

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From the South Carolina
Workers' Compensation Commission

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

Patricia Pate, Employee, Respondent.

v.

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

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW	8
ARGUMENT	9
1. Respondent’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.....	10
A. Two-Body Part Rule.....	10
B. Psychological Overlay.....	14
C. Radiculopathy from the back affecting the buttocks, hips and legs	18
D. Injury to the sacroiliac joint	25
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.....	27
A. There is no legal authority for the proposition that an unrelated medical condition can defeat a disability claim arising out of a work-related injury.....	27
B. There is no evidence to show that the pulmonary emboli are the cause of Pate’s total and permanent disability	30
3. Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back	36
4. Pate is permanently and totally disabled as no employer is able to accommodate the restrictions resulting from her work injury	40

CONCLUSION..... 44

TABLE OF AUTHORITIES

CASES

<u>Allen v. Industrial Commission,</u> 347 P.2d 710 (Arizona 1959)	33
<u>Brockel v. N.D. Workforce Safety & Ins.,</u> 843 N.W.2d 15 (N.D. 2014)	28
<u>Brown v. Owen Steel Co.,</u> 316 S.C. 278, 450 S.E.2d 57 (Ct.App.1994)	12
<u>Bundrick v. Powell's Garage and Wrecker Service,</u> 248 S.C. 496, 151 S.E.2d 437 (1966)	38 n.9
<u>Burnette v. City of Greenville,</u> 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)	8
<u>Clark v. Philips Electronics/Shakespeare,</u> 433 S.C. 186, 195, 857 S.E.2d 378, 382 (Ct. App. 2021)	16
<u>Clemmons v. Lowe's Home Ctrs., Inc.,</u> 420 S.C. 282. 803 S.E.2d 268 (2017)	10, 39 n.11
<u>Colonna v. Marlboro Park Hospital,</u> 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013)	23-24
<u>Cropfv. Pantry, Inc.,</u> 289 S.C. 106,344 S.E.2d 879 (Ct. App. 1986)	38 n.9
<u>Dodge v. Brucoli, Clark, Layman, Inc.,</u> 334 S.C. 574,514 S.E.2d 593 (Ct. App. 1999)	17
<u>Doe v. South Carolina Dept. of Disabilities and Special Needs,</u> 377 S.C. 346, 660 S.E.2d 260 (2008)	15
<u>Dykes v. Daniel Constr. Co.,</u> 262 S.C. 98,202 S.E.2d 646 (1974)	17
<u>Estate of Ensley v. Anglo Alask Const. Inc.,</u> 773 P.2d 955 (Alaska 1989)	29

<u>Geathers v. 3V, Inc.</u> , 371 S.C. 570, 641 S.E.2d 29 (2007)	27
<u>Getsinger v. Owens-Corning Fiberglas Corp.</u> , 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)	16, 18
<u>Gilliam v. Woodside Mills</u> , 461 S.E.2d 818, 319 S.C. 385 (1995)	25-26
<u>Gupton v. Builders Transport</u> , 357 S.E.2d 674 (N.C. 1987)	12
<u>Hilton v. Flakeboard Am. Ltd.</u> , 418 S.C. 245, 791 S.E.2d 719 (2016)	9-10
<u>Hines v. Pacific Mills</u> , 214 S.C. 125, 51 S.E.2d 383 (1949)	10
<u>Hutson v. S.C. State Ports Authority</u> , 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010)	13-14, 19, 24, 38 n.9
<u>Hutson v. S.C. State Ports Authority</u> , 399 S.C. 381, 732 S.E.2d 500 (2012)	8, 13, 19, 24, 32, 38 n.9
<u>Lancaster Cnty. Bar Ass'n v. S.C. Comm'n on Indigent Defense</u> , 380 S.C. 219, 670 S.E.2d 371 (2008)	39
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 276 S.E.2d 304 (1981)	8
<u>Linen v. Ruscon Construction Co.</u> , 286 S.C. 67, 332 S.E.2d 211 (1985)	38, 38 n.9
<u>Lyles v. Quantum Chemical Co.</u> , 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)	38 n.9
<u>Mauldin v. Dyna-Color/Jack Rabbit</u> , 416 S.E.2d 639, 308 S.C. 18 (1991)	17 n.3
<u>McLean v. Eaton Corp.</u> , 481 S.E.2d 289 (N.C. App. 1997)	12

<u>Moore v. Component Assembly Sys.,</u> 857 A.2d 549 (2004)	28 n.8
<u>Orr v. Elastomeric Prods.,</u> 323 S.C. 342, 474 S.E.2d 448 (Ct. App.1996)	28, 28 n.8, 31
<u>Pate v. College of Charleston,</u> 437 S.C. 139, 876 S.E.2d 877 (Ct.App. 2022)	<i>passim</i>
<u>Peoples v. Cone Mills Corp.,</u> 342 S.E.2d 798, 805 (N.C. 1986)	32-33
<u>Peoples v. Henry Co.,</u> 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)	38 n.9
<u>Pierre v. Seaside Farms, Inc.,</u> 386 S.C. 534, 689 S.E.2d 615 (2010)	8
<u>Potter v. Spartanburg Sch. Dist. 7,</u> 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011)	8
<u>Randolph v. Fiske-Carter Constr. Co.,</u> 240 S.C. 182, 125 S.E.2d 267 (1962)	10
<u>Roper v. Kimbrell's of Greenville,</u> 231 S.C. 453, 99 S.E.2d 52 (1957)	37
<u>Russell v. Wal-Mart Stores, Inc.,</u> 426 S.C. 281, 826 S.E.2d 863 (2019)	9
<u>Simmons v. City of Charleston,</u> 349 S.C. 64, 562 S.E.2d 476 (Ct.App.2002)	13
<u>Singleton v. Young Lumber Co.,</u> 236 S.C. 454, 114 S.E.2d 837 (1960)	13
<u>Solomon v. W.B. Easton, Inc.,</u> 307 S.C. 518,415 S.E.2d 841 (Ct.App. 1992)	38 n.9
<u>Therrell v. Jerry's Inc.,</u> 633 S.E.2d 893, 370 S.C. 22 (2006)	15

<u>Thomas v. Burggraf Restoration,</u> 31 P.3d 402 (Okla.Ct.Civ.App.2001)	28 n.8
<u>Thurston v. Guys With Tools, Ltd.,</u> 217 P.3d 824 (Alaska 2009)	28-30, 28 n.8
<u>Tims v. J.D. Kitts Constr.,</u> 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 2011)	29
<u>Whitfield v. Daniel Constr. Co.,</u> 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954)	29
<u>Wigfall v. Tideland Utils., Inc.,</u> 354 S.C. 100, 580 S.E.2d 100 (2003)	12-14, 23
<u>Wood v. Fletcher Allen Health Care,</u> 739 A.2d 1201 (Vt. 1999)	28 n.8
<u>Workmen's Comp. Appeal Bd. v. Chamberlain Mfg. Corp.,</u> 336 A.2d 659 (Pa. Commw. Ct. 1975)	28 n.8
<u>Wynn v. People's Natural Gas Co. of S. C.,</u> 238 S.C. 1, 118 S.E.2d 812 (1961)	8, 31-32, 42

STATUTES

S.C. Code Ann. § 1-23-380 (Supp. 2011)	8
S.C. Code Ann. § 42-1-160 (2007)	14 n.1, 17-18
S.C. Code Ann. § 42-9-10 (2007)	1, 11
S.C. Code Ann. § 42-9-20 (2007)	11
S.C. Code Ann. § 42-9-30 (2007)	11-13, 36

REGULATIONS

S.C. Code Ann.Reg. 67-411 (2008)	17 N.3
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SECONDARY SOURCES

- 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 10.01 (2010) 29-30
- 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987) 12
- 2015 ICD-9-CM 16 n.2
- Beard, Poteat, Lamar, Sumwalt, *The Law of Workers' Compensation Insurance in South Carolina* (3rd ed. 2003), § 11-24. 22,
- Linda Cocchiarella and Gunnar B.J. Andersson,
Guides to the Evaluation of Permanent Impairment (5th ed.) 19 N.4, 37-39, 39 n.11

STATEMENT OF ISSUES ON APPEAL

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 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 under § 42-9-10 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].

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].

Respondent 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].

Respondent 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].

Respondent timely appealed to the South Carolina Court of Appeals. Oral argument was held on April 12, 2022. The court reversed and remanded on July 20, 2022. Pate v. College of Charleston, 437 S.C. 139, 876 S.E.2d 877 (Ct.App. 2022).

The Court of Appeals denied Rehearing on August 12, 2022.

Petitioners filed a Petition for Writ of Certiorari on September 12, 2022. The Court granted the Petition on September 12, 2023.

STATEMENT OF THE FACTS

The Respondent, 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 a 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-coagulant] 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 LESI 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 LWOP (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

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, 437 S.C. 139, 141-142, 876 S.E.2d 877, 878 (Ct.App. 2022). The court reversed and remanded with instructions “envisio[n]g 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, it is in being too circumspect regarding the Appellate Panel’s findings of fact on disability. 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, 437 S.C. 139, 147, 876 S.E.2d 877, 880-881 (Ct.App. 2022).

The ultimate issue 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 a 12-year old case remanded once already -- seems to run afoul of Hilton and Russell.

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, thus entitling her to a disability award under the economic model. The court did not specifically address the injury to the SI joint.

A. 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, 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 compensated 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 affirm the Court of Appeals 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.”

B. 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 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, 437 S.C. 139, 145, 876 S.E.2d 877, 880 (Ct.App. 2022). This finding does not invade the Commission’s fact-finding role as the medical evidence of psychological overlay caused by the

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.” Petitioners’ 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).

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 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 (Ct. 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 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

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.

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 "causally related or connected to the accident or injury" S.C. Code Ann. § 42-1-160 (D)(2007). 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 e.g., Dykes v. Daniel Constr. Co., 262 S.C. 98,202 S.E.2d 646 (1974)(claimant entitled to additional medical treatment for eye even though he had returned to work and been compensated for 100% loss of eye); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574,514 S.E.2d 593 (Ct. App. 1999)("an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement"). See

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.Reg. 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.")

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. See S.C. Code Ann. § 42-1-160 (D)(2007)("found to be causally related or connected to the accident or injury by an authorized psychologist or psychiatrist.").

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 Petitioners, 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 affirm the Court of Appeals finding on psychological overlay.

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, 437 S.C. 139, 144, 876 S.E.2d 877, 879

(Ct.App. 2022). 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.” [Brief of Petitioners, page 17]. 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.” [Brief of Petitioners, page 17].

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.’” [Brief of Petitioners, page

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.

18]. 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].

A handful of reports lend at best a bare scintilla of credence to Petitioners' argument. The reports from October 4, 2013 and November 15, 2013 do not mention leg pain or weakness nor SI 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.⁵ [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

⁵Although Petitioners 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.

radiculitis, leg pain and numbness, and SI joint pain returned after the injections had worn off.⁶ 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, 437 S.C. 139, 144, 876 S.E.2d 877, 879 (Ct.App. 2022)(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.” [Brief of Petitioners, 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 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,

⁶Other 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].

and I pay the consequences for that, and that's about it." [R.P. 497, lines 11-25].

In their argument, Petitioners 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 distinguishable on the facts and law.

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 pain 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. The 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; and (2) 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 more than twenty-five pounds on a frequent basis. However, Hutson “suffered radicular symptoms in his right leg that affected the functioning of the limb.” The Court of Appeals 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)(holding radiculopathy into leg constituted a second body part thus allowing an award for lost earnings capacity).

Petitioners 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.”⁷ [Brief of Petitioners, page 18]. Hutson

⁷On 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. 335]. A restriction on standing is inherently a restriction on the use of one’s legs.

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.

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 v. College of Charleston, 437 S.C. 139, 144, 876 S.E.2d 877, 879 (Ct.App. 2022). The evidence detailed herein confirms that, as with the psychological overlay, the evidence the back injury affects other body parts is all one-way. Therefore, the opinion of the Court of Appeals should be affirmed.

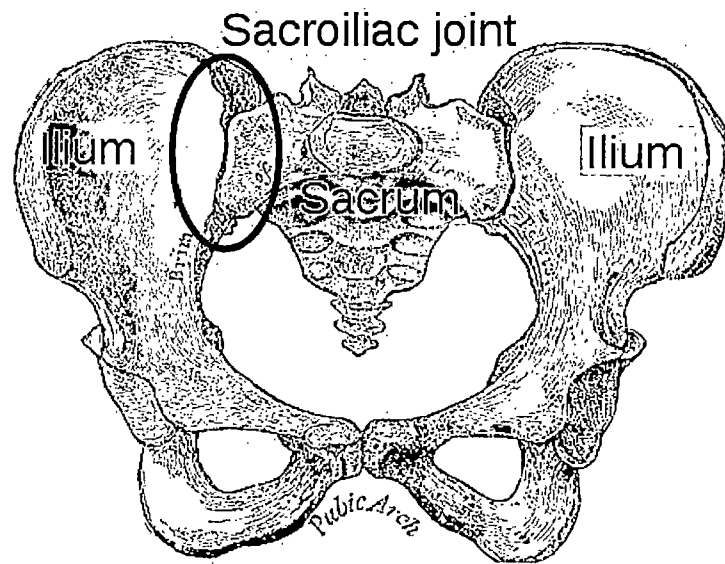
C. Injury to the sacroiliac joint [As an additional sustaining ground].

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.

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, 437 S.C. 139, 147, 876 S.E.2d 877, 881 (Ct.App. 2022). The court is correct.

A. There is no legal authority for the proposition that an unrelated medical condition can defeat a disability claim arising out of a work-related injury.

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. Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007). 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."⁸ 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 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

⁸A 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., 857 A.2d 549 (2004); 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 (Pa. Commw. Ct. 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 (Vt. 1999).

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 or further disabled her. 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.

This Court should affirm the holding that the unrelated pulmonary emboli is not an intervening cause of Pate's present ailments nor can it break the chain of causation.

B. There is no evidence to show that the pulmonary emboli are the cause of Pate's total and permanent disability.

Petitioners argue incorrectly that the "Gordon Rule" applies to this case. As discussed above, Geathers by its own terms is used to apply the "last injurious exposure rule" to determine whether a subsequent employer is liable for an industrial accident. It has no application to ending

compensation and medical treatment for an admittedly compensable injury. The rule to be applied here is that set out in Orr, to wit: “The fact that Orr’s [subsequent unrelated medical condition] indirectly prolonged the period during which she was unemployable does not change the fact that *her injury, not her [subsequent unrelated medical condition], rendered her unable to work.*” Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448, 449 (Ct. App.1996)(emphasis added).

That being said, even under Petitioners’ analysis, the evidence does not support a theory that Pate is disabled due to pulmonary emboli. Petitioners posit two questions which they contend address how the issue must be decided: “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?” Petitioners then state “The answer to these questions is undoubtedly ‘yes.’” [Brief of Petitioners, page 22]. To reach this self-serving conclusion, Petitioners must strain the facts and selectively misquote Dr. Nolan.

As to the first question, Pate’s back injury was disabling. On April 23, 2014 – well before the pulmonary embolus – Dr. Nolan had written “**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.**” [APA page 29 (emphasis added)]. Furthermore, she required constant pain management with injections and oral medication to perform even at this minimal level.

The fact her employer of ten years was willing to accommodate these restrictions for a time does not mean they were not disabling in the larger sense. The test for 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). See, also Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012) (“To use such unsupported and wildly optimistic goals which are in direct conflict with the only concrete evidence in the record would turn the Act on its head and violate the stated policy behind it.”). The law is clear that working in sheltered employment provided by an employer (whether out of largesse to a particularly valued employee, or a desire to limit its workers’ compensation exposure) at the time of the hearing cannot defeat a permanent and total disability claim. See Peoples v. Cone Mills Corp., 342 S.E.2d 798, 805 (N.C. 1986) (“an injured employee’s earning capacity must be measured not by the largesse of a particular employer, but rather by the employee’s own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity.”).

The North Carolina Supreme Court’s analysis in Peoples is strikingly on point, as is an Arizona case cited by the North Carolina court:

Also to be taken into consideration is whether the post-injury earnings are a proper index of the employee's earning capacity or whether the amount of such earnings truly reflects other considerations which may exaggerate such capacity and be only of a temporary nature.

* * *

The sole evidence to support the Commission’s finding was petitioner’s actual post-injury earnings. These earnings were not evaluated in the light of whether there was a change of business conditions or an adjustment in wages for economic reasons in the almost two-year period between the date of the injury and the date petitioner's condition became stationary. Nor did the Commission adequately consider the policy of the employer to retain at their previous wages all employees disabled as the result of on-the-job injuries. Thus, wages may reflect not the employee's earning capacity in a competitive situation but rather a company policy which, if abrogated for any reason by the employer, will force the employee into a position where he will be unable, because of his injuries, to continue to earn such wages or to secure equivalent

employment.

Allen v. Industrial Commission, 347 P.2d 710 (Arizona 1959), *quoted in* Peoples v. Cone Mills Corp., 342 S.E.2d 798, 806 (N.C. 1986).

The Peoples court further explained:

Wages paid an injured employee out of sympathy, or in consideration of his long service with the employer, clearly do not reflect his actual earning capacity, and for purposes of determining permanent disability are to be discounted accordingly. The same is true if the injured man's friends help him to hold his job by doing much of his work for him, or if he manages to continue only by delegating his more onerous tasks to a helper, or if the work for which claimant is paid is 'made work' or 'sheltered work.'

Peoples v. Cone Mills Corp., 342 S.E.2d 798, 806 (N.C. 1986)

As posited in Peoples, the College made extraordinary accommodations for Pate because she was an exceptionally valued employee. Pate's manager, Cheryl Connor, testified: "I needed Patty. . . . I've been very fortunate to have five great assistant managers in my career, Patty being one of them. And they are hard to come by, and when you find somebody that's dedicated and honest and wants to work hard, you want to keep them." [R.p. 514, line 22-page 515, line 2]. Connor testified that the Copy Center provided multiple accommodations to Pate including taking away all lifting and "hir[ing] two students who basically – they were to be available to her to open the trays and put paper in, to lifting the paper she needs moved, or to go – like if she sent an order out to print, she would tell them to go retrieve it from the printer just to save her from getting up." [R.p. 511, line 9-page 512, line 6].

No other employer would (or could) hire someone with Pate's work restrictions or make similar accommodations. The College of Charleston ultimately determined it could no longer keep her employed.

As to the second question – was Pate's disability caused by the pulmonary emboli and

resulting treatment – the answer is no. Pate has *no work restrictions due to the pulmonary emboli*. The treatment for the pulmonary emboli did not cause her to miss any work (other than the first few days in the hospital). Had Pate been hospitalized permanently, died or even been left with permanent restrictions from the pulmonary emboli, then perhaps Petitioners would at least have a colorable argument. Here, there are no permanent work restrictions associated with taking an anticoagulant – which is the only treatment Pate received for the pulmonary emboli. Her restrictions are a direct and proximate result of her work-related injury.

Indeed, the medical evidence shows Pate made a full recovery from the pulmonary emboli. Dr. Rose noted on December 3, 2014 that she had returned to work. “Physically she is doing well. Her shortness of breath has markedly improved. She has minimal shortness of breath, if any, remaining.” [R.p. 278].

Petitioners rely entirely on a partial quote from Dr. Nolan to bootstrap an argument that taking an anticoagulant to treat unrelated pulmonary emboli completely severs the chain of causation – such that medical treatment specifically prescribed to treat the workplace injury is somehow no longer causally related. The full quote from Dr. Nolan reads:

Counseled patient on their current medication regimen and discussed how they are tolerating it. Pt continues to complain of significant pain to the low back and buttocks primarily with radiating symptoms. 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 embolism we recommend she be placed out of work *at this time* and a letter will be drafted to this effect. [R. P. 144 (emphasis added)]

Dr. Nolan wrote this statement on October 3, 2014. He *temporarily* wrote Pate out of work – which is clear where he states “we recommend she be placed out of work *at this time*.” Pate returned to work on December 4, 2014. And she received injection therapy on January 21, 2015. [R. P. 170-

172].

It was ultimately the Employers' decision to no longer accommodate Pate's restrictions that led to the cessation of her employment with the Copy Center. She remained willing to work despite her significant restrictions, pain and depression. The fact the Employer was unwilling or unable to accommodate Pate's restrictions (including the temporary decrease in her hours available for work) shows that the proximate cause of her disability is the work restrictions from her work injury.

Petitioners ask a third question – did the pulmonary embolism and resulting treatment aggravate the Claimant's pre-existing low back problems – the answer is no. Petitioners make a tortuous analysis that the pulmonary emboli required anticoagulants which limited Pate's ability to receive epidural steroid injections (one of multiple treatment modalities for her work injury) which increased her pain which increased her restrictions which led the Copy Center to terminate her employment which rendered her permanently and totally disabled.

To begin with, even if the premise were correct, the fact remains that the restrictions are entirely a result of the work injury; there are no work restrictions associated with the pulmonary embolus. Moreover, there is no evidence that the pulmonary emboli or the anticoagulant medication directly increased Pate's restrictions from her injury. The medical records show that Pate's pain and anxiety were elevated by her work activities in April 2014 – months before the pulmonary emboli. [R.P. 103 (“She reports that she has returned to work full time with no restrictions on 04/11/14 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.”)].

Pate's continued employment at the Copy Center was hanging on a thread. Pate managed to struggle through her constant pain and continue to work. The Copy Center was willing to

accommodate most of her restrictions for almost 4 years because she was a valuable and exceptional employee. Her manager, Cheryl Connor, described her as “Dependable, conscientious. Customer service was unbelievable, pleasant all the time.” [R. P. 5109, line 25-page 511, line 1]. The increasing pain and disability were natural consequences flowing from the work-related injury. The pulmonary emboli were no more than a speed bump on an inexorable path to total disability resulting from the work injury. Such a speed bump is not sufficiently severe to break the chain of causation.

The Court should affirm the conclusion that the pulmonary emboli were not an intervening accident sufficient to break the chain of causation as a matter of law.

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 “corresponded precisely with the her impairment rating to the spine issued by Pate’s surgeon,” 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 v. College of Charleston, 437 S.C. 139, 146, 876 S.E.2d 877, 880 (Ct.App. 2022). 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 importance is that the legislature did not base awards under the medical

model on impairment ratings; it 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.⁹ Linen is particularly instructive because the claimant in that case had a lower impairment rating than the 40% whole person 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.¹⁰ Linda Cocchiarella and Gunnar B.J. Andersson, *Guides to the Evaluation of*

⁹See, 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 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).

¹⁰Dr. 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].

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.

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.¹¹

The question 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

¹¹In 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.

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.

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 College of Charleston 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 merely affirm the Commission’s 40% award, as requested by Petitioners. The Court should analyze the issue in terms of disability and loss of use rather than impairment, ultimately holding that Pate has lost 50% of the use of her back.

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.” Pate v. College of Charleston, 437 S.C. 139, 146, 876 S.E.2d 877, 880 (Ct.App. 2022).

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 no longer 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]. Dr. Nolan temporarily stopped these injections on October 4, 2014 noting she was unable to “receive needed injection therapy until 02/2015 due to pulmonary embolism. The resumption of injections on January 21, 2015 is important because it confirms Pate's 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 not 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.”¹² [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.

The Court of Appeals declined to hold Pate was permanently and totally disabled as a matter of law out of deference to the Appellate Panel’s role as the trier of fact. As a law making court, this

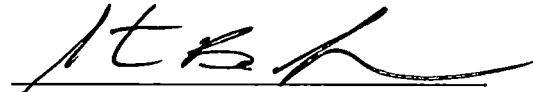
¹²The College of Charleston terminated Pate on January 28, 2015 – one week after injection therapy resumed. The College acted swiftly, not waiting to see if the injection would relieve her pain and allow her to work more hours.

Court need not be so circumspect. The evidence here is overwhelming that Pate is totally disabled. Her long time employer can no longer provide accommodations in sheltered employment. The uncontradicted vocational evidence confirms that she is unemployable. As the evidence is all one way, this Court can and should hold Pate is permanently and totally disabled as a matter of law

CONCLUSION

For the foregoing reasons, the decision below should be affirmed in part and modified in part. 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; and (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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