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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal From the South Carolina
Workers' Compensation Commission

Opinion No. 5925 (S.C. Ct. App. Filed July 20, 2022)
Appellate Case No. 2022-001260

Patricia Pate, Employee.....Respondent,

v.

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

BRIEF OF THE PETITIONERS

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Questions Presented

I. Did the Court of Appeals err in failing to affirm and, in fact, entirely overlooking, the Workers' Compensation Commission's detailed finding of fact regarding Pate's claim for depression, which is supported by substantial evidence and the applicable law?

II. Is the mandate of the Court of Appeals regarding Pate's leg claims contrary to well-established precedent requiring proof of a "disabling effect"?

III. Did the Court of Appeals err in failing to conclude that Pate's subsequent pulmonary emboli are an intervening cause of her present condition, as a matter of fact, in accordance with substantial evidence in the record and the applicable law?

IV. Did the Court of Appeals err in failing to affirm the Workers' Compensation Commission's award of 40% loss of use of the back under S.C. Code Ann. § 42-9-30 based upon substantial evidence in the record and the applicable law?

Statement of the Case

The Claimant, Patricia Pate, allegedly experienced low back pain while assisting a co-worker with a box on December 14, 2011, while working in the Copy Center at the College of Charleston. (A. p.372). In the years that followed, Pate continued working in her same job as Assistant Manager of the Copy Center, which entailed answering the phone, greeting customers, collating and binding papers, and some computer work. (A. p.495, ll.2—10).

After December 14, 2011, Pate was diagnosed with degenerative changes in her lumbar spine. (A. p.216). She received treatment from Dr. Joseph Marzluff, including spine surgery on May 15, 2012. (A. p.227). Dr. Marzluff placed Pate at maximum medical improvement on September 12, 2012, at which time she again returned to her regular, full-time job as the

Assistant Manager of the Copy Center. (A. p.236, p.511).[1] Pate continued working in this position, earning her regular wages for over two more years. (A. pp.512—515).[2]

Pate eventually came under the care of Dr. J. Edward Nolan. Dr. Nolan reported on February 13, 2014, that Pate "continues to report good pain relief with her injection therapy and medication management and work restrictions." (A. p.82). As of February 13, 2014, Dr. Nolan reiterated that Pate was at maximum medical improvement and subsequently issued an impairment rating of 23% to the spine.[3] (A. p.201). She continued in her regular job and, as of September 4, 2014, Pate rated her pain as a "4/10 overall," despite the fact that she was working full time. (A. p.132).

In the summer of 2014, Pate admitted that she began having new and different symptoms in her legs, including discoloration, swelling, and numbness, and she also began experiencing serious shortness of breath. (A. p.22). These new leg problems were ultimately diagnosed as multiple pulmonary emboli, unrelated to her employment or her workers' compensation claim. (A. p.140). Pate was hospitalized for several days in September 2014. (A.

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[1] Dr. Marzluff rated Pate's impairment at 30% of the whole person, which translates to a regional impairment rating of 40% of the lumbar spine, but also includes an additional "ten percent or so because of the chronic pain." (A. pp.468—469). Dr. Marzluff did not issue any impairment rating for Pate's legs or any body member other than the lumbar spine.

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

[3] According to Dr. Nolan, the 23% impairment rating was not additive to the prior impairment rating issued by Dr. Marzluff on September 19, 2012. (A. p.201). Dr. Nolan did not issue any impairment rating for Pate's legs.

p. 503, pp.381—382). Pate's supervisor, Ms. Connor, testified that as a result of the pulmonary emboli, Pate was taken out of work from September 2014 until December 2014. (A. p.516).

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

A hearing was held before Workers' Compensation Hearing Commissioner Aisha Taylor on July 14, 2015, to determine issues as set forth in the Form 21 and Forms 50[4] and 51. (A. p.482, p.485 ll.15—18). Prior to the scheduled hearing, Pate filed a Form 58, Pre-Hearing Brief dated July 14, 2015, alleging injuries to the "[b]ack, legs, psyche (depression)." (A. p.74). By

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

Form 58 dated June 29, 2015, the Petitioners argued that Pate was at maximum medical improvement for the low back injury of December 14, 2011, and that Pate was not entitled to any wage-loss benefits under S.C. Code Ann. § 42-9-10 or § 42-9-30 as a matter of law because Pate's multiple pulmonary emboli in 2014 aggravated her work-related low back injury and resulted in increased pain and new work restrictions that were not previously required. (A. pp.249—252). The Petitioners further denied Pate was entitled to benefits for depression, as the record reveals that Pate's depression was related to her long-term bowel incontinence, her brother's recent battle with pancreatic cancer, and her own near-fatal pulmonary emboli. (A. p.250).

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

> "is not supported by the preponderance of the evidence. Specifically, no physician has opined that [Pate] has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical certainty that [Pate's] alleged psychological condition is causally-related to her original work injury to her lower back. [Pate's] personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well." (A. p. 11).

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

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

On May 27, 2016, Pate filed a Form 30, Request for Commission Review, alleging 13 grounds for appeal. (A. pp.389—390). In her brief to the Appellate Panel dated July 18, 2016, Pate argued only five: (1) "[a]n unrelated medical condition cannot constitute an intervening cause sufficient to break the chain of causation"; (2) "[Pate's] work restrictions and need for ongoing medical treatment are directly related to her workplace injury"; (3) "[Pate] met the legal standard for post-MMI medical treatment"; (4) [Pate's] injury was not limited to her back in that she suffered from radiculopathy and psychological overlay"; and (5) "[t]he 23% permanent partial disability award to the back is based on legal error in that the [hearing] Commissioner mistakenly concluded she could not award more than Dr. Nolan's impairment rating." (A. p.396, p.400, p.404, p.405, p.409). Pate also argued, for the first time on appeal, that she was entitled to a general disability award under S.C. Code Ann. § 42-9-10 based upon an alleged non-scheduled injury to the sacroiliac joint. (A. p.406)

The Petitioners filed their Brief to the Appellate Panel on August 1, 2016, arguing that it was improper for Pate to raise new claims for the first time on appeal; specifically, her new

allegations regarding the sacroiliac joint. (A. p.418). Pate had made no allegation concerning a sacroiliac joint injury in her four previous Form 50 claim forms, her Form 58 pre-hearing brief, at the hearing before Commissioner Taylor, or in her May 27, 2016, Form 30, Request for Review by the Appellate Panel. (A. p.66, p.68, p.69, p.72, p.74, pp.491—492, pp.431—432).

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

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

On May 24, 2018, Hearing Commissioner Taylor issued a Decision and Order on Remand without taking additional evidence or hearing any additional arguments from the parties. (A. pp.34—42). According to the May 24, 2018, Order, the Hearing Commissioner made new findings of fact that Pate's injury was "a single-member injury affecting [Pate's] lower back

only" and awarded Pate benefits for a 40% loss of use of the back under S.C. Code Ann. § 42-9-30. (A. p.38).

On June 7, 2018, Pate filed her second Form 30, Request for Commission Review, alleging four grounds for appeal of the Hearing Commissioner's Order on remand. (A. pp.431—432). However, Pate's Brief to the Appellate Panel dated September 17, 2018, raised only two arguments: (1) "Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back;" and (2) Pate's "injury was not limited to her back in that she suffered from radiculopathy and psychological overlay." (A. p.439, p.441).

Oral arguments were presented to the Appellate Panel on October 22, 2018. On October 22, 2018, counsel for the Petitioners wrote to alert the Appellate Panel about an error in the record, which was relevant to the issues on appeal. (A. p. 60). Specifically, the Hearing Commissioner's May 22, 2019, Order on remand misquoted the Appellate Panel's Finding of Fact #9 by adding two additional sentences. At the oral arguments, Pate's attorney had relied upon this scrivener's error, which pertained to the effect of Pate's non-work-related pulmonary emboli on her physical condition, her ability to work, and her need for medical treatment.

The Appellate Panel issued its Order on May 31, 2019, affirming the Decision and Order of the Hearing Commissioner on remand, with amendment of the scriveners' error contained in Finding of Fact #9. (A. p.60). The May 31, 2019, Order specifically found that, "[b]ased on the greater weight of the evidence in the record, the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system," but awarded the Claimant benefits for a "40% loss of use of the back … based on the evidence as a whole, including Dr. Nolan's permanent impairment rating of 23% of the lumbar spine." (APA p.61, p.63). In addition, the Appellate Panel specifically found that,

> "Claimant has not met her burden of proving a psychological injury casually-related to her original injury. Her claim is not supported by the preponderance of the evidence. Specifically, no physician has opined that Claimant has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical certainty that Claimant's alleged psychological condition is causally-related to her original work injury to her lower back. Claimant's personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well." (APA pp.62-63).

Thereafter, Pate appealed to the South Carolina Court of Appeals.

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

Furthermore, the Petitioners respectfully contend that the Court of Appeals erred as a matter of law by suggesting that Pate's subjective complaints of pain "in other parts of her body" constitute "ample evidence" to support an award under S.C. Code Ann. § 42-9-10. This analysis of the Court of Appeals directly conflicts with prior appellate decisions holding that such subjective complaints are insufficient to prove the requisite disabling effect or impairment of a second body member such that Pate could be entitled to pursue general disability benefits under § 42-9-10. It would appear that the Court of Appeals improperly rejected the sound reasoning of precedent by remanding the claim to the Commission to reconsider legally insufficient subjective allegations.

In addition, the Petitioners respectfully contend that the Court improperly rejected substantial evidence in the record supporting the Commission's finding that Pate sustained a 40% loss of use of the back as a result of her work accident, as well as the substantial evidence that the proximate cause of any disability or loss of wage-earning capacity was Pate's subsequent, intervening pulmonary emboli. Therefore, the Petitioners respectfully request that the South Carolina Supreme Court reverse the Court of Appeals and issue a new order affirming the final Decision and Order of the Workers' Compensation Commission in accordance with the Administrative Procedures Act. In the alternative, the Petitioners request that the Court limit the scope of mandate on remand to the consideration of whether Pate's work-related low back injury caused "disabling effect" on Pate's legs, and if so, whether she is entitled to general disability benefits as a result thereof.

Standard of Review

The findings of the Workers' Compensation Commission are presumed correct; therefore, it is not within the province of the appellate courts to reverse findings of the Commission that are supported by evidence of substance. Anderson v. Baptist Med. Center., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999). Additionally, the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission, as an administrative agency, in accordance with the fundamental separation of powers, and not even the possibility of drawing two inconsistent conclusions from the evidence prevents the Commission's findings from being supported by substantial evidence. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004). Instead, a reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-380(A)(6)(e) (2005).

Arguments

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

According to the Court of Appeals, "[n]either the single commissioner nor the appellate panel gave any analysis in deciding this was a single member case"[5] and remanded the claim to the Workers' Compensation Commission with a mandate to again consider whether Pate is entitled to general disability benefits under S.C. Code Ann. § 42-9-10 as a result of alleged "pain-related depression." Though the Court of Appeals clearly suggests that the Commission did not consider the depression claim or give any reasoning for its denial, the Commission

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[5] The phrase "single member case" employed by the Court of Appeals is an apparent reference to the seminal case of Singleton v. Young Lumber Company, which holds that

> "[w]here the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is limited to the scheduled compensation"

pursuant to S.C. Code Ann. § 42-9-30. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). Singleton further stands for the proposition that "impairment" in this regard means a "physical deficiency." *Id.* Colonna v. Marlboro Park Hosp, has since explained that

> "the question of whether [a claimant] is totally and permanently disabled, and thus entitled to recovery under Section 42-9-10, turns on whether the initial injury had a 'disabling effect' on other parts of her body."

404 S.C. 537, 545, 745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*). There is no case law to support the proposition that mere subjective complaints of pain in other parts of the body are sufficient to permit awards under S.C. Code Ann. § 42-9-10, as the Court of Appeals suggests.

specifically addressed Pate's claim for "psyche (depression)" benefits with the following finding of fact:

> "7. Claimant has not met her burden of proving a psychological injury casually related to her original injury. Her claim is not supported by the preponderance of the evidence. Specifically, no physician opined that Claimant has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical certainty that Claimant's alleged psychological condition is causally related to her original work injury to her lower back. Claimant's personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well." (A. p.62--63).

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

Respectfully, proper consideration of the Commission's finding regarding the psychological claim, and the substantial evidence supportive of that finding, should have resulted in a full affirmation in accordance with the Administrative Procedures Act. *See* Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005) (holding that a reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record"); *see also* S.C. Code Ann. § 1-23-380(A)(6)(e)

(2005). Therefore, the Petitioners respectfully contend that the Supreme Court should reverse the decision of the Court of Appeals and affirm the Commission's specific finding of fact regarding Pate's alleged psychological condition accordance with the Administrative Procedures Act. *See* Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999) (holding it is not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence).

Substantial evidence supporting the Commission's finding regarding the claim for "psyche (depression)" includes the medical records submitted into evidence and even Pate's own testimony. At the evidentiary hearing on July 14, 2015, Pate's attorney did not ask her any questions about any alleged psychological injury or depression. (A. pp.493—500). At no time during that hearing did Pate give testimony to support any allegation of a psychological injury or depression related to her low back injury. (A. pp.493—508). While Pate did testify that her brother's recent death from pancreatic cancer was "very stressful" for her and resulted in her seeking medications from her family physician, Pate testified that was feeling better at the time of the hearing. (A. p.507). Therefore, not even Pate's own testimony could support a finding that she sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

The records Carolina Family Medicine indicate that Pate first complained of a three-to-four-year history of "stress" in January 2013, which was aggravated by "work stressors" and her "brother dying from pancreatic cancer." (A. p.264). While her family physicians also noted "stress" on other occasions, (A. p.269, p.271, p.284, p.286, p.288, p.293, p.296), it was always attributed to undefined "work stressors" and her "brother dying from pancreatic cancer," not the low back injury that is the subject of her workers' compensation claim. In addition, at no time

did Carolina Family Medicine indicate that Pate required any work restrictions because of her "stress," much less opine that the condition resulted in any permanent impairment. As such, these records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

Pate described her alleged work stressors to her hematologist, Dr. Rose, in December 2014. (A. p.357). According to Pate, her job was "apparently transitioning to a new computer system, and she is concerned about her ability to perform her job."[6] In response, Dr. Rose "offered her words of encouragement regarding her job and also offered her ways she could help train herself with the computer system." Dr. Rose's records do not support a finding that Pate sustained any permanent or disabling psychological injury as a result of her work-related low back injury.

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

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

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

Dr. Lowndes-Rosen did not recommend any work restrictions or find any permanent psychological impairment. Accordingly, Dr. Lowndes-Rosen's records do not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10. *See also*, Breeden v. TCW, Inc./Tennessee Exp., 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) (explaining that the Workers' Compensation Act does not provide benefits for "pain and suffering.").

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

Ms. Davis referred Pate to a psychologist, Dr. Kee, for a one-time evaluation on September 22, 2014. Apparently, Pate complained to Dr. Kee that "there has been conflict that her supervisor has pushed her to do new jobs on the computer … she reports having problems with anxiety and going to sleep because of worrying about work," though Pate admitted she had been taking the sleeping medication, Ambien, since 2010 (prior to the work accident). Although Dr. Kee diagnosed a "[m]ajor depressive disorder, single episode, moderate," he did in any way indicate that Pate's depression was permanent or disabling. Therefore, the one-time evaluation

of Dr. Kee in 2014 (a year prior to the hearing) does not support a finding that Pate sustained any permanent or disabling psychological injury that would entitle her to pursue wage loss benefits under S.C. Code Ann. § 42-9-10.

Because the findings of the Commission are presumed correct and it is otherwise not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence, the Supreme Court should reverse the mandate of the Court of Appeals requiring that the Workers' Compensation Commission reconsider the "substance" of Pate's claim for "psyche (depression)." Anderson v. Baptist Med. Center., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999). Furthermore, because the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and even the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence, the Supreme Court should affirm the Commission's findings regarding the claim for "psyche (depression)" in accordance with the Administrative Procedures Act. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004).

II. The mandate of the Court of Appeals regarding the leg claim is contrary to well-established precedent requiring proof a "disabling effect."

According to the July 20, 2022, Opinion of the Court of Appeals, the Workers' Compensation Commission must reconsider whether Pate is entitled to general disability benefits

under S.C. Code Ann. § 42-9-10 because "the record contains ample markers of a colorable claim that the effects of Pate's back injury extend beyond her back." According to Pate's own testimony, the substance of her leg injury claim[7] is that pain "sometimes ... leads down to [her] – into [her] right thigh[8] through [her] buttocks.'" (A. p.497, ll.11-15). No physician issued any impairment rating for either of Pate's legs. No physician issued any restriction on the use of either of Pate's legs. More importantly, intermittent subjective complaints are legally insufficient to support a general disability claim under S.C. Code Ann. § 42-9-10. Therefore, the mandate of the Court of Appeals for the Commission to reconsider such legally insufficient evidence under S.C. Code Ann. § 42-9-10 is plainly contrary to long established and recently reaffirmed legal standards, which require evidence of a "disabling effect" on a second body member.

According to the South Carolina Supreme Court in the seminal case of Singleton v. Young Lumber Company,

> "[w]here the injury is confined to the scheduled member, and there is no *impairment* of any other part of the body because of such injury, the employee is

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

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

limited to the scheduled compensation"

pursuant to S.C. Code Ann. § 42-9-30. 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added). Singleton further stands for the proposition that "impairment" in this regard means a "physical deficiency." *Id.* Accordingly, entitlement to benefits for permanent and total disability benefits under S.C. Code Ann. § 42-9-10 requires, not only proof that another body part has been "affected" by the work injury, but that another body part is permanently "impaired." Colonna v. Marlboro Park Hosp, 404 S.C. 537, 545, 745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*) (emphasis added). Indeed, in Colonna, *supra*, the Court of Appeals reasoned that

> "the question of whether [a claimant] is totally and permanently disabled, and thus entitled to recovery under Section 42-9-10, turns on whether the initial injury had a 'disabling effect' on other parts of her body." *Id.*

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

a separate impairment rating to either leg,) nor did he opine that Pate required any work restrictions as a result of any leg symptoms.

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

Moreover, Pate has a myriad of non-work-related leg problems, including a pre-existing ankle injury, which according to Pate remain symptomatic. (A. p.503, ll.2—3; pp.256-259). Pate also admits that in 2014 she began having new and different symptoms with respect to her legs, including swelling and discoloration, which was specifically noted by the Commission, and which are wholly unrelated to her work injury. (A. p.5, p.7, p.502, ll.19-21, p.5). According to her personal physicians' records from May 2014, Pate began noticing these new symptoms in both feet and legs. (A. p.277). By July 2014, Pate was reportedly experiencing "tingling in both feet and some swelling in lower legs," in addition to discoloration of the skin of both feet and lower legs, "which began 2 months" earlier. (A. p.277). Pate was diagnosed with "Edema/Bilateral peripheral – New" in August 2014. (A. p.280). Pate testified that she initially assumed these new leg and foot symptoms in 2014 were caused by the pre-existing April 2011 ankle injury. (A. p.503, pp.256--259). However, her hematologists subsequently diagnosed her with chronic venous stasis in the legs and non-pitting edema due to her non-work-related pulmonary emboli. (A. pp.352--361). By November 2014 – almost three years after the work accident -- Pate was also complaining of another "new" and unrelated leg problem:

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

Again, there is no competent medical evidence that the leg and foot symptoms Pate began experiencing in 2014 were causally related to her 2011work injury, or even permanent or disabling in nature.

More importantly, there is no competent evidence that Pate's work-related back injury caused any physical deficiency or impairment of the legs, much less evidence of any "disabling effect" on her legs. Again, the record contains neither any impairment rating for the legs, nor any restriction on their use. The mere fact that Pate made various complaints about her legs, the most severe of which are wholly unrelated to her work accident, does not constitute "a colorable claim" that Pate has any "impairment of any other part of her body because of" her work-related back injury. Singleton v. Young Lumber, 236 S.C. 454, 114 S.E.2d 837(1960). Because "a claimant must prove not only that another body part was affected … but that another body part was impaired or injured for section 42-9-10 to apply," the Petitioners respectfully contend that the mandate of the Court of Appeals is premised upon an error of law, necessitating reversal by the Supreme Court. Colonna v. Marlboro Park Hosp, 404 S.C. 537, 545, 745 S.E.2d 128 (2013).

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

Even assuming, *arguendo*, that Pate was entitled to pursue general disability (wage loss) benefits under S.C. Code Ann. § 42-9-10, she is not permanently and totally disabiled as a result of the December 14, 2011, accident because she was working in her regular, full-time position as the Assistant Manager of the College of Charleston Copy Center earning her regular, pre-accident wages for more than two years thereafter. Pate had no "incapacity for work resulting from" the December 14, 2011, back injury during this period, but had a dependable job. When Dr. Marzluff placed Pate at maximum medical improvement on September 12, 2012, she was still working her regular, full-time job as the Assistant Manager of the Copy Center. (A. p.236, p.511). Even after Dr. Nolan placed Pate was at maximum medical improvement February 13, 2014, Pate continued to work. Pate's supervisor, Ms. Cheryl Connor, testified that this job was available to Pate "indefinitely," even with accommodations. (A. pp.512--513).

Pate had no lost wages, or even loss of wage-earning capacity, until she was hospitalized for near-fatal pulmonary emboli in September 2014, which aggravated her pain and resulted in new work restrictions that she had not previously required as a direct result of the December 14, 2011, accident. As a matter of fact, it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability or loss of wage-earning capacity Pate may now have.

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

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

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

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

In addition, it is equally clear from the record that Pate's multiple pulmonary emboli and anticoagulant therapy after September 2014 aggravated her low back problems. At the hearing before Commissioner Taylor, Pate admitted that her back pain increased after the pulmonary emboli. (A. p.506). This aggravation is also clearly documented in the records of Dr. Nolan. For example, after being diagnosed with the pulmonary emboli in September 2014, Dr. Nolan

doubled Pate's pain medications because she was no longer able to get the relief from the medication and treatment she availed herself of prior to the anticoagulant therapy. (A. p.140). Dr. Nolan opined that "[d]ue to her inability to receive needed injection therapy…due to pulmonary embolisms we recommend she be placed out of work." (A. p.144).

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

According to this Court, "[p]roximate cause requires proof of (1) causation in fact and (2) legal cause." Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing that Pate would not have become disabled "but for" the pulmonary emboli, while legal cause is proved by establishing foreseeability. If Pate's sudden disability in September 2014 was not the natural and probable consequence of the December 14, 2011, work injury, such sudden disability after more than two years of full employment was not foreseeable. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996). Therefore, Pate's work-related back injury was not the proximate cause of her disability and accordingly, such disability is not the responsibility of the Petitioners under S.C. Code Ann. § 42-9-10. Respectfully, the Supreme Court should reverse the decision of the

Court of Appeals, which mandates that the Commission reconsider a general disability claim to which she is neither factually, nor legally, entitled.

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

According to the Court of Appeals, "[w]eighing impairment ratings as part of arriving at a percentage of disability strikes us as a task that the Legislature envisioned entrusting to members of the commission..." (emphasis added). This statement by the Court of Appeals betrays a fundamental misunderstanding of S.C. Code Ann. § 42-9-30, which prejudicially and erroneously affects the Workers' Compensation Commission's mandate on remand. Respectfully, the question for the Commission under S.C. Code Ann. § 42-9-30 is not Pate's "percentage of disability,"[9] but the degree to which she has sustained a physical "loss of use." The language of the statute is plain[10]:

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

[10] "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)).

> "In cases included in the following schedule, the disability in each case is considered to continue for the period specified … for the loss of use of the back in cases where the loss of use is forty-nine percent or less, sixty-six and two-thirds percent of the average weekly wages during three hundred weeks."

S.C. Code Ann. § 42-9-30(21).

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

scheduled member case under S.C. Code Ann. § 42-9-30 is an error of law, which necessitates reversal.

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

These reports simply do not support a finding that Pate's physical loss of use of the back exceeds the 40% awarded by the Commission and therefore, the award should have been affirmed by the Court of Appeals and should be affirmed by the Supreme Court. Perhaps more importantly, based upon these reports, it cannot reasonably be said that the Commission's award of benefits for a 40% loss of use of the back are "clearly erroneous." *See* Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-

380(A)(6)(e) (2005). Instead, the reports and opinions of Dr. Nolan are substantial evidentiary support for the Commission's finding in this regard and mandate affirmation on appeal.

The opinions of Dr. Marzluff, Pate's surgeon, also constitute substantial evidence in support of the Commission's award. In his 2013 deposition, Dr. Marzluff testified that he believed Pate to have a "40% regional rating to her lumbar spine," which he translated as a "30% whole person rating." (A. pp.468--459). Dr. Marzluff further testified that he has already inflated both of these impairment ratings by adding another "ten percent or so" over and above what would be appropriate under the AMA GUIDES to account for what he termed "chronic pain." (A. p.466, p.476). Therefore, Dr. Marzluff's impairment rating is actually commensurate with the 23% rating issued by Pate's current treating physician, Dr. Nolan. Respectfully, there is simply no competent evidence in the record that the Commission clearly and erroneously underestimated Pate's physical loss of use of the back in awarding her benefits for a 40% loss of use of the back under S.C. Code Ann. § 42-9-30.

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

Respectfully, it is clear that the Commission – the final arbiter of the weight of the evidence – properly awarded Pate benefits for a 40% loss of use of the back based upon substantial evidence in the record and the applicable law, without resorting to impermissible surmise, conjecture and speculation. *See* Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965). As such, the award should have been affirmed by the Court of Appeals in accordance with the Administrative Procedures Act. *See* Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission).

Conclusion

Based on the arguments set forth herein above, the Petitioners, the College of Charleston and the South Carolina State Accident Fund, respectfully request that the South Carolina Supreme Court reverse the Court of Appeals and, instead, affirm the final Decision and Order of the South Carolina Workers' Compensation Commission in accordance with the Administrative Procedures Act based upon substantial evidence in the record and the applicable law.

Respectfully submitted,

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