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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)
Appellate Case No. 2022-001260**

Patricia Pate, Employee.....Respondent,

v.

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

**APPENDIX
Volume II**

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SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1121370

EMPLOYEE/CLAIMANT: PATRICIA A. PATE

EMPLOYER: UNIVERSITY OF CHARLESTON

CARRIER: STATE ACCIDENT FUND

COPY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 14TH DAY
OF JULY, 2015, COMMENCING AT THE HOUR OF 1:06 P.M., IN
GOOSE CREEK, SOUTH CAROLINA, BEFORE THE HONORABLE AISHA
TAYLOR, ATTENDED BY COUNSEL AS FOLLOWS:

TIMMI A. PARRISH
VERBATIM REPORTER

TIMMI A. PARRISH
COURT REPORTING SERVICES
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ALSO ATTENDING: MR. DONALD PATE
MS. CHERYL CONNER

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1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 WAS TAKEN BY THE ABOVE-NAMED COURT REPORTER, A NOTARY
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN GOOSE CREEK,
4 SOUTH CAROLINA.

5 * * * * * * * * * * * * * * *

6 BY COMMISSIONER TAYLOR:

7 TODAY IS TUESDAY, JULY 14TH, 2015. WE ARE HERE
8 ON WORKERS' COMP FILE NUMBER 1121370. THIS IS THE
9 CLAIM OF MS. PATRICIA PATE, WHO IS PRESENT HERE
10 TODAY AND REPRESENTED BY MR. MAX SPARWASSER. THE
11 EMPLOYER IS THE COLLEGE OF CHARLESTON, AND THE
12 CARRIER IS THE STATE ACCIDENT FUND. BOTH THE
13 COLLEGE OF CHARLESTON AND THE ACCIDENT FUND ARE
14 REPRESENTED TODAY BY MS. KIRSTEN BARR.

15 WE ARE HERE SET ON BOTH THE CLAIMANT'S FORM 50,
16 REQUEST FOR HEARING, AS WELL AS THE EMPLOYER AND
17 CARRIER'S REQUEST FOR HEARING. IT APPEARS, BASED
18 UPON THE FILINGS, THAT THE FORM 21 WAS FILED FIRST.
19 THIS MATTER WAS SUBJECT TO MANDATORY MEDIATION,
20 WHICH WAS UNSUCCESSFUL, AND THUS WE ARE HERE SET FOR
21 A HEARING.

22 I WILL ALLOW THE PARTIES TO PUT DETAILED
23 POSITION STATEMENTS ON THE RECORD. HOWEVER, PRIOR
24 TO DOING SO, ARE THERE ANY OBJECTIONS TO APAs,
25 JURISDICTION, VENUE, OR ANY OTHER ITEMS? MS. BARR?

1 BY MS. BARR:

2 NONE FROM THE DEFENDANTS, YOUR HONOR.

3 BY THE COMMISSIONER:

4 MR. SPARWASSER?

5 BY MR. SPARWASSER:

6 NONE FROM THE CLAIMANT, YOUR HONOR.

7 BY THE COMMISSIONER:

8 THANK YOU. WITHOUT OBJECTION THE COMMISSION
9 FILE BECOMES A PART OF THE RECORD WITH THE EXCEPTION
10 OF SELF-SERVING DECLARATIONS AND UNSTIPULATED
11 MEDICAL REPORTS.

12 MS. BARR, SINCE YOUR 21 WAS FILED FIRST, YOU
13 MAY PUT YOUR POSITION STATEMENT ON THE RECORD FIRST.

14 BY MS. BARR:

15 THANK YOU, YOUR HONOR. IT IS OUR POSITION THAT
16 THE CLAIMANT WAS RELEASED AT MAXIMUM MEDICAL
17 IMPROVEMENT FOR A DECEMBER 14TH, 2011, LOW BACK
18 INJURY, WHICH WAS ESSENTIALLY DEGENERATIVE DISC
19 DISEASE. SHE HAS A REGIONAL RATING FROM DR. NOLAN
20 OF 23 PERCENT TO THE SPINE. WE SEEK A DETERMINATION
21 OF PERMANENCY IN ACCORDANCE WITH THAT RATING. IT'S
22 OUR POSITION THAT THE CLAIMANT SUFFERED A SUBSEQUENT
23 INTERVENING INJURY IN SEPTEMBER OF 2014 WHEN SHE WAS
24 HOSPITALIZED FOR MULTIPLE PULMONARY EMBOLISMS, WHICH
25 ARE UNRELATED TO HER EMPLOYMENT AND UNRELATED TO

1 THIS INJURY. AS A RESULT OF THESE PULMONARY
2 EMBOLISMS, SHE SUFFERED SHORTNESS OF BREATH,
3 NUMBNESS, TINGLING AND SWELLING IN HER LEGS AND HAD
4 TO CEASE HER ONGOING PAIN MANAGEMENT WITH DR. NOLAN,
5 INJECTION THERAPY. DR. NOLAN SAYS VERY SUCCINCTLY
6 IN HIS RECORDS, AT PAGE 70 AND PAGE 257, 'THE RESULT
7 OF COMPLICATIONS FROM THE PULMONARY EMBOLISMS, THAT
8 SHE WOULD HAVE TO REMAIN OUT OF WORK FOR SEVERAL
9 MONTHS. HE THEN SIGNIFICANTLY CHANGED HER WORK
10 RESTRICTIONS TO INCLUDE A LIMIT OF FOUR HOURS A DAY
11 AND FOUR DAYS A WEEK. THESE RESTRICTIONS THAT ARE
12 NECESSITATED BY THE PULMONARY EMBOLISMS COULD NOT BE
13 ACCOMMODATED LONG TERM BY THE COPY CENTER WHERE MS.
14 PATE WORKED AS AN ASSISTANT MANAGER. WE HAD
15 ACCOMMODATED WORK RESTRICTIONS NECESSITATED BY THE
16 BACK INJURY FOR OVER THREE YEARS. THAT'S
17 DOCUMENTED, AND WE WILL PRESENT TESTIMONY FROM MS.
18 CONNOR ABOUT THOSE ACCOMMODATIONS FOR THREE YEARS.
19 THEREFORE, WE BELIEVE THAT ANY SUBJECTIVE COMPLAINTS
20 THAT MS. PATE HAS AT THIS POINT IN TIME ARE NOT
21 CAUSALLY RELATED AND CANNOT WITHOUT SPECULATION BE
22 ATTRIBUTED TO THE DECEMBER 14, 2011, ACCIDENT,
23 BECAUSE MS. PATE HERSELF HAS TESTIFIED THAT HER
24 SYMPTOMS WORSENERD AS A RESULT OF THE PULMONARY
25 EMBOLISM AND COMPLICATION. CERTAINLY HER WORK

1 RESTRICTIONS CHANGED SIGNIFICANTLY, AS INDICATED BY
2 DR. NOLAN. SO ANY DISABILITY OR LOSS OF WAGE
3 EARNING CAPACITY IS PROXIMALLY CAUSED BY THESE
4 PERSONAL HEALTH PROBLEMS, NOT BY THE ACCIDENT.

5 WE SEEK A CREDIT FOR OVERPAYMENT OF ALL
6 TEMPORARY TOTAL PAID AFTER FEBRUARY 13, 2014, WHICH
7 WAS THE DATE OF MAXIMUM MEDICAL IMPROVEMENT, AND WE
8 WOULD SUBMIT THAT THERE IS NO EVIDENCE THAT SHE
9 REQUIRES ANY ADDITIONAL MEDICAL TREATMENT TO LESSEN
10 HER PERIOD OF DISABILITY STATED BY THE REQUIRED
11 REASONABLE DEGREE OF MEDICAL CERTAINTY.

12 THERE IS ALSO A PSYCH CLAIM THAT'S BEEN DENIED.
13 AS WE STATED IN OUR PRETRIAL CONFERENCE, MS. PATE
14 HAS A NUMBER OF SIGNIFICANT PERSONAL STRESSORS
15 UNRELATED TO THIS DEGENERATIVE DISC DISEASE CLAIM,
16 INCLUDING A BROTHER WHO SUFFERED UNFORTUNATELY FROM
17 PANCREATIC CANCER AND DIED RECENTLY. SHE HAS
18 CHRONIC BOWEL PROBLEMS THAT ARE MENTIONED THROUGHOUT
19 FOR YEARS IN HER PERSONAL FAMILY PHYSICIAN'S
20 RECORDS, AND THEN, AGAIN, THIS VERY SIGNIFICANT
21 HEALTH PROBLEM WITH THE MULTIPLE PULMONARY EMBOLISMS
22 AND SYMPTOMS RELATED TO THAT. WE BELIEVE THOSE ARE
23 THE SIGNIFICANT FACTORS, ANY STRESS THAT SHE HAS.
24 BUT, MOREOVER, THERE'S NO DISABILITY OR WORK
25 RESTRICTIONS AS A RESULT OF ANY PSYCHIATRIC

1 PROBLEMS, AND NO DOCTOR HAS STATED TO A REASONABLE
2 DEGREE OF MEDICAL CERTAINTY THAT SHE REQUIRES
3 PSYCHIATRIC TREATMENT AT THIS TIME TO LESSEN ANY
4 PERIOD OF DISABILITY.

5 BY THE COMMISSIONER:

6 OKAY, THANK YOU. MR. SPARWASSER.

7 BY MR. SPARWASSER:

8 YES, YOUR HONOR. FIRST OF ALL, IF THERE IS NO
9 OBJECTION, I'VE GOT DR. MARZLUFF'S DEPOSITION.

10 BY MS. BARR:

11 THERE IS AN OBJECTION. HE WAS NOT NOTICED AS A
12 WITNESS. IT WAS NOT PUT IN HIS APAs. IT WOULD BE
13 IMPROPER AT THIS TIME.

14 BY MR. SPARWASSER:

15 YOUR HONOR, IF THE DEFENDANTS ARE OBJECTING TO
16 FUTURE MEDICAL TREATMENT, DR. MARZLUFF DIRECTLY
17 ADDRESSED THIS TO A REASONABLE DEGREE OF MEDICAL
18 CERTAINTY.

19 BY MS. BARR:

20 WELL, THEN YOU SHOULD HAVE NOTICED IT.

21 BY MR. SPARWASSER:

22 IT'S IN HIS DEPOSITION.

23 BY THE COMMISSIONER:

24 WHO IS DR. MARZLUFF; WAS IT AN I.M.E.?

25 BY MR. SPARWASSER:

1 HE'S THE ONE THAT PERFORMED THE SURGERY.

2 BY MS. BARR:

3 DR. MARZLUFF HASN'T SEEN HER SINCE 2012.

4 BY MR. SPARWASSER:

5 HE'S THE ONE THAT PERFORMED THE SURGERY, YOUR
6 HONOR.

7 BY MS. BARR:

8 ACCORDING TO THE RECORDS YOU DID SUBMIT, HE
9 LAST SAW HER IN SEPTEMBER OF 2012. DR. MARZLUFF WAS
10 NOT NAMED AS A WITNESS, WAS NOT SUBMITTED AS AN APA.
11 IT'S NOT LISTED ON THE BRIEF.

12 BY THE COMMISSIONER:

13 WHAT'S THE DATE OF THE DEPOSITION, MR.
14 SPARWASSER?

15 BY MR. SPARWASSER:

16 IT IS MARCH 13TH, 2013.

17 BY THE COMMISSIONER:

18 OKAY. JUST TO NOTE FOR THE RECORD, THE
19 CLAIMANT IS MAKING A MOTION TO SUBMIT DR. MARZLUFF'S
20 DEPOSITION TRANSCRIPT INTO THE RECORD. IT APPEARS
21 THE CLAIMANT TREATED WITH DR. MARZLUFF FROM MAY
22 15TH, 2012, THROUGH SEPTEMBER 19TH, 2012. THE
23 DEPOSITION WAS TAKEN IN CLOSER PROXIMITY TO THAT
24 TIME. THE DEFENDANTS HAVE OBJECTED TO THAT
25 TRANSCRIPT COMING INTO THE RECORD. I WILL ADMIT IT

1 INTO THE RECORD OVER THE DEFENDANTS' OBJECTION. MR.
2 SPARWASSER.

3 BY MR. SPARWASSER:

4 YES, YOUR HONOR. THE RECORD IS CLEAR THAT THE
5 COLLEGE OF CHARLESTON NO LONGER HAS WORK FOR
6 PATRICIA PATE. THE RESTRICTIONS HAVE CHANGED FROM
7 THIRTY POUND LIFTING RESTRICTIONS TO TEN POUNDS AND
8 FROM EIGHT HOURS A DAY TO FOUR HOURS PER DAY.
9 THAT'S THE ONLY THING THAT'S CHANGED. APA RECORD
10 PAGE 173 DOCUMENTS THAT THEY NO LONGER HAVE WORK FOR
11 HER. AS FAR AS IMPAIRMENT RATINGS, DR. MARZLUFF IN
12 HIS DEPOSITION GAVE A 36 PERCENT WHOLE PERSON IN
13 ADDITION TO DR. NOLAN'S 23 PERCENT WHOLE PERSON
14 RATING. AS FAR AS FUTURE MEDICAL TREATMENT, SHE IS
15 CURRENTLY STILL TAKING PERCOCET, OXYCONTIN, AND
16 TAZIDINE.

17 BY MS. BARR:

18 TIZANIDINE.

19 BY MR. SPARWASSER:

20 TIZANIDINE. AND THEN WE ALSO AGREE AS FAR AS
21 THE M.M.I. DATE OF FEBRUARY 13TH, 2014. SO WE'RE
22 SEEKING A FINDING OF PERMANENT AND TOTAL DISABILITY
23 BASED UPON THAT THE COLLEGE OF CHARLESTON NO LONGER
24 HAS WORK FOR HER.

25 BY THE COMMISSIONER:

1 AND JUST FOR THE RECORD SO WE'RE CLEAR, WAS MS.
2 PATE TAKING THOSE THREE MEDICATIONS PRIOR TO
3 SEPTEMBER OF 2014? WERE THEY ALWAYS RECOMMENDED BY
4 AN AUTHORIZED TREATING PHYSICIAN?

5 BY MS. BARR:

6 YOU WILL SEE DR. NOLAN ADDRESS THAT HE HAD TO
7 CHANGE HER MEDICATION MANAGEMENT AS A RESULT OF THE
8 PULMONARY EMBOLISMS AND THE CHANGE IN THE INJECTION
9 THERAPY.

10 BY THE COMMISSIONER:

11 OKAY.

12 BY MS. BARR:

13 BUT FOR THE RECORD, AS WE NOTED IN THE PRETRIAL
14 CONFERENCE, AT PAGE 174, 177, AND 179, THE CLAIMANT
15 WAS TAKING FLEXERIL, WHICH IS A MUSCLE RELAXER MUCH
16 LIKE TIZANIDINE, LORTAB, PERCOCET, AND USING FLECTOR
17 PATCHES IN THE MONTHS PRIOR TO THE ACCIDENT.

18 BY THE COMMISSIONER:

19 ALL RIGHT. THANK YOU. MADAM COURT REPORTER,
20 WILL YOU PLEASE SWEAR MS. PATE.

21 BY THE COURT REPORTER:

22 MA'AM, IF YOU WOULD RAISE YOUR RIGHT HAND,
23 PLEASE.

24 * * * * *

25 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE

1 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
2 MATTER HEREIN:

3 PATRICIA A. PATE,

4 BEING FIRST DULY SWORN, TESTIFIED ON HER OATH AS
5 FOLLOWS:

6 BY THE COMMISSIONER:

7 MS. BARR, TECHNICALLY YOUR 21 WAS FILED FIRST.
8 YOU HAVE THE RIGHT TO EXAMINE THE CLAIMANT FIRST, OR
9 YOU CAN RESERVE THE RIGHT TO CROSS EXAMINE.

10 BY MS. BARR:

11 YOUR HONOR, WE WOULD LIKE TO RESERVE THE RIGHT
12 TO CROSS EXAMINE.

13 BY THE COMMISSIONER:

14 OKAY. THANK YOU. MR. SPARWASSER.

15 DIRECT EXAMINATION BY MR. SPARWASSER:

16 Q. YOUR FULL NAME FOR THE RECORD, PLEASE.

17 A. PATRICIA ANN PATE.

18 Q. YOUR DATE OF BIRTH?

19 A. DECEMBER 22ND, 1960.

20 Q. WHERE DO YOU LIVE?

21 A. 1108 BERKELEY STREET IN HANAHAN.

22 BY THE COMMISSIONER:

23 OFF THE RECORD FOR A SECOND.

24 (OFF THE RECORD)

25 DIRECT EXAMINATION RESUMED BY MR. SPARWASSER:

1 Q. YOUR FULL NAME FOR THE RECORD, PLEASE.

2 A. PATRICIA ANN PATE.

3 Q. YOUR DATE OF BIRTH?

4 A. DECEMBER 22ND, 1960.

5 Q. WHAT'S YOUR ADDRESS?

6 A. 1108 BERKELEY STREET, HANAHAN, SC.

7 Q. ARE YOU MARRIED?

8 A. YES, I AM.

9 Q. WHAT'S YOUR HUSBAND'S NAME?

10 A. DONALD J. PATE.

11 Q. IS HE HERE TODAY?

12 A. YES, HE IS.

13 Q. WHAT'S YOUR EDUCATION LEVEL?

14 A. GRADUATED HIGH SCHOOL.

15 Q. ALL RIGHT. AND AS FAR AS YOUR WORK HISTORY, WHERE
16 HAVE YOU WORKED?

17 A. HARDEE'S, IDEAL PRINTING, CITADEL, COLLEGE OF
18 CHARLESTON.

19 Q. AND HOW LONG DID YOU WORK AT THE COLLEGE OF
20 CHARLESTON?

21 A. SIX YEARS, I THINK.

22 Q. WHAT ABOUT -- HOW LONG DID YOU WORK AT THE CITADEL
23 COPY SHOP?

24 A. TEN YEARS.

25 Q. HOW LONG DID YOU WORK AT IDEAL PRINTING?

1 A. APPROXIMATELY TEN YEARS.

2 Q. TELL US -- OR PLEASE TELL THE COMMISSIONER WHAT KIND
3 OF JOB DUTIES YOU HAD AT THE COPY SHOP.

4 A. IT WAS A VARIETY OF THINGS; ANSWERING THE PHONE,
5 DEALING WITH CUSTOMERS WALKING IN AND ON THE PHONE,
6 THE BINDERY WORK -- MY MIND'S GOING BLANK --
7 COLLATING, PUTTING PAPER IN THE COPIERS, CLEARING
8 JAMS. I DID SOME COMPUTER WORK, BUT I'M NOT VERY
9 GOOD ON THE COMPUTER, SO THAT WAS LIMITED. MORE OR
10 LESS, I JUST DID THE PRODUCTION WORK, PER SE.

11 Q. WHAT WAS YOUR JOB TITLE?

12 A. ASSISTANT MANAGER.

13 Q. TELL THE COMMISSIONER WHAT KIND OF LIFTING YOU DID
14 AS THE ASSISTANT MANAGER AT THE COPY SHOP.

15 A. WE REALLY DIDN'T HAVE THAT -- LIFTING, I DIDN'T DO
16 THAT MUCH LIFTING. SOMETIMES I LIFTED HEAVIER
17 OBJECTS THAN I WASN'T SUPPOSED TO, BUT SOMETIMES IT
18 GOT UP TO MAYBE 40 POUNDS OR SO.

19 Q. IS THAT ---

20 A. BOX OF PAPER.

21 Q. THAT'S WHAT I WAS THINKING OF, BOX OF PAPER. ALL
22 RIGHT. ALL RIGHT. AND THEN WE DISCUSSED YOUR DATE
23 OF ACCIDENT, DECEMBER 14TH, 2011?

24 A. MM-HMM.

25 Q. ALL RIGHT. YOU ENDED UP HAVING A LUMBAR FUSION WITH

1 DR. MARZLUFF, CORRECT?

2 A. CORRECT.

3 Q. ALL RIGHT. AND THEN YOU WORKED LIGHT DUTY IN THE
4 COPY SHOP FOR AN EXTENDED PERIOD OF TIME; DID YOU
5 NOT?

6 A. CORRECT.

7 Q. AND THEY ACCOMMODATED YOUR REQUEST, RIGHT?

8 A. YES.

9 Q. AS FAR AS YOUR LIGHT-DUTY RESTRICTIONS, ---

10 A. YES.

11 Q. --- THEY ACCOMMODATED THEM?

12 A. MM-HMM.

13 Q. YOU KEPT WORKING, BUT AT SOME POINT YOU STOPPED
14 WORKING. WHY DID YOU STOP WORKING?

15 A. BECAUSE THEY SAID THEY COULDN'T ACCOMMODATE MY
16 RESTRICTIONS ANYMORE. THEY NEEDED A FULL-TIME
17 EMPLOYER (SIC), AND I COULD NO LONGER DO EIGHT-HOUR
18 DAYS.

19 Q. THEY NEEDED A FULL-TIME EMPLOYEE?

20 A. YES.

21 Q. DID CHERYL HIRE YOU?

22 A. YES.

23 Q. YOU WORKED TOGETHER FOR THAT FIVE- OR SIX-YEAR
24 PERIOD OF TIME?

25 A. YES.

1 Q. DID YOU LIKE WORKING AT THE COPY SHOP?

2 A. YES.

3 Q. WOULD YOU BE WORKING THERE NOW IF THEY COULD
4 ACCOMMODATE YOUR RESTRICTIONS?

5 A. I WOULD LIKE TO THINK SO, YEAH.

6 Q. PLEASE TELL THE COMMISSIONER HOW YOUR BACK IS NOW.

7 A. I'M STILL DEALING WITH PAIN DAILY. AT SOME POINTS
8 IT GETS A LOT WORSE THAN OTHERS. IT'S JUST A VERY
9 ONGOING, NAGGING PAIN. THAT'S REALLY ABOUT ALL I
10 CAN SAY.

11 Q. MS. PATE, WHERE IS THE PAIN?

12 A. IN MY LOWER BACK, AND SOMETIMES IT LEADS DOWN TO MY
13 -- INTO MY RIGHT THIGH THROUGH MY BUTTOCKS. I HAVE
14 MORE PAIN ON THE LEFT SIDE THAN WHAT IT IS ON THE
15 RIGHT.

16 Q. DOES IT AFFECT YOUR DAILY ACTIVITIES?

17 A. AT TIMES, YES.

18 Q. ALL RIGHT. AND HOW DOES IT AFFECT YOUR ACTIVITIES?

19 A. I HAVE TO SIT DOWN OR LAY DOWN OR TAKE MORE
20 MEDICATION, AND THAT'S ABOUT IT.

21 Q. HOW DO YOU SPEND YOUR DAYS?

22 A. I GET UP AND DO THE LITTLE ODDS AND ENDS AROUND THE
23 HOUSE THAT I CAN. SOMETIMES I GET MORE INVOLVED
24 THAN I SHOULD, AND I PAY THE CONSEQUENCES FOR THAT,
25 AND THAT'S ABOUT IT.

1 Q. ARE YOU WORKING NOW?

2 A. NO, I'M NOT.

3 Q. WHY NOT?

4 A. I'M STILL EMPLOYED AT THE COLLEGE, I THINK.

5 Q. NOW, YOU HAD BLOOD CLOTS LAST YEAR, RIGHT?

6 A. YES, SIR.

7 Q. YOU'RE STILL TREATED FOR THAT?

8 A. YES.

9 Q. ALL RIGHT. HOW HAVE YOUR RESTRICTIONS CHANGED
10 BEFORE AND AFTER THE BLOOD CLOTS?

11 A. THE JOB RESTRICTIONS I DON'T THINK CHANGED. IT WAS
12 JUST THE HOURLY -- MY HOURS CHANGED.

13 Q. AND AS FAR AS YOUR MEDICAL TREATMENT, DR. NOLAN HAS
14 GIVEN YOU THREE DIFFERENT TYPES OF MEDICATION,
15 CORRECT?

16 A. CORRECT.

17 Q. DO YOU KNOW THE NAMES OF THEM?

18 A. PERCOCET, OXYCONTIN, AND TIZANIDINE.

19 Q. ALL RIGHT. AND YOU JUST RECEIVED A TRIGGER POINT
20 INJECTION RECENTLY?

21 A. YES.

22 Q. THAT WAS MAY THE 28TH, 2015?

23 BY MS. BARR:

24 OBJECTION; THE MEDICAL RECORDS WILL SPEAK FOR
25 THEMSELVES.

1 BY THE COMMISSIONER:

2 SUSTAINED.

3 DIRECT EXAMINATION RESUMED BY MR. SPARWASSER:

4 Q. WHAT OTHER KIND OF MEDICAL TREATMENT ARE YOU
5 RECEIVING FROM DR. NOLAN?

6 A. AT THIS POINT I JUST DO THE MEDICATION AND THE
7 MACHINE, TENS MACHINE.

8 Q. TENS UNIT?

9 A. YES.

10 Q. ALL RIGHT. DID HE ALSO PRESCRIBE A BACK BRACE FOR
11 YOU?

12 A. YES. I DO DO THAT OCCASIONALLY. IT'S A LITTLE BIG
13 AND HOT RIGHT NOW.

14 Q. YOU SAY IT'S TOO HOT TO USE THE BACK BRACE, RIGHT
15 NOW?

16 A. YEAH.

17 Q. BECAUSE ---

18 A. IT'S UNCOMFORTABLE.

19 Q. ALL RIGHT. DO YOU WANT THE COMMISSIONER TO ORDER
20 YOU FUTURE MEDICAL TREATMENT?

21 A. YES.

22 Q. HOW WOULD YOU GET THAT MEDICAL TREATMENT IF THE
23 COMMISSIONER DID NOT ORDER FUTURE MEDICAL TREATMENT?

24 A. I DON'T KNOW HOW. I HAVE INSURANCE THROUGH MY
25 HUSBAND RIGHT NOW THROUGH HIS JOB, BUT I DON'T KNOW

1 IF I CAN GET THEM TO GO ALONG WITH WHAT I'M DOING
2 NOW SINCE IT WAS A JOB-RELATED INJURY.

3 BY MR. SPARWASSER:

4 THAT'S ALL THE QUESTIONS I HAVE AT THIS TIME.
5 PLEASE ANSWER ANY QUESTIONS MS. BARR MAY HAVE FOR
6 YOU.

7 BY THE COMMISSIONER:

8 MS. BARR.

9 CROSS EXAMINATION BY MS. BARR:

10 Q. MS. PATE, MY NAME IS KIRSTEN BARR, AND I REPRESENT
11 THE COLLEGE AND THE STATE ACCIDENT FUND. PRIOR TO
12 THIS INCIDENT THAT WE'RE HERE ABOUT TODAY ON
13 DECEMBER 14TH, 2011, YOU WERE TREATING AT CAROLINA
14 FAMILY MEDICINE. I BELIEVE DR. HANNA IS YOUR FAMILY
15 DOCTOR; IS THAT CORRECT?

16 A. YES, YES.

17 Q. DR. HANNA'S RECORDS REFLECT THAT IN APRIL OF 2011
18 YOUR CURRENT MEDICATIONS AT THAT TIME INCLUDED
19 PERCOCET, FLEXERIL, LORTAB, FLECTOR PATCHES, AND
20 OTHER MEDICATIONS, I BELIEVE, FOR HIGH BLOOD
21 PRESSURE; IS THAT CORRECT?

22 A. I DIDN'T HAVE HIGH BLOOD PRESSURE.

23 Q. OKAY. BUT YOU WERE TAKING THE PERCOCET, FLECTOR
24 PATCHES, FLEXERIL, AND LORTAB?

25 A. I GUESS. IT'S BEEN A LONG TIME AGO.

1 Q. OKAY. AND YOU RECALL HAVING COMPLAINED TO HIM OF
2 BACK PAIN AND SHOULDER PAIN, ANKLE AND FOOT PAIN, IF
3 THAT'S WHAT HIS RECORDS INDICATE?

4 A. THE INJURY ON MY ANKLE, I DID. YEAH.

5 Q. IT LOOKS LIKE, ALSO, PRIOR TO THE LEFT ANKLE INJURY
6 YOU WERE SEEING HIM FOR COMPLAINTS ---

7 BY MS. BARR:

8 YOUR HONOR, THIS IS PAGE 174.

9 CROSS EXAMINATION RESUMED BY MS. BARR:

10 Q. --- OF LOW BACK PAIN?

11 A. I DON'T RECALL THAT. I'M NOT SURE.

12 Q. THERE WAS A MENTION THAT YOU COULDN'T TAKE ANY
13 INFLAMMATORY MEDICATIONS BECAUSE YOU HAD A HISTORY
14 OF ULCERS, IS THAT RIGHT?

15 A. YES.

16 Q. SO YOU'VE HAD TROUBLE WITH THE TYPES OF MEDICATIONS
17 YOU TAKE FOR PAIN; IS THAT WHY YOU WERE TAKING THE
18 PERCOCET?

19 A. YES.

20 Q. OKAY. NOW, AFTER THIS ACCIDENT YOU CAME BACK TO
21 WORK AS ASSISTANT MANAGER AT THE COPY SHOP, IS THAT
22 RIGHT?

23 A. CORRECT.

24 Q. AND YOU WERE WORKING ALONGSIDE WITH CHERYL?

25 A. RIGHT.

1 Q. YOU ALL HAVE BEEN FRIENDS FOR A LONG TIME, I
2 BELIEVE?

3 A. CORRECT.

4 Q. OKAY. AND YOU WERE ABLE TO DO CERTAIN THINGS, DO
5 WHAT CHERYL ASKED OF YOU WHILE YOU WERE ON LIGHT
6 DUTY, IS THAT RIGHT?

7 A. YES.

8 Q. OKAY. AND SOMETIMES -- I THINK YOU MENTIONED IT IN
9 YOUR TESTIMONY -- YOU PUSH YOURSELF TOO HARD AND YOU
10 DO THINGS THAT YOU'RE NOT SUPPOSED TO; IS THAT FAIR
11 TO SAY?

12 A. MM-HMM.

13 Q. BUT CHERYL WASN'T MAKING YOU DO THINGS THAT YOU
14 WEREN'T SUPPOSED TO DO?

15 A. NO.

16 Q. OKAY. DID SHE SOMETIMES FUSS AT YOU IF YOU DID TOO
17 MUCH?

18 A. YEAH.

19 Q. OKAY, ALL RIGHT. NOW, THE PULMONARY EMBOLISMS, IT
20 LOOKS LIKE YOU STARTED HAVING SOME NEW AND DIFFERENT
21 SYMPTOMS WITH YOUR LEGS LAST SUMMER, JULY, AUGUST OF
22 LAST YEAR. YOUR FAMILY DOCTOR RECORDS INDICATED
23 THAT YOU HAD SOME DISCOLORATION IN YOUR LEGS AND YOU
24 WERE EXPERIENCING SOME SWELLING, IS THAT RIGHT?

25 A. YES. AND I ---

1 Q. OH, GO AHEAD.

2 A. I JUST ASSUMED IT WAS FROM THE ANKLE INJURY. I
3 STILL HAVE DISCOLORATION IN THEM.

4 Q. AND THERE WAS MENTION THAT YOU WOULD FEEL NUMBNESS
5 OR ---

6 A. I FELT NUMBNESS AFTER THE BACK INJURY.

7 Q. OKAY. BUT THAT CHANGED; YOU STARTED HAVING
8 DIFFERENT SYMPTOMS, THOUGH, WITH THE -- WHAT WAS
9 ULTIMATELY DIAGNOSED AS THE PULMONARY EMBOLISM, IS
10 THAT RIGHT?

11 A. I GUESS. IF YOU SAY SO.

12 Q. YOU HAD SHORTNESS OF BREATH; WE KNOW THAT?

13 A. YES, YES.

14 Q. OKAY. AND THAT HAD TO BE -- THEY HOSPITALIZED YOU
15 TO TRY TO FIGURE OUT WHAT WAS GOING ON; IS THAT WHAT
16 HAPPENED? IS THAT HOW YOU GOT THE DIAGNOSIS?

17 A. YES, MA'AM. WELL, IT SHOWED UP.

18 Q. IT SHOWED UP. ALL RIGHT. AND YOU WERE IN THE
19 HOSPITAL FOR A COUPLE OF DAYS?

20 A. RIGHT.

21 Q. SO IT WAS AFTER YOU GOT OUT OF THE HOSPITAL YOU WENT
22 BACK AND SAW DR. NOLAN?

23 A. YES.

24 Q. OKAY. IT LOOKS LIKE FROM DR. NOLAN'S RECORDS HE WAS
25 ALWAYS ASKING YOU BEFORE HE DID ANY INJECTIONS IF

1 YOU WERE TAKING ANTICOAGULANTS, THE MEDICATIONS THAT
2 YOU -- YOU TAKE MEDICATION FOR YOUR PULMONARY
3 EMBOLISM, RIGHT?

4 A. YES.

5 Q. WHAT'S THAT MEDICATION CALLED?

6 A. XARELTO.

7 Q. XARELTO. I GUESS WE'VE ALL SEEN THOSE TELEVISION
8 COMMERCIALS, BUT XARELTO WAS SOMETHING YOU NEVER
9 TOOK BEFORE YOUR HOSPITALIZATION FOR THE PULMONARY
10 EMBOLISMS, IS THAT RIGHT?

11 A. CORRECT.

12 Q. AND YOU STILL TAKE THAT MEDICATION TODAY?

13 A. YES, MA'AM.

14 Q. DR. ROSE IS TREATING YOU PRIMARILY FOR THOSE
15 PROBLEMS?

16 A. YES.

17 Q. OKAY. AS A RESULT OF TAKING THAT XARELTO, YOUR
18 TREATMENT CHANGED WITH DR. NOLAN, DIDN'T IT?

19 A. YES, MA'AM.

20 Q. ALL RIGHT. IT WAS A PRETTY SIGNIFICANT CHANGE. YOU
21 HAD BEEN GETTING INJECTIONS THAT WERE HELPING YOU,
22 WEREN'T YOU, BEFORE THE XARELTO?

23 A. CORRECT.

24 Q. ALL RIGHT. HAS ANYTHING HELPED AS MUCH SINCE YOU
25 STARTED TAKING THE XARELTO AS THE INJECTIONS THAT

1 HAVE HELPED YOU IN THE PAST?

2 A. NO. THEY'VE TRIED THE TRIGGER SHOTS OCCASIONALLY,
3 BUT IT DOESN'T SEEM TO LAST AS LONG AS THE
4 INJECTIONS DID.

5 Q. AND AFTER YOU HAD TO STOP TAKING THOSE INJECTIONS
6 BECAUSE OF THE XARELTO, DID YOU HAVE TO TAKE MORE
7 PAIN PILLS OR CHANGE YOUR PAIN PILLS?

8 A. NO, I DIDN'T HAVE TO CHANGE THEM. NO.

9 Q. DO YOU TAKE MORE NOW THAN YOU DID BEFORE?

10 A. WELL, AT TIMES I DO.

11 Q. YOU HAD YOUR -- DO YOU REMEMBER HAVING YOUR
12 DEPOSITION TAKEN LAST NOVEMBER?

13 A. YEAH.

14 Q. THAT WAS PROBABLY NOT LONG AFTER YOU HAD BEEN IN THE
15 HOSPITAL?

16 A. MY MEMORY IS NOT WHAT IT USED TO BE. I'M SORRY.

17 Q. THAT'S ALL RIGHT. JUST AS LONG AS YOU'RE TRUTHFUL
18 IN ANSWERING TO THE BEST OF YOUR ABILITY, THAT'S ALL
19 WE CAN ASK.

20 A. OKAY.

21 Q. YOU WERE ASKED THEN WHY YOU HAD BEEN TAKEN OUT OF
22 WORK, AND YOU STATED THEN THAT YOU WERE TAKEN OUT OF
23 WORK BECAUSE YOU COULD NO LONGER HAVE THE
24 INJECTIONS; IS THAT CORRECT?

25 A. RIGHT.

1 Q. OKAY. AND YOU STATED THEN THAT THE PAIN YOU WERE
2 FEELING WAS INCREASED BECAUSE YOU WERE NO LONGER
3 TAKING THE INJECTIONS; IS THAT CORRECT?

4 A. YES.

5 Q. AND AS A RESULT OF THOSE INCREASE IN PAIN AND THE
6 FACT THAT YOU WEREN'T TAKING THE INJECTIONS, THAT'S
7 WHY DR. NOLAN WAS LIMITING YOU TO FOUR HOURS A DAY,
8 FOUR DAYS A WEEK; IS THAT CORRECT?

9 A. I ASSUME, YES.

10 Q. YOU HAD NEVER -- YOU HAD BEEN WORKING FOR A COUPLE
11 OF YEARS ON A FIVE-DAY-A-WEEK SCHEDULE FULL TIME, IS
12 THAT RIGHT?

13 A. YES.

14 Q. OKAY. AND SO YOU CAME BACK AND WORKED THAT REDUCED
15 SCHEDULE IN DECEMBER OF 2014?

16 A. UH-HUH.

17 Q. YES?

18 A. YES.

19 Q. WERE YOU HAVING TROUBLE KEEPING UP WITH EVEN THAT
20 REDUCED SCHEDULE IN DECEMBER?

21 A. YES.

22 Q. YOU WERE HAVING TO CALL OUT A GOOD BIT?

23 A. YES. I HAD TROUBLE WITH EIGHT HOURS.

24 Q. YOU HAD BEEN -- I GUESS YOU HAD A LOT OF NEW
25 SYMPTOMS WITH THE PULMONARY EMBOLISM, IS THAT RIGHT?

1 A. RIGHT.

2 Q. OKAY. YOUR BROTHER PASSED AROUND THAT PERIOD OF
3 TIME, TOO; IS THAT CORRECT?

4 A. YES, MA'AM; HE DID.

5 Q. I'M SO SORRY. IT'S IN THE MEDICAL RECORDS, SO
6 THERE'S A LOT OF THINGS THAT THE COMMISSIONER WILL
7 SEE, AND IT'S MENTIONED IN DR. HANNA'S RECORDS, AND
8 THAT'S WHY I ASKED, THAT THAT WAS SOMETHING -- IT
9 WAS OBVIOUSLY VERY STRESSFUL FOR YOU?

10 A. YES, MA'AM; IT WAS.

11 Q. SOMETHING YOU JUST -- IT'S HARD TO GET PAST?

12 A. YES.

13 Q. WELL, WE'RE VERY SORRY FOR YOUR LOSS. BUT YOU
14 TALKED TO DR. HANNA ABOUT THAT, AND DR. HANNA GAVE
15 YOU SOME MEDICATIONS?

16 A. YEAH. YEAH, WE TALKED ABOUT THAT.

17 Q. DO YOU FEEL LIKE YOU'RE GETTING BETTER, MAYBE
18 GETTING OVER THE HUMP OR FEELING A LITTLE BIT BETTER
19 AS FAR AS STRESS-WISE AT THIS POINT IN TIME?

20 A. YES, MA'AM.

21 Q. OKAY, GOOD. JUST SO WE'RE CLEAR FOR THE RECORD, WE
22 -- I KNOW THAT DR. MARZLUFF RETIRED, BUT IT'S BEEN
23 SEVERAL YEARS SINCE YOU'VE SEEN DR. MARZLUFF; IS
24 THAT TRUE?

25 A. CORRECT.

1 Q. DR. NOLAN IS THE MAIN DOCTOR TREATING YOU AT THIS
2 POINT IN TIME?

3 A. CORRECT.

4 Q. IN FACT, HE'S THE ONLY DOCTOR WHO TREATS YOU FOR
5 YOUR LOW BACK PROBLEMS, IS THAT RIGHT?

6 A. YES.

7 BY MS. BARR:

8 MS. PATE, THAT'S ALL THE QUESTIONS I HAVE FOR
9 YOU. I APPRECIATE YOUR TIME.

10 BY THE WITNESS:

11 OKAY.

12 BY THE COMMISSIONER:

13 MR. SPARWASSER?

14 BY MR. SPARWASSER:

15 NOTHING FURTHER, YOUR HONOR.

16 BY THE COMMISSIONER:

17 ALL RIGHT. THANK YOU, MA'AM. YOU MAY HAVE A
18 SEAT NEXT TO YOUR ATTORNEY. ANY OTHER WITNESSES ON
19 BEHALF OF MS. PATE?

20 BY MR. SPARWASSER:

21 NO, YOUR HONOR.

22 BY THE COMMISSIONER:

23 OKAY. MS. BARR, YOU MAY CALL YOUR FIRST
24 WITNESS.

25 BY MS. BARR:

1 THANK YOU. CHERYL, DO YOU MIND TAKING THE
2 STAND.

3 BY THE COMMISSIONER:

4 MADAM COURT REPORTER, WILL YOU SWEAR THE
5 WITNESS, PLEASE.

6 BY THE COURT REPORTER:

7 MA'AM, IF YOU WOULD RAISE YOUR RIGHT HAND,
8 PLEASE.

9 * * * * *

10 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
11 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
12 MATTER HEREIN:

13 CHERYL CONNOR,

14 BEING FIRST DULY SWORN, TESTIFIED ON HER OATH AS
15 FOLLOWS:

16 BY THE COURT REPORTER:

17 AND WOULD YOU SPELL YOUR NAME FOR ME, PLEASE,
18 MA'AM.

19 BY THE WITNESS:

20 C-H-E-R-Y-L, C-O-N-N-O-R.

21 BY THE COURT REPORTER:

22 THANK YOU.

23 BY THE COMMISSIONER:

24 ALL RIGHT, MS. BARR.

25 BY MS. BARR:

1 THANK YOU.

2 DIRECT EXAMINATION BY MS. BARR:

3 Q. MS. CONNOR, WHERE ARE YOU EMPLOYED?

4 A. THE COLLEGE OF CHARLESTON.

5 Q. WHAT IS YOUR POSITION AT THE COLLEGE?

6 A. I'M THE MANAGER OF THE COPY CENTER.

7 Q. HOW LONG HAVE YOU BEEN IN THAT POSITION?

8 A. THIRTY-ONE YEARS.

9 Q. THIRTY-ONE YEARS. AND IT'S IN THAT POSITION THAT
10 YOU CAME TO KNOW MS. PATE?

11 A. YES. WELL, YES, I GUESS. SHE WAS WORKING AT THE
12 CITADEL PRINT SHOP, AND WE -- OUR DEPARTMENTS WORK
13 TOGETHER, AND SHE USED TO COME OVER TO BRING THINGS
14 AND PICK UP THINGS, AND THAT'S HOW I MET HER.

15 Q. AND THEN YOU ULTIMATELY HIRED HER TO BE YOUR
16 ASSISTANT MANAGER?

17 A. YES. SHE -- THE CITADEL PRINT SHOP WAS CLOSING
18 DOWN, AND WE WERE DELIGHTED TO HAVE PATTY COME AND
19 JOIN OUR TEAM.

20 Q. YOU ALL WORK CLOSELY TOGETHER; IS THAT FAIR TO SAY?

21 A. YES. IT WAS THE TWO OF US RUNNING THAT CRAZY PLACE.

22 Q. WHAT TYPE -- BEFORE THIS ACCIDENT WHAT TYPE OF
23 EMPLOYEE -- HOW WOULD YOU DESCRIBE PATTY AS AN
24 EMPLOYEE?

25 A. DEPENDABLE, CONSCIENTIOUS. CUSTOMER SERVICE WAS

1 UNBELIEVABLE, PLEASANT ALL THE TIME.

2 Q. WOULD YOU CONSIDER HER A FRIEND?

3 A. YES.

4 Q. AFTER THIS ACCIDENT SHE HAD SOME WORK RESTRICTIONS,
5 I THINK INITIALLY FROM DR. MARZLUFF BACK IN 2012,
6 LIMITS ON LIFTING MORE THAN 30 POUNDS, RESTRICTIONS
7 ON HOW LONG SHE COULD DRIVE OR STAND. WERE YOU ABLE
8 TO ACCOMMODATE THOSE RESTRICTIONS?

9 A. YES. WE CHANGED HER POSITION DESCRIPTION TO
10 ACCOMMODATE IT. AND WHAT WE DID WAS NO STANDING OR
11 SITTING MORE THAN TWO HOURS, NO WALKING MORE THAN
12 ONE HOUR, WHICH BASICALLY SHE DIDN'T HAVE TO RUN
13 ERRANDS ON CAMPUS. HER DESK IS, YOU KNOW, IN A
14 LITTLE OFFICE RIGHT OUTSIDE THE COPY CENTER. SO IF
15 SHE DID HAVE TO GET UP AND GO TO THE COPY CENTER,
16 SHE WAS LIMITED ON THAT WALKING. I TOOK ALL THE
17 LIFTING AWAY FROM HER. I HIRED TWO STUDENTS WHO
18 BASICALLY -- THEY WERE TO BE AVAILABLE TO HER TO
19 OPEN THE TRAYS AND PUT PAPER IN, TO LIFTING THE
20 PAPER SHE NEEDS MOVED, OR TO GO -- LIKE IF SHE SENT
21 AN ORDER OUT TO PRINT, SHE WOULD TELL THEM TO GO
22 RETRIEVE IT FROM THE PRINTER JUST TO SAVE HER FROM
23 GETTING UP. HER RESTRICTIONS WERE LIFTING ONE TO
24 TEN POUNDS FREQUENTLY, ELEVEN TO THIRTY POUNDS
25 OCCASIONALLY, BUT WE ELIMINATED LIFTING BY ASKING

1 STUDENT EMPLOYEES TO DO THAT FOR HER. AND ALL SHE
2 HAD TO DO WAS TELL THE EMPLOYEE, "I NEED YOU TO DO
3 THIS." BENDING AND STOOPING OCCASIONALLY. WE HAD A
4 TEMP EMPLOYEE FOR THIS. AND STUDENTS, THEY COULD
5 ADD PAPER TO THE DRAWERS, WHICH WOULD ELIMINATE
6 BENDING.

7 Q. WERE YOU PREPARED TO ACCOMMODATE THOSE RESTRICTIONS
8 INDEFINITELY?

9 A. YEAH, BECAUSE AS LONG AS WE COULD HAVE STUDENT
10 EMPLOYEES IN THERE, WE COULD DO THAT.

11 Q. OKAY. NOW, I'M LOOKING AT A NOTE FROM DR. NOLAN
12 WHEN HE FIRST STARTED SEEING HER IN APRIL OF 2014.

13
14 BY MS. BARR:

15 AND, YOUR HONOR, IT'S PAGE 29.

16 DIRECT EXAMINATION RESUMED BY MS. BARR:

17 Q. BUT, CHERYL, AT THIS POINT IT SAID THAT "IN ORDER TO
18 KEEP WORKING SHE CANNOT STAND MORE THAN ONE HOUR AT
19 A TIME AND THEN MUST SIT FOR AT LEAST TWO HOURS; SHE
20 MAY REQUIRED BREAKS DURING THESE TIMES TO CHANGE
21 POSITION, CANNOT LIFT MORE THAN 15 POUNDS." ANY
22 PROBLEM ACCOMMODATING THOSE RESTRICTIONS?

23 A. NO PROBLEM WITH THAT. WE DID PUT A PODIUM IN HER
24 OFFICE SO THAT SHE COULD SEE AT THE STANDUP DESK,
25 WAS SOMETHING SHE WAS GONNA NEED THAT WE WOULD NEED

1 TO INVEST IN. SHE COULD SIT WHEN SHE NEEDED. AND I
2 DID TALK WITH PATTY ABOUT THAT BECAUSE WE'RE BUSY
3 AND I CAN'T MONITOR WHEN SHE'S SITTING AND WHEN
4 SHE'S STANDING. SO IT WAS UP TO HER MANAGE THAT AND
5 TO NOTIFY ME OR A STUDENT OR THE TEMP EMPLOYEE THAT
6 "I'VE GOT TO GO SIT DOWN" OR "I CAN'T GET UP."

7 Q. AND YOU WERE TYPICALLY NEARBY IF SHE NEEDED
8 ANYTHING?

9 A. OH, YEAH, YEAH.

10 Q. AND YOU MADE HER AWARE OF THAT, THAT YOU WERE HAPPY
11 TO HELP?

12 A. YEAH. IT WAS JUST A COMMUNICATION THING.
13 UNFORTUNATELY, IT KIND OF FELL ON HER TO BE THE
14 COMMUNICATOR, BUT SHE WAS THE ONE WITH THE NEEDS,
15 AND I FELT LIKE SHE COULD COMMUNICATE BETTER THAN I
16 COULD.

17 Q. OKAY. THERE'S A MENTION ---

18 BY MS. BARR:

19 AND, YOUR HONOR, THIS IS PAGE 43.

20 DIRECT EXAMINATION RESUMED BY MS. BARR:

21 Q. --- BY DR. NOLAN IN JULY OF 2014 THAT SHE WAS UNABLE
22 TO MEET HER QUOTAS REQUIRED OF HER WITH RESTRICTION.
23 DID YOU HAVE ANY QUOTAS OR PROBLEMS WITH HER
24 PERFORMANCE DURING THAT PERIOD OF TIME?

25 A. NO. YOU MEAN DURING THE RESTRICTED TIME?

1 Q. YES, MA'AM.

2 A. THE ONLY PROBLEM I HAD THAT I COULD SEE IS THAT WHEN
3 WE CHANGED HER JOB DESCRIPTION, 'CAUSE I DIDN'T WANT
4 HER TO FEEL LIKE SHE DIDN'T HAVE ANYTHING TO DO,
5 'CAUSE WE TAKING AWAY A LOT TO OTHER PEOPLE TO DO.
6 SO, I DID ASK HER TO REVIEW OUR WEB PAGE BECAUSE
7 THAT'S SOMETHING SHE COULD DO AT A DESK. SHE COULD
8 READ THE WEB PAGE. SHE COULD MAKE NOTES OF ANYTHING
9 THAT NEEDED TO BE CHANGED OR NEW SERVICES THAT WE
10 OFFER, BECAUSE PATTY NOR I DO WEB DESIGN. WE AREN'T
11 PAID TO DO THAT. WE DON'T KNOW HOW TO DO THAT. BUT
12 OUR DIVISION HAS A WEB MASTER. SO, WHAT I ASKED HER
13 TO DO IS REVIEW THE WEB PAGE AND SEND THE EMAIL TO
14 OUR WEB MASTER. OUR WEB MASTER MAKES THE CHANGES.
15 PATTY WOULD ASSURE THAT THE CHANGES HAD BEEN MADE.
16 SO THAT WAS KIND OF LIKE ADDING SOMETHING DIFFERENT,
17 AND PATTY'S REACTION WAS COMPUTER, AND IT MADE HER
18 VERY UNCOMFORTABLE. SHE DID NOT WANT TO DO IT.

19 Q. THERE IS MENTION IN THE MEDICAL RECORDS THAT SHE
20 FELT LIKE YOU WERE TRYING TO PUSH HER OUT. WERE YOU
21 TRYING TO PUSH HER OUT?

22 A. NO. I NEEDED PATTY. YEAH. I'VE BEEN VERY
23 FORTUNATE TO HAVE FIVE GREAT ASSISTANT MANAGERS IN
24 MY CAREER, PATTY BEING ONE OF THEM. AND THEY ARE
25 HARD TO COME BY, AND WHEN YOU FIND SOMEBODY THAT'S

1 DEDICATED AND HONEST AND WANTS TO WORK HARD, YOU
2 WANT TO KEEP THEM.

3 Q. NOW, WHEN PATTY -- YOU SAID SHE KIND OF PANICKED
4 WHEN YOU SAID WEB PAGE OR COMPUTER. WERE YOU TRYING
5 TO ENCOURAGE HER, OR WERE YOU TRYING TO PUSH HER
6 OUT?

7 A. TRYING TO ENCOURAGE HER TO GIVE HER MORE VALUE IN
8 HER DAY, BUT I SCARED HER, AND I DID NOT MEAN TO
9 SCARE HER. BUT PATTY CAN DO IT, AND I WOULD NEVER
10 WANT HER TO SELL HERSELF SHORT BECAUSE SHE CAN DO
11 IT.

12 Q. DID THINGS CHANGE AROUND ABOUT SEPTEMBER OF 2014
13 WITH THE PULMONARY EMBOLISM? WERE YOU AWARE OF THAT
14 DIAGNOSIS?

15 A. I REMEMBER HER TALKING ABOUT SHORTNESS OF BREATH
16 WHEN SHE LEFT FOR A DOCTOR'S APPOINTMENT, AND THE
17 NEXT THING, SHE CALLS AND SHE'S IN THE HOSPITAL.
18 SO, YEAH, WE WERE ALL VERY CONCERNED. AND WHEN SHE
19 CAME BACK -- 'CAUSE SHE WAS OUT THEN FROM SEPTEMBER
20 16TH -- I THINK THAT WAS HER SURGERY OR YOUR
21 HOSPITAL ADMISSION, AND SHE CAME BACK ON DECEMBER
22 THE 4TH. AND WHEN SHE DID SHE CAME BACK WITH NEW
23 WORK RESTRICTIONS, BECAUSE IN APRIL -- APRIL OF 2013
24 -- I'M SORRY; I'M CHECKING MY NOTES SO I GET
25 EVERYTHING RIGHT. WHEN HER...

1 Q. THOSE WERE THE LATEST RESTRICTIONS?

2 A. YES. OKAY, APRIL 2014 HER RESTRICTIONS WERE
3 IMPROVED. SO WE WERE ALL EXCITED, AND THEN WHEN SHE
4 GOT SICK IN SEPTEMBER AND DIDN'T COME BACK UNTIL
5 DECEMBER, HER NEW RESTRICTIONS -- NOW THOSE
6 RESTRICTIONS THAT HAD BEEN LIFTED WERE PUT BACK IN,
7 BUT SHE COULD ONLY COME FOUR DAYS A WEEK, FOUR DAYS
8 -- FOUR HOURS A DAY, FOUR DAYS A WEEK. AND I COULD
9 DO THAT IN DECEMBER BECAUSE SCHOOL'S OUT. IN
10 JANUARY WE'RE VERY BUSY, A LOT OF ACTIVITY GOING
11 AROUND, AND BECAUSE WE ARE A TWO-PERSON OPERATION I
12 NEEDED MY SECOND FULL-TIME POSITION.. SO, I DIDN'T
13 SEE HOW WE COULD WORK AROUND HER BEING THERE FOUR
14 HOURS A DAY, FOUR DAYS A WEEK.

15 Q. SO, WHEN SHE CAME BACK IN DECEMBER OF 2014, THE ONLY
16 THING THAT YOU HAD NOT ACCOMMODATED BEFORE WAS THIS
17 FOUR DAYS A WEEK, FOUR HOURS A DAY?

18 A. FOUR DAYS A WEEK, FOUR HOURS A DAY. YEAH, 'CAUSE
19 YOU'RE REALLY NOT THERE ENOUGH TO GET ANYTHING -- IT
20 IS A FULL-TIME POSITION. I HAVE FULL-TIME NEEDS
21 FROM THAT PERSON IN THAT POSITION.

22 Q. THE LIFTING RESTRICTIONS, EVERYTHING ELSE THAT SHE
23 HAD IN THE PAST, YOU WERE ABLE TO WORK AROUND?

24 A. OH, YEAH, 'CAUSE THE OTHER RESTRICTIONS WERE NO
25 LIFTING OVER 15 POUNDS, NO BENDING, SQUATTING, OR

1 CRAWLING, NO PUSHING OR PULLING HEAVY OBJECTS. AND
2 WE WERE GOOD ON ALL THAT.

3 Q. THERE IS A REPORT FROM A VOCATIONAL SPECIALIST THAT
4 PATTY SUBMITTED THAT REFERRED TO HER WORK AS BEING A
5 PRODUCTION WORKER. WOULD YOU CALL HER A PRODUCTION
6 WORKER, OR WAS SHE SOMETHING MORE?

7 A. SHE -- OUR STUDENTS -- WELL, I HAVE A TEMPORARY THAT
8 WE CALL PRODUCTION COORDINATOR. THAT'S THE PERSON
9 THAT ACTUALLY -- PATTY WOULD SET THE JOBS UP BECAUSE
10 SHE HAD THE KNOWLEDGE AND THE TRAINING TO DO THAT.
11 AND THEN THE TEMPORARY WORKERS WOULD GO IN AND
12 PRODUCE IT, PUT IT ON THE SHELF. PATTY OR I WOULD
13 PUT IT IN THE DATABASE.

14 Q. SHE ACQUIRED SOME SKILL SET IN HER YEARS AT THE COPY
15 SHOP?

16 A. YES. AND THAT'S WHY I SAY DON'T SELL YOURSELF
17 SHORT. WE HAD A WONDERFUL DATABASE, AND IT WAS
18 BUILT SPECIFICALLY FOR US, AND IT WAS KEYING IN WHAT
19 WE DID, AND IT COMPUTED THE COST, AND WE JUST WOULD
20 TRANSFER THAT ON TO THE INTERDEPARTMENTAL TO
21 TRANSFER, AND SHE WOULD EMAIL IT TO THE CUSTOMER.

22 Q. ONE OTHER THING I'D LIKE FOR YOU TO ADDRESS: ALSO
23 IN THIS VOCATIONAL REPORT THAT MS. PATE'S ATTORNEY
24 SUBMITTED IT SAYS THAT "LIGHT WORK REQUIRES STANDING
25 AND/OR WALKING FOR AT LEAST SIX HOURS OF AN EIGHT-

1 HOUR DAY AND LIFTING UP TO TWENTY POUNDS, FREQUENTLY
2 LIFTING UP TO TEN POUNDS." YOU WEREN'T REQUIRING
3 HER TO DO THOSE THINGS AT THE COLLEGE?

4 A. WE SPECIFICALLY ORDERED SMALLER CARTON BOXES OF OUR
5 20-POUND PAPER, WHICH IS OUR MOST-USED PAPER,
6 BECAUSE WE COULD LIFT THAT, THOUGH IT REALLY WASN'T
7 NECESSARY, 'CAUSE YOU COULD OPEN THE BOX, TAKE OUT
8 HOW MUCH PAPER YOU FEEL COMFORTABLE CARRYING. I HAD
9 A RULE, NO BOXES ON THE FLOOR, BECAUSE I'M NOT GOING
10 TO LIFT IT FROM THE FLOOR AND I WOULDN'T EXPECT
11 ANYONE ELSE TO DO THAT. WE HAD SHELVES AT COUNTER
12 LENGTH SO WE COULD SLIDE THEM ON AND SLIDE THEM OFF.

13 Q. AND THEN YOU HAD THE ASSISTANTS TO HELP WITH ANY
14 LIFTING?

15 A. STUDENTS.

16 Q. I THINK THERE WAS ALSO MENTION THAT YOU GOT AN
17 ERGONOMIC CHAIR FOR MS. PATE?

18 A. YEAH. WE ALL GOT ERGONOMIC CHAIRS ABOUT THREE YEARS
19 AGO WHEN WE REDESIGNED THE OFFICE.

20 Q. OKAY. WERE THERE ANY -- PRIOR TO THE REQUEST FOR
21 THE FOUR-HOUR DAYS, FOUR DAYS A WEEK, WERE THERE ANY
22 ACCOMMODATIONS OR REQUESTS OR RESTRICTIONS THAT YOU
23 DIDN'T ACCOMMODATE FOR PATTY?

24 A. NO. I FELT LIKE WE REALLY WORKED HARD TO MAKE IT
25 WORK BECAUSE WE WANTED TO RETAIN PATTY AS LONG AS

1 SHE WANTED TO BE WITH US, AND WE WERE ALL HOPEFUL
2 THAT HER PAIN WOULD IMPROVE.

3 BY MS. BARR:

4 WELL, THANK YOU VERY MUCH. PLEASE ANSWER ANY
5 QUESTIONS THAT COMMISSIONER TAYLOR OR MS. PATE'S
6 ATTORNEY HAS FOR YOU.

7 BY THE COMMISSIONER:

8 MR. SPARWASSER.

9 CROSS EXAMINATION BY MR. SPARWASSER:

10 Q. MS. CONNOR, AS FAR AS YOU'RE AWARE PATTY PATE HAS
11 PHYSICAL RESTRICTIONS AND TIME RESTRICTIONS,
12 CORRECT?

13 A. YES.

14 Q. AS FAR AS HER PHYSICAL RESTRICTIONS, THE COLLEGE OF
15 CHARLESTON CAN STILL ACCOMMODATE HER PHYSICAL
16 RESTRICTIONS; IS THAT FAIR TO SAY?

17 A. YES, 'CAUSE I PERSONALLY WON'T LIFT MORE THAN 15
18 POUNDS MYSELF.

19 Q. THE ONLY THING THAT IS THE ROADBLOCK TO HER
20 RETURNING TO WORK AT THE COLLEGE OF CHARLESTON IS
21 THE RESTRICTION FROM HER WORKING EIGHT HOURS A DAY;
22 IS THAT FAIR?

23 A. THAT'S FAIR.

24 BY MR. SPARWASSER:

25 NOTHING FURTHER. THANK YOU.

1 BY THE WITNESS:

2 THANK YOU.

3 BY THE COMMISSIONER:

4 ANYTHING FURTHER?

5 BY MS. BARR:

6 NO, YOUR HONOR.

7 BY THE COMMISSIONER:

8 ALL RIGHT. MS. CONNOR, THANK YOU. YOU MAY
9 STEP DOWN. ANY OTHER WITNESSES ON BEHALF OF THE
10 DEFENDANTS?

11 BY MS. BARR:

12 NO, YOUR HONOR.

13 BY THE COMMISSIONER:

14 ALL RIGHT. I BELIEVE THAT CONCLUDES THIS
15 MATTER.

16 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
17 CONCLUDED AT THE HOUR OF 1:44 P.M.)

CERTIFICATE OF NOTARY PUBLIC
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 1121370

EMPLOYEE/CLAIMANT: PATRICIA A. PATE

EMPLOYER: UNIVERSITY OF CHARLESTON

CARRIER: STATE ACCIDENT FUND

I, TIMMI A. PARRISH, A NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA, DULY COMMISSIONED AND QUALIFIED AS SUCH, DO HEREBY CERTIFY THAT THE FOREGOING 39 PAGES REPRESENTS A TRUE AND ACCURATE TRANSCRIPT OF THE FOREGOING HEARING OF PATRICIA A. PATE, TAKEN ON THE 14TH DAY OF JULY, 2015.

THAT THE WITNESS WAS DULY PLACED UNDER OATH AND ADMONISHED TO SPEAK THE WHOLE TRUTH. THAT THE ORAL HEARING WAS DULY TAKEN AND TRANSCRIBED AS TO THE QUESTIONS PROPOUNDED AND THE ANSWERS GIVEN.

THAT ALL THE OFFERED EXHIBITS, STIPULATIONS AND OBJECTIONS, IF ANY, INVOLVED IN THIS CASE ARE DULY ATTACHED OR INCLUDED HEREIN.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND OFFICIAL SEAL THIS 2ND DAY OF SEPTEMBER, 2015.

TIMMI A. PARRISH
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 11-20-2018

* THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.

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 hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


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SC Court of Appeals

Patricia Pate, Employee/Claimant,

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State Accident Fund, Carrier

Respondents.

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9n.1, 22n.5

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 OxyContin, 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].

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.

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 antidepressant" 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 (Cl.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.

¹The 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 Pate'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].

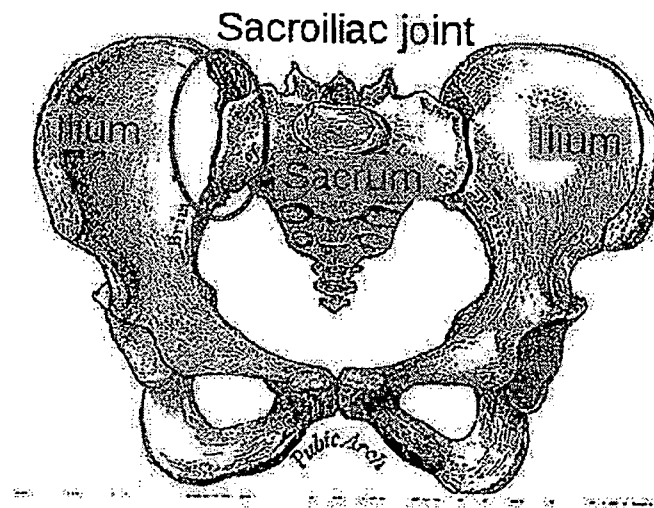
B. Injury to the sacroiliac joint.

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 make 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]"); Therrell 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.

²Although 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 (Cl. App. 1999) ("Dr.

³The 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.

Barnashmus 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 anticoagulant 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 Clemons, 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

⁴The 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.

⁵The 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

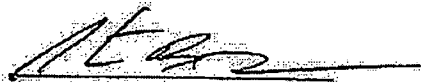
Respondents. Respondents failed to present any evidence to rebut the vocational evidence submitted by Pate. Indeed, the Employer admitted it could not accommodate Pate's work restrictions even though she was a valuable and long standing employee. See Hutson v. South Carolina State Ports Authority, 732 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 THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2019-001064
W.C.C. No. 1121370

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SC Court of Appeals

Patricia Pate, Employee/Claimant, ... Appellant

v.

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

FINAL BRIEF OF THE RESPONDENTS

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Statement of Issues on Appeal

- I. Should the Workers' Compensation Commission's finding that Pate suffered a 40% loss of use of the back and the award under S.C. Code Ann. § 42-9-30 be affirmed based upon substantial evidence in the record and the applicable law?
- II. Does the Workers' Compensation Commission or the Court of Appeals have the authority or jurisdiction to address new claims raised by Pate for the first time on appeal?
- III. Should the Workers' Compensation Commission's finding that Pate's depression is not causally-related to the work accident be affirmed based upon substantial evidence in the record and the applicable law?
- IV. Should the Workers' Compensation Commission's finding that Pate's injury is limited to a single, scheduled body member (the back) be affirmed based upon substantial evidence in the record and the applicable law?
- V.
- VI. Should the claim for permanent and total disability benefits be denied as a matter of law because the December 14, 2011 accident is not the proximate cause of Pate's loss of wage-earning capacity?

Statement of the Case

The Appellant, Patricia Pate, apparently experienced low back pain while assisting a co-worker with a box on December 14, 2011. (R. p.372). Pate was subsequently diagnosed with degenerative changes in her lumbar spine. (R. p.216). She received treatment from Dr. Joseph Marzluff, who placed her at maximum medical improvement on September 12, 2012, at which time Pate returned to her regular, full-time job as the Assistant Manager of the College of Charleston's Copy Center. (R. p.236, p.511). Pate continued working in this position, earning her regular, pre-accident wages for over two years. (R. pp.512—515).

In September 2014, Pate was hospitalized for multiple pulmonary emboli, which were wholly unrelated to her employment or her workers' compensation claim. (R. p.140). As a result of the multiple pulmonary emboli and necessary anticoagulant therapy, Pate was placed on work restrictions by Dr. Edward Nolan, who stated that with previous injection therapy for her low back, Pate "continued to perform her job duties;" however, due to her new need for anticoagulant therapy she was unable to "resume injection therapy until her pulmonary embolisms are resolved," resulting in his recommendation "that she be placed out of work." (R. p.336). Dr. Nolan specifically stated that "due to pulmonary embolisms we recommend that she be placed out of work." (R. p.144). Therefore, Respondents argued that, despite her work-related low back problem, Pate would be working her regular, full-time job, earning her regular wages, "but for" the fact of the newly-required anticoagulant therapy. The proximate cause of any loss of wage-earning capacity was the pulmonary emboli in 2014, not the work accident of December 14, 2011.

A hearing was held before Commissioner Aisha Taylor on July 14, 2015, to determine issues as set forth in the Form 21 and Forms 50¹ and 51. (R. p.482, p.485 ll.15—18). Prior to the scheduled hearing, Pate filed a Form 58, Pre-Hearing Brief dated July 14, 2015, alleging injuries to the “[b]ack, legs, psyche (depression).” (R. p.74). By Form 58 dated June 29, 2015, the Respondents argued that Pate was at maximum medical improvement for the low back injury of December 14, 2011 and that Pate was not entitled to any benefits under S.C. Code Ann. § 42-9-10 or § 42-9-30 as a matter of law because Pate’s multiple pulmonary emboli in 2014 aggravated her work-related low back injury and resulted in increased pain and new work restrictions that were not previously required. (R. pp.249—252). The Respondents further denied Pate was entitled to any benefits for depression, as the record reveals that her depression was related to her long-term bowel incontinence, her brother’s recent battle with pancreatic cancer, and her own near-fatal pulmonary emboli. (R. p.250).

After receiving documentary evidence and testimony, Hearing Commissioner Taylor filed a Decision and Order on May 16, 2016, finding, *inter alia*, that

1. On December 14, 2011, [Pate] sustained an admitted injury to

¹ Pate filed her initial Form 50 on November 9, 2012, alleging only an injury to the back. (R. p.66). An amended Form 50 was filed on August 28, 2014 alleging injuries to the back, legs, and depression. (R. p.68). Subsequent Forms 50 filed on September 10, 2014 and February 3, 2015 also alleged injuries to the back, legs, and depression. (R. p.69, p. 72). No Form 50 was ever filed to claim any injury to the sacroiliac joint. By Forms 51 dated December 10, 2012; September 29, 2014, and March 3, 2015, the Respondents admitted an injury to the low back only. (R. p.67, p.70, p.73).

her lower back within the course and scope of her employment. Based upon the greater weight of the evidence in the record, the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system.

2. [Pate] received all appropriate medical care at the direction of the [Respondents] with Drs. Marzluff and Nolan.

3. [Pate] was initially placed at maximum medical improvement by Dr. Marzluff on September 12, 2012, at which time she returned to regular, full-time employment, with some accommodations pursuant to her restrictions, on August 30, 2012.

4. [Pate] began pain management with Dr. Nolan while working full time and continued to do so until September of 2014 when [Pate] suffered multiple pulmonary embolisms, which I find were unrelated to her employment and work injury.

5. Prior to [Pate's] pulmonary embolisms, Dr. Nolan placed [Pate] at maximum medical improvement from a pain management standpoint as of February 13, 2014, with future medical treatment to include injection therapy.

6. I find [Pate's] multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to [Pate's] disability and continued medical treatment. This finding is based on the evidence as a whole including, but not limited to, the following:

a. Dr. Nolan increased [Pate's] work restrictions as a direct

result of her pulmonary embolisms and she is no longer able to work full time, despite doing so for nearly three (3) years after the December 14, 2011 accident. (APAs p. 70 & 257).

b. [The College of Charleston] could not accommodate her increased restrictions required by the pulmonary embolisms after having accommodated the prior restrictions for almost three years.

c. [Pate] can no longer receive causally-related injection therapy or other medications (Percocet) due to her need for anti-coagulates and as a result of her pulmonary embolisms. [Pate] now requires additional medical treatments as a direct result of the pulmonary embolisms and anticoagulant therapy that she did not otherwise require following the December 14, 2011 accident.

7. [Pate] also alleges a psychological injury as a result of her original work injury. I find [Pate] 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 [Pate] 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 [Pate's] alleged psychological condition is causally-related to her original work injury to her lower back. [Pate's] personal history, prior medical history, and current unrelated medical conditions have

weighed into this finding as well.

8. [Pate] is at maximum medical improvement for her December 14, 2011 low back injury as of February 13, 2014 per Dr. Nolan, the authorized pain management physician.

9. [Pate] has sustained a 23% permanent loss of use of her back as a result of her work injury. I base this finding on the impairment rating issued by Dr. Nolan, as well as the fact that [Pate] was able to work full time, with her pain well controlled, prior to the pulmonary embolisms in September 2014. Due to [Pate's] subsequent, intervening pulmonary embolisms, I find any increase above the permanent impairment would require impermissible surmise, conjecture and/or speculation. [Pate's] current condition, subjective complaints, need for medical treatment, and work restrictions have all been significantly increased and aggravated by the subsequent, intervening pulmonary embolisms.

11. [Pate] is not entitled to future medical treatment, as none is currently recommended that would tend to lessen her period of disability directly related to the December 14, 2011 work injury. The record reveals that the [Pate's] pain levels and need for medical treatment have increased significantly as a result of her subsequent, intervening pulmonary embolisms. Dr. Nolan, [Pate's] current treating physician, has not made any future medical recommendations to the requisite "reasonable degree of medical certainty." While Dr. Marzluff previously testified about [Pate's] medical treatment, he has

not evaluated [Pate] since 2012. [Pate's] inability to continue injection therapy due to her subsequent, intervening, personal health issues have weighed into this decision as well. (R. pp.9–12).

Despite these findings, Hearing Commissioner Taylor awarded Pate “benefits representing the 23% loss of use of the back causally-related to the December 14, 2011 accident.” (R. p.14).

On May 27, 2016, Pate filed a Form 30, Request for Commission Review, alleging 13 grounds for appeal. (R. pp.389–390). In her brief to the Appellate Panel dated July 18, 2016, Pate argued only five: (1) “[a]n unrelated medical condition cannot constitute an intervening cause sufficient to break the chain of causation”; (2) “[Pate’s] work restrictions and need for ongoing medical treatment are directly related to her workplace injury”; (3) “[Pate] met the legal standard for post-MMI medical treatment”; (4) [Pate’s] injury was not limited to her back in that she suffered from radiculopathy and psychological overlay”; and (5) “[t]he 23% permanent partial disability award to the back is based on legal error in that the [hearing] Commissioner mistakenly concluded she could not award more than Dr. Nolan’s impairment rating.” (R. p.396, p.400, p.404, p.405, p.409).

The Respondents filed their Brief to the Appellate Panel on August 1, 2016. At that time, the Respondents specifically argued that it was improper for Pate to raise new claims for the first time on appeal; specifically her new argument that she was entitled to a general disability award under S.C. Code Ann. § 42-9-10 based upon an alleged non-scheduled injury to the sacroiliac joint. (R. pp.412–426). Pate had previously made no allegation concerning a sacroiliac joint injury in her four previous Form 50s, her Form

58, at hearing before Commissioner Taylor, or in her May 27, 2016 Form 30, Request for Review by the Appellate Panel. (R. p.66, p.68, p.69, p.72, p.74, pp.491—492, pp.431—432). The Respondents requested that the Hearing Commissioner's May 16, 2016 Decision and Order be affirmed in accordance with the greater weight of the evidence and the applicable law. (R. p.426).

Oral arguments were held before the Commission's Appellate Panel, which consisted of Commissioners James, Wilkerson, and Campbell, on August 16, 2016. (R. p.16). The Appellate Panel issued its Decision and Order on December 22, 2016, affirming the Hearing Commissioner's findings and conclusions regarding the nature and extent of Pate's work-related injury, but determined that the Hearing Commissioner erred in concluding that Pate's non-work-related pulmonary emboli constituted a subsequent intervening accident. (R. pp.29—31). The Appellate Panel remanded the issue of Pate's causally-related loss of use of the back to Hearing Commissioner Taylor for reconsideration. (R. p.31).

Thereafter, Pate filed a Petition for Rehearing or Reconsideration on January 23, 2017, arguing that her back injury affected the buttocks and left leg and resulted in a psychological injury. (R. pp.427—430). Of course, Pate never filed any claim for any alleged injury to the buttocks related to the December 14, 2011 accident. (R. p.66, p.68, p.69, p.72, p.74, pp.491—492, pp.431—432). The Claimant's Petition was denied by Order dated February 21, 2017. Pursuant to a March 15, 2017 Consent Order, the parties agreed that under Bone v. U.S. Food Service, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013), the Appellate Panel's Order was not immediately appealable, as it remanded the case to the jurisdictional commissioner for further findings of fact and was; therefore, interlocutory. (R. pp.32—33).

On May 24, 2018, Hearing Commissioner Taylor issued a Decision and Order on Remand, without taking additional evidence or hearing any additional arguments from the parties. (R. pp.34–42). According to the May 24, 2018 Order, the Hearing Commissioner made new findings of fact that Pate’s injury was “a single-member injury affecting [Pate’s] lower back only” and that Pate was entitled to benefits for a 40% loss of use of the back under S.C. Code Ann. § 42-9-30. (R. p.38).

On June 7, 2018, Pate filed her second Form 30, Request for Commission Review, alleging four grounds for appeal of the Hearing Commissioner’s Order on remand. (R. pp.431–432). Pate then submitted a Brief to the Appellate Panel on September 17, 2018, raising only two arguments: (1) “Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back;” and (2) Pate’s “injury was not limited to her back in that she suffered from radiculopathy and psychological overlay.” (R. p.439, p.441). The Respondents timely filed their Brief to the Appellate Panel on October 1, 2018, contending that the Hearing Commissioner properly determined that Pate is not permanently and totally disabled under S.C. Code Ann. § 42-9-30 because her causally-related loss of use of the back does not exceed 50% (and she is not entitled to pursue benefits under S.C. Code Ann. § 42-9-10). (R. pp.446-457).

Oral argument was presented to the Appellate Panel on October 22, 2018. On October 22, 2018, counsel for the Respondents wrote the Commission to alert the Appellate Panel about an error in the record, which is relevant to the issues on appeal. (R. p. 60). Specifically, the Hearing Commissioner’s May 22, 2019 Order on remand misquoted the Appellate Panel’s Finding of Fact #9 by adding two additional sentences. At the Appellate Hearing, during oral argument, the Pate’s attorney relied upon this

scrivener's error, which pertained to the effect of Pate's non-work-related pulmonary emboli on her physical condition her ability to work, and her need for medical treatment.

The Appellate Panel issued its Order on May 31, 2019, affirming the Decision and Order of the Hearing Commissioner on remand, with amendment of the scriveners' error contained in Finding of Fact #9. (R. p.60). Thereafter, Pate filed the present action in with the Court of Appeals.

Evidence Summary

Prior to the December 14, 2011 work accident and in the years that followed, Pate was employed by the Copy Center at the College of Charleston. She described her duties as answering the phone, greeting customers, collating and binding papers, and some computer work. (R. p.495, ll.2—10).

After the December 14, 2011 accident, Pate underwent a surgery at L4-5 on May 15, 2012, which was performed by Dr. Joseph Marzluff. (R. p.227). Dr. Marzluff released Pate at maximum medical improvement on September 19, 2012, at which time he stated that Pate had "returned to work on a limited duty bases [sic] and seems to be tolerating that well." (R. p.235). Dr. Marzluff rated her impairment at 30% of the whole person, which translates to a regional impairment rating of 40% of the lumbar spine." (R. pp.468—469). Dr. Marzluff has not evaluated Pate since September 2012. (R. p.235).

After being out of work for only three months, Pate was able to return to full duty at the College's Copy Center and she continued working her regular pre-accident job duties for another two years without incident. The College of Charleston documented her return to work and her ability to perform her regular job duties on

August 30, 2012. (R. p. 373). Pate's supervisor, Ms. Cheryl Connor, who manages the College of Charleston's Copy Center, testified that this job was available to Pate indefinitely. (R. p.512, ll.7-10).

Dr. J. Edward Nolan's records were also submitted into evidence. Dr. Nolan reported on February 13, 2014 that Pate "continues to report good pain relief with her injection therapy and medication management and work restrictions." (R. p.82). As of February 13, 2014, Dr. Nolan stated that Pate was at maximum medical improvement and later issued an impairment rating of 23% to the spine.¹ (R. p.201). Dr. Nolan noted that Pate "returned to work full time with no restrictions on April 11, 2014." As of September 4, 2014, Pate rated her pain as a "4/10 overall," despite the fact that she was working full time. (R. p.132).

While Pate attempted to deny having any pre-existing problems with low back pain prior to the December 14, 2011 work accident at the hearing, she was confronted with the medical records of her own family physician, Dr. Hanna, which plainly show that Pate was being prescribed Percocet, Flexeril, Lortab, and Flector patches for low back pain prior to December 14, 2011. (R. p.253-258). Pate also required a two-month medical leave in 2011, prior to the work accident, despite the fact that her job duties were physically-limited. (R. pp.369-371).

The Carolina Family Medicine record detail Pate's need for narcotic pain medication and muscle relaxers prior to the December 14, 2011 work accident, as well as her diagnosis with multiple pulmonary embolisms in September 2014. At that time,

¹ According to Dr. Nolan, the 23% impairment rating was inclusive of the prior impairment rating issued by Dr. Marzluff on September 19, 2012. (R. p.201).

Pate was suffering from shortness of breath, in addition to the stress of her brother dying from pancreatic cancer. (R. p.284). In November 2014, Pate complained to Carolina Family Medicine that she had a new pain in her left lower leg and behind her left knee, which was aggravated by weight bearing, standing, walking, and bending her knee. (R. p.288).

Pate admitted that she began having new and different symptoms in her legs (including discoloration, swelling, and numbness) in the summer of 2014 and she also began experiencing serious shortness of breath. (R. p.22). Pate was ultimately diagnosed with multiple pulmonary emboli and she was hospitalized for several days in September 2014, which rendered her unable to work. (R. p. 503, pp.381—382). Pate's supervisor, Ms. Connor, testified that as a result of the pulmonary emboli, Pate was completely out of work from September until December 2014. (R. p.516).

In addition, because of the multiple pulmonary emboli and her new need for anticoagulant therapy, Pate admitted that the treatment for her low back prescribed by Dr. Nolan changed significantly after September 2014, as she was no longer able to receive injection therapy that had helped her in the past. (R. p.504). Pate admitted that none of the treatments she received for her back after the pulmonary emboli worked as well as the treatment she received before the pulmonary embolisms and, as a result, she suddenly required more oral medications than she had prior to the pulmonary emboli. (R. p.504, l.24—p.506, l.4; p.336; p.140). Pate also admitted that her low back pain increased significantly after the pulmonary emboli. (R. p.506, ll.1—4 Pate admitted that because she was no longer able to have injection therapy for her back, she was taken out of work by Dr. Nolan, who restricted her to working only four (4) hours a day and four (4) days per week. (R. p.505—506).

According to a statement issued by Dr. Nolan on October 3, 2014, Pate had

"been hospitalized on 9/17/14 resulting in a diagnosis of pulmonary embolism which will require daily use of an anticoagulant ...The addition of this medication will hinder my ability to continue injection therapy until this issue has resolved. She has received benefit from injection therapy and with treatment she continued to perform her job duties. She presented to my office today and on exam I am concerned about her ability to continue to perform her job as required. In light of this and our inability to resume injection therapy until her pulmonary embolisms are resolved, I recommend that she be placed out of work for a period of two (2) months and her work status will be evaluated at each visit to our office...Several measures have been taken to try to provide her some form of pain relief to include increasing pain medication strength and frequency and adding physical therapy until we are able to resume treatment with injection therapy." (R. p.336).

On September 22, 2014, Dr. Nolan had noted that Pate was "not getting as much relief from the Oxycodone IR 5 mg therefore we will ask her to start doubling what she has to 10 mg." (R. p.140).

By October 3, 2014, Dr. Nolan noted that, despite doubling her pain medication,

"she is ultimately unable to perform her job duties as required. Due to her inability to receive needed injection therapy until 02/2015 due to pulmonary embolisms we recommended she be placed out of work at this..." (R. p.144).

Because of the blood thinner (anticoagulant therapy), Pate was also unable to take Percocet, which she felt had helped more than the pain medications she was forced to take after her pulmonary emboli. (R. p.155). Pate was still taking the anticoagulant medication Xarelto at the time of the hearing before Commissioner Taylor in July 2015.

In December 2014, Pate's new restrictions from Dr. Nolan regarding her hours (limiting her to four hours per day/four days per week) were accommodated because school was in recess, but the College could no longer afford Pate as a part-time employee as of January 2015 when classes resumed. (R. p.516). Ms. Connor testified that she was able to accommodate all of Pate's *physical* work restrictions, only the new *time* restrictions issued after her pulmonary emboli were problematic going forward. (R. p.516, ll.15–24). But for Pate's pulmonary emboli, she would have been able to continue working her regular job, earning her regular wages, at the Copy Center indefinitely. (R. p.512, ll.7–10).

Standard of Review

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct.App.2004). A reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct.App.2005); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Thus, an appellate court's

review is limited to deciding whether the Commission's decision is unsupported by "substantial evidence" or is controlled by some error of law. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct.App.2004)

"Substantial evidence" is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). However, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence. 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). Instead, where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002).

Indeed, the findings of the Commission are presumed correct. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). Therefore, it is not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999).

Arguments

- I. The Commission's finding that Pate suffered a 40% loss of use of the back is supported by substantial evidence and the award under S.C. Code Ann. § 42-9-30 is supported by the applicable law; therefore they should be affirmed.

Pate alleges that she is entitled to a presumption of permanent and total disability under S.C. Code Ann. § 42-9-30 because she is not currently working. However, Pate has failed to cite any legal authority for her argument that scheduled awards should be based upon a claimant's work status. More importantly, Pate fails to recognize that her current work status is not causally-related to the December 14, 2011 work accident, but, instead, is the proximate result of her non-work-related pulmonary emboli in September 2014. Therefore, even if Pate's work status were germane to the Commission's determination of physical loss of use under S.C. Code Ann. § 42-9-30, Pate's work status in the present case is not relevant.

According to our Supreme Court, there are

"Two competing models of workers' compensation...The first, the economic model, defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury. The second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts." Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003) (internal citations omitted).

Here, Pate is not entitled to an award based upon the "economic model," because her work injury affects only a single-scheduled injury to her back. See Appellate Panel Finding of Fact #1 (R. p.44). Therefore, Pate's only available remedy is under the "medical model" set forth in S.C. Code Ann. § 42-9-30, which compensates for "physical ailments." Wigfall, supra (citing Jewell v. R. B. Pond Co., 198 S.C. 86, 15 S.E.2d 684 (1941)). Pate's physical ailment (lumbar degenerative disc disease) resulted in a medical impairment rating of 23% from her current treating physician, Dr. Nolan, which was then increased a full 74% by Commissioner Taylor, who awarded Pate benefits for a 40% loss of use of the back. (R. p.333).

Apparently, Pate believes her medical impairment rating should at least have been doubled to something in excess of 50% of the back, due to alleged economic considerations. However, under S.C. Code Ann. § 42-9-30's "medical model," the Legislature has already "statutorily presumed lost earning capacity" for her scheduled injury. Wigfall, supra footnote 2 (citing G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958) and LARSON'S WORKERS COMPENSATION LAW § 86.02 (1999)). Essentially, Pate takes issue, not with her treating physician's impairment rating, but with the amount of compensation the Legislature designated to correspond with her degree of impairment. Of course, the Commission was without authority to overrule the Legislature in this regard, but was constrained to weigh the evidence, including the medical impairment ratings and Pate's limited testimony that she has "nagging pain" that affects her activities "at times." (R. p.497, l.9 & l.17). The Court of Appeals is similarly constrained in determining whether the impairment ratings and this testimony constitutes "substantial evidence" in support of the Commission's finding

of a 40% loss of use of the back, as there was clearly no legal error implicit in this finding. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct.App.2004)

Furthermore, Pate does not take issue with the credibility of her treating physician's 23% impairment rating – she did not even seek to cross-examine Dr. Nolan on this, or any other issue. In addition, there is no evidence that Dr. Nolan, who was in the best position to observe Pate and her medical problems, and who was in the best position to apply the AMA's GUIDE TO THE EVALUATION OF IMPAIRMENT, underestimated that impairment. "Dr. Nolan's rating is consistent with his report on February 13, 2014 that Pate "continues to report good pain relief with her injection therapy and medication management and work restrictions." (R. p.82). By September 4, 2014, Pate rated her pain as a "4/10 overall," despite the fact that she was working full time in her regular job. (R. p.132). These reports are simply not support a finding that Pate's physical loss of use of the back exceeds 50%, nor does it support a conclusion that she is permanently and totally disabled as a result of the December 14, 2011 accident.

While Pate does not challenge Dr. Nolan's impairment rating, Pate does appear to take issue with the impairment rating issued by her previous physician, Dr. Marzluff, and goes so far as to completely misrepresent his impairment rating in her Brief to the Court of Appeals. Pate would have the Court believe that Dr. Marzluff rated her impairment as "a 40% spine rating and a 36% whole person rating." (Brief p.20). This statement is disingenuous at best, as it is plainly contrary to the records and testimony of Dr. Marzluff. In his 2013 deposition, Dr. Marzluff testified that he believed Pate to have a "40% regional rating to her lumbar spine," which he translated as, and *not added to*, a "30% whole person rating." (R. pp.468--459). Dr. Marzluff further testified that he has already inflated both of these impairment ratings by adding another

"ten percent or so" over and above what would be appropriate under the AMA GUIDES to account for what he termed "chronic pain." (R. p.466, p.476). Therefore,

Dr. Marzluff's impairment rating is actually commensurate with the 23% rating issued by Pate's current treating physician, Dr. Nolan. In addition, the Commission further inflated Dr. Marzluff's ratings by an additional 33% by awarding Pate benefits for a 40% loss of use of the back, based upon Pate's subjective complaints and work restrictions. Therefore, there is simply no competent evidence in the record that the Commission in any way underestimated Pate's physical loss of use of the back in awarding her benefits under S.C. Code Ann. § 42-9-30.

Pate further argues that, after her impairment ratings were issued, "her condition worsened" and that this worsening somehow supports mandated an even greater inflation of the medical impairment ratings by the Commission. Of course, even Pate admits that the worsening of her condition following her multiple pulmonary emboli in September 2014 is not causally-related the December 14, 2011 work accident and; therefore, the worsening of her condition is not the responsibility of the Respondents, nor relevant to the determination of her loss of use of the back caused by the December 14, 2011 accident. Furthermore, Dr. Nolan, who was treating Pate during this time, did not amend or inflate his impairment rating after the pulmonary embolism worsened her low back pain.

Therefore, it is clear that 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 substantial evidence in the record and the applicable law, 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 award should be affirmed 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).

II. It is improper for Pate to raise new claims for the first time on appeal; therefore, neither the Commission, nor the Courts, have jurisdiction or authority to address such claims.

In her July 18, 2016 Brief to the Appellate Panel, Pate argued for the very first time that she is entitled to a general disability award under S.C. Code Ann. § 42-9-10 based upon a newly-alleged, unscheduled injury to her “sacroiliac joint.” However, Pate filed Forms 50 on November 19, 2012, August 28, 2014, September 10, 2014, and February 2, 2015— none of which allege any injury to the sacroiliac joint. (R. p.66, p.68, p.69). Similarly, Pate’s Form 58, Pre-Hearing Brief, dated June 29, 2015 makes absolutely no mention of any alleged injury to the sacroiliac joint. (R. p.74). In fact, at the hearing before Commissioner Taylor, Pate’s attorney was given a broad opportunity to restate the issues to be addressed, but said nothing about any alleged injury to the sacroiliac joint and made no claim for benefits for any sacroiliac injury. (R. pp.486—491). Pate herself gave no testimony regarding her sacroiliac joint. Furthermore, Pate’s Form 30 made no mention of any alleged injury to the sacroiliac joint. (R. pp.389—391). Yet, Pate now argues that the Commission’s failure to award benefits for an alleged sacroiliac injury somehow “commands reversal.” This argument is wholly without merit.

First, it is fundamental that the Commission can only address such issues as are actually presented by the parties. Obviously, Hearing Commissioner Taylor committed no legal error in failing to award benefits for a claim that was never made by Pate

herself. More importantly, the issue of whether Pate is entitled to general disability benefits for an alleged injury to the sacroiliac joint is not preserved for review by the Appellate Panel or the Court of Appeals, as it was not raised before the Hearing Commissioner. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); see also Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); RRR, Inc. v. Toggas, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (noting a party cannot raise an issue for the first time on appeal):

Therefore, the Commission committed no legal error in refusing to award benefits to Pate for any alleged injury to the sacroiliac joint. The claim having never been raised before or ruled upon by the Hearing Commissioner, the claim was not preserved for review by the Appellate Panel or the Court of Appeals. As such, the Commission's Decision and Order should be affirmed in accordance with the Administrative Procedures Act because it is supported by substantial evidence and otherwise not affected by any error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

III. The Commission's finding that Pate's depression is not causally-related to the work accident is supported by substantial evidence and the applicable law and; therefore, should be affirmed.

Claims for mental injuries are compensable only if the employee proves by a preponderance of evidence that they are caused by a work-related physical injury, or by extraordinary and unusual conditions of employment. Pack v. State Dep't of Transp., 381 S.C. 526, 538, 673 S.E.2d 461, 467 (Ct.App.2009). To meet this burden, S.C. Code Ann. § 42-1-160(D) requires that the employee present an opinion from a "physician" (i.e., a medical doctor) that the alleged mental injury is "causally-related or connected the injury or accident." While Pate alleges that she suffers from depression as a result of the December 14, 2011 accident, she presented no such evidence from any "physician" and; therefore, she is not entitled to benefits for a mental injury as a matter of law.

Not only did no physician opine that Pate has any disability or work restrictions as a result of any alleged mental injury, no physician opined that Pate's depression is causally-related to the December 14, 2011 accident or her low back problem generally. In fact, the reports authored by Pate's treating physicians, Dr. Marzluff and Dr. Nolan, make absolutely no mention of any mental injury or depression.¹ Therefore,

¹ As discussed below, in the 160 pages of records from Trident Pain Center in evidence, there are only 2 pages containing any reference to any mental issue. (R. p.129 and p.133) Both of these office notes were authored by a Nurse Practitioner, Allison Davis. There is no report authored by Dr. Nolan referencing any mental issue contained in the record. Therefore, Pate's allegation in her Brief to the Court of Appeals that there are "multiple

the Commission's denial of her mental injury claim is also supported by substantial evidence in the record.

According to the Commission, the evidence in the record actually weighed *against* Pate's claim for depression. According to the Commission, Pate's personal history, her prior medical history, and her other unrelated medical conditions, which include a long-term battle with bowel incontinence and a near-fatal pulmonary emboli, were all causative factors in her mental issues and were all unrelated to the December 14, 2011 accident. This finding is supported by the records of Pate's personal physicians at Carolina Family Medicine, who noted that Pate's "stress" actually began well before the December 14, 2011 accident. In addition, Carolina Family Medicine repeatedly described the "aggravating factors" in Pate's "stress" as "work stressors, brother dying from pancreatic cancer," without reference her back injury or the December 14, 2011 accident. (R. pp. 264, 269, 271, 284, 286, 288, 293, 296).

Around the time of her hospitalization for multiple pulmonary emboli in September 2014, Pate complained of depression to a nurse practitioner, Allison Davis, who opined that it was "due s/t [sic] pain and increased pressures/stressors ... She states that she feels work is 'trying to push her out, that they don't want her there anymore.'" (R. p.129).¹ As a result, Pate was evaluated by a psychologist, William Kee; references of [sic] psychological overlay from Dr. Nolan" (Appellant's Brief p.12) is simply false.

¹ According to the plain language of S.C. Code Ann. § 42-1-160, mental injuries allegedly resulting from "any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the

however, Kee did not address causation of any alleged mental injury. More importantly, neither Kee, nor Davis, are a "physician," and; therefore, their opinions cannot satisfy S.C. Code Ann. § S.C. Code Ann. § 42-1-160(D).

Dr. Dyana Lowndes-Rosen, a psychiatrist and actual physician specializing in mental disorders, evaluated Pate on January 13, 2015, but did not diagnose any mental injury. Instead, Dr. Lowndes-Rosen concluded

"I have no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. [Pate] also expressed her belief that she has no need for mental health involvement" (R. p.368).

Dr. Lowndes-Rosen's opinion alone constitute substantial evidence in support of the Commission's denial of the mental injury claim.

Not even Pate's own testimony at the July 14, 2015 hearing supports a finding that she has any mental injury as a result of the December 14, 2011 accident. In her testimony before Commissioner Taylor, Pate made no mention of depression or any other mental problem. She was not asked by her own lawyer about depression or any employer such as disciplinary actions, work evaluations, transfers, promotions demotions, salary reviews, or terminations" are not compensable, "except when these actions are taken in an extraordinary or unusual manner." At no time has Pate ever alleged any extraordinary or unusual events in her employment relationship; therefore, any alleged mental issue connected to her "stress" at work is not compensable as a matter of law.

alleged mental injury, nor did she describe any symptoms of depression or any alleged mental injury when testifying about her condition following the accident. However, on cross-examination, Pate admitted that she had been under significant "stress" after she was hospitalized with life-threatening, multiple pulmonary emboli in September 2014 and that shortly thereafter, her brother died as a result of pancreatic cancer, which Pate admitted was also very stressful for her. (R. p.507).

Of course, regardless of the multiple causes for any mental injury or depression in Pate's life, the fact remains that at the time of the hearing, no "physician" connected such problems to the December 14, 2011 injury, as required by S.C. Code Ann. § 42-1-60. At best, the evidence on the issue is in conflict. However, it is well-established that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence, instead, where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. 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); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002). This is because the final determination of the weight and credibility of the evidence is reserved exclusively to the Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Therefore, the Respondents respectfully request that the Commission's Decision and Orders be affirmed, as it is supported by both substantial evidence in the record and the applicable law.

IV. The Commission's finding that Pate's injury is limited to a single, scheduled body member (the back) is supported by substantial evidence and the applicable law and; therefore, should be affirmed.

In addition to claiming an injury to her back and depression, Pate's Forms 50 and Form 58 alleges that she sustained an unspecified injury to her "legs." (R. p.68, p.69, p.72, p.74). In her Brief to the Court of Appeals, Pate argues that she should be entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10 because Pate testified that she has pain that

"sometimes....leads down to my – into my right thigh through my buttocks." (R. p.497, ll.11-15) (emphasis added).

However, intermittent subjective complaints are legally-insufficient. Therefore, the Respondents respectfully contend that the Commission's finding that "the December 14, 2011 accident did not result in any injury to, or otherwise affect" Pate's legs is supported by substantial evidence in the record and the applicable law and should be affirmed. (R. p.61 #1).

According to the South Carolina Supreme Court in 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 [pursuant to S.C. Code

Ann. § 42-9-30].... To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added).

Under *Singleton*, an employee with a single, scheduled-member injury is limited to recovery under S.C. Code Ann. § 42-9-30 alone. See Wigfall v. Tideland Utilities, 354 S.C. 100, 106, 580 S.E.2d 100, 103 (2003). 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." *Id.* 254 S.C. 106-07; 580 S.E.2d at 103 (internal citation omitted) (emphasis added). The *Singleton* court further intended for "impairment" in this regard to encompass a "physical deficiency." *Id.* Accordingly, the question of whether an employee is entitled to recover benefits for permanent and total disability benefits under S.C. Code Ann. § 42-9-10 requires not only such an additional "physical deficiency," but importantly "turns on whether her initial injury had a disabling effect on other parts of her body." Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*) (emphasis added).

Here, there is absolutely no evidence that Pate's back injury caused a "physical deficiency" or otherwise had a "disabling effect" on her legs (or any other part of her body aside from her low back). No doctor ever issued an impairment rating for Pate intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source. According to Dr. Nolan (Pate's pain management physician), the

location of Pate's pain was repeatedly stated to be simply "lower back" (R. pp. 75, 78, 105, 156, 161, 173, 185, 192, 199) or "low back" (R. pp. 81, 90, 108, 110, 116, 125, 132, 142, 143, 145, 146, 154, 158, 178, 181, 182, 197). At no time did Dr. Nolan ever suggest that any intermittent leg complaint was a factor in his spinal impairment rating, nor did he suggest that Pate required any work restrictions as a result of any leg problem. Furthermore, according to Pate's surgeon, Dr. Marzluff, the only body part "injured" on December 14, 2011 was Pate's "back" and the only body part "affected" was her "spine." (R. p.236). Even at his deposition, Dr. Marzluff never suggested that Pate had any permanent impairment of her leg, nor did he suggest that his spinal impairment rating was based on any such complaint or that she was in any way disabled or limited by any alleged leg problem. The issue simply was not raised by Pate's attorney.

In addition, Pate admits that in 2014 she began having new and different symptoms with respect to her legs, including swelling and discoloration. (R. p.502, ll.19-21). According to her personal physicians' records, in May 2014, she began noticing new symptoms in both feet and legs. (R. p.277). She was diagnosed with "Edema/Bilateral peripheral - New" in August 2014. (R. p.280). Pate testified that she initially assumed these leg symptoms were caused by an ankle and foot injury she sustained in April 2011, prior to the work accident. (R. p.503, APA pp.256--259). However, her hematologists subsequently diagnosed her with chronic venous stasis in the legs and non-pitting edema due to her pulmonary emboli. (R. pp.352--361). By November 2014, Pate was complaining of a "new" problem"

"pain to the left lower leg and behind the left knee, which did not result from an injury which began 1 month ago. The patient characterized it as

stabbing pain when standing up. Severity – worsening. Aggravating factors: weight bearing, standing, walking and bending knee. Relieving factors: nothing. On Xarelto. History of multiple pulmonary embolisms.” (R. pp. 288–289).

Therefore, it is not clear that any alleged problem with Pate’s legs at the time of the hearing was even proximately-caused by the December 14, 2011 accident. More importantly, there is simply no competent evidence that any alleged leg problem was disabling. Quite simply, the vague, intermittent leg symptoms of which Pate complains do not rise to the level of a “physical deficiency,” nor is there any evidence that they have had any “disabling effect,” as required by law. As such, the Respondents respectfully request that the Decision and Order of the Commission be affirmed based upon the substantial evidence in the record and the applicable law.

V. **The December 14, 2011 accident is not the proximate cause of Pate’s loss of wage-earning capacity and, therefore, she is not entitled to permanent and total disability benefits as a matter of law.**

Even assuming, *arguendo*, that Pate was entitled to pursue benefits under S.C. Code Ann. § 42-9-10, Pate is not entitled to benefits for permanent and total disability as a result of the December 14, 2011 accident as a matter of law. The Workers’ Compensation Act defines “disability” as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury”). See S.C. Code Ann. § 42-1-120.

Further, S.C. Code Ann. § 42-9-10 specifically requires proof that “the incapacity for work resulting from an injury is total” and “permanent.” (emphasis added). In fact,

“The burden, of course, was upon the employee to prove...that he was unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist. An award in his favor may not rest on surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965) (internal citations omitted).

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 the December 14, 2011 work accident. Therefore, she had no “incapacity for work resulting from” the December 14, 2011 injury back injury during this period, but had a dependable job. Pate’s had no loss of wages, or even loss of wage-earning capacity, until she was hospitalized for multiple pulmonary embolisms 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. Therefore, it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have.

In Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007), the Supreme Court reaffirmed the well-established “Gordon Rule,” which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers’

compensation claims. In applying the "Gordon Rule" to the facts *sub judice*, the questions presented are whether Pate's work-related back injury was non-disabling prior to the pulmonary emboli in September 2014, and whether her non-work-related pulmonary emboli resulted in a new loss of wage-earning capacity? The answer to these questions is undoubtedly "yes."

As to the first question, the record is clear that Pate returned to her regular, full time job as Assistant Manager of the Copy Center at the College of Charleston on September 12, 2012 and continued working in this position, earning her regular wages despite her low back injury, for over two years before she was hospitalized with multiple pulmonary emboli, unrelated to her employment, in September 2014. Pate's supervisor testified that Pate was capable of performing all of the duties required of this job and it was available to her indefinitely. (R. p.512). Therefore, Pate's work-related back injury was not disabling as a matter of law.

Regarding the second question, it is equally clear that Pate's disability after September 2014 is the direct result of the multiple pulmonary emboli she suffered in September 2014. Even Pate's treating physician, Dr. Nolan, stated "due to pulmonary embolisms we recommended she be placed out of work." (R. p.144). There is simply no evidence to suggest that Pate would suddenly have ceased working and earning wages after two years in a dependable job that was available to her "indefinitely" without an intervening cause such as the multiple pulmonary emboli.

In addition, it is equally clear that Pate's multiple pulmonary emboli and anticoagulant therapy after September 2014 aggravated her low back problems. At the hearing before Commissioner Taylor Pate admitted that her back pain increased after the pulmonary emboli. (R. p.506). This aggravation is also clearly documented in the

records of Dr. Nolan. For example, after being diagnosed with the pulmonary emboli in September 2014, Dr. Nolan doubled Pate's pain medications because she was no longer able to get the relief from the medication and treatments she availed herself of prior to the anticoagulant therapy. (R. p.140). Dr. Nolan opined that "[d]ue to her inability to receive needed injection therapy...due to pulmonary embolisms we recommend she be placed out of work." (R. p.144).

While Pate would suggest that her near-fatal, multiple pulmonary emboli and resulting disability are of no legal significance in jurisdictions where concurrent or contributing causation is sufficient, proof of "proximate cause" is essential in South Carolina, as explained by the Supreme Court in the *Geathers* case. In *Geathers*, the Supreme Court specifically rejected the argument that a pre-existing injury was a contributing cause of the employee's disability, in favor of a bright line test requiring that proximate causation be used to determine liability. Clearly, the "proximate cause" of Pate's disability (i.e., inability to earn wages) was the multiple pulmonary emboli and resultant anticoagulant therapy. Once the proximate cause of her disability has been determined, prior contributing causes are of no legal consequence.

According to our Supreme Court, "[p]roximate cause requires proof of (1) causation in fact and (2) legal cause." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing that Pate would not have become disabled "but for" the pulmonary emboli, while legal cause is proved by establishing foreseeability. If Pate's sudden disability in September 2014 was not the natural and probable consequence of the December 14, 2011 work injury, such sudden disability after more than two years of full employment was not foreseeable. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996).

Therefore, Pate's work-related back injury was not the proximate cause of her disability and; therefore, this disability is not the responsibility of the Respondents under S.C. Code Ann. § 42-9-10 as a matter of law.

Conclusion

Based on the arguments set forth herein above, the College of Charleston and the South Carolina State Accident Fund respectfully request that the final Decision and Order of the South Carolina Workers' Compensation Commission be affirmed in accordance with the Administrative Procedures Act, as it is supported by substantial evidence in the record and the applicable law.

Respectfully submitted,



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February 21, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. : 2019-001064

RECEIVED

JAN 29 2020

SC Court of Appeals

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

v.

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

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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. Respondents argue that these other conditions – despite being caused by Pate's injury – are "intermittent subjective complaints [which] are legally-insufficient."

- A. Respondents' argument ignores the undisputed diagnosis of radiculitis and radiculopathy into the left leg [In Reply to Respondents' argument IV at pages 26-28].

In their argument, Respondents discuss Colonna v. Marlboro Park Hospital, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013). However, Colonna provides no support for their argument and is easily distinguished.

First off, Colonna affirmed the general principle applicable here, to wit: "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." Id., quoting, Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003). The essential point made in Colonna is "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. (emphasis in original).

In Colonna, the claimant suffered from a foot and ankle injury, which ultimately required surgical implantation of a spinal cord stimulator to treat severe intractable felt in the foot due to the

complication of Reflex Sympathetic Dystrophy (RSD). The Commission made a partial disability award to the leg under S.C. Code Ann. § 42-9-30. Colonna appealed, contending that the surgical implantation of the spinal cord stimulator in her back necessarily resulted affected her back – thus enabling her to seek a permanent and total disability award under S.C. Code Ann. § 42-9-10.

The issue framed by the Court was whether the successful implantation of a medical device (without additional injuries from surgical complications) constituted an affected body part within the meaning of Wigfall and Singleton. This Court found “Colonna’s argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment.” Colonna.

Colonna is distinguishable for two reasons: (1) it involved the situs of medical treatment rather than the situs of an injury;¹ and (2) and there was no evidence of impairment or injury to any part of the body other than the foot. In the instant case, Pate suffers from a medically documented injury with permanent impairment and injury to her back, SI joint, and right leg, along with somatic depressive disorder. As such, this case involves a very different issue and very different level of proof than Colonna.

The controlling case here is Hutson. In Hutson, the employee suffered a nonsurgical back injury for which he was assigned a 10% whole person impairment rating (far less than the impairment assigned by Drs. Nolan and Marzluff in the instant case). He was given medium duty permanent restrictions with lifting no more than thirty-five pounds on an occasional basis and no

¹Colonna did not reach the issue of whether the RSD that required implantation of the spinal cord stimulator was itself a separate injury. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) (“Reflex Sympathetic Dystrophy (‘RSD’) is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain.”).

more than twenty-five pounds on a frequent basis. However, even though the leg was not given a separate impairment rating, Hutson nonetheless "suffered radicular symptoms in his right leg that affected the functioning of the limb." This Court affirmed the award of 30% to the back, yet remanded for an additional award of permanent partial disability to the affected leg. Hutson v. S.C. State Ports Auth., 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010), *reversed on other grounds*, 399 S.C. 108, 700 S.E.2d 462 (2012).

Respondents contend under Colonna there is no "disabling effect" on Pate's legs because "[n]o doctor ever issued an impairment rating for Pate's intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source."² [Brief of Respondents, page 27]. Hutson shows the error of this interpretation, for Hutson had no separate impairment rating nor any separate restriction on the use of his legs. The presence of radicular symptoms was enough to have "affected the functioning of the limb." Id.

As to Pate's radicular symptoms, Respondents argue without citation to authority that "intermittent subjective complaints are legally-insufficient." [Brief of Respondents, page 25]. Respondents mischaracterize Appellant's argument (and omit much of the relevant evidence). Respondents state:

Pate argues that she should be entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10 because Pate testified that she has pain that

²On April 23, 2014, 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. 3]. A restriction on standing is inherently a restriction on the use of one's legs.

"sometimes . . . leads down to my – into my right thigh through my buttocks."³
[Brief of Respondents, page 25 (emphasis added by Respondents.)].

To read Respondents' Brief, one would assume Pate based her case entirely on this one line of testimony. This is manifestly not the case, as Pate's buttock and leg symptoms are verified throughout the medical records.

Respondents cite to several medical records from Dr. Nolan stating "the location of Pate's pain was repeatedly stated to be simply "lower back" . . . or "low back." [Brief of Respondents, page 27 (citations to record omitted)]. Once again, the devil is in the details, for one need only read the reports to see that Respondents (and the Commission) omitted, ignored or overlooked multiple consistent references to radicular effects in the legs and SI joint pain.

Dr. Nolan took over Pate's treatment on May 14, 2013. In his very first report (entered into evidence by Respondents, yet not referenced in their brief), he states: the pain is located in "lower back, buttocks, bilateral legs." As to physical examination, he writes: "Radiating Symptoms:

³Pate continued her description of her pain and its effects testifying:

A. [The pain is] 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.

Q. Does it affect your daily activities?

A. At times, yes.

Q. All right. And how does it affect your activities?

A. I have to sit down or lay down or take more medication, and that's it.

Q. How do you spend your days?

A. I get up and do the little odds and ends around the house that I can. 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].

moderate lumbar radiculitis pain with ROM in the bilateral S1 nerve distribution to the feet.” [R.P. 302-303]. Pate returned the next day for epidural steroid injections into her “Bilateral LS nerve root and S1 nerve root” because “[Patient’s] low back pain and leg pain are the areas with the greatest pain and we will treat them today.” [R.P. 304-306]. The diagnosis and treatment continued throughout Dr. Nolan’s care of Pate from the initial visit on May 14, 2013 up to the last treatment visit on May 28, 2015 shortly before the trial.

In total, 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, S1 joint pain, pain over the iliac crest or other conditions. [R.P. 1-6, 22-24, 36-37, 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].

A handful of reports lend at best a bare scintilla of credence to Respondents’ argument. The reports from October 4, 2013 and November 15, 2013 do not mention leg pain or weakness nor S1 joint pain (although the report from November 13, 2015 describes “Radiating Symptoms: moderate lumbar radiculitis pain with ROM in the left L5 nerve distribution and S1 nerve distribution to the foot.”). [R.P. 321-322]. This absence is explained by the next visit on November 26, 2013, where Dr. Nolan addresses pain relief from the September 23, 2013 epidural steroid injection given to treat left leg radiculopathy. He writes “significant (>80%) initial pain relief of low back pain and of leg

pain. Duration of relief: the pain has slowly returned since her last injection." It was on this visit that Dr. Nolan increased Pate's work restrictions ("Job should remain more sedentary") and requested authorization from the Carrier to treat Pate's significant SI joint pain.⁴ [R.P. 324-326]. This report confirms that the radicular pain into the legs was temporarily alleviated by the injections; not that Pate did not have radiculopathy.

There are two more reports with no mention of leg pain or SI joint pain on February 18, 2015 and March 20, 2015. [R.P. 178-180, 182-184]. These are followed by the last two reports from Dr. Nolan in the record. The April 21, 2015 report lists the location of pain as "lower back, buttocks, leg." [R.P. 186-187]. The final report from May 4, 2015 also lists "lower back, buttocks, leg pain." [R.P. 190-191]. Again, this confirms that treatment provided some degree of temporary relief; not a cure.

As much as one hates to belabor the contents of these reports, the Court should not be misled 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

⁴Although Respondents contend the radiculopathy and SI joint injury are unrelated to the back injury, the Carrier authorized and paid for the injections to treat both conditions.

⁵Other 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 1-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

There is no evidence on which a reasonable trier of fact could hold as the Commission did. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S. E.2d 438, 442 (2000)("Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.").

For the Commission to disregard, ignore or overlook the medical evidence concerning the left buttocks and leg (and SI joint) from Dr. Nolan and other providers is an error of law. This is essentially the same error the Commission made in Burnette, where the Court reversed the Commission because "We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy." Burnette v. City of Greenville, 737 S. E.2d 200, 401 S.C. 417 (Ct. App. 2012)(finding of fact based on a commissioner's own lay medical opinion is not substantial evidence and must be reversed). Ignoring competent medical evidence is an impermissible resort to rank speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate

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].

Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). As such, the Court should reverse the finding that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." Pate's injury affected multiple body parts and she should be deemed disabled as a matter of law.

B. Injury to the sacroiliac joint [In Reply to Respondents' argument II at pages 19-21].

Respondents declined to address the SI joint injury on the merits.⁶ Instead, Respondents argue the issue on the SI joint injury is not preserved. A review of the record and pleadings show that the issue of general disability for multiple body parts (including the SI joint) under Section 42-9-10 was raised and ruled upon (albeit against Pate, thus necessitating correction on appeal).

The issue was presented to the Single Commissioner. In her prehearing brief, Pate stated the facts in controversy were "Extent of disability/body parts." [R.P. 74]. Conversely, Respondents contended the injury was limited to the lower back. [R.P. 486]. As noted earlier in this brief, the medical records are replete with diagnoses and treatment for SI joint injury and pain related to the original accident -- all of which was authorized and provided for by the Carrier.

The Single Commissioner ruled "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [R.P. 9, Finding of Fact 1]. This finding was specifically appealed in the Form 30, where it is stated: "Whether the Single Commissioner erred as a matter of law in limiting the award to the back." [R.P. 21, 49, Issue on Appeal 13].

⁶The Court has authority to treat Respondents' failure to respond to this issue as a confession that the Commission's finding that the SI joint was not injured or affected was reversible error. See First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Cl.App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

Additionally the issue was raised and ruled upon by the Appellate Panel. In its first Order, the Appellate panel wrote "Dr. Nolan . . . treated Pate with SI joint injections . . . " [R.P. 17]. The issue was briefed by both parties. Indeed, Respondents made the same preservation issue they make here. The Appellate Panel declined to address Respondents' preservation argument, instead affirming the finding of the Single Commissioner that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [R.P. 26, Finding of Fact 1]. Inconsistently, even though the Appellate Panel stated it found no other body parts injured or affected, the Panel specifically ordered Respondents to provide SI joint injections. [R.P. 64].

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. If the appellate court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793 (Ct. App. 1989) (issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E. 2d 463 (Ct. App. 1988) ("it is inferable from the record that [claimant] raised this issue before the single commissioner"). The courts have held issues are preserved where "it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court in its order." Baddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, the appellate courts have ruled on issues even when explicitly raised for the first time to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994) ("On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid

to Swinton after May 21, 1990.”).

Here, the Single Commissioner held the injury was limited to the back, thus excluding the SI joint. Given that ruling, Appellant had every right to appeal the issue. She did so—listing the issue on her Form 30 and arguing it in her brief. The Appellate Panel addressed the issue, albeit inconsistently, by ordering Respondents to provide treatment for the SI joint. [R.P. 64]. As such, the issue is preserved and properly before the Court.

C. Psychological Overlay [In Reply to Respondents' argument III at pages 21-25].

Respondents begin their argument against the claim for psychological overlay by alleging there is no “opinion from a ‘physician’ (i.e., a medical doctor) that the alleged mental injury is ‘causally-related or connected [to] the injury or accident.’”⁷ This simply is not the case.

Two physicians provided medical opinions. Indeed, Respondents own independent medical examiner, Dr. Dyana Lowndes-Rosen, is a physician. Dr. Lowndes-Rosen diagnosed Pate with *Somatic Symptom Disorder with Predominant Pain* (300.82). This diagnosis by definition establishes the causal connection, as it refers to “Disorders characterized by bodily symptoms caused by psychological factors.” [2015 ICD-9-CM Diagnosis Code 300.82]. Dr. Lowndes-Rosen wrote

⁷Respondents make an unnecessary and irrelevant argument, to wit: that an injured worker must prove that “mental injuries ... are caused ... by extraordinary and unusual conditions of employment.” [Brief of Respondents, page 21]. This is a reference to the higher burden for so-called mental-mental injuries. A mental-mental injury is a mental injury unaccompanied by physical injury, such that the injury is entirely caused by unusual and extraordinary stress on the job. See S.C. Code Ann. § 42-1-160 (B)(2007)(requiring “mental injuries ... unaccompanied by physical injury ... are not considered a personal injury unless ... the employee's employment conditions causing ... the mental injury ... were extraordinary and unusual in comparison to the normal conditions of the particular employment ...”). As the mental injury here is accompanied by physical injury (hence it is denominated as a physical-mental injury), Pate need merely prove the causal connection by a preponderance of the evidence. Under *Getsinger*, it is sufficient that the depression include an element of stress from inability to work, as well as pain and disability.

"She recognizes *her emotional symptoms are a direct result of her pain and limitations.*" [R.P. 367 (emphasis added)]. See Gelsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)(opinion of doctor that inability to work precipitated depression "sufficiently establishes that [employee's] injury caused his depression.").

Respondents focus on a particular passage from Dr. Lowndes-Rosen's report. The full passage (with the portion referred to by Respondents in bold) states:

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 (emphasis added)].

Dr. Lowndes-Rosen confirms Pate suffered a psychological overlay with somatic symptom disorder as a result of the pain and disability resulting from her workplace injury. Her opinion that there may be no benefit to Pate from counseling – differing from Dr. Kee's opinion – goes to treatment; not diagnosis and not causation. Dr. Lowndes-Rosen states with certainty that Pate suffers from "real physical pain" which directly resulted in her emotional symptoms. Respondents' strained reading of the report should be given no credence.

Respondents ask the Court to 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).

Moreover, Dr. Nolan states: "[Patient] is significantly depressed [secondary to] pain and

increased pressures/stressors. . . . 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." Dr. Nolan referred Pate to Dr. Kee and prescribed Effexor (an anti-depressant) to treat depression. [R.P. 129].

Dr. Nolan's records provide more than enough proof for Pate to have shown her depression directly resulted from her pain and limitations. The argument that his 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].

Respondents further argue that:

According to the Commission, Pate's personal history, her prior medical history, and her other unrelated medical conditions, which include a long-term battle with bowel incontinence and a near-fatal pulmonary emboli, were all causative factors in her mental issues and were all unrelated to the December 14, 2011 accident." [Brief of Respondents, page 22].

This argument overstates what the Appellate Panel actually found. The Order states:

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 conditions. 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. 52-63 finding of fact 7].

Nowhere does the Commission's order discuss "bowel incontinence."⁸ Nor does the

⁸Under stress, Pate's family doctor list two aggravating factors: "work stressors, brother dying from pancreatic cancer. . ." [R.P. 264]. Her family doctor treated her for chronic stomach problems, including diarrhea. The family doctor notes she "is having severe diarrhea and bloating and wants to come off all meds until her stomach is better." [R.P. 264]. On May 21, 2013, she was diagnosed with IBS (irritable bowel syndrome), after which the mention of

Commission discuss "near fatal pulmonary emboli."⁹ Respondents base their argument on these embellishments, but they were not a basis for the Commission's decision. The Commission merely found Pate failed to prove her case – a conclusion shown to be erroneous upon review of the record.

The Commission appears to have made two conclusions, both of which are error. The first is "no physician has opined that Claimant has any disability or work restrictions as a result of any alleged psychological conditions." [R.P. 62-63, finding of fact 7]. Restrictions or disability are not essential elements. Most workers' compensation claims are considered medical only cases, where the employee receives treatment but no compensation.¹⁰ There are many injuries and conditions

diarrhea in her medical records virtually stop. [R.P. 274]. There is no mention of the IBS as a stressor.

In his deposition, Dr. Marzluff is asked about the cause of the bowel incontinence. He states "One of the causes of bowel and bladder incontinence is spine problems," but he ultimately testified he had no opinion as to whether it was related to her spinal problems. [R.P. 462, lines 1-20].

The second mention of "incontinence of her bowels" comes from Dr. Lowndes-Rosen. She mentions Dr. Marzluff's January 13, 2013 report, noting that Pate had been "doing reasonably well following her surgery but she then complained to him of multiple problems, including incontinence of her bowels." [R.P. 365]. Dr. Marzluff's January 13, 2013 report is not in the record. However, Dr. Lowndes-Rosen appears to be stating that the "incontinence of her bowels" began after her surgery. Regardless, Dr. Lowndes-Rosen did not attribute Pate's depression to her bowel issues; she attributed it to chronic pain syndrome due to her work-related injuries.

⁹Records from Dr. Jeffrey Rose, who treated Pate for the pulmonary embolus, do not describe it as life-threatening. [R.P. 352-361].

¹⁰ 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.") (emphasis added).

which do not warrant work restrictions, yet require treatment under workers' compensation because they are caused by a work accident. See 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. Brucoli, 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) (claimant entitled to treatment for depression occurring five years after injury).

In the instant case, Dr. Kee opined Pate would benefit from treatment for the depression resulting from her chronic pain. [R.P. 239-240]. Dr. Nolan also ordered treatment, including counseling and medication. [R.P. 129]. And although Dr. Lowndes-Rosen disagreed on counseling, she endorsed continuing the antidepressant medication. Dr. Lowndes-Rosen's diagnosis of Somatic Symptom Disorder shows that the psychological issues affect and worsen Pate's perception of her pain. [R.P. 367].

As to the Commission's finding that no doctor opined as to the causal connection to the work injury, this is belied by the reports from Drs. Nolan and Lowndes-Rosen. One might also note that it is sufficient to prove the depression resulted from pain and disability, as in Getsinger. If the Commission is quibbling over the magic words "stated to a reasonable degree of medical certainty," that would be error. The statute sets forth multiple types of proof required for an aggravation of a preexisting psychological condition. Existing medical records do not require any particular language or phrasing.

The only type of report that must be “stated to a reasonable degree of medical certainty” is a forensic opinion, report or testimony. Opinions “noted in a medical record” do not contain this requirement. See Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(letter from doctor hired for purposes of litigation “does not constitute ‘documents, records, or other material,’ but is an ‘opinion or testimony’ that must be ‘stated to a reasonable degree of medical certainty.’”). Indeed, the statute only requires that it be “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.” S.C. Code Ann. § 42-1-160(D)(2)(2007)(emphasis added). Dr. Nolan’s report meets this standard. And while technically Dr. Lowndes-Rosen’s report could have been objected to because she did not use the term reasonable degree of medical certainty, no objection was made. As Respondents introduced the report without objection, they cannot claim about its sufficiency on appeal.

The Commission erred by holding Pate failed to prove the causal connection between her physical injury and resulting depression. There is no substantial evidence to support the decision below. It must therefore be reversed and Pate found to have suffered additional disability due to psychological overlay and be entitled to treatment.

2. Pate is permanently and totally disabled as no employer is able to accommodate the restrictions resulting from her work injury [in Reply to Respondents’ argument at pages 28-32].

In their Brief, Respondents repeat the canard that “it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have.” [Brief of Respondents, page 30]. The fatal flaw in this argument is that Respondents have already litigated and lost this issue. In its first Order, the Appellate Panel found as fact that “We reverse the Single

Commissioner's finding that "Claimant's pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to Claimant's disability and continued medical treatment." [R.P. 27, Finding of Fact 7]. The Appellate Panel further rejected the application of Geathers v. 3V to the case, concluding "The ruling below regarding Geathers has no support in the law and is an erroneous misapplication of Geathers [R.P. 30-31, Conclusion of Law 18]. Respondents failure to appeal this ruling means they are bound by the law of the case. See, e.g. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014) ("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.")

As to the merits, 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.

Respondents argue that Pate "returned to her regular, full time job . . . before she was hospitalized with multiple pulmonary emboli, unrelated to her employment. . . . Therefore, Pate's work related back injury was not disabling as a matter of law." [Brief of Respondents, page 30]. This argument is belied by the Commission's finding that "Pate *temporarily* stopped working on September 15, 2014 when she was hospitalized for a pulmonary embolism." [R.P. 62, Finding of Fact 5 (emphasis in original)]. While Pate did miss work due to the hospitalization, the absence was temporary. As Respondents point out, Dr. Nolan took her out of work (albeit temporarily) on October 3, 2014 due to the pulmonary embolisms. He "continue[d] to monitor her work status at each visit," before returning her to work one month later once the pulmonary embolism resolved. [R.P. 144, 254-155]. From that point, she was under no work restrictions from the embolism. In fact,

her hematologist, Dr. Rose, consistently "gave her words of encouragement regarding her job." [R.P. 352-361].

The reason Pate can no longer work is entirely due to the restrictions assigned by Dr. Nolan from her work-related injury. In December 2014, he restricted her to sedentary duty no more than 4 hours per day. [R.P. 167-175]. The Copy Center could not accommodate her restrictions, placing her on leave without pay on January 29, 2015 and ultimately determining "there are no available positions at this time." [R.P. 248, 388; 519, lines 19-23].

The evidence conclusively shows Pate is permanently and totally disabled due to her work-related injuries. As such, the Decision and Order below should be reversed.

3. Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back [In Reply to Respondents' Argument at pages 15-19].

On remand, the Single Commissioner found Pate had sustained permanent partial disability (loss of use) of 40% of the back. The Appellate Panel affirmed. Respondents contend "Pate has failed to cite any legal authority for her argument that scheduled awards should be based upon a claimant's work status." [Brief of Respondents, page 15]. Appellant actually cited to numerous decisions holding that a scheduled award should exceed the impairment rating.¹¹ Moreover, she cited

¹¹See, 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. 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

to the authoritative treatise on workers' compensation for the proposition that 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. Indeed, the Commission applied this principle in its award where it considered "Claimant's work restrictions at the time of separation from her employer . . ." [R.P. 63, Finding of Fact 11].

The core issue is that when the restrictions are considered, they are inherently disabling. There is simply no work for someone with these restrictions, such that the true loss of use of the back necessarily exceeds 50%. This creates a rebuttable presumption of permanent and total disability. Respondents cannot rebut the presumption because the Employer cannot accommodate the restrictions nor, per the vocational evidence, can any other employer. [R.P. 241-246].

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.

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); Cropfy. 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).

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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January 29, 2020
Columbia, South Carolina

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Patricia Pate, Employee/Claimant, Appellant,

v.

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

Appellate Case No. 2019-001064

Appeal From The Workers' Compensation Commission

Opinion No. 5925

Heard April 12, 2022 – Filed July 20, 2022

REVERSED AND REMANDED

Stephen Benjamin Samuels, of Samuels Reynolds Law
Firm LLC, of Columbia and Max Capper Sparwasser, of
Max Sparwasser Law Firm, LLC, of Mount Pleasant,
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Margaret Mary Urbanic, of Clawson & Staubes, LLC and
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Barr, of Trask & Howell, LLC, of Mount Pleasant, all
for Respondents.

HEWITT, J.: This is an appeal from the Workers' Compensation Commission.
The case is about whether the commission properly limited Patricia Pate to an

award for a back disability and whether the commission erred when it determined she has lost a lesser degree of the use of her back than she claimed.

There is ample evidence Pate's back injury affects other parts of her body. It was thus a 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 also argues the only conclusion supported by the evidence is that she is permanently and totally disabled. Though the restrictions in this case are extensive, we do not think we can say the forty percent loss of use finding is clearly erroneous. As noted above, the commission has not yet done a substantive weighing of Pate's claim under the general disability regime. We therefore reverse and remand for the commission to evaluate Pate's claim for a general disability award.

FACTS

We will try to abbreviate the facts as much as possible. Pate worked at the College of Charleston's copy center. She hurt her back at work in December 2011.

The injury was severe enough to warrant surgery in May 2012. Pate's surgeon assigned a forty percent impairment rating to the spine and a thirty-six percent rating to the whole person.

Pate's long-term treatment regimen after surgery included sacroiliac (SI) joint injections, trigger point injections, epidural steroid injections, a TENS unit, and pain medications (OxyContin, Percocet, and Tizanidine). For reasons that matter later in our analysis, we will mention that the surgeon said he increased Pate's impairment rating by ten percent in an effort to account for chronic pain caused by the injury.

Pate returned to work but remained on pain medication and received injections approximately every two months. In August 2014—over two years after Pate's back surgery—the authorized treating physician referred Pate to a clinical psychologist for an evaluation and possible treatment for depression. He also started Pate on an antidepressant and nerve pain medication, noting Pate was significantly depressed.

The next point we should mention is that Pate was hospitalized shortly after that (in September 2014) with blood clots in her lungs. This resulted in increased pain medication and prevented her from receiving her injection therapy for several months. The blood clots also prevented her from working.

Pate was approved to return to work in December 2014, but for only four hours per day; four days per week; no lifting more than fifteen pounds; no bending, squatting, crawling, or pushing heavy objects; and with a reevaluation scheduled two weeks later. Pate's restrictions did not change. The College placed her on leave without pay in January 2015 after determining that it could not accommodate her restrictions.

The case had a lengthy journey at the commission. Pate alleged injuries to her back, legs, and psyche (depression). The College admitted an injury to Pate's back only. The College also claimed the blood clots in Pate's lungs were an "intervening act" and that all of Pate's current medical treatment and impairments resulted from the clots, not from her back injury.

The single commissioner agreed with the College that Pate's embolisms were an intervening event, awarded the case as a "back only" claim, and did not award any future medical treatment. Pate appealed. The appellate panel affirmed in part, reversed in part, and remanded. The panel reversed the single commissioner's finding that the blood clots were an intervening act and remanded for the single commissioner to determine Pate's degree of disability and to award causally related medical treatment.

On remand, the single commissioner found Pate's injury only affected her back, that she sustained a forty percent permanent partial disability, and that Pate was entitled to future medical treatment including SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medication, and a lumbar back brace.

Pate appealed to the appellate panel again, raising the same arguments she raises here. The appellate panel affirmed. This appeal followed.

ISSUES

1. Whether the commission erred in finding this was a "single member" case and limited Pate to an award for a back injury.

2. Whether the commission erred in failing to find Pate permanently and totally disabled; either because of her extensive restrictions or because the commission allegedly erred in concluding she had not lost more than fifty percent of the use of her back.

THE SINGLE MEMBER DEFENSE

The Workers' Compensation Act has two methods of compensation. General disability is codified at sections 42-9-10 and -20 of the South Carolina Code (2015). Scheduled recovery is codified at section 42-9-30 of the South Carolina Code (2015).

If a worker with a single injury to a body part listed in the scheduled recovery statute—say, a back or arm injury—wishes to pursue a general disability award, the worker must show that the injury affects other parts of the worker's body. *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994); *Singleton v. Young Lumber Co.*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Pate made such a claim here. She claims her back injury has caused pain radiating into other parts of her body and pain-related depression.

The record indicates no less than forty physician notes about Pate having nerve pain in places other than her back. They commonly reference pain in her left leg and hip. There are also numerous references in the record to 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. A functional capacity evaluation reported that Pate exhibited an altered gait secondary to pain. We mentioned in the earlier background that the authorized treating physician added ten percent to his impairment rating for Pate's back because of her chronic pain, prescribed Pate an antidepressant, and referred her to a psychologist. The psychologist confirmed a diagnosis of major depressive disorder. 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.

Neither the single commissioner nor the appellate panel gave any analysis in deciding this was a single member case. The 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.

The law instructs us to affirm the commission's factual findings unless they are clearly erroneous in view of the reliable, probative, and substantial evidence in the record. S.C. Code Ann. § 1-23-380(5)(e) (Supp. 2021). But the law also instructs that the commission's final decision must include "a concise and explicit statement of the underlying facts" that support its findings. S.C. Code Ann. § 1-23-350 (2005); *see also Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings."). Here, we have no idea why the commission rejected Pate's argument that her back injury was causing complications in other parts of her body. We cannot say whether the commission erred or was correct in its reasoning. The commission gave no reasoning in its order.

The College argues we can affirm because the only conclusion supported in the record is that Pate's leg pain was off-and-on, mild, and that no physician has diagnosed Pate with a mental injury related to the work accident. We respectfully disagree. The references to complications in other parts 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. Dr. Nolan was the authorized treating physician for Pate's back injury. Dr. Kee is the psychologist who evaluated Pate at Dr. Nolan's request. Dr. Nolan prescribed Pate an antidepressant. The pertinent records have repeated references to Pate's back injury and the complications caused by the back injury. We do not think it is fair to say that the evidence in the record leads unquestionably to the finding that Pate's back injury affects nothing more than her back.

PERMANENT AND TOTAL DISABILITY

Pate's second argument is that rather than remand, we should find she is permanently and totally disabled either because of her extensive restrictions or because the commission allegedly erred in concluding she had not lost more than fifty percent of the use of her back.

We will take these arguments in reverse. Under the scheduled recovery statute, a worker who has lost more than fifty percent of the back is presumed to be permanently and totally disabled. *See* § 42-9-30(21). The commission found Pate sustained permanent partial disability of forty percent of her back. This

corresponded precisely with the impairment rating to the spine assigned by Pate's surgeon.

Several things support Pate's argument that her award must be greater than her medical impairment. She points us to a medical authority explaining that impairment ratings should not be used to estimate the degree of disability. See generally Linda Cocchiarella & Gunnar B.J. Andersson, *Guides to the Evaluation of Permanent Impairment* 9 (5th ed. 2000). She also points us to numerous cases where the disability awards exceed the impairment ratings. E.g. *Linen v. Ruscon Constr. Co.*, 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985) (affirming a finding of greater than fifty percent loss of use of the back when highest rating to back was twenty to thirty percent).

Even if we found it was error to limit Pate's award to the precise amount of her impairment rating, we do not think we could go so far as to say the evidence in the record supports no conclusion other than that Pate has lost more than fifty percent of the use of her back. Pate claims it is clear that she is permanently and totally disabled and that we can "work backwards" from that to conclude that she must have lost more than fifty percent of the use of her back. We are not so sure. Would we say the commission clearly erred if it found Pate had lost forty-eight percent of her back but that Pate was permanently and totally disabled because of the effects her back injury caused in other parts of her body? We do not know, and we do not have that sort of order before us. Weighing impairment ratings as part of arriving at a percentage of disability strikes us as a task that the Legislature envisioned entrusting to members of the commission, not to us.

There is certainly evidence of permanent and total disability in the record. The restrictions are extensive, and total disability does not require helplessness. "The generally accepted test of total disability is inability to perform services other than those that are 'so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.'" *Wynn v. Peoples Nat. Gas Co. of S.C.*, 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961) (quoting *Lee v. Minneapolis St. Ry. Co.*, 41 N.W.2d 433, 436 (Minn. 1950)).

But as we noted in the section discussing the single member defense, the commission has not evaluated Pate's claim for compensation under the general disability regime. Though we do not wish to prolong this case for the parties or to add to the commission's workload, we hold it is not appropriate for us to evaluate the merits of this argument before the commission has spoken.

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. The appellate panel rejected this argument, and we likewise reject the College's contention that the only conclusion with support in the record is that Pate's current and substantial work restrictions have no relation to her back injury.

CONCLUSION

For the foregoing reasons, we reverse and remand. We do not wish to prevent the commission from following whatever procedures it deems appropriate for expeditiously adjudicating the claim. We envision that, at a minimum, the commission will evaluate the substance of Pate's general disability claim.

REVERSED AND REMANDED.

THOMAS and MCDONALD, JJ., concur.

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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION**

**Appellate Case No. 2019-001064
W.C.C. No. 1121370**

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

v.

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

PETITION FOR REHEARING

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Statement of the Case

By Order dated July 20, 2022, the Court of Appeals reversed the final Decision and Order of the Workers' Compensation Commission dated May 31, 2019 (R. p.34) and remanded TO for the Commission to "evaluate the substance of Pate's claim for a general disability" based on her allegations of "pain radiating into other parts of her body" and "pain-related depression." According to the Court, the Commission "gave no reasoning" in its order for denying additional benefits as a result of these allegations under S.C. Code Ann. § 42-9-10. Respectfully, the Court has overlooked the Commission's detailed finding of fact that Pate had "not met her burden of proving" that she "has any disability or work restrictions as a result of any alleged psychological injury." (R. p.62 #7). The Respondents, the College of Charleston and the State Accident Fund contend that this finding, which is supported by substantial evidence in the record, should have been affirmed by the Court of Appeals and that; therefore, a remand to consider an award of additional benefits for an alleged psychological injury would be improper.

Furthermore, the Respondents respectfully contend that the Court of Appeals misapprehended both the evidence and the applicable law by suggesting that Pate's subjective complaints of pain "in other parts of her body" constitute "ample evidence" to support an award under S.C. Code Ann. § 42-9-10. As previously held by this Court, such subjective complaints are insufficient to prove the requisite disabling effect or impairment of a second body member such that Pate could be entitled to pursue general disability benefits under that statute. It would appear that the Court overlooked the sound reasoning of precedent by remanding the claim to the Commission to reconsider legally insufficient subjective allegations.

In addition, the Respondents respectfully contend that the Court overlooked substantial evidence in the record that supports the Commission's finding that Pate sustained a 40% loss of use of the back as a result of her work accident, as well as the substantial evidence that the proximate cause of any disability or loss of wage-earning capacity was Pate's subsequent, intervening pulmonary emboli. Therefore, pursuant to Rule 221, S.C.A.C.R., the Respondents respectfully request that the Court of Appeals grant the Petition for Rehearing and issue a new order affirming the final Decision and Order of the Workers' Compensation Commission in accordance with the Administrative Procedures Act. In the alternative, the Respondents request that the Court limit the scope of their 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.

Arguments

I. The Court of Appeals overlooked the Workers' Compensation Commission's finding of fact regarding the depression claim.

The Court of Appeals has remanded this claim to the Workers' Compensation Commission with a mandate to consider whether Pate is entitled to general disability benefits under S.C. Code Ann. § 42-9-10 as a result of alleged "pain-related depression," suggesting that the Commission did not consider this claim or give any reasoning for its denial. The Court's July 20, 2022, Opinion apparently overlooks the Commission's specific finding of fact regarding Pate's claim for "psyche (depression)," which reads as follows:

"7. Claimant has not met her burden of proving a psychological injury casually related to her original injury. Her claim is not supported by the preponderance of the evidence. **Specifically, no physician 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.62--63) (emphasis added).

Despite this specific finding of fact, the Court's Order makes no mention of it, or of the substantial evidence in the record supporting the Commission's denial of benefits for any alleged psychological injury.

Proper consideration of the Commission's finding in this regard should have resulted in a full affirmation in accordance with the Administrative Procedures Act. *See Bass v. Kenco Group*, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct.App.2005) (holding that a reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"); *see also* S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Therefore, the Respondents respectfully contend that the Court of Appeals should reconsider its decision and affirm the Commission's specific finding of fact regarding the Claimant's alleged psychological condition 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 the medical records submitted into evidence and even the Claimant's own testimony. At the evidentiary hearing on July 14, 2015, Pate's attorney did not ask her any questions about any alleged psychological injury or depression. (R. pp.493—500). At no time during that hearing did Pate give testimony to support any allegation of a psychological injury or depression related to her low back injury. (R. pp.493—508). While Pate did testify that her brother's recent death from pancreatic cancer was "very stressful" for her and resulted in her seeking medications from her family physician, Pate testified that she was feeling better at the time of the hearing. (R. p.507). Therefore, not even Pate's own testimony could support a finding that she sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

The records Carolina Family Medicine indicate that Pate first complained of a three-to-four-year history of "stress" in January 2013, which was aggravated by "work stressors" and her "brother dying from pancreatic cancer." (R. p.264). While her family physicians also noted "stress" on other occasions, (R. p.269, p.271, p.284, p.286, p.288, p.293, p.296), it was always attributed to undefined "work stressors" and her "brother dying from pancreatic cancer," not her low back injury. In addition, at no time did Carolina Family Medicine indicate that Pate required any work restrictions because of her "stress," much less opine that the condition resulted in any permanent impairment.

As such these records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

Pate described her alleged work stressors to her hematologist, Dr. Rose, in December 2014. (R. p.357). According to Pate, her job was "apparently transitioning to a new computer system, and she is concerned about her ability to perform her job."¹ In response, Dr. Rose "offered her words of encouragement regarding her job and also offered her ways she could help train herself with the computer system." Dr. Rose's records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

Dr. Dyana Lowndes-Rosen was the only psychiatrist to evaluate Pate. According to Dr. Lowndes-Rosen, Pate's emotional symptoms were due to a "chronic pain syndrome." (R. p.368). However, Dr. Lowndes-Rosen concluded that she had

"no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. [Pate] also expressed her belief that she has no need for mental health involvement." (R. p.368).

Dr. Lowndes-Rosen did not recommend any work restrictions or find any permanent psychological impairment. Accordingly, Dr. Lowndes-Rosen's records do not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

¹ "Stress, mental injuries ... are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations..." S.C. Code Ann. § 42-1-160(C).

While Trident Pain Center Nurse Practitioner Allison Davis stated on August 21, 2014, -- shortly before her new leg pain and swelling was diagnosed as multiple pulmonary emboli -- that Pate was depressed due to "pain and increased pressures/stressors," neither Ms. Davis, nor her supervisor, Dr. Nolan, commented on these symptoms further. More importantly, neither Ms. Davis, nor Dr. Nolan, ever issued any work restrictions for these symptoms and never indicated that they resulted in any permanent impairment. In fact, after September 4, 2014, there is no mention of any symptoms of depression or stress in the next 17 office notes from Trident Pain Center. Therefore, the records of Trident Pain Center do not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

Ms. Davis referred Pate to a psychologist, Mr. Kee, for a one-time evaluation on September 22, 2014. Apparently, Pate complained to Dr. Kee that "there has been conflict that her supervisor has pushed her to do new jobs on the computer ... she reports having problems with anxiety and going to sleep because of worrying about work," though she admitted she had been taking the sleeping medication, Ambien, since 2010 (prior to the work accident). Although Mr. Kee diagnosed a "[m]ajor depressive disorder, single episode, moderate," he did not in any way indicate that Pate's depression was permanent or disabling. Therefore, the one-time evaluation of Mr. Kee a year prior to the hearing does not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

Because the findings of the Commission are presumed correct and it is otherwise not within the province of the appellate courts to reverse findings of the Commission

that are supported by substantial evidence, the Court of Appeals should reconsider its mandate that the Commission reconsider the “substance” of Pate’s claim for “psyche (depression).” Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d

526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999).

Furthermore, because the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and even the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s findings from being supported by substantial evidence, the Court of Appeals should 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 misapprehended the applicable law with regard to whether Pate’s back injury had a disabling effect on her legs.

According to the Court’s July 20, 2022, Opinion, the Commission must reconsider whether Pate is entitled to general disability benefits under S.C. Code Ann. § 42-9-10 because “the record contains ample markers of a colorable claim that the effects of Pate’s back injury extend beyond her back.” First, while Pate did allege an unspecified injury to “the legs,” she did not ever file a claim for any alleged injury to the hips, or knees, or ankles, or sacroiliac joint. (R. p.68, p.69, p.72, p.74). Furthermore, according to Pate’s own testimony, the substance of her leg injury claim is that pain

"sometimes ...leads down to [her] – into [her] right thigh¹ through [her] buttocks." (R. p.497, ll.11-15) (emphasis added). However, because intermittent subjective complaints are legally insufficient to support a general disability claim under S.C. Code Ann. § 42-9-10, the remand to reconsider such evidence appears to be premised on a misapprehension of the applicable legal standard established by long-standing and recently reaffirmed precedent.

According to the South Carolina Supreme Court in 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" pursuant to S.C. Code Ann. § 42-9-30. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). Singleton intended that "impairment" in this regard is a "physical deficiency." *Id.* Accordingly, entitlement to benefits for permanent and total disability benefits under S.C. Code Ann. § 42-9-10 requires, not only proof that another body part has been "affected" by the work injury, but that another body part is permanently "impaired." Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*) (emphasis added). Indeed, in Colonna, *supra*, the Court of Appeals reasoned that "the question of whether [a claimant] is totally and permanently disabled, and thus entitled to recovery under Section 42-9-10, turns on whether the initial injury had a 'disabling effect' on other parts of her body." *Id.*

Here, despite Pate's intermittent subjective complaints, there is absolutely no

¹ According to the Court's Opinion, Pate's medical records "reference pain in her left leg and hip." However, the Claimant 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).

evidence that her work-related back injury had a "disabling effect" on her legs. No doctor ever issued an impairment rating for Pate's intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source. According to Dr. Nolan (Pate's pain management physician), the location of Pate's pain was repeatedly stated to be simply "lower back" (R. pp. 75, 78, 105, 156, 161, 173, 185, 192, 199) or "low back" (R. pp. 81, 90, 108, 110, 116, 125, 132, 142, 143, 145, 146, 154, 158, 178, 181, 182, 197). At no time did Dr. Nolan ever suggest that any intermittent leg complaint was a factor in his spinal impairment rating (much less necessitate a separate impairment rating to either leg), nor did he opine that Pate required any work restrictions as a result of any leg symptoms.

Furthermore, according to Pate's surgeon, Dr. Marzluff, the only body part "injured" on December 14, 2011, was Pate's "back" and the only body part "affected" was her "spine." (R. p.236). Even at his deposition, Dr. Marzluff never suggested that Pate had any permanent impairment of her legs, nor did he suggest that his spinal impairment rating was based on any such complaint or that Pate was in any way disabled or limited by any alleged leg problem. The issue was not even raised to Dr. Marzluff (or Dr. Nolan) by Pate's attorney.

Moreover, Pate has a number of non-work-related leg problems, including a pre-existing ankle injury, which according to Pate remains symptomatic. (R. p.503, lines2—3; pp.256-259). Pate also admits that in 2014 she began having new and different symptoms with respect to her legs, including swelling and discoloration. (R. p.502, ll.19-21). According to her personal physicians' records, in May 2014, she began noticing these new symptoms in both feet and legs. (R. p.277). By July 2014, Pate was reportedly experiencing "tingling in both feet and some swelling in lower legs," in addition to

discoloration of the skin of both feet and lower legs, "which began 2 months" earlier. (R. p.277). Pate was diagnosed with "Edema/Bilateral peripheral – New" in August 2014. (R. p.280). Pate testified that she initially assumed these new leg and foot symptoms in 2014 were caused by the pre-existing April 2011 ankle injury. (R. p.503, APA pp.256--259). However, her hematologists subsequently diagnosed her with chronic venous stasis in the legs and non-pitting edema due to her non-work-related pulmonary emboli. (R. pp.352--361). By November 2014, Pate was also complaining of another "new" problem:

"pain to the left lower leg and behind the left knee, which did not result from an injury which began 1 month ago. The patient characterized it as stabbing pain when standing up. Severity – worsening. Aggravating factors: weight bearing, standing, walking and bending knee. Relieving factors: nothing. On Xarelto. History of multiple pulmonary embolisms." (R. pp. 288--289).

However, there is no competent medical evidence that the leg and foot symptoms Pate was experiencing in the second half of 2014 were causally related to her work-related low back injury.

More importantly, there is no competent evidence that the work-related low back injury had any "disabling effect on her legs." Again, the record contains no impairment rating for either leg and no restrictions on their use. The mere fact that Pate made various complaints about her legs, the most severe of which are wholly unrelated to her work accident, does not constitute "a colorable claim" that Pate has any "impairment of

any other part of her body because of" her work-related low back injury. Singleton v. Young Lumber, 236 S.C. 454, 114 S.E.2d 837(1960). Because "a claimant must prove not only that another body part was affected ... but that another body part was impaired or injured for section 42-9-10 to apply,"¹ the Respondents respectfully request that the Court of Appeals reconsider its decision to remand the claim and, instead, affirm the Decision and Order of the Commission based upon the substantial evidence in the record and the applicable law.

III. The Court of Appeals overlooked the fact that Pate's subsequent pulmonary emboli are an intervening cause of her present ailments as a matter of fact.

Even assuming, *arguendo*, that Pate was entitled to pursue benefits under S.C. Code Ann. § 42-9-10, Pate is not entitled to benefits for permanent and total disability as a result of the December 14, 2011, accident because 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 thereafter. Therefore, Pate had no "incapacity for work resulting from" the December 14, 2011, injury back injury during this period, but had a dependable job. 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

¹ Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128 (2013).

14, 2011, accident. Therefore, as a matter of fact, it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have.

In Geathers v 3V, Inc, 371 S.C. 570, 641 S.E.2d 29 (2007), the Supreme Court reaffirmed the well-established "Gordon Rule," which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers' compensation claims. In applying the "Gordon Rule" to the facts *sub judice*, the questions presented are whether Pate's work-related back injury was non-disabling prior to the pulmonary emboli in September 2014, and whether her non-work-related pulmonary emboli resulted in a new loss of wage-earning capacity? The answer to these questions is undoubtedly "yes."

As to the first question, the record is clear that Pate returned to her regular, full-time job as Assistant Manager of the Copy Center at the College of Charleston on September 12, 2012, and continued working in this position, earning her regular wages despite her low back injury, for over two years before she was hospitalized with multiple pulmonary emboli, unrelated to her employment, in September 2014. Pate's supervisor testified that Pate was capable of performing all of the duties required of this job and it was available to her indefinitely. (R. p.512). Therefore, Pate's work-related back injury was not disabling as a matter of fact.

Regarding the second question, it is equally clear that Pate's disability after September 2014 is the direct result of the multiple pulmonary emboli she suffered in September 2014. Even Pate's treating physician, Dr. Nolan, stated "due to pulmonary embolisms we recommended she be placed out of work." (R. p.144). There is simply no evidence to suggest that Pate would suddenly have ceased working and earning wages

after two years in a dependable job that was available to her “indefinitely” without an intervening cause such as the multiple pulmonary emboli.

In addition, it is equally clear from the record that Pate’s multiple pulmonary emboli and anticoagulant therapy after September 2014 aggravated her low back problems. At the hearing before Commissioner Taylor Pate admitted that her back pain increased after the pulmonary emboli. (R. p.506). This aggravation is also clearly documented in the records of Dr. Nolan. For example, after being diagnosed with the pulmonary emboli in September 2014, Dr. Nolan doubled Pate’s pain medications because she was no longer able to get the relief from the medication and treatments, she availed herself of prior to the anticoagulant therapy. (R. p.140). Dr. Nolan opined that “[d]ue to her inability to receive needed injection therapy...due to pulmonary embolisms we recommend she be placed out of work.” (R. p.144).

While Pate would suggest that her near-fatal, multiple pulmonary emboli and resulting disability are of no factual or legal significance in jurisdictions where concurrent or contributing causation is sufficient, proof of “proximate cause” is essential in South Carolina, as explained by the Supreme Court in the *Geathers* case. In *Geathers*, the Supreme Court specifically rejected the argument that a pre-existing injury was a contributing cause of the employee’s disability, in favor of a bright line test requiring that proximate causation be used to determine liability. Clearly, the “proximate cause” of Pate’s disability (*i.e.*, inability to earn wages) was the multiple pulmonary emboli and resultant anticoagulant therapy. Once the proximate cause of her disability has been determined, prior contributing causes are of no legal consequence.

According to our Supreme Court, “[p]roximate cause requires proof of (1)

causation in fact and (2) legal cause.” Bramlette v. Charter Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing that Pate would not have become disabled “but for” the pulmonary emboli, while legal cause is proved by establishing foreseeability. If Pate’s sudden disability in September 2014 was not the natural and probable consequence of the December 14, 2011, work injury, such sudden disability after more than two years of full employment was not foreseeable. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996). Therefore, Pate’s work-related back injury was not the proximate cause of her disability and; therefore, this disability is not the responsibility of the Respondents under S.C. Code Ann. § 42-9-10.

IV. The Workers’ Compensation Commission’s finding that Pate suffered a 40% loss of use of the back is supported by substantial evidence and the award under S.C. Code Ann. § 42-9-30 is supported by the applicable law; therefore, the Commission’s Decision and Order should have been affirmed.

Under S.C. Code Ann. § 42-9-30’s “medical model,” the Legislature has already “statutorily presumed lost earning capacity” for Pate’s scheduled injury to her back. Wigfall v. Tidelands Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003) (citing G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958) and LARSON’S WORKERS COMPENSATION LAW § 86.02 (1999)). The Workers’ Compensation Commission was without authority to overrule the Legislature in this regard, but was constrained to weigh the evidence, including the medical impairment ratings and Pate’s limited testimony that she has “nagging pain” that affects her activities “at times.”

(R. p.497, l.9 & l.17). The Court of Appeals is similarly constrained in determining whether the impairment ratings and this testimony constitutes “substantial evidence” in support of the Commission’s finding of a 40% loss of use of the back, as there was clearly no legal error implicit in this finding. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App.2004)

Dr. Nolan’s 23% impairment rating alone constitutes substantial evidence in support of the Commission’s finding regarding Pate’s physical loss of use under S.C. Code Ann. § 42-9-30. Pate does not take issue with the credibility of her treating physician’s 23% impairment rating – she did not even seek to cross-examine Dr. Nolan on this, or any other issue. Additionally, there is no evidence that Dr. Nolan, who was in the best position to observe Pate and her medical problems, and who was in the best position to apply the AMA’s GUIDE TO THE EVALUATION OF IMPAIRMENT, underestimated that impairment. Dr. Nolan’s rating is consistent with his report on February 13, 2014, that Pate “continues to report good pain relief with her injection therapy and medication management and work restrictions.” (R. p.82). By September 4, 2014, Pate rated her pain as a “4/10 overall,” despite the fact that she was working full time in her regular job. (R. p.132). These reports simply do not support a finding that Pate’s physical loss of use of the back exceeds the 40% awarded by the Commission.

The opinions of Dr. Marzluff, Pate’s treating surgeon, also constitute substantial evidence in support of the Commission’s award. In his 2013 deposition, Dr. Marzluff testified that he believed Pate to have a “40% regional rating to her lumbar spine,” which he translated as a “30% whole person rating.” (R. pp.468--459). Dr. Marzluff further testified that he has already inflated both of these impairment ratings by adding another “ten percent or so” over and above what would be

appropriate under the AMA GUIDES to account for what he termed "chronic pain." (R. p.466, p.476). Therefore, Dr. Marzluff's impairment rating is actually commensurate with the 23% rating issued by Pate's current treating physician, Dr. Nolan. Respectfully, there is simply no competent evidence in the record that the Commission in any way underestimated Pate's physical loss of use of the back in awarding her benefits under S.C. Code Ann. § 42-9-30.

While Pate argues that, after her impairment ratings were issued, "her condition worsened" and that this worsening somehow supports mandated an even greater inflation of the medical impairment ratings by the Commission, this argument is without merit. Even Pate admits that the worsening of her condition following her multiple pulmonary emboli in September 2014 is not causally-related the December 14, 2011, work accident and; therefore, the worsening of her condition is not the responsibility of the Respondents, nor relevant to the determination of her loss of use of the back caused by the December 14, 2011, accident. Furthermore, Dr. Nolan, who was treating Pate during this time, did not amend or inflate his impairment rating after the pulmonary embolism worsened her low back pain.

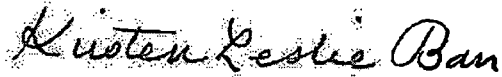
Respectfully, it is clear that the Commission – the final arbiter of the weight of the evidence – properly awarded Pate benefits for a 40% loss of use of the back based upon substantial evidence in the record and the applicable law, without resorting to impermissible surmise, conjecture and speculation. See Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965). As such, the 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).

Conclusion

Based on the arguments set forth herein above, the College of Charleston and the South Carolina State Accident Fund respectfully request that the Court of Appeals reconsider its Opinion dated July 20, 2022 and conclude that the final Decision and Order of the South Carolina Workers' Compensation Commission should be affirmed 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 Respondents request that the Court limit the scope of their 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,



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August 3, 2022

The South Carolina Court of Appeals

Patricia Pate, Employee/Claimant, Appellant,

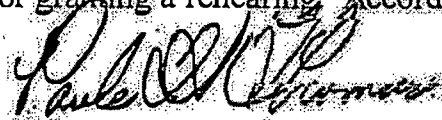
v.

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

Appellate Case No. 2019-001064

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

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FILED
Aug 12 2022

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Sep 12 2022

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.

PETITION FOR WRIT OF CERTIORARI

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Certificate of Counsel

The undersigned counsel for the Petitioners hereby certify that the Petition for Rehearing was made on August 3, 2022, and finally ruled on by the Court of Appeals on August 12, 2022.

Questions Presented

- I. Did the Court of Appeals err in failing to affirm and, in fact, entirely overlooking, the Workers' Compensation Commission's detailed finding of fact regarding Pate's claim for depression, which is supported by substantial evidence and the applicable law?
- II. Is the mandate of the Court of Appeals regarding Pate's leg claims contrary to well-established precedent requiring proof of a "disabling effect"?
- III. Did the Court of Appeals err in failing to conclude that Pate's subsequent pulmonary emboli are an intervening cause of her present condition, as a matter of fact, in accordance with substantial evidence in the record and the applicable law?
- IV. Did the Court of Appeals err in failing to affirm the Workers' Compensation Commission's award of 40% loss of use of the back under S.C. Code Ann. § 42-9-30 based upon substantial evidence in the record and the applicable law?

Statement of the Case

The Claimant, Patricia Pate, apparently experienced low back pain while assisting a co-worker with a box on December 14, 2011. (R. p.372). Prior to the December 14, 2011, accident and in the years that followed, Pate was employed by the Copy Center at the College of Charleston. She described her duties as answering the phone, greeting customers, collating and binding papers, and some computer work. (R. p.495, 11.2—10).

After the events of December 14, 2011, Pate was diagnosed with degenerative changes in her lumbar spine. (R. p.216). She received treatment from Dr. Joseph Marzluff, including surgery at L4-5 on May 15, 2012. (R. p.227). Dr. Marzluff placed Pate at maximum medical improvement on September 12, 2012, at which time she returned to her regular, full-time job as the Assistant Manager of the College of Charleston's Copy Center. (R. p.236, p.511).¹ Pate continued working in this position, earning her regular, pre-accident wages for over two more years. (R. pp.512—515).²

Pate eventually came under the care of Dr. J. Edward Nolan. Dr. Nolan reported on February 13, 2014, that Pate "continues to report good pain relief with her injection therapy and medication management and work restrictions." (R. p.82). As of February 13, 2014, Dr. Nolan stated that Pate was at maximum medical improvement and later issued an impairment rating of 23% to the spine.³ (R. p.201). Dr. Nolan noted that Pate "returned to work full time with no restrictions on April 11, 2014." As of September 4, 2014, Pate rated her pain as a "4/10 overall," despite the fact that she was working full time. (R. p.132).

Pate admitted that she began having new and different symptoms in her legs (including discoloration, swelling, and numbness) in the summer of 2014 and she also began

¹ Dr. Marzluff rated Pate's impairment at 30% of the whole person, which translates to a regional impairment rating of 40% of the lumbar spine. (R. pp.468—469). Dr. Marzluff has not evaluated Pate since September 2012. (R. p.235).

² Pate's supervisor, Ms. Cheryl Connor, who manages the College of Charleston's Copy Center, testified that this job was available to Pate indefinitely. (R. p.512, ll.7—10).

³ According to Dr. Nolan, the 23% impairment rating was inclusive of the prior impairment rating issued by Dr. Marzluff on September 19, 2012. (R. p.201).

experiencing serious shortness of breath. (R. p.22). Pate was ultimately diagnosed with multiple pulmonary emboli, which were wholly unrelated to her employment or her workers' compensation claim. (R. p.140). Pate was hospitalized for several days in September 2014. (R. p. 503, pp.381—382). Pate's supervisor, Ms. Connor, testified that as a result of the pulmonary emboli, Pate was completely out of work from September until December 2014. (R. p.516).

As a result of the multiple pulmonary emboli and necessary anticoagulant therapy, Pate was placed on work restrictions by Dr. Nolan, who stated that with previous injection therapy for her low back, Pate "continued to perform her job duties;" however, due to her new need for anticoagulant therapy she was unable to "resume injection therapy until her pulmonary embolisms are resolved," resulting in his recommendation "that she be placed out of work." (R. p.336). Dr. Nolan specifically stated that "*due to pulmonary embolisms* we recommend that she be placed out of work." (R. p.144) (emphasis added). Therefore, the Petitioners argued that, despite her work-related low back problem, Pate would be working her regular, full-time job, earning her regular wages, "but for" the fact of the newly-required anticoagulant therapy. The proximate cause of any loss of wage-earning capacity was the pulmonary emboli in 2014, not the work accident of December 14, 2011.

A hearing was held before Workers' Compensation Hearing Commissioner Aisha Taylor on July 14, 2015, to determine issues as set forth in the Form 21 and Forms 50⁴ and 51. (R.

⁴ Pate filed her initial Form 50 on November 9, 2012, alleging only an injury to the back. (R. p.66). An amended Form 50 was filed on August 28, 2014 alleging injuries to the back, legs, and depression. (R. p.68). Subsequent Forms 50 filed on September 10, 2014 and February 3, 2015 also alleged injuries to the back, legs, and depression. (R. p.69, p. 72). No Form 50 was ever filed to claim any injury to the sacroiliac joint or hips or buttocks. By Forms 51 dated

p.482, p.485 ll.15—18). Prior to the scheduled hearing, Pate filed a Form 58, Pre-Hearing Brief dated July 14, 2015, alleging injuries to the “[b]ack, legs, psyche (depression).” (R. p.74). By Form 58 dated June 29, 2015, the Petitioners argued that Pate was at maximum medical improvement for the low back injury of December 14, 2011, and that Pate was not entitled to any benefits under S.C. Code Ann. § 42-9-10 or § 42-9-30 as a matter of law because Pate’s multiple pulmonary emboli in 2014 aggravated her work-related low back injury and resulted in increased pain and new work restrictions that were not previously required. (R. pp.249—252). The Petitioners further denied Pate was entitled to any benefits for depression, as the record reveals that her depression was related to her long-term bowel incontinence, her brother’s recent battle with pancreatic cancer, and her own near-fatal pulmonary emboli. (R. p.250).

After receiving documentary evidence and testimony, Hearing Commissioner Taylor filed a Decision and Order on May 16, 2016, finding, *inter alia*, that Pate “sustained an admitted injury to her lower back” but “the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system.” Commissioner Taylor specifically found that the claim for a psychological

“is not supported by the preponderance of the evidence. Specifically, no physician has opined that [Pate] 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 [Pate’s] alleged psychological condition is

December 10, 2012; September 29, 2014, and March 3, 2015, the Respondents admitted an injury to the low back only. (R. p.67, p.70, p.73).

causally-related to her original work injury to her lower back. [Pate's] personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well." (R. p. 11).

Commissioner Taylor awarded Pate benefits for a 23% loss of use of the back under S.C. Code Ann. § 42-9-30, based in part on the fact that Pate

"was able to work full time, with her pain well controlled, prior to ... [Pate's] subsequent, intervening pulmonary embolisms .. [Pate's] current condition, subjective complaints, need for medical treatment, and work restrictions have all been significantly increased and aggravated by the subsequent, intervening pulmonary embolisms." (R. p.11).

On May 27, 2016, Pate filed a Form 30, Request for Commission Review, alleging 13 grounds for appeal. (R. pp.389—390). In her brief to the Appellate Panel dated July 18, 2016, Pate argued only five: (1) "[a]n unrelated medical condition cannot constitute an intervening cause sufficient to break the chain of causation"; (2) "[Pate's] work restrictions and need for ongoing medical treatment are directly related to her workplace injury"; (3) "[Pate] met the legal standard for post-MMI medical treatment"; (4) [Pate's] injury was not limited to her back in that she suffered from radiculopathy and psychological overlay"; and (5) "[t]he 23% permanent partial disability award to the back is based on legal error in that the [hearing] Commissioner mistakenly concluded she could not award more than Dr. Nolan's impairment rating." (R. p.396, p.400, p.404, p.405, p.409).

The Petitioners filed their Brief to the Appellate Panel on August 1, 2016. At that time, the Petitioners specifically argued that it was improper for Pate to raise new claims for the first time on appeal; specifically, her new argument that she was entitled to a general disability award under S.C. Code Ann. § 42-9-10 based upon an alleged non-scheduled injury to the sacroiliac joint. (R. pp.412—426). Pate had previously made no allegation concerning a sacroiliac joint injury in her four previous Form 50s, her Form 58, at the hearing before Commissioner Taylor, or in her May 27, 2016 Form 30, Request for Review by the Appellate Panel. (R. p.66, p.68, p.69, p.72, p.74, pp.491—492, pp.431—432). The Respondents requested that the Hearing Commissioner's May 16, 2016 Decision and Order be affirmed in accordance with the greater weight of the evidence and the applicable law. (R. p.426).

Oral arguments were held before the Commission's Appellate Panel on August 16, 2016. (R. p.16). The Appellate Panel issued its Decision and Order on December 22, 2016, affirming the Hearing Commissioner's findings and conclusions regarding the nature and extent of Pate's work-related injury, but determined that the Hearing Commissioner erred in concluding that Pate's non-work-related pulmonary emboli constituted a subsequent intervening accident. (R. pp.29—31). The Appellate Panel remanded the issue of Pate's causally-related loss of use of the back to Hearing Commissioner Taylor for reconsideration. (R. p.31).

Thereafter, Pate filed a Petition for Rehearing or Reconsideration on January 23, 2017, arguing that her back injury affected the buttocks and left leg and resulted in a psychological injury. (R. pp.427—430). Of course, Pate never filed any claim for any alleged injury to the buttocks related to the December 14, 2011 accident. (R. p.66, p.68, p.69, p.72, p.74, pp.491—492, pp.431—432). Pate's Petition was denied by Order dated February 21, 2017. Pursuant to a March 15, 2017 Consent Order, the parties agreed that under Bone v. U.S. Food Service, 404

S.C. 67, 76, 744 S.E.2d 552, 557 (2013), the Appellate Panel's Order was not immediately appealable, as it remanded the case to the jurisdictional commissioner for further findings of fact and was; therefore, interlocutory. (R. pp.32—33).

On May 24, 2018, Hearing Commissioner Taylor issued a Decision and Order on Remand without taking additional evidence or hearing any additional arguments from the parties. (R. pp.34—42). According to the May 24, 2018 Order, the Hearing Commissioner made new findings of fact that Pate's injury was "a single-member injury affecting [Pate's] lower back only" and awarded Pate benefits for a 40% loss of use of the back under S.C. Code Ann. § 42-9-30. (R. p.38).

On June 7, 2018, Pate filed her second Form 30, Request for Commission Review, alleging four grounds for appeal of the Hearing Commissioner's Order on remand. (R. pp.431—432). Pate's Brief to the Appellate Panel dated September 17, 2018, raised only two arguments: (1) "Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back;" and (2) Pate's "injury was not limited to her back in that she suffered from radiculopathy and psychological overlay." (R. p.439, p.441). The Respondents timely filed their Brief to the Appellate Panel on October 1, 2018, contending that the Hearing Commissioner properly determined that Pate is not permanently and totally disabled under S.C. Code Ann. § 42-9-30 because her causally-related loss of use of the back does not exceed 50% (and she is not entitled to pursue benefits under S.C. Code Ann. § 42-9-10). (R. pp.446-457).

Oral arguments were presented to the Appellate Panel on October 22, 2018. On October 22, 2018, counsel for the Petitioners wrote to alert the Appellate Panel about an error in the record, which is relevant to the issues on appeal. (R. p. 60). Specifically, the Hearing Commissioner's May 22, 2019 Order on remand misquoted the Appellate Panel's Finding of

Fact #9 by adding two additional sentences. At the Appellate Hearing, during oral argument, the Pate's attorney relied upon this scrivener's error, which pertained to the effect of Pate's non-work-related pulmonary emboli on her physical condition, her ability to work, and her need for medical treatment.

The Appellate Panel issued its Order on May 31, 2019, affirming the Decision and Order of the Hearing Commissioner on remand, with amendment of the scriveners' error contained in Finding of Fact #9. (R. p.60). Thereafter, Pate appealed to the South Carolina Court of Appeals.

By Order dated July 20, 2022, the Court of Appeals reversed the final Decision and Order of the Workers' Compensation Commission dated May 31, 2019 (R. p.34) and remanded the claim for the Commission to "evaluate the substance of Pate's claim for a general disability claim" based on her allegations of "pain radiating into other parts of her body" and "pain-related depression." According to the Court of Appeals, the Commission "gave no reasoning" in its order for denying additional benefits as a result of these allegations under S.C. Code Ann. § 42-9-10. Respectfully, the Court of Appeals wholly overlooked the Commission's detailed finding of fact that Pate had "not met her burden of proving" that she "has any disability or work restrictions as a result of any alleged psychological injury." (R. p.62 #7). The Petitioners respectfully contend that this finding, which is supported by substantial evidence in the record, should have been affirmed by the Court of Appeals and that; therefore, the mandate to consider an award of additional benefits for an alleged psychological injury on remand is improper.

Furthermore, the Petitioners respectfully contend that the Court of Appeals erred as a matter of law by suggesting that Pate's subjective complaints of pain "in other parts of her body" constitute "ample evidence" to support an award under S.C. Code Ann. § 42-9-10. This analysis of the Court of Appeals directly conflicts with prior appellate decisions holding that such

subjective complaints are insufficient to prove the requisite disabling effect or impairment of a second body member such that Pate could be entitled to pursue general disability benefits under that statute. It would appear that the Court of Appeals improperly rejected the sound reasoning of precedent by remanding the claim to the Commission to reconsider legally insufficient subjective allegations.

In addition, the Petitioners respectfully contend that the Court improperly rejected substantial evidence in the record supporting the Commission's finding that Pate sustained a 40% loss of use of the back as a result of her work accident, as well as the substantial evidence that the proximate cause of any disability or loss of wage-earning capacity was Pate's subsequent, intervening pulmonary emboli. Therefore, pursuant to Rule 242, S.C.R.C.R., the Petitioners respectfully request that the South Carolina Supreme Court grant this Petition to review the decision of the Court of Appeals and issue a new order affirming the final Decision and Order of the Workers' Compensation Commission in accordance with the Administrative Procedures Act. In the alternative, the Respondents request that the Court limit the scope of 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.

Arguments

- I. The Court of Appeals erred in failing to affirm (and entirely overlooking) the Workers' Compensation Commission's detailed finding of fact regarding the depression claim, which is supported by substantial evidence and the applicable law.

The Court of Appeals remanded this claim to the Workers' Compensation Commission with a mandate to consider whether Pate is entitled to general disability benefits under S.C. Code Ann. § 42-9-10 as a result of alleged "pain-related depression," suggesting that the Commission did not consider the depression claim or give any reasoning for its denial. The Court's July 20, 2022, Opinion clearly overlooks the Commission's specific finding of fact regarding Pate's claim for "psyche (depression)," which reads as follows:

"7. Claimant has not met her burden of proving a psychological injury casually related to her original injury. Her claim is not supported by the preponderance of the evidence. **Specifically, no physician 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.62--63) (emphasis added).

Despite this specific finding of fact, the Order of the Court of Appeals makes no mention of it, or of the substantial evidence in the record supporting the Commission's denial of benefits for any alleged psychological injury. Instead, the Court of Appeals inexplicably mandated that the Commission reconsider the psychological claim on remand.

Proper consideration of the Commission's finding regarding the psychological claim, and the substantial evidence supportive of that finding, should have resulted in a full affirmation in

accordance with the Administrative Procedures Act. See Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct.App.2005) (holding that a reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"); see also S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Therefore, the Petitioners respectfully contend that the Supreme Court should reverse the decision of the Court of Appeals and affirm the Commission's specific finding of fact regarding Pate's alleged psychological condition 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 the medical records submitted into evidence and even Pate's own testimony. At the evidentiary hearing on July 14, 2015, Pate's attorney did not ask her any questions about any alleged psychological injury or depression. (R. pp.493—500). At no time during that hearing did Pate give testimony to support any allegation of a psychological injury or depression related to her low back injury. (R. pp.493—508). While Pate did testify that her brother's recent death from pancreatic cancer was "very stressful" for her and resulted in her seeking medications from her family physician, Pate testified that was feeling better at the time of the hearing. (R. p.507). Therefore, not even Pate's own testimony could support a finding that she sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

The records Carolina Family Medicine indicate that Pate first complained of a three-to-four-year history of "stress" in January 2013, which was aggravated by "work stressors" and her "brother dying from pancreatic cancer." (R. p.264). While her family physicians also noted "stress" on other occasions, (R. p.269, p.271, p.284, p.286, p.288, p.293, p.296), it was always attributed to undefined "work stressors" and her "brother dying from pancreatic cancer," not her low back injury that is the subject of this workers' compensation claim. In addition, at no time did Carolina Family Medicine indicate that Pate required any work restrictions because of her "stress," much less opine that the condition resulted in any permanent impairment. As such, these records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

Pate described her alleged work stressors to her hematologist, Dr. Rose, in December 2014. (R. p.357). According to Pate, her job was "apparently transitioning to a new computer system, and she is concerned about her ability to perform her job."²⁵ In response, Dr. Rose "offered her words of encouragement regarding her job and also offered her ways she could help train herself with the computer system." Dr. Rose's records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

Dr. Dyana Lowndes-Rosen was the only psychiatrist to evaluate Pate. According to Dr. Lowndes-Rosen, Pate's emotional symptoms were due to a "chronic pain syndrome." (R. p.368). However, Dr. Lowndes-Rosen concluded that she had

²⁵"Stress, mental injuries ... are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations..." S.C. Code Ann. § 42-1-160(C).

“no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. [Pate] also expressed her belief that she has no need for mental health involvement.” (R. p.368).

Dr. Lowndes-Rosen did not recommend any work restrictions or find any permanent psychological impairment. Accordingly, Dr. Lowndes-Rosen’s records do not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

While Trident Pain Center Nurse Practitioner Allison Davis stated on August 21, 2014, -- shortly before her new leg pain and swelling was diagnosed as multiple pulmonary emboli -- that Pate was depressed due to “pain and increased pressures/stressors,” neither Ms. Davis, nor her supervisor, Dr. Nolan, commented on these symptoms further. More importantly, neither Ms. Davis, nor Dr. Nolan, ever issued any work restrictions for these symptoms and never indicated that they resulted in any permanent impairment. In fact, after September 4, 2014, there is no mention of any symptoms of depression or stress in the next 17 office notes from Trident Pain Center. Therefore, the records of Trident Pain Center do not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

Ms. Davis referred Pate to a psychologist, Dr. Kee, for a one-time evaluation on September 22, 2014. Apparently, Pate complained to Dr. Kee that “there has been conflict that her supervisor has pushed her to do new jobs on the computer ... she reports having problems with anxiety and going to sleep because of worrying about work,” though Pate admitted she had

been taking the sleeping medication, Ambien, since 2010 (prior to the work accident). Although Dr. Kee diagnosed a "[m]ajor depressive disorder, single episode, moderate," he did in any way indicate that Pate's depression was permanent or disabling. Therefore, the one-time evaluation of Dr. Kee a year prior to the hearing does not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

Because the findings of the Commission are presumed correct and it is otherwise not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence, the Supreme Court should reverse the mandate of the Court of Appeals requiring that the Workers' Compensation Commission reconsider the "substance" of Pate's claim for "psyche (depression)." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999). Furthermore, because the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and even 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 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 mandate of the Court of Appeals regarding the leg claim is contrary to well-established precedent requiring proof a "disabling effect."

According to the July 20, 20222, Opinion of the Court of Appeals, the Workers' Compensation Commission must reconsider whether Pate is entitled to general disability benefits under S.C. Code Ann. § 42-9-10 because "the record contains ample markers of a colorable claim that the effects of Pate's back injury extend beyond her back." According to Pate's own testimony, the substance of her leg injury claim⁶ is that pain "sometimes...leads down to [her] – into [her] right thigh⁷ through [her] buttocks." (R. p.497, ll.11-15) (emphasis added). No physician issued any impairment rating for, or restriction on the use of, either of Pate's legs. More importantly, intermittent subjective complaints are legally insufficient to support a general disability claim under S.C. Code Ann. § 42-9-10. Therefore, the mandate of the Court of Appeals for the Commission to reconsider such legally insufficient evidence under S.C. Code Ann. § 42-9-10 is plainly contrary to long established and recently reaffirmed legal standards, which require evidence of a "disabling effect" on a second body member.

According to the South Carolina Supreme Court in the seminal case of Singleton v. Young Lumber Company, "[w]here the injury is confined to the scheduled member, and there is

⁶ While Pate did allege an unspecified injury to "the legs," she did not ever file a claim for any alleged injury to the hips, or knees, or ankles, or sacroiliac joint, or any other injury "beyond her back." (R. p.68, p.69, p.72, p.74).

⁷ According to the Court's Opinion, Pate's medical records "reference pain in her *left* leg and hip." (emphasis added). However, the Claimant gave no testimony regarding any problem with her *left* leg and, again, at no time did she ever file any claim for any alleged injury to either hip. (R. pp.66, 68, 69, 72, 74).

no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation” pursuant to S.C. Code Ann. § 42-9-30. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). Singleton intended that “impairment” in this regard mean a “physical deficiency.” *Id.* Accordingly, entitlement to benefits for permanent and total disability benefits under S.C. Code Ann. § 42-9-10 requires, not only proof that another body part has been “affected” by the work injury, but that another body part is permanently “impaired.” Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*) (emphasis added). Indeed, in Colonna, *supra*, the Court of Appeals reasoned that “the question of whether [a claimant] is totally and permanently disabled, and thus entitled to recovery under Section 42-9-10, turns on whether the initial injury had a ‘disabling effect’ on other parts of her body.” *Id.*

Here, despite Pate’s intermittent subjective complaints, there is absolutely no evidence that her work-related back injury had a “disabling effect” on her legs. No doctor ever issued an impairment rating for Pate’s intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source. According to Dr. Nolan (Pate’s pain management physician), the location of Pate’s pain was repeatedly stated to be simply “lower back” (R. pp. 75, 78, 105, 156, 161, 173, 185, 192, 199) or “low back” (R. pp. 81, 90, 108, 110, 116, 125, 132, 142, 143, 145, 146, 154, 158, 178, 181, 182, 197). At no time did Dr. Nolan ever suggest that any intermittent leg complaint was a factor in his spinal impairment rating (much less necessitate a separate impairment rating to either leg,) nor did he opine that Pate required any work restrictions as a result of any leg symptoms.

Furthermore, according to Pate’s surgeon, Dr. Marzluff, the only body part “injured” on December 14, 2011, was Pate’s “back” and the only body part “affected” was her “spine.” (R.

p.236). Even at his deposition, Dr. Marzluff never suggested that Pate had any permanent impairment of her legs, nor did he suggest that his spinal impairment rating was based on any such complaint or that Pate was in any way disabled or limited by any alleged leg problem. The issue was not even raised to Dr. Marzluff (or Dr. Nolan) by Pate's attorney.

Moreover, Pate has a number of non-work-related leg problems, including a pre-existing ankle injury, which according to Pate remain symptomatic. (R. p.503, lines2—3; pp.256-259). Pate also admits that in 2014 she began having new and different symptoms with respect to her legs, including swelling and discoloration, which was specifically noted by the Commission (R. p.502, ll.19-21, p.5)). According to her personal physicians' records, in May 2014, Pate began noticing these new symptoms in both feet and legs. (R. p.277). By July 2014, she was reportedly experiencing "tingling in both feet and some swelling in lower legs," in addition to discoloration of the skin of both feet and lower legs, "which began 2 months" earlier. (R. p.277). Pate was diagnosed with "Edema/Bilateral peripheral – New" in August 2014. (R. p.280). Pate testified that she initially assumed these new leg and foot symptoms in 2014 were caused by the pre-existing April 2011 ankle injury. (R. p.503, pp.256–259). However, her hematologists subsequently diagnosed her with chronic venous stasis in the legs and non-pitting edema due to her non-work-related pulmonary emboli. (R. pp.352–361). By November 2014, Pate was also complaining of another "new" problem:

"pain to the left lower leg and behind the left knee, which did not result from an injury which began 1 month ago. The patient characterized it as stabbing pain when standing up. Severity – worsening. Aggravating factors: weight bearing, standing, walking and bending knee. Relieving factors: nothing. On Xarelto.

History of multiple pulmonary embolisms.” (R. pp. 288—289).

However, there is no competent medical evidence that the leg and foot symptoms Pate was experiencing in the second half of 2014 were causally related to her work-related low back injury.

More importantly, there is no competent evidence that the work-related low back injury caused any physical deficiency or impairment of the legs, much less evidence of any “disabling effect” on her legs. Again, the record contains no impairment rating for either leg and no restrictions on their use. The mere fact that Pate made various complaints about her legs, the most severe of which are wholly unrelated to her work accident, does not constitute “a colorable claim” that Pate has any “impairment of any other part of her body because of” her work-related low back injury. Singleton v. Young Lumber, 236 S.C. 454, 114 S.E.2d 837(1960). Because “a claimant must prove not only that another body part was affected ... but that another body part was impaired or injured for section 42-9-10 to apply,”⁸ the Petitioners respectfully contend that the mandate of the Court of Appeals is premised upon an error of law, necessitating reversal by the Supreme Court.

III. The Court of Appeals erred in failing to conclude that Pate’s subsequent pulmonary emboli are an intervening cause of her present condition, as a matter of fact, based upon substantial evidence in the record and the applicable law.

Even assuming, *arguendo*, that Pate was entitled to pursue benefits under S.C. Code Ann. § 42-9-10, Pate is not entitled to benefits for permanent and total disability as a result of the

⁸ Colonna v. Marlboro Park Hosp., 404 S.C. 537, 545, 745 S.E.2d 128 (2013).

December 14, 2011, accident because 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 thereafter. Therefore, Pate had no "incapacity for work resulting from" the December 14, 2011, injury back injury during this period, but had a dependable job. 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. As a matter of fact, it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have.

In Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007), the Supreme Court reaffirmed the well-established "Gordon Rule," which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers' compensation claims. In applying the "Gordon Rule" to the facts *sub judice*, the questions presented are whether Pate's work-related back injury was non-disabling prior to the pulmonary emboli in September 2014, and whether her non-work-related pulmonary emboli resulted in a new loss of wage-earning capacity? The answer to these questions is undoubtedly "yes."

As to the first question, the record is clear that Pate returned to her regular, full-time job as Assistant Manager of the Copy Center at the College of Charleston on September 12, 2012, and continued working in this position, earning her regular wages despite her low back injury, for over two years before she was hospitalized with multiple pulmonary emboli, unrelated to her employment, in September 2014. Pate's supervisor testified that Pate was capable of performing all of the duties required of this job and it was available to her indefinitely. (R. p.512). Therefore, Pate's work-related back injury was not disabling as a matter of fact.

Regarding the second question, it is equally clear that Pate's disability after September 2014 is the direct result of the multiple pulmonary emboli she suffered in September 2014. Even Pate's treating physician, Dr. Nolan, stated "due to pulmonary embolisms we recommended she be placed out of work." (R. p.144). There is simply no evidence to suggest that Pate would suddenly have ceased working and earning wages after two years in a dependable job that was available to her "indefinitely" without an intervening cause such as the multiple pulmonary emboli.

In addition, it is equally clear from the record that Pate's multiple pulmonary emboli and anticoagulant therapy after September 2014 aggravated her low back problems. At the hearing before Commissioner Taylor, Pate admitted that her back pain increased after the pulmonary emboli. (R. p.506). This aggravation is also clearly documented in the records of Dr. Nolan. For example, after being diagnosed with the pulmonary emboli in September 2014, Dr. Nolan doubled Pate's pain medications because she was no longer able to get the relief from the medication and treatments, she availed herself of prior to the anticoagulant therapy. (R. p.140). Dr. Nolan opined that "[d]ue to her inability to receive needed injection therapy...due to pulmonary embolisms we recommend she be placed out of work." (R. p.144).

While Pate would suggest that her near-fatal, multiple pulmonary emboli and resulting disability are of no factual or legal significance in jurisdictions where concurrent or contributing causation is sufficient, proof of "proximate cause" is essential in South Carolina, as explained in the Geathers case. In Geathers, the Supreme Court specifically rejected the argument that a pre-existing injury was a contributing cause of the employee's disability, in favor of a bright line test requiring that proximate causation be used to determine liability. Clearly, the "proximate cause" of Pate's disability (*i.e.*, inability to earn wages) was the multiple pulmonary emboli and

resultant anticoagulant therapy. Once the proximate cause of her disability has been determined, prior contributing causes are of no legal consequence.

According to this Court, “[p]roximate cause requires proof of (1) causation in fact and (2) legal cause.” Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing that Pate would not have become disabled “but for” the pulmonary emboli, while legal cause is proved by establishing foreseeability. If Pate’s sudden disability in September 2014 was not the natural and probable consequence of the December 14, 2011, work injury, such sudden disability after more than two years of full employment was not foreseeable. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996). Therefore, Pate’s work-related back injury was not the proximate cause of her disability and; accordingly, this disability is not the responsibility of the Petitioners under S.C. Code Ann. § 42-9-10. Respectfully, the Supreme Court should grant a Writ of Certiorari and reverse the decision of the Court of Appeals which mandates that the Commission reconsider a general disability claim to which she is neither factually, nor legally, entitled.

IV. The Workers’ Compensation Commission’s finding that Pate suffered a 40% loss of use of the back is supported by substantial evidence and the award under S.C. Code Ann. § 42-9-30 is supported by the applicable law; therefore, the Commission’s Decision and Order should have been affirmed by the Court of Appeals.

According to the Court of Appeals, “[w]eighing impairment ratings as part of arriving at a percentage of disability strikes us as a task that the Legislature envisioned entrusting to members of the commission...” (emphasis added). This statement by the Court of Appeals betrays a fundamental misunderstanding of S.C. Code Ann. § 42-9-30, which prejudicially and

erroneously affects the Workers' Compensation Commission's mandate on remand.

Respectfully, the question for the Commission under S.C. Code Ann. § 42-9-30 is not Pate's "percentage of disability,"⁹ but the degree to which she has sustained a physical "loss of use."

Under S.C. Code Ann. § 42-9-30's "medical model," the Legislature has already "statutorily presumed lost earning capacity" for Pate's scheduled injury to her back. Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003); S.C. Code Ann. § 42-9-30 (stating that "[i]n cases included in the following schedule, the disability in each case is considered to continue for the period specified..."). In Wigfall, the Supreme Court further explained that "... the medical model, provides awards for disability **based upon degrees of medical impairment to specified body parts.**" (emphasis added) (citing G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958) and LARSON'S WORKERS COMPENSATION LAW § 86.02 (1999); see also Dykes v. Daniel Constr., 262 S.C. 98, 202 S.E.2d 646 (1974) (holding that compensation depends upon "functional loss," not earning capacity); Dunmore v. Brooks Veneer Co., 248 S.C. 326, 149 S.E.2d 766 (1969) (holding that compensation depends on the "character of the injury," not lost earnings). Therefore, the Workers' Compensation Commission and the appellate courts are constrained to weigh the evidence bearing on the "degree of medical impairment," or physical loss of use of the specific body part, because the corresponding degree of "disability" has already been conclusively determined by the Legislature. Here, the relevant evidence includes the medical impairment ratings and Pate's limited testimony that she has "nagging pain" that affects her activities "at times." (R. p.497, l.9 & l.17). For the Court of Appeals to suggest

⁹ "Disability" is a term of art defined by S.C. Code Ann. § 42-1-120 to mean "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

that the Commission should determine the “percentage of disability” in a scheduled member case under S.C. Code Ann. § 42-9-30 is an error of law, which necessitates reversal.

The Court of Appeals further erred in failing to conclude that the impairment ratings and this testimony in this case constitute “substantial evidence” in support of the Commission’s finding that Pate sustained a 40% loss of use of the back under S.C. Code Ann. §42-9-30, as there was clearly no legal error implicit in this finding. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct. App. 2004). Dr. Nolan’s 23% impairment rating alone constitutes substantial evidence in support of the Commission’s finding in this regard. Pate does not take issue with the credibility of her treating physician’s 23% impairment rating – she did not even seek to cross-examine Dr. Nolan on this, or any other issue. Additionally, there is no evidence that Dr. Nolan, who was in the best position to observe Pate and her medical problems, and who was in the best position to apply the AMA’s GUIDE TO THE EVALUATION OF IMPAIRMENT, underestimated that impairment. Dr. Nolan’s rating is consistent with his report on February 13, 2014, that Pate “continues to report good pain relief with her injection therapy and medication management and work restrictions.” (R. p.82). By September 4, 2014, Pate rated her pain as a “4/10 overall,” despite the fact that she was working full time in her regular job. (R. p.132). These reports simply do not support a finding that Pate’s physical loss of use of the back exceeds the 40% awarded by the Commission and; therefore, the award should have been affirmed by the Court of Appeals.

The opinions of Dr. Marzluff, Pate’s surgeon, also constitute substantial evidence in support of the Commission’s award. In his 2013 deposition, Dr. Marzluff testified that he believed Pate to have a “40% regional rating to her lumbar spine,” which he translated as a “30% whole person rating.” (R. pp.468--459). Dr. Marzluff further testified that he has already

inflated both of these impairment ratings by adding another "ten percent or so" over and above what would be appropriate under the AMA GUIDES to account for what he termed "chronic pain." (R. p.466, p.476). Therefore, Dr. Marzluff's impairment rating is actually commensurate with the 23% rating issued by Pate's current treating physician, Dr. Nolan. Respectfully, there is simply no competent evidence in the record that the Commission in any way underestimated Pate's physical loss of use of the back in awarding her benefits under S.C. Code Ann. § 42-9-30.

While Pate argues that, after her impairment ratings were issued, "her condition worsened" and that this worsening somehow supports mandated an even greater inflation of the medical impairment ratings by the Commission, this argument is without merit. Even Pate admits that the worsening of her condition following her multiple pulmonary emboli in September 2014 is not causally-related the December 14, 2011, work accident and; therefore, the worsening of her condition is not the responsibility of the Respondents, nor relevant to the determination of her loss of use of the back caused by the December 14, 2011, accident. Furthermore, Dr. Nolan, who was treating Pate during this time, did not amend or inflate his impairment rating after the pulmonary embolism worsened her low back pain.

Respectfully, it is clear that 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 substantial evidence in the record and the applicable law, 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 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).

Conclusion

Based on the arguments set forth 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,



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September 12, 2022

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Oct 24 2022

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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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 OxyContin, 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 “envison[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

¹Although 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]”); Therrell 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

²The 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. Brucoli, 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.”

⁴DRE 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 misled 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

⁵Other 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 1-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

⁶A 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

⁷See, 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).

⁸Dr. 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.

⁹In 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 anticoagulant 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].

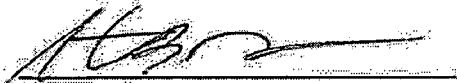
The disabling work restrictions are directly due to the workplace injury – assigned by Dr. Nolan. *Pate has no restrictions from the pulmonary embolus.* As such, she has met her burden of proving total and permanent disability.

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,



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October 24, 2022
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Nov 03 2022

Appeal From the South Carolina
Workers' Compensation Commission

S.C. SUPREME COURT

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**

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Questions Presented in Reply

- I. Did the Court of Appeals fail to address the Workers' Compensation Commission's detailed finding of fact regarding Pate's depression claim and thus fail to apply the appropriate standard to review that finding?
- II. Should a reviewing court make its own findings of fact on appeal based on conflicting evidence regarding Pate's leg claim?
- 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*

¹The 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.2d 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 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 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 thigh³ 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

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 award⁴ 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

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, 1.9 & 1.17). 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,



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ATTORNEYS FOR THE PETITIONERS

November 3, 2022

The Supreme Court of South Carolina

Patricia Pate, Employee/Claimant, Respondent,

v.

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

Appellate Case No. 2022-001260

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted. The parties shall proceed to serve and file ten additional copies of the appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia M. Howard
CLERK

Columbia, South Carolina
September 12, 2023

cc:

Margaret Mary Urbanic, Esquire
Mikell Holbrook Wyman, Esquire
Page Hilton, Esquire
Kirsten Leslie Barr, Esquire
Stephen Benjamin Samuels, Esquire
Max Capper Sparwasser, Esquire
The Honorable Jenny Abbott Kitchings

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)
Appellate Case No. 2022-001260

Patricia Pate, Employee.....Respondent,

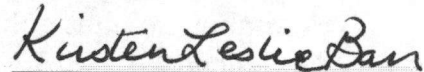
v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appendix complies with Rule 211(b),
SCACR, and Supreme Court Order 2007-08-16-02, dated October 11, 2023, requiring
redaction of personal data identifiers.

October 11, 2023


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