substantial evidence supporting the Commission's finding regarding the claim for "psyche (depression)" includes not only the medical records submitted into evidence but even Pate's own testimony, which in no way supports any allegation of a psychological injury or depression related to her low back injury. (R. pp.493—508). Pate did not give any testimony that her back injury caused her any psychological problems, though she admitted that her brother's recent death from pancreatic cancer was "very stressful" for her and resulted in her seeking psychiatric medications from her family physician. (R. p.507). Not only does Pate's testimony alone constitute substantial evidence supporting the Commission's denial of the depression claim, but numerous records of her primary care physician, which indicate that Pate's "psyche" issues were due to "work stressors" (later described as new computer work) and "her brother dying from pancreatic cancer" (R. pp. 264, 269, 271, 284, 286, 288, 293, 296), also constitute substantial evidence in support of the Commission's finding. Because the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and because the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence, the Supreme Court should grant the Petition and affirm the Commission's findings regarding the claim for "psyche (depression)" in accordance with the Administrative Procedures Act. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004).

II. The Court of Appeals did not it make its own finding of fact on appeal regarding Pate's leg claim, nor should Supreme Court do so upon review, as Pate contends.

Pate's Return argues that the "Court of Appeals was *correct in finding* that Pate's physical injury to her back affected … her legs." (emphasis added). As with the depression claim, the Court of Appeals did not make any finding of fact regarding the weight or sufficiency of the evidence bearing on Pate's leg claim, but instead remanded the claim to the Commission to reconsider the issue. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2 392, 394 (1995) (explaining that a reviewing court "has no authority to determine factual issues but must remand the matter to the Commission"). In addition, while Pate argues that evidence of a permanent injury to her leg is "all one-way," such that the issue is "one of law for the Court and not of fact for the Commission," this is argument is similarly without merit.

No physician issued any impairment rating for, or restriction on the use of, either of Pate's legs.[2] According to Pate's own testimony, the substance of her leg injury claim is that pain "*sometimes* …leads down to [her] – into [her] *right* thigh[3] through [her] buttocks.'" (R. p.497, ll.11-15) (emphasis added). Importantly, Pate admitted that she has a number of non-work-related leg problems, including a symptomatic, pre-existing ankle injury (R. p.503, lines2—3; pp.256-259) and a new leg problem (swelling, tingling, and discoloration of both feet

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[2] Pate's speculative arguments regarding her interpretation of the AMA's GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT at footnote 4 of her Return are without merit. Pate did not present any actual evidence or testimony to support these allegations.

[3] According to the Court of Appeals, Pate's medical records "reference pain in her *left* leg and hip." (emphasis added). However, Pate gave no testimony regarding any problem with her *left* leg and at no time did she ever file any claim for any alleged injury to either hip. (R. pp.66, 68, 69, 72, 74).

and legs) that began in 2014 (R. p.277, p.280), which was subsequently diagnosed as chronic venous stasis due to her non-work-related pulmonary emboli (R. pp.352--361), as specifically noted by the Commission (R. p.502, ll.19-21, p.5). By November 2014, Pate was also complaining of another "new" leg problem: stabbing pain in her *left* lower leg and knee that was aggravated by weight bearing, standing, and walking. (R. pp. 288—289). However, there is no evidence that any of these pre-existing or new leg problems are causally related to her low back injury. Therefore, the record plainly reveals that the questions of whether and to what extent Pate has any leg injury casually-related to her work accident entitling her to workers' compensation benefits is far from "all one-way," as Pate now claims.

Not only is the evidence bearing on Pate's leg claim not uncontradicted or "all one-way," but the Supreme Court should not make its own finding of fact as Pate requests. Indeed, "[w]here there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999) (citing Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960). Furthermore, "a reviewing court may not substitute its judgment for that of the [appellate panel] as to the weight of the evidence on questions of fact." Frampton v. S.C. Dep't of Nat. Res., 432 S.C. 247, 257, 851 S.E.2d 714, 719 (Ct. App. 2020) (internal citations omitted). Here, substantial, albeit conflicting, evidence in the record necessitates reversal of the remand order of the Court of Appeals, affirmation of the Workers Compensation Commission in accordance with the Administrative Procedures Act, and otherwise prohibits a reviewing court from making its own findings on appeal.

III. Pate is not entitled to a new legal presumption, or finding of fact on appeal, that she is permanently and totally disabled under S.C. Code Ann. § 42-9-30(21) based on unrelated and irrelevant economic factors.

Pate argues that if the Writ of Certiorari is issued, the Supreme Court should "hold the award *must be* greater than 50% [to the back], thus *creating the presumption* that Pate is permanently and totally disabled." (emphasis added). According to Pate, her work restrictions "plainly equates to more than 50% loss of use of the back." Respectfully, these arguments regarding the proper factors to be considered in making a scheduled award[4] under S.C. Code Ann. § 42-9-30 are contrary to both well-settled law and the facts of this case.

Pate was working in her regular, full-time position as the assistant manager of the College of Charleston Copy Center earning her regular, pre-accident wages for more than two years after her December 14, 2011, back injury. Pate had no loss of wages, or even loss of wage-earning capacity, until she was hospitalized for near-fatal pulmonary emboli in September 2014, which aggravated her back condition and resulted in new work restrictions that she had not previously required as a direct result of the December 14, 2011, accident. The Commission made a specific finding that Pate "stopped working on September 15, 2014, when she was hospitalized for a pulmonary embolism. The Claimant's pulmonary embolism is unrelated to her

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[4] According to the seminal case of Singleton v. Young Lumber Company, "[w]here 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" provided by S.C. Code Ann. § 42-9-30. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). Singleton holds that "impairment" in this regard means a "physical deficiency." *Id.*

employment and work injury." Therefore, it is the pulmonary emboli, not the work accident, that are the proximate cause of any lost wages. *See* Geathers v 3V, Inc, 371 S.C. 570, 641 S.E.2d 29 (2007) (reaffirming the well-established "Gordon Rule," which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers' compensation claims).

In addition, the Commission's Order makes clear that it has already considered Pate's "work restrictions at the time of separation from her employer" (R. p.63, #11) in determining Pate's entitlement to a scheduled award for causally-related loss of use of the back. It was within the Commission's sole discretion to determine that this evidence does not "plainly equate to more than 50% loss of use" as Pate now asks the Supreme Court to presume. *See* Houston v. Deloach & Deloach, 378 S.C. 543, 551, 663 S.E.2d 85, 89 (Ct. App. 2008) (holding that the "final determination of witness credibility and the weight assigned to the evidence is reserved to the appellate panel." (citations omitted).

Furthermore, Pate's current work status or ability to earn wages is immaterial to a scheduled award under S.C. Code Ann. § 42-9-30 and for the Supreme Court to find or mandate a presumption of permanent and total disability based on economic factors in this case, as Pate requests, would necessitate reversal of many decades of well-settled precedent. Indeed, it was 72 years ago that the South Carolina Supreme Court first held that scheduled awards "are compensable in the prescribed amounts *irrespective of actual earnings of injured workmen*," and that; therefore, a claimant's work status and earnings were not proper factors in determining his entitlement to a scheduled award. Hoke v. Cherokee County, 216 S.C. 376, 58 S.E.2d 330 (1950) (emphasis added).

In 1958, the South Carolina Supreme Court further explained that a claimant's ability to earn wages was "immaterial" to the determination of his entitlement to benefits for loss of use of a scheduled body member, explaining that,

> "wages are considered only to a certain limit, and then only for the purpose of determining the amount to be allowed per week. The period during which the weekly payments are to continue is based solely on the character of the injury and not upon the earnings or earning capacity of the injured employee." G. E. Moore Co. v. Walker, 232 S.C. 320, 325, 102 S.E.2d 106, 108 (1958) (emphasis added).

In subsequent years, the Supreme Court reaffirmed the holding of G.E. Moore, *supra*, in Singleton v. Young Lumber, 236 S.C. 454, 114 S.E.2d 837 (1960); Dunmore v. Brooks Veneer Co., 248 S.C. 326, 149 S.E.2d 766 (1969); Dykes v. Daniel Constr., 262 S.C. 98, 202 S.E.2d 646 (1974); Fields v. Owens Corning Fiberglas, 201 S.C. 554, 393 S.E.2d 172 (1990); and numerous other cases both reported and unreported.

In 2003, the "medical model" prohibiting consideration of economic factors in scheduled awards was directly challenged in Wigfall v. Tidelands Utilities, 354 S.C. 100, 580 S.E.2d 100. Again, the Supreme Court held that the Legislature has already "statutorily presumed lost earning capacity" under S.C. Code Ann. § 42-9-30's "medical model," commensurate with the degree of physical impairment of the body member. Indeed, in Wigfall, the Supreme Court specifically stated that "the medical model, provides awards for disability based upon *degrees of medical impairment* to specified body parts" (emphasis added) and rejected the claimant's

argument that he can be awarded benefits for total disability "if he can prove a scheduled injury caused sufficient lost earning capacity."

Despite this this long history of well-established precedent, including the above-quoted holding in Wigfall, Pate nevertheless argues, without citation of authority, that it is "erroneous" for courts to "conflate *impairment ratings* with *disability* or *loss of use awards.*" (emphasis original). According to Pate, her argument is somehow supported by "legislative intent." However, the Supreme Court already specifically rejected this "legislative intent" argument in Wigfall:

> "[w]hile we may be inclined to accept Wigfall's equity argument, we decline to do so in the face of the Legislature's mandates … Buttressing a plain reading of the statute is the Legislature's inactivity on the issue over the last forty years since *Singleton.* The Legislature is presumed to be aware of this Court's interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation." (Wigfall, 354 S.C. 100, 110-111, 580 S.E.2d 100, 105 (internal citations omitted)).

Given that 72 years have now passed since the issue was first addressed in Hoke v. Cherokee County, and 64 years have passed since the rule was expanded in G. E. Moore Co. v. Walker, and 62 years have passed since this rule was affirmed in Singleton v. Young Lumber, and even 19 years have passed since these holdings were all reaffirmed in Wigfall v. Tideland Utilities -- during which the Legislature has taken no action to amend S.C. Code Ann. § 42-9-30

to address these holdings -- this inaction must be seen as clear evidence that the Legislature agrees with the Supreme Court's prior interpretations of S.C. Code Ann. § 42-9-30, thus rendering entirely specious Pate's "legislative intent" argument for a mandatory legal presumption based on economic factors, or even consideration of such economic factors, under S.C. Code Ann. § 42-9-30. As previously explained by the Supreme Court, not only is the language of S.C. Code Ann. § 42-9-30 clear, but legislative inaction "demonstrates the Legislature's intent to allow Singleton to remain effective." Wigfall, 354 S.C. 100, 114, 580 S.E.2d 100, 107.

Moreover, the record in this case, including the impairment ratings and Pate's own testimony, constitute "substantial evidence" in support of the Workers' Compensation Commission's finding that Pate sustained a 40% loss of use of the back under S.C. Code Ann. §42-9-30. Pate testified that she has "nagging pain" that affects her activities "at times." (R. p.497, l.9 & l.17). Dr. Nolan issued a 23% impairment rating consistent with his report on February 13, 2014, that Pate "continues to report good pain relief" (R. p.82), as well as Pate's September 4, 2014, report that her pain as a "4/10 overall," despite the fact that she was working full time in her regular job at the time. (R. p.132). There is simply no competent evidence in the record that the Workers' Compensation Commission underestimated Pate's causally-related loss of use of the back and there is no legal authority for Pate's contention that the Commission (or a reviewing court) must more than double a medical impairment rating on appeal based on economic, or any other, factors.

Instead, the Commission – the final arbiter of the weight of the evidence – properly awarded Pate benefits for a 40% loss of use of the back based upon their view of substantial evidence in the record, without resorting to impermissible surmise, conjecture and speculation.

See Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965). As such, the Commission's award should have been affirmed by the Court of Appeals in accordance with the Administrative Procedures Act. *See* Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission). In addition to seeking such an affirmation by the Supreme Court upon review, the Petitioners further contend that the Supreme Court should reject Pate's request to create a new legal presumption or finding of fact on appeal that her loss of use exceeds 50% based on her current employment status because this request would necessitate overruling many decades of well-established legal precedent, ignoring the plain language of S.C. Code Ann. § 42-9-30, usurpation of legislative powers, and inappropriate fact-finding on appeal based on conflicting evidence as to both the extent and cause of Pate's alleged disability and loss of use of the back.

Conclusion

Based on the arguments set forth in the Petition and herein above, the Petitioners, the College of Charleston and the South Carolina State Accident Fund, respectfully request that the South Carolina Supreme Court issue a Writ of Certiorari to review the July 20, 2022, Opinion of the Court of Appeals. The Petitioners further request that the Supreme Court affirm the final Decision and Order of the South Carolina Workers' Compensation Commission in accordance with the Administrative Procedures Act, as it is supported by substantial evidence in the record and the applicable law. In the alternative, the Petitioners request that the Court limit the mandate on remand to the consideration of whether Pate's work-related low back injury caused "disabling

effect" on Pate's legs, and if so, whether she is entitled to general disability benefits as a result thereof.

Respectfully submitted,

Kirsten Leslie Barr
S.C. Bar #15525
Trask & Howell, LLC
P.O. Box 2167
Mt. Pleasant, South Carolina 29465
(843) 881-1027
kbarr@trask-howell.com
ATTORNEYS FOR THE PETITIONERS

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