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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.

REPLY BRIEF OF THE PETITIONERS

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### Additional Questions Presented

- I. Is it proper for Pate to raise an untimely claim for an alleged injury to the sacroiliac joint on appeal?
- II. Did the Court of Appeals overlook the Workers' Compensation Commission's finding of fact regarding Pate's depression claim?
- III. Did the Court of Appeals it make its own finding of fact on appeal regarding Pate's leg claim, or should Supreme Court do so upon review, as Pate now contends?
- IV. Is Pate entitled to a finding of fact on appeal that she is permanently and totally disabled under S.C. Code Ann. § 42-9-30 based on unrelated and irrelevant economic factors?
- V. Are Pate's pulmonary emboli the proximate cause of the increased work restrictions that resulted in her general disability?

### Arguments

**I. It is improper for Pate to raise an untimely claim for an alleged injury to "the SI joint" on appeal.**

Pate argues, "[a]s an additional sustaining ground," that "[t]he evidence is overwhelming that the SI joint was permanently injured in the accident," thus entitling her to pursue a general disability award under S.C. Code Ann. § 42-9-10. (Respondent's Brief pp.25—26). Despite the boldness of this characterization, Pate fails to support it with any citation to the evidentiary record. More importantly and dispositively, Pate did not actually file any claim for an alleged injury to either "SI joint" with the Workers' Compensation Commission. Indeed, even twelve

years after the work accident, Pate fails to elucidate which sacroiliac joint she claims to have injured on December 14, 2011.<sup>1</sup>

Pate filed Forms 50 on November 19, 2012; August 28, 2014; September 10, 2014; and February 2, 2015; and not one of these four Notices of Claim alleges any injury to (or effect on) either sacroiliac joint. (A. p.66, p.68, p.69). Pate filed a Form 58, Pre-Hearing Brief, on June 29, 2015, yet made absolutely no mention of any claim for either sacroiliac joint. (A. p.74). At the hearing before Commissioner Taylor on July 14, 2015, Pate's attorney was given a broad opportunity to restate the issues but still said nothing about the sacroiliac joints and Pate herself gave no testimony regarding her sacroiliac joints at that hearing. (A. pp.486—491).

Additionally, Pate's initial Form 30, Notice of Appeal to the Commission's Appellate Panel, raises no allegation about her sacroiliac joints. (A. pp.389—391). At no time did Pate seek to amend her claim to include either sacroiliac joint in accordance with S.C. Code Reg. 67-610.<sup>2</sup> Despite these facts, Pate now argues that the Commission's failure to award benefits for an unspecified sacroiliac joint injury that she, herself, failed to raise somehow "commands reversal." Respectfully, this argument is without merit.

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<sup>1</sup> The human body has two sacroiliac joints, left and right. Though her Brief to this Court seemingly acknowledges this fact by including an unattributed diagram of the pelvis that is not otherwise part of the record, Pate has yet to reveal to the Petitioners which sacroiliac joint forms the basis of their alleged liability.

<sup>2</sup> Pursuant to S.C. Code Reg. 67-610, Pate was required to amend her Form 50 claim "no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party." At no time did Pate seek such leave or consent to amend her claim to include one for any alleged injury to either sacroiliac joint.

Of course, it is fundamental that the Workers' Compensation Commission can only address (and the Petitioners can only defend<sup>3</sup>) such claims as are actually raised. Hearing Commissioner Taylor could not have committed any legal error by failing to award benefits for a claim that was never made by Pate. In addition, the issue of whether Pate is entitled to general disability benefits for an alleged injury to the sacroiliac joint was not preserved for review by the Appellate Panel, the Court of Appeals, or the Supreme Court, as it was not raised before Hearing Commissioner Taylor, or even timely raised on appeal. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); see also Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); RRR, Inc. v. Toggas, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (noting a party cannot raise an issue for the first time on appeal). Therefore, the Commission's Appellate Panel committed no legal error in refusing to award benefits to Pate as a result of any alleged problem with either sacroiliac joint.

In addition, Pate's Brief mischaracterizes the evidence of the alleged permanent injury to the "SI joint" as "overwhelming." No treating physician or other expert diagnosed any permanent injury to either of Pate's sacroiliac joints. There are no impairment ratings in the record for either of Pate's sacroiliac joints. No restrictions were issued on the use of the

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<sup>3</sup> The constitutional requirements of due process should afford the Petitioners the right to adequate notice and the opportunity to be heard in a meaningful way – prior to an evidentiary hearing on the merits. S.C. Const. Art. 1, § 22, Stono River Env'tl. Protection Ass'n v. S.C. Dep't Health and Env'tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

sacroiliac joints. Neither the words “SI joint”, nor “sacroiliac,” even appear in the transcript of the evidentiary hearing. In fact, neither the words “SI joint,” nor “sacroiliac” appear in the records or testimony of Pate’s treating neurosurgeon, Dr. Marzluff. In fact, Dr. Marzluff completed a Form 14B on November 7, 2012, which explicitly states,

“Body part(s) injured: Back” and “Body part(s) affected: Spine.” (A. p.236).

Because no sacroiliac joint claim was ever raised before or ruled upon by the Hearing Commissioner, because no sacroiliac joint claim was timely preserved for review by the Commission’s Appellate Panel or the appellate courts, and because the unspecified sacroiliac joint claim otherwise has no competent evidentiary support, Pate’s present argument that the failure to award benefits for the “SI joint” somehow “commands reversal” should be rejected. Instead, the Commission’s Decision and Order should be affirmed in accordance with the Administrative Procedures Act because it is supported by substantial evidence and otherwise not affected by any error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

**II. The Court of Appeals overlooked the Workers’ Compensation Commission’s finding of fact regarding Pate’s depression claim, it did not reverse that finding or make its own finding of fact on appeal as Pate alleges.**

In her Brief to the Supreme Court, Pate argues that the

“Court of Appeals was *correct in finding* that Pate’s physical injury to her back affected her psychological state.” (Respondent’s Brief p.11, emphasis added).

The Court of Appeals made no such finding of fact, nor was it even empowered to do so under the Administrative Procedures Act. *See Fox v. Newberry County Mem'l Hosp.*, 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995) (holding that the “duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues) (citing *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 127 S.E.2d 288 (1962)). Instead of making any finding of fact on appeal as Pate alleges, the Court of Appeals remanded the claim to the Workers’ Compensation Commission “to evaluate the substance of Pate’s general disability claim.”

In addition, Pate claims that the

“Court of Appeals *reversed the Appellate Panel’s finding* that ‘Claimant has not met her burden of proving a psychological injury causally-related to her original injury.’” (Respondent’s Brief p. 14, emphasis added).

Not only did the Court of Appeals *not* reverse the Commission’s finding, but the Order of the Court of Appeals does not even acknowledge the existence of the Commission’s finding of fact on this issue.<sup>4</sup> Instead, the Court of Appeals mandated that the Commission reconsider the evidence of the depression claim on remand because the Court of Appeals inexplicably had

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<sup>4</sup> The Workers’ Compensation Commission explicitly found:

“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

“no idea why the commission rejected Pate’s argument ... We cannot say whether the commission erred or was correct in its reasoning. The commission gave no reasoning in its order.” (A. p.619)

This language clearly contradicts Pate’s contention that the Court of Appeals reversed finding of fact number seven (A. pp.62—63) outlining the basis for the Commission’s denial of the depression claim – the Court of Appeals failed to even acknowledge the existence of this finding.

Pate also alleges that the Court of Appeals concluded that

“the medical evidence of psychological overlay caused by the injury is one-sided and *uncontradicted*.” (Respondent’s Brief pp.14—15, emphasis added)

While the Opinion of Court of Appeals does state that it did not believe the evidence “leads unquestionably to the finding that Pate’s back injury affects nothing more than her back,” the Court of Appeals absolutely did not make any independent finding of fact or conclusion of law regarding the depression claim, nor did it conclude that the evidence supporting that claim was “uncontradicted.”

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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).

Respectfully, there is substantial evidence in the record supporting the Workers' Compensation Commission's finding regarding to Pate's depression claim and concomitant denial of benefits. Therefore, instead of usurping the fact-finding province of the Commission as Pate suggests, the Petitioners respectfully contend that the Supreme Court should reverse the decision of the Court of Appeals and affirm the Commission in accordance with the Administrative Procedures Act. *See Broughton v. South of the Border*, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999) (holding it is not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence). Substantial evidence supporting the Commission's finding regarding the claim for "psyche (depression)" includes not only the medical records submitted into evidence but even Pate's own testimony, which in no way supports any allegation of a permanent psychological injury or disabling depression related to her low back injury. (A. pp.493—508).

Pate did not testify that her back injury caused her any psychological problems, though she admitted that her brother's recent death from pancreatic cancer was "very stressful" for her in late 2014 and resulted in her seeking medications from her family physician, though she was apparently feeling better at the time of the hearing in 2015. (A. p.507). Not only does Pate's testimony constitute substantial evidence supporting the Commission's denial of the depression claim, but the records of her primary care physician, which indicate that Pate's "stress" was due to "work stressors" (later described as new computer work) and "her brother dying from pancreatic cancer" (A. pp. 264, 269, 271, 284, 286, 288, 293, 296), also support the Commission's finding of fact number seven. Because the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and because the possibility of drawing two inconsistent conclusions from the evidence does not prevent the

Commission's findings from being supported by substantial evidence, the Supreme Court should 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 & Env'tl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004).

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

In her Brief to the Supreme Court, Pate argues that the

"Court of Appeals was *correct in finding* that Pate's physical injury to her back affected ... her legs." (Respondent's Brief p.11, emphasis added).

The Court of Appeals did not make any finding of fact regarding the weight or sufficiency of Pate's leg claims, but instead remanded the claim to the Commission to reconsider the evidence because it lacked authority to make findings of fact on appeal. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2 392, 394 (1995) (explaining that a reviewing court "has no authority to determine factual issues but must remand the matter to the Commission"). While Pate would lead this Court to believe that evidence of a disabling injury to her leg is "all one-way," such that the issue is "one of law for the Court and not of fact for the Commission," this is argument is, respectfully, without merit.

No physician issued any impairment rating for, or restriction on the use of, either of Pate's legs, irrespective of any vague subjective complaints.<sup>5</sup> According to Pate's own testimony, the substance of her leg injury claim is that pain

*"sometimes ...leads down to [her] – into [her] right thigh<sup>6</sup> through [her] buttocks."* (A. p.497, ll.11-15) (emphasis added).

Additionally, Pate has a number of non-work-related leg problems, including a pre-existing ankle injury (A. p.503, lines2—3; pp.256-259) and new leg problems (swelling, tingling, and discoloration of both feet and legs) that began in 2014 (A. p.277, p.280), which were specifically noted by the Commission (A. p.502, ll.19-21, p.5)) and which were subsequently diagnosed as chronic venous stasis due to her non-work-related pulmonary emboli. (A. pp.352--361). By November 2014, Pate was also complaining of another "new" problem: stabbing pain in her left lower leg and knee that was aggravated by weight bearing, standing, and walking, (A. pp. 288—289). However, there is no evidence that these "new" leg problems are causally related to her low back injury.

Not only is the evidence bearing on Pate's leg claim not "uncontradicted or "all one-

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<sup>5</sup> Pate's speculative arguments regarding her interpretation of the AMA's GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT at footnote 4 of her Respondent's Brief are without merit. Pate did not present any actual evidence or testimony to support these allegations.

<sup>6</sup> According to the Court of Appeals, Pate's medical records "reference pain in her *left* leg and hip." (emphasis added). However, Pate gave no testimony regarding any problem with her *left* leg at the hearing and at no time did she ever file any claim for any alleged injury to either her right or her left hip. (A. pp.66, 68, 69, 72, 74).

way,” but the Court of Appeals did not make its own finding of facts on appeal, as Pate alleges. Instead, there is substantial evidence to support the Workers’ Compensation Commission’s denial of the leg claims in the record, which necessitates review and reversal of the remand order of the Court of Appeals and affirmation of the Workers Compensation Commission in accordance with the Administrative Procedures Act.

In addition, the case of Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010), *rev’d* 399 S.C. 108, 700 S.E.2d 462 (2012), is not “controlling” as Pate now argues. (Respondent’s Brief p.24). According to Pate, the Court of Appeals in Hutson held that “radiculopathy into leg constituted a second body part thus allowing an award for lost earnings [sic] capacity” (Respondent’s Brief p.24). In reality, it was the Workers’ Compensation Commission that found “Hutson suffered radicular symptoms in his right leg that affected the functioning of the limb” and the employer did not appeal this finding. In this case, the Workers’ Compensation Commission carefully weighed the evidence and 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 body member other than Pate’s back.” (A. p.61). Because the Commission’s finding is supported by substantial evidence in the record, including the opinion of Pate’s treating neurosurgeon, Dr. Marzluff (A. p.236), it should be affirmed on appeal in accordance with the Administrative Procedures Act.

**IV. Pate is not entitled to a finding of fact on appeal that she is permanently and totally disabled under S.C. Code Ann. § 42-9-30 based on unrelated and irrelevant economic factors.**

Pate argues that the Supreme Court should

“hold the award must be greater than 50% [to the back], thus creating the presumption that Pate is permanently and totally disabled.” (Respondent’s Brief p.40).

According to Pate, her work restriction “plainly equates to more than 50% loss of use of the back.” Respectfully, these arguments are contrary to both the law and the facts of this case.

Pate was working in her regular, full-time position as the Assistant Manager of the College of Charleston Copy Center earning her regular, pre-accident wages for more than two years after the December 14, 2011, back injury and this job was available to her indefinitely. (A. p.512, p.519). Pate had no loss of wages, or even loss of wage-earning capacity, until she was hospitalized for near-fatal pulmonary emboli in September 2014, which aggravated her back condition and resulted in new work restrictions that she had not previously required as a direct result of the December 14, 2011, accident. The Commission made a specific finding that Pate “stopped working on September 15, 2014, when she was hospitalized for a pulmonary embolism. The Claimant’s pulmonary embolism is unrelated to her employment and work injury.” (A. p.62). Therefore, it is the pulmonary emboli, not the work accident, that are the proximate cause of any lost wages. *See Geathers v 3V, Inc*, 371 S.C. 570, 641 S.E.2d 29 (2007) (reaffirming the well-established “Gordon Rule,” which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers’ compensation claims). In addition, the Commission’s Order makes plain that it already considered Pate’s “work restrictions at the time

of separation from her employer” in determining that she had sustained a 40% loss of use of the back. (A. p.63, #11).

Furthermore, Pate’s work status following her pulmonary emboli is not relevant to an award under S.C. Code Ann. § 42-9-30 and certainly does not mandate a presumption of permanent and total disability, or a finding on appeal by the Supreme Court that Pate has proven greater than 50% loss of use of the back based on conflicting evidence. With Section 42-9-30’s “medical model,” the Legislature has already “statutorily presumed lost earning capacity” for Pate’s back injury, commensurate with her physical loss of use. Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003); S.C. Code Ann. § 42-9-30 (stating that “[i]n cases included in the following schedule, the disability in each case is considered to continue for the period specified...”). In Wigfall, the Supreme Court further explained that “... the medical model, provides awards for disability **based upon degrees of medical impairment to specified body parts.**” (emphasis added) (citing G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958) and LARSON’S WORKERS COMPENSATION LAW § 86.02 (1999); *see also* Dykes v. Daniel Constr., 262 S.C. 98, 202 S.E.2d 646 (1974) (holding that compensation depends upon “functional loss,” not earning capacity); Dunmore v. Brooks Veneer Co., 248 S.C. 326, 149 S.E.2d 766 (1969) (holding that compensation depends on the “character of the injury,” not lost earnings).

While Pate argues that it is “erroneous” for courts – such as the Supreme Court in Singleton and Wigfall – to “conflate *impairment ratings* with *disability* or *loss of use awards*,” (emphasis original), Pate cites no legal authority to support the reversal of longstanding precedent, though she makes unfounded arguments regarding legislative intent. However, the Supreme Court specifically rejected the same “legislative intent” arguments in Wigfall, when the

employee therein sought to establish permanent and total disability in a single scheduled injury claim with evidence of wage loss. The Wigfall Court explained that

“[w]hile we may be inclined to accept Wigfall’s equity argument, we decline to do so in the face of the Legislature’s mandates ... Buttressing a plain reading of the statute is the Legislature’s inactivity on the issue over the last forty years since *Singleton*. The Legislature is presumed to be aware of this Court’s interpretation of its statutes. When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court’s interpretation.” (internal citations omitted).

Given that more than 60 years have now passed since the Supreme Court decided Singleton, and 20 years have passed since it was reaffirmed in Wigfall, during which the Legislature has taken no action to amend S.C. Code Ann. § 42-9-30 to address either Singleton or Wigfall, this inaction must be seen as clear evidence that the Legislature agrees with the Supreme Court’s prior interpretation of S.C. Code Ann. § 42-9-30, thus rendering Pate’s “legislative intent” argument for considering economic factors under S.C. Code Ann. § 42-9-30 specious.

Moreover, the record in this case, including the impairment ratings and Pate’s own testimony, constitute “substantial evidence” in support of the Workers’ Compensation Commission’s finding that Pate sustained a 40% loss of use of the back under S.C. Code Ann. §42-9-30. Pate testified that she has “nagging pain” that affects her activities “at times.” (A. p.497, 1.9 & 1.17). Dr. Nolan issued a 23% impairment rating consistent with his report on February 13, 2014, that Pate “continues to report good pain relief” (A. p.82), as well as Pate’s September 4, 2014, report that her pain as a “4/10 overall,” despite the fact that she was working

full time in her regular job at the time. (A. p.132). There is simply no competent evidence in the record that the Workers' Compensation Commission underestimated Pate's loss of use of the back in awarding her benefits under S.C. Code Ann. § 42-9-30 and there is no legal authority for Pate's contention that a reviewing court must more than double a medical impairment rating on appeal based on economic, or any other, factors.<sup>7</sup>

Instead, the Commission – the final arbiter of the weight of the evidence – properly exercised its discretion to award Pate benefits for a 40% loss of use of the back based upon substantial evidence in the record, without resorting to impermissible surmise, conjecture and speculation. *See Herndon v. Morgan Mills*, 246 S.C. 201, 143 S.E.2d 376 (1965). As such, the award should have been affirmed by the Court of Appeals in accordance with the Administrative Procedures Act. *See Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000) (holding that the final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission). In addition to seeking such an affirmation by the Supreme Court, the Petitioners further contend that the Supreme Court should reject Pate's request for a finding of fact on appeal that her loss of use exceeds 50% based on her current employment status because

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<sup>7</sup> Pate raises another new argument for the first time on appeal: that the appellate courts should independently “convert” the 25% impairment rating issued by Dr. Nolan into a 28% “lumbar spine rating” and make a finding of fact on appeal that Pate's impairment to the back exceeds 50%. Pate did not make any such argument before the Workers' Compensation Commission (*see* A. pp.409—411, pp.433—445) and this issue is neither preserved for appeal, nor supported with actual evidence. Moreover, Pate concedes 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% to the back.” (A. p.39, f.n.11). Respectfully, such consideration of these “multiple factors” is a task reserved to the Workers' Compensation Commission, which was accomplished in the case *sub judice* without error.

the appellate courts have no authority to make findings of fact on appeal, because economic considerations have long been held to be irrelevant in scheduled member claims, and because Pate's current work status is not even the proximate or natural result of her work injury.

V. **Pate's pulmonary emboli are the proximate cause of the increased work restrictions that resulted in her general disability.**

Pate argues that "there is no evidence that the pulmonary emboli or the anticoagulant medication directly increased Pate's restrictions." (Respondent's Brief p.35). Pate further argues that she "made a full recovery from the pulmonary emboli." (Respondent's Brief p.34). Both arguments are untenable.

The record is clear that Pate continued working full time for the College of Charleston for more than three years after the accident until her near-fatal pulmonary emboli required indefinite anticoagulant therapy and an increase in her work restrictions, including a 60% reduction in hours (from 40 to 16 hours per week). (A. p.506). The opinion of Dr. Nolan as to the cause of his recommended drastic reduction in work hours and increase in work restrictions is also clear:

"Due to her inability to receive needed injection therapy until 02/2015 *due to pulmonary embolisms* we recommended that she be placed out of work at this time and a letter will be drafted to this affect." (A.144) (emphasis added).

The fact that Pate did not "fully recover" from her pulmonary emboli prior to the hearing in July 2015 is also clear. In his aforementioned letter, Dr. Nolan clarified that given the

“inability to resume injection therapy until her pulmonary embolisms are resolved, I recommend that she be placed out of work for a period of two (2) months and her work status will be evaluated at each visit to our office to determine if she is able to return to work at that time.” (A. p.257).

At each office visit thereafter, the need for new and increased restrictions, including a four-hour workday and 16-hour work week, continued because Pate remained on the anticoagulant therapy necessitated by her pulmonary emboli. Pate confirmed with Dr. Nolan’s office on May 28, 2015, that she was still “on Xarelto” and her increased restrictions/reduced hours were unchanged. (A. p.123). Pate’s hematologist, Dr. Rose, confirmed on April 15, 2015, that the

“plan is to complete at least 1 year of Xarelto therapy. At the end of 1 year’s time, we will consider discontinuation of therapy ... She will return to clinic in 2 months’ time with a CBC with differential and a CMP.” (A. p.282).

Pate herself testified at the hearing on July 14, 2015, that she was still taking the anticoagulant Xarelto therapy and that she remained under the care of Dr. Rose for the pulmonary emboli. (A. p.504). Pate also admitted that after her pulmonary emboli in October 2014, she could no longer work the full-time, eight-hour per day, 40-hour per week schedule she had successfully done for years following the work accident.<sup>8</sup> (A. p.506).

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<sup>8</sup> While Pate’s Brief suggests that “Pate’s continued employment at the Copy Center was hanging on a thread” (Respondent’s Brief p.35), there is no evidence to support this contention. In fact, this “thread” as a full time Assistant Manager lasted for three years and her supervisor,

Clearly, Pate had *not* fully recovered from her non-work-related pulmonary emboli at the time of the hearing as she now claims but was continuing to require regular medical treatment and increased work restrictions as a direct result of the pulmonary emboli. This does not mean that Pate should not be compensated for her work-related low back injury. To the contrary, Pate was fairly compensated by payment of \$73,581.97 in indemnity benefits by the State, including benefits representing a 40% permanent loss of use of the back. However, the Petitioners respectfully contend that neither Pate’s work-related low back injury, nor any alleged problem with her legs or psyche, are the proximate cause of any permanent disability<sup>9</sup> and that she is not

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Ms. Connor, testified that she was prepared to accommodate Pate’s physical restrictions “indefinitely.” (A. p.512, ll.7—10). The integrity and stability of this “thread” is further illustrated by the following questions posed by Pate’s attorney to Ms. Connor:

*Q. As far as her physical restrictions, the College of Charleston can still accommodate her physical restrictions; is that fair to say?*

*A. Yes, ‘cause I personally won’t lift more than 15 pounds myself.*

*Q. The only thing that is the roadblock to her returning to work at the College of Charleston is the restriction from her working eight hours a day; is that fair?*

*A. That’s fair.*

(A. p.519, ll.14—23).

<sup>9</sup> Pate appears to argue that any disability caused by the pulmonary emboli in 2014 and 2015 was only temporary and that the pulmonary emboli only “indirectly prolonged the period during which she was unemployable,” citing Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996) (holding that an employee who was out of work and receiving temporary disability compensation was entitled to continuing temporary disability benefits despite a subsequent pregnancy prolonging that period prior to maximum medical improvement). The facts of Orr are clearly distinguishable, as Pate had already reached maximum medical improvement for her work injury, and she had returned to work full-time work for several years prior to suddenly becoming disabled as a result of her pulmonary emboli. Having not recovered

entitled to any additional compensation benefits as a result thereof, as properly concluded by the Workers' Compensation Commission.<sup>10</sup> Therefore, the issues of whether the low back injury had a disabling effect on her legs or psyche, or whether she properly claimed and proved an injury to her sacroiliac joint, are moot and remand to the Commission is unwarranted.

### **Conclusion**

Based on the arguments set forth in the Petitioner's Brief and herein above, the College of Charleston and the South Carolina State Accident Fund respectfully request that the South Carolina Supreme Court affirm the final Decision and Order of the South Carolina Workers' Compensation Commission in accordance with the Administrative Procedures Act. The

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from the pulmonary emboli at the time of the evidentiary hearing, a new hearing would be required to determine whether the treatment for the pulmonary emboli ever ended and, if so, whether and to what extent she required any permanent work restrictions or had any permanent loss of wage-earning capacity due to any cause thereafter. However, because Pate's work injury did not have a disability effect on more than one body member, she is not entitled to pursue benefits under S.C. Code Ann. § 42-9-10 or § 42-9-20 and the point is moot.

<sup>10</sup>As explained in the Alaska decision relied upon by Pate, the Workers' Compensation Commission was not required "to pretend" that Pate does not have restrictions due to her pulmonary emboli, instead, Pate was required to "prove that her [low back injury] is totally disabling ... *regardless* of her [pulmonary emboli]." See Thurston v. Guys With Tools, Ltd., 217 P.3d 824 (2009) (emphasis added) (holding that where an employee sustained a work-related knee injury and was subsequently diagnosed with cancer, "the employer does not 'take on unrelated diseases that find the employee after a work-related injury,'" instead, the employee must prove that "her knee disability is totally disabling, either temporarily or permanently, regardless of her cancer," with the ultimate decision resting with the worker' compensation board.).

Commission properly exercised its discretionary authority to award benefits to Pate based on a finding of a 40% loss of use of the back causally related to the December 14, 2011, accident, which is supported by substantial evidence in the record and the applicable law. In the alternative, the Petitioners request that the Court modify the decision of the Court of Appeals to limit any mandate on remand to the consideration of whether Pate's work-related low back injury caused a "disabling effect" on Pate's legs, and if so, whether, in the opinion of the Commission, she is entitled to general disability benefits as a direct result thereof.

Respectfully submitted,

*Kirsten Leslie Barr*

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