

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

Appellate Case No.: 2018-001249

**RECEIVED**  
MAR 15 2019  
SC Court of Appeals

Sarah Folston, Claimant,.....Appellant,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and  
SC State Accident Fund, Carrier,..... Respondents.

**RECORD ON APPEAL**

Stephen B. Samuels  
SAMUELS LAW FIRM, LLC  
1320 Richland Street  
Columbia, SC 29201  
(803) 779-4000

**ATTORNEY FOR APPELLANT**

Erin F. Farthing  
SC STATE ACCIDENT FUND  
Post Office Box 102100  
Columbia, SC 29221  
(803) 896-5892

**ATTORNEY FOR RESPONDENTS**

# INDEX

<b>I.</b>	<b>ORDERS.....</b>	<b>1</b>
	Consent Order filed January 3, 2014 .....	1
	Order filed November 7, 2016 .....	4
	Decision and Order filed October 6, 2017 .....	7
	Request for Proposed Decision and Order of March 14, 2018 .....	30
	Appellant Panel Decision and Order filed June 5, 2018 .....	31
<b>II.</b>	<b>PLEADINGS .....</b>	<b>43</b>
	Form 21 of January 21, 2016 .....	43
	Form 22 of February 25, 2016 .....	44
	Defendant’s Form 58 of January 31, 2017.....	45
	Defendant’s APA Submissions.....	46
	1. First Care.....	47
	2. Lexington Medical Center .....	59
	3. ImageCare .....	69
	4. Doctors Express .....	73
	5. InMed.....	125
	6. Midlands Orthopedics.....	127
	7. David Troyer, M.D. ....	167
	8. Carolinas Center for Advanced Management of Pain .....	169
	9. SC Diagnostic Imaging.....	189
	Ex. A – Employability Analysis and Labor Market Survey .....	190
	Ex. B – CORA – FCE.....	203
	Ex. C – Deposition of Claimant.....	228
	Ex. D – Video of Claimant from Facebook page of Fred D. Dodson.....	Enclosed CD

Claimant’s Form 58 of February 8, 2017.....	294
Claimant’s APA Submissions.....	300
10. Doctors Express .....	300
11. Progressive Physical Therapy .....	304
12. Ellis Physical Therapy Associates .....	307
13. First Care.....	333
14. Southeastern Spine Institute.....	337
15. Columbia Rehabilitation Clinic, Inc. ....	342
16. Adams & Wilkinson .....	364
Exhibit E – Subpoena Response from the Directions Group.....	373
Exhibit F – Deposition Transcript of Jacqueline Kennedy-Merritt .....	405
<b>III. TRANSCRIPTS .....</b>	<b>435</b>
Transcript of Proceedings before Commissioner R. Michael Campbell, II of February 15, 2017.....	435
Witness - Sarah Folston .....	456
Direct Examination by Mr. Samuels.....	456
Cross Examination by Ms. Farthing .....	475
Redirect Examination by Mr. Samuels .....	491
Full Commission Hearing (Transcript) of January 22, 2018 .....	495
Caption.....	496
Call to Order (Court Reporter).....	498
Appellant’s Argument by Mr. Samuels .....	498
Respondent’s Argument by Ms. Farthing.....	504
Appellant’s Reply by Mr. Samuels.....	511
<b>IV. CERTIFICATE OF COUNSEL.....</b>	<b>515</b>

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 1108515

SARAH FOLSTON,	)	
	)	
CLAIMANT,	)	HEARING
	)	BEFORE COMMISSIONER
v.	)	R. MICHAEL CAMPBELL, II
	)	
	)	<b><u>TRANSCRIPT</u></b>
DEPARTMENT OF	)	
DISABILITIES AND SPECIAL	)	
NEEDS,	)	
	)	
EMPLOYER,	)	
AND	)	
	)	
STATE ACCIDENT FUND,	)	
	)	
CARRIER,	)	
DEFENDANTS.	)	
_____	)	

THE WORKERS' COMPENSATION HEARING, TAKEN  
BEFORE CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR  
THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF  
11:55 A.M., WEDNESDAY, FEBRUARY 15, 2017, SOUTH  
CAROLINA WORKERS' COMPENSATION COMMISSION, COLUMBIA,  
SOUTH CAROLINA 29202.

**CORA ELLIS BRUTON  
COURT REPORTER  
131 BROWNING COURT  
LEXINGTON, SOUTH CAROLINA 29073  
803-397-0189**

**APPEARANCES**

**FOR THE CLAIMANT**

STEPHEN B. SAMUELS, ESQUIRE  
SAMUELS LAW FIRM, LLC  
1320 RICHLAND STREET  
COLUMBIA, SOUTH CAROLINA 29201  
803-779-4000

**FOR THE DEFENDANT**

ERIN FARTHING, ESQUIRE  
SOUTH CAROLINA STATE ACCIDENT FUND  
POST OFFICE BOX 102100  
COLUMBIA, SOUTH CAROLINA 29221-5000  
803-896-5820

**REPORTED BY**

CORA ELLIS BRUTON  
COURT REPORTER  
131 BROWNING COURT  
LEXINGTON, SOUTH CAROLINA 29073  
803-397-0189

**INDEX**

WITNESS - SARAH FOLSTON

DIRECT EXAMINATION BY MR. SAMUELS . . . . .22

CROSS EXAMINATION BY MS. FARTHING . . . . .41

REDIRECT EXAMINATION BY MR. SAMUELS . . . . .57

CERTIFICATE . . . . .60

**EXHIBITS**

(No Exhibits Proffered)

CORA ELLIS BRUTON - COURT REPORTER  
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073  
803-397-0189

1           THE COURT: Today's hearing date is February  
2           15th, 2017. This is South Carolina Workers'  
3           Compensation Case File Number 1108515. This is the  
4           case of the Claimant Sarah Folston represented by  
5           Attorney Stephen B. Samuels. The Employer is the  
6           South Carolina Department of Disabilities and Special  
7           Needs (Midlands Center). The Carrier is The State  
8           Accident Fund; both Defendants represented by Attorney  
9           Erin Farthing.

10           The date of accident is March 22, 2011. There  
11           was an average weekly wage of \$413.20 with a  
12           corresponding compensation rate of \$275.48.

13           APAs have been submitted. Are there any  
14           objections to APAs, jurisdiction, venue or any other  
15           items?

16           MS. FARTHING: Nothing from Defendants.

17           MR. SAMUELS: None from the Claimant. I believe  
18           you may have misspoke on the average weekly wage and  
19           compensation rate.

20           MS. FARTHING: Oh. Sorry.

21           THE COURT: What did I --

22           MR. SAMUELS: I think you read the higher one,  
23           which I prefer, --

24           THE COURT: You know what I think I actually did?

25           MS. FARTHING: I was looking at something else in

1 the file.

2 THE COURT: Okay. So the correct one should be

3 --

4 MR. SAMUELS: I can read it, Your Honor. \$380.66  
5 average weekly wage and a compensation rate of \$253.79  
6 by Consent Order signed by Commissioner James January  
7 3rd, 2014.

8 THE COURT: I appreciate the clarification.

9 Thank you for calling me on that.

10 Without objection the Commission file becomes a  
11 part of the record with the exception of self-serving  
12 declarations and unstipulated medical reports.

13 Ms. Farthing, we are here today on your Form 21  
14 so, ma'am, if you would please put your position on  
15 the record and let us know exactly what you're seeking  
16 here today?

17 MS. FARTHING: Yes. Thank you, Commissioner. I  
18 know we had a pretty extensive pre-trial conference so  
19 I'm not going to try -- try to keep it a little bit  
20 more concise than that was.

21 THE COURT: Thank you.

22 MS. FARTHING: We are here today on our Form 21  
23 which was filed back on -- I had the date -- January  
24 21st, 2016 in which we requested the stop payment of  
25 TTD, determination of the compensation owed to the

1 Claimant and also overpayment of TTD dating back to  
2 the date of MMI which was November 12th of 2015 at  
3 which time Dr. LaMotta assigned Ms. Folston a seven  
4 percent rating to -- regional rating to the lumbar  
5 spine which converted to a five percent whole person  
6 respective to the spine; and future medicals,  
7 including repeat ortho visits, physical therapy and  
8 injections. Defendants contend that this is a fairly  
9 simple single member claim and that Ms. Folston's  
10 recovery is limited to recovery under 42-9-30. Ms.  
11 Folston fell when she was pushed by a consumer while  
12 working for the Department of Disabilities and Special  
13 Needs. Initial treatment was for the hip. She was  
14 released to return to work and worked -- worked for  
15 her prior Employer through November of 2012 when the  
16 light duty was no -- they could no longer accommodate  
17 light duty restrictions. In July of 2013 a Form 50  
18 was filed alleging an injury to the low back.  
19 Claimant produced an IME from Dr. Poletti which  
20 indicated that the pain could be from the low back  
21 rather than from the hip. The parties agreed on a  
22 Consent Order to Dr. LaMotta to be the authorized  
23 treating physician with regard to Ms. Folston's back  
24 and Dr. LaMotta provided the treatment which was  
25 exclusively conservative treatment. At one point he

1 sent her to Dr. Hutchison for pain management, but at  
2 Ms. Folston's request he was -- she was referred back  
3 to Dr. Hutchison -- or Dr. LaMotta rather, because she  
4 did not, as per Defendants' APA 134, she did not  
5 tolerate pain meds and muscle relaxants well. At that  
6 time Dr. LaMotta ordered additional PT before finally  
7 placing her at MMI on November 12th of 2015. Again,  
8 we are -- we are requesting overpayment too of the TTD  
9 dating back to the date of MMI which as of today is 66  
10 weeks. If not to the date of MMI then credit back --  
11 dating back to the date when we filed the 21 which  
12 again is -- as of today is 56 weeks. Again, we argue  
13 that the only permanent injury is to the low back and  
14 that Ms. Folston is therefore limited to recovery  
15 under 42-9-30 under Singleton and Colonna as a second  
16 body part needs to have an injury and a permanent  
17 impairment to qualify for perm and total under  
18 Singleton. There's a five percent rating, no surgery,  
19 none needed and there's no indication in the file of a  
20 greater than 50 percent loss of use to the back. In  
21 the alternative if there are two body parts we would  
22 argue that she is entitled to a wage -- a  
23 determination of wage loss per the vocational  
24 assessment of Dr. Jacqueline -- of Jacqueline  
25 Kennedy-Merritt which is a range of, I think, on the

1 low end -- the potential of future earnings being on  
 2 the low end, the difference of -- I think potential  
 3 earnings of \$6900 a year to potential earnings of  
 4 \$21,600 a year which is actually greater than Mr. --  
 5 Ms. Folston's salary at the time of her injuries. Let  
 6 me make sure I'm getting everything in.

7 THE COURT: Okay.

8 MS. FARTHING: Defendants also have -- with  
 9 regard to restrictions, Dr. LaMotta placed her --  
 10 indicated that there would be no contraindication to  
 11 her performing sedentary work restrictions, however,  
 12 we also have an FCE from CORA that actually indicates  
 13 medium duty capabilities and further indicated that  
 14 Ms. Folston self-limited during the FCE and that her  
 15 actual capabilities are higher than that. As for the  
 16 treatment recommended, the referral from Dr. LaMotta  
 17 and Dr. Hutchison, again Dr. LaMotta in his MMI note  
 18 indicated that she may need, in the future,  
 19 injections. This is certainly part and parcel of what  
 20 was anticipated in the future medical -- medical  
 21 treatment by Dr. LaMotta and we would certainly agree  
 22 that she is entitled to go back to Dr. Hutchison for  
 23 those injections, especially in light of her request  
 24 to be released from him because the other modalities  
 25 of treatment provided by him were not effective. And

CORA ELLIS BRUTON - COURT REPORTER  
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073  
 803-397-0189

1           that's all we have.

2           THE COURT: Okay. Thank you. Mr. Samuels?

3           MR. SAMUELS: Thank you, Your Honor. May it  
4 please the Commission? As a threshold issue, Your  
5 Honor, we do note that Dr. LaMotta did place Ms.  
6 Folston at MMI, but I would point out that he was  
7 specifically doing a surgical evaluation subject to  
8 follow-up. So -- so while she may be at MMI from the  
9 standpoint of whether she's a surgical candidate is  
10 not an indication that she was at MMI from Dr.  
11 Hutchison and Ms. Folston most recent went back to Dr.  
12 LaMotta in 2016. She saw him November 10th, 2016.  
13 This is Defendants' APAs 113(B) through 113(H), and we  
14 note several points from that, Your Honor, that I  
15 think are critical to this case. The first is a  
16 diagnosis of lumbar -- lumbosacral radicular syndrome  
17 right side, foraminal disc herniation L5-S1 with L5  
18 radiculopathy. This case does not fall under  
19 Singleton and Wigfall because there are two body parts  
20 that have been affected and the effect is a physical  
21 effect which is one that is required by law. And  
22 particularly we would refer to the Hutson case,  
23 H-U-T-S-O-N where the Court of Appeals found that the  
24 Commission had erred in not making a separate award  
25 for the leg even though there was no rating to the leg

1 and that the effect on the leg was a radiculopathy  
 2 which would be the exact same diagnosis that we have  
 3 in this case. In addition to that we already have  
 4 several orders -- two orders from the Commission  
 5 establishing more than one body part is involved,  
 6 specifically Commissioner Beck issued an Order  
 7 November 7, 2016 which states that Finding of Fact  
 8 Number 1, per prior Consent Order this is an admitted  
 9 claim for injuries to the right hip, right elbow and  
 10 back with the back injury causing sciatic pain into  
 11 the right leg. So not only does it establish  
 12 medically it's also the law of the case that there is  
 13 more than one body part involved. So legally Ms.  
 14 Folston is entitled to proceed under the economic  
 15 model. If Your Honor finds that she has suffered a  
 16 wage loss and is not permanently and totally disabled  
 17 I think the likely result then would be from a  
 18 residual earning capacity \$6900 as Defendants' counsel  
 19 pointed out as a part of Ms. Kennedy-Merritt's report.  
 20 Your Honor, the other thing we also know is that Ms.  
 21 Folston is 59; she's almost 60. Per the vocational  
 22 testing she reads at a third grade level and has very  
 23 limited spelling and math skills. Both vocational  
 24 experts, Glenn Adams for the Claimant and Jacqueline  
 25 Kennedy-Merritt for Defendants agree that she cannot

CORA ELLIS BRUTON - COURT REPORTER  
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073  
 803-397-0189

1 return to any of her previous employments and that she  
2 has no transferrable skills which she could use in any  
3 of her employment. So the only jobs that  
4 theoretically that would be available to her would be  
5 unskilled or semi-skilled sedentary jobs and the  
6 problem with that is that there are virtually no jobs  
7 of that sort. In Ms. Kennedy-Merritt's deposition she  
8 effectively conceded that point and I think that I  
9 point Your Honor to her deposition at page 78 through  
10 79. Page 78 line 16 to line 5 on page 79 where she  
11 testified "there are possible jobs that she can do".  
12 She goes on to say, "But on the other hand she would  
13 need help going to these types of jobs. That's why  
14 I'm saying she can't just walk out the door and go get  
15 them. I believe, based on my vocational knowledge,  
16 education, experience that with some help these jobs  
17 -- she could possibly do these jobs. And that candid  
18 testimony from the vocational expert shows that she  
19 cannot meet the most probable standards in finding  
20 there are jobs available that Ms. Folston could  
21 actually be hired to do. So in that case she meets  
22 the test that -- and while total disability is not  
23 required to plead helplessness it does require proof  
24 that there are few jobs or no jobs in the local and  
25 national economy. That is shown by both vocational

1 experts. I will also make the observation regarding  
2 the FCE from CORA that was done pursuant to the Order  
3 of Commissioner Beck that Ms. Kennedy-Merritt did not  
4 change her opinion based on that. Her opinion has  
5 remained the same. There's been no addendum, no  
6 additional testimony, so neither vocational expert was  
7 affected by that opinion and the vocational experts  
8 seem to agree on the totality of the evidence that Ms.  
9 Folston is limited to sedentary duty, and of course,  
10 Dr. LaMotta confirmed that she was at sedentary duty.  
11 And in fact, at page 113(F) of Defendants' APAs there  
12 is a work status information dated November 10th, 2016  
13 under Physical Limitations it states, "Sedentary  
14 Duties Only". And Your Honor, we would contend that  
15 the evidence shows Ms. Folston is permanently and  
16 totally disabled. We are requesting that an award be  
17 made in a lump sum for the commuted value of the  
18 remaining 500 weeks and we would request that a James  
19 allocation in the Order, because she is a candidate  
20 for social security per both Dr. Poletti and  
21 Jacqueline Kennedy-Merritt. There is one other issue  
22 which is a legal issue, and we defer to that in our  
23 attachment. Essentially Ms. Folston should have been  
24 paid assault leave which is the benefit to State  
25 Employees under Section 8-11-40, and that applies to

1 State Employees who are assaulted on the job. So it  
2 typically covers correction officers, it covers an  
3 individual like Ms. Folston who worked with Special  
4 Needs people who are sometimes violent. In this case  
5 she was attacked, so she would be entitled to those  
6 benefits in addition to the temporary total that she  
7 has received. The Statute actually states, "Both  
8 State Employees and FTE positions who are physically  
9 attacked while in the performance of official duties  
10 and suffer bodily harm as a result of the attack must  
11 be placed on administrative leave and be paid by their  
12 Employer rather than sick for a period of  
13 administrative leave for each incident, to not exceed  
14 180 days." So 8-11-40 provides that additional  
15 benefit. The State recognizes that some State workers  
16 do participate in higher risk jobs than others and  
17 created this additional benefit whereby they can  
18 obtain additional annual leave when they're assaulted  
19 on the job. All right. I believe that covers our  
20 position.

21 THE COURT: Thank you. Ms. Farthing?

22 MS. FARTHING: Yes, sir, just a few things.

23 Thank you. I think you -- a couple of things to  
24 direct. First, with regards to Dr. LaMotta being  
25 referred to as the surgeon -- the doctor seeing her

1 for surgical evaluation. He's been the authorized  
2 treating physician from 2013 onward. He was not  
3 simply consulted to determine her surgical options and  
4 whether she was a candidate for surgical treatment.  
5 He provided treatment throughout the course of the  
6 claim from 2013 until the date of MMI. With regard to  
7 the distinction between Colonna and Hutson, as Mr.  
8 Samuels indicated, Hutson sent them back for a  
9 separate award to the leg, so I guess a separate award  
10 under 42-9-30. That's not what is at play here. The  
11 issue is Singleton provides for a situation where if  
12 there's more than one body part impaired in a claim  
13 the residual disability as a result of both of those  
14 two injuries can be greater than the impairment of  
15 each, you know, the five percent to the leg and the  
16 three percent to the -- the shoulder, it can be  
17 greater than that. This isn't a situation where she  
18 -- where there were -- there's a request for a  
19 determination of five percent to the leg or some  
20 disability -- degree of disability to the leg. It's  
21 attempting to combine those two injuries to find -- to  
22 essentially get around the 50 percent or greater  
23 requirement for the back. There's a reason that that  
24 requirement is in play and we're in a situation here  
25 where the only rating from an authorized treating

1 physician was five percent to the back which certainly  
2 takes into consideration any radiculopathy or any pain  
3 in the leg as a result of that back injury, as Dr.  
4 LaMotta noted in his records, routinely that -- that  
5 she was having sciatic issues. As for any kind of  
6 wage loss determination we would request that the 340  
7 weeks start as of the date of MMI. We think under the  
8 law that that would be the appropriate time for that  
9 to start. In the alternative, the Defendants have  
10 paid almost 220 weeks at this point. Until there's an  
11 award in this matter who knows how many weeks we'll  
12 pay in the interim. We would request that any award  
13 under the wage loss be capped so that she's not  
14 getting more than 500 weeks of compensation. As with  
15 Jacqueline Kennedy-Merritt, it's clear that her  
16 opinion both in her report and her opinion at her  
17 deposition testimony was that Ms. Folston is capable  
18 of returning to work, and in fact, that is the opinion  
19 of Dr. LaMotta and the opinion of all the doctors who  
20 have treated her up until this point. The only -- the  
21 only individual who has opined that she cannot is her  
22 own voc -- the person who did her own voc assessment,  
23 and maybe Dr. Poletti who, again, was an IME at her  
24 request and was previously -- and despite the fact  
25 that the authorized treating physician who had already

1 given his opinion as to the degree of impairment was  
2 one that the parties had agreed to. With regard to  
3 the contention that there's been no change in  
4 anybody's opinion since our FCE, we didn't provide it  
5 to anybody. Whenever we got the Order from Dr. --  
6 from Commissioner Beck requiring that she attend an  
7 FCE there was a lot of concern raised to the fact that  
8 Mr. Samuels had already paid to take Dr. -- Jacqueline  
9 Kennedy-Merritt's deposition, so there had already  
10 been discovery concluded, and quite frankly,  
11 Jacqueline Kennedy-Merritt dealing with much stricter  
12 restrictions than those imposed under the -- than  
13 those found to be at play in the CORA FCE, found that  
14 she was employable. So there was no need for us to  
15 get her to amend her opinion in light; it's just  
16 further evidence for the Commission that Ms. Folston  
17 is capable of returning to work. As far as -- should  
18 the Commission find that Ms. Folston is permanently  
19 and totally disabled we would object to the lump sum.  
20 We would request that the award be paid out weekly and  
21 if that is the case we would object to Utica-Mohawk  
22 language to the extent that it creates an internal  
23 inconsistency. In the Order that you've got it's  
24 indicating that she's making a certain number per week  
25 -- being paid a certain amount per week and then a

1 later -- a later part of the Order saying that she's  
2 actually making a different amount per week. And as  
3 far as the legal issue of the assault leave, that's  
4 something that this Commission does not have  
5 jurisdiction over. It is not a -- a -- anything  
6 that's awarded under the Act as -- as Mr. Samuels  
7 indicated, it's from, I believe Article 8 of the Code  
8 which deals with State Employees. Additionally Ms.  
9 Folston didn't even go out of work until November of  
10 2012, well after the 180 days after the date of  
11 injury, so instead they actually provided her with  
12 work within her restrictions during that time. And  
13 again, and additionally any -- any sort of payment  
14 made pursuant to that we would argue falls within  
15 42-9-210 in which there's a deduction from  
16 compensation of payments made. An Employee was not  
17 due and payable under the Workers' Comp Act. These  
18 are payments that she's entitled to under the Act so  
19 even if she were awarded that, which again, we would  
20 argue that the Commission doesn't even have  
21 jurisdiction to consider that. That's an issue that  
22 Ms. Folston needed to have raised with her Employer.  
23 It's an Employment law issue and quite frankly  
24 something I don't even get involved in because it's  
25 not something to do with a Workers' Comp Claim, it's a

1 -- it's a benefit provided under the -- a separate  
2 part of the Act by the Employer. So we would argue  
3 that the Commission does not have jurisdiction on it  
4 so it's something that would fall within 42-9-210.  
5 Thank you.

6 THE COURT: Mr. Samuels?

7 MR. SAMUELS: I go back to Hutson and probably  
8 one of the most distinguished cases, the Hutson case  
9 given that the Court of Appeals sent it back down to  
10 the Commission with instructions to award permanency  
11 to the leg in addition to the permanency to the back  
12 that they had already awarded. What happened from  
13 there, though, the Supreme Court granted CERT and they  
14 reversed Hutson, but on different grounds. So the  
15 point about the leg being found to be a separate award  
16 is still good law. What happened, though, with the  
17 Supreme Court is they held that the testimony of the  
18 Claimant that he could possibly open a restaurant and  
19 that was the basis for the Commission to find that he  
20 was not permanently and totally disabled. Well, the  
21 Supreme Court said that was rank speculation which is  
22 much more like what we have in Jacqueline  
23 Kennedy-Merritt's report. I think that exposed in the  
24 deposition of her subsequent backing off of opinions  
25 that include she could only say possibly rather than

1 most probably. The other point about Hutson is  
2 because he had radiculopathy in the leg he was legally  
3 entitled to under 42-9-10 and 42-9-20. That was a  
4 very, very critical part of that case and it felt  
5 exactly what we have here, undisputed she's got  
6 radiculopathy and again, it's the law of the case  
7 because of the previous Orders; the Consent Order and  
8 then -- and then Commissioner Beck's later Order that  
9 her injury affects multiple body parts, including her  
10 radicular pain in her leg. I did want to address the  
11 objection to awarding a lump sum and objection to the  
12 James allocation. First off as far as allocation  
13 language is concerned the Supreme Court was  
14 fundamentally and absolutely clear that a Claimant is  
15 entitled to that sort of allocation language which is  
16 absolutely clear. That was very significant in appeal  
17 and, in fact, when it first went up the Supreme Court  
18 really didn't understand what it was about. They  
19 thought it looked like double dipping. So then it --  
20 they actually reversed themselves on rehearing which  
21 is an extraordinary thing for the Supreme Court to do.  
22 They completely did a 180, reversed themselves,  
23 recognized that there was absolutely no prejudice to  
24 the Employer by granting the allocation language in  
25 the settlement of an award. And it's -- it's

1       troubling. The -- the other point goes to lump sum.  
2       Lump sums are controlled by Section 42-9-301 and the  
3       fact that lump sum awards are favored. One of the  
4       reasons they would be favored is because if you don't  
5       do the award in a lump sum then the Claimant is left  
6       with the Social Security offset. So the James -- if  
7       you can't do James language unless you do an offset.  
8       But the test for lump sum is if it is contrary to the  
9       best interest of the Employee or his dependents.  
10      There is no suggestion, no evidence -- I cannot  
11      imagine what evidence they could possibly come up with  
12      that would be against Ms. Folston's best interest. I  
13      think -- when we start thinking it against somebody's  
14      best interest we're probably thinking of a 25 year old  
15      getting a lump sum and going out and buying the  
16      biggest, badest truck that there could be, throwing a  
17      big party enjoying all that money. Obviously Ms.  
18      Folston needs this to survive and she needs to survive  
19      in a situation where she's struggling at \$253 a week.  
20      The State of South Carolina was unable to provide work  
21      for her. They had the opportunity and could have put  
22      her back to work; they didn't do that, because those  
23      jobs don't exist. And the other part of the lump sum  
24      is whether it works an undue hardship on the Employer.  
25      The Employer is the State of South Carolina. It is

1 not a small uninsured company who is scraping to come  
2 up with that kind of money. Frankly it is an amount  
3 that would not even register on the budget it is  
4 ridiculously so small. I'm not sure what the commuted  
5 value is as of today, but it's somewhere in the range  
6 of \$60 to \$70,000. So the fact she's talking about a  
7 pretty minimal award to try to help somebody who can't  
8 work for the rest of their working life. So we would  
9 ask that Your Honor does award -- make the award in a  
10 lump sum with the James allocation.

11 THE COURT: Okay. Thank you. Anything more?

12 MR. FARTHING: Yeah. And just a point of  
13 clarification. A lump sum we don't object to the  
14 James -- the Utica-Mohawk language or James  
15 allocation. As I said, it was specifically in the  
16 situation where it's not paid out weekly, which Mr.  
17 Samuels admitted himself, it affects the ability to do  
18 a separate allocation. Thank you.

19 THE COURT: All right.

20 THE WITNESS: Can I stand up for a minute?

21 THE COURT: Ma'am?

22 THE WITNESS: Can I stand up?

23 THE COURT: Sure. Absolutely. And if you can  
24 just kind of stand right there because we're getting  
25 ready to start taking your testimony. While you're

1 standing I'll go ahead and give you some instructions.  
2 First of all I need you to speak up, speak clearly for  
3 us so we can all hear your responses to the questions.  
4 But most importantly so this nice lady right here in  
5 front of me can get them for the record. If you're  
6 asked a yes or no question please give us a verbal yes  
7 or no answer. Try and stay away from things like  
8 uh-huh and huh-uh. That's just too easily  
9 misunderstood for the record. So if you could help us  
10 out with that we would appreciate it. Okay?

11 THE WITNESS: Okay.

12 THE COURT: Please raise your right hand. Do you  
13 swear or affirm that the testimony you're about to  
14 give is the truth, the whole truth and nothing but the  
15 truth?

16 THE WITNESS: Yes.

17 THE COURT: Please state and spell your name for  
18 the record.

19 THE WITNESS: Sarah, S-A-R-A-H. Folston,  
20 F-O-L-S-T-O-N.

21 THE COURT: Okay. Thank you, Ms. Folston. And I  
22 believe, Ms. Farthing, you're going to defer to Mr.  
23 Samuels?

24 MS. FARTHING: Yes, sir.

25 THE COURT: Okay. Mr. Samuels, your witness.

1           MR. SAMUELS: Thank you, Your Honor. I'm going  
2 to call Sarah Folston.

3                                 Sarah Folston,  
4 Having first been duly sworn, testified as follows:

5                                 DIRECT EXAMINATION

6           BY MR. SAMUELS:

7           Q     Ms. Folston, how old are you?

8           A     59.

9           Q     When will you be 60?

10          A     August the 30th of this year.

11          Q     What is your marital status?

12          A     Divorced.

13          Q     Where do you live?

14          A     (No verbal response).

15          Q     Where do you live?

16          A     Oh, I'm sorry. The address or --

17          Q     Just the town?

18          A     Oh, Columbia.

19          Q     Columbia? Does somebody live there with  
20 you?

21          A     Yes.

22          Q     Who lives with you?

23          A     My daughter.

24          Q     Okay. Is your daughter partially dependent  
25 on you for support?

CORA ELLIS BRUTON - COURT REPORTER  
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073  
803-397-0189

1 A Yes.

2 Q Do you have any other children?

3 A Yes.

4 Q What's your daughter's name?

5 A Misty.

6 Q And what is your other child's name?

7 A Freddie.

8 Q What does Freddie do for a living?

9 A He's in -- it's called life insurance and a  
10 pastor.

11 Q What church is he a pastor at?

12 A Life Destiny.

13 Q Do you go to that church?

14 A Yes.

15 Q How often do you go to church?

16 A Wednesdays and Sundays.

17 Q Does your injury present any physical  
18 limitations to your participating in church  
19 activities?

20 A Yeah. I -- yeah.

21 Q What kind of limitations?

22 A I can't -- well, I can't sit as long and  
23 can't stand as long, but I am allowed to, you know, I  
24 can walk around.

25 Q Okay. I asked you about your education.

1 You graduated from high school?

2 A Yes.

3 Q That was in 1975 in Mississippi?

4 A Yes.

5 Q And then you also went to school to become a  
6 massage therapist?

7 A Yes.

8 Q I want to go through -- and I should ask;  
9 you were standing a moment ago, you just sat down and  
10 why is that?

11 A It -- I felt really better just standing.

12 Q Okay. I want to run through your -- some of  
13 your work history and --

14 MR. SAMUELS: Your Honor, I don't have APA pages,  
15 but these are actually laid out in the Defendants'  
16 vocational report at pages five and six of that  
17 report. It's just not given APA pages.

18 Q -- so it looks like a number of years ago  
19 when you were in Orlando, Florida you worked as a  
20 school bus driver?

21 A Yes.

22 Q Okay. Is that something you'd be able to go  
23 back to do?

24 A No.

25 Q Okay. Why not?

1 A Because that I have to sit a long time.

2 Q Do you have difficulty driving for long  
3 periods of time?

4 A Yes.

5 Q Are you able to drive at all?

6 A I drive some.

7 Q Okay. You drove to my office today for this  
8 hearing?

9 A Yes.

10 Q There was a time when you were a child  
11 caretaker. Are you able to do the physical things  
12 required to take care of children?

13 A No. Can I give an explanation of that?

14 Q Sure.

15 A Because the kids I was taking care of I had  
16 to lift them, and some of those was, you know, heavy.

17 Q And it also appears while still in Florida  
18 you worked for two years as a massage therapist?

19 A Yes.

20 Q Is that something you'd be able to return  
21 to?

22 A No.

23 Q Then you moved to South Carolina and it  
24 looks like you worked at a minimum wage job as a prep  
25 cook at Popeye's; is that correct?

1 A Right.

2 Q Is that a physical job?

3 A Yes.

4 Q Okay. Would you be able to return to that?

5 A No.

6 Q And then your last job -- what was your last  
7 job?

8 A Working at the special need.

9 Q That's for the South Carolina Department of  
10 Disabilities and Special Needs?

11 A Yes.

12 Q What did you do there?

13 A I was -- they have another name for it, but  
14 I was like a caregiver to them where I had to make  
15 sure they had got their bath, some I had to feed and  
16 -- and we had to do like little activity with them.  
17 And plus, you know, change the Pampers and put them in  
18 the bed.

19 Q Okay. And that's -- that's at Disability  
20 and Special Needs?

21 A Right. That's all what I had to do.

22 Q And what -- what kind of people are you  
23 taking care of?

24 A Wheelchair -- guys that was in the  
25 wheelchair. A couple of them could walk and I -- but

1 the one that did walk I had to, you know, hold -- you  
2 know, lead them or -- mostly lead them because some of  
3 them was blind.

4 Q Okay. And there was these people who had  
5 various disabilities.

6 A Say that again.

7 Q Were these people you were taking care of  
8 that had various disabilities?

9 A Yes.

10 Q Okay. Were some of them occasionally  
11 violent? Did they act out?

12 A Yes.

13 Q Will you explain what happened to you when  
14 you were injured on that job?

15 A This particular evening the young man that I  
16 was -- he was in a wheelchair and I thought I had got  
17 him in -- into getting a shower and I had got his  
18 shoes and put them underneath his bed. And I had just  
19 stepped into the bathroom door. He jumped up out of  
20 the wheelchair made a step towards me and said, "No".  
21 And when he said no, with his force he shoved me  
22 backwards then I landed between both -- foot of both  
23 beds on the floor. Then when I was falling down, you  
24 know, I was trying to twist to see where I was falling  
25 to because one -- you know, the beds, one was a iron

1 bed and one was a wooden bed.

2 Q Were you injured when you fell?

3 A Yes.

4 Q When the patient attacked you?

5 A Yes.

6 Q What are the injuries that you suffered when  
7 it happened?

8 A I don't how to describe it, but at the time  
9 I was checked they were looking at my hip but I was  
10 continuing having pains.

11 Q Where were you having pains?

12 A In the top of my hip and on the side of my  
13 hip.

14 Q Anywhere else?

15 A Oh, I'm sorry, yeah even -- they even  
16 checked my elbow.

17 Q Okay. How's your elbow now?

18 A It's doing all right.

19 Q Okay. As time went on did your condition  
20 get better, did it stay the same or did it get worse?

21 A It got worse.

22 Q What sort of problems did you start having?

23 A Well, I thought it -- the pain was getting,  
24 you know, sharper and if I kind of move a certain way  
25 it would hurt and I would tell my supervisor. But he

1 -- at the time he didn't do anything about it.

2 Q Was there a good period of time where you  
3 went without treatment altogether?

4 A Yes.

5 Q When was that?

6 A Okay. They -- like I say I kept complaining  
7 about it, then I went to the -- she -- that with the  
8 insurance, then she referred me to another doctor  
9 which was at that time I think Dr. Jones. Then she  
10 had -- she diagnosed me as -- I don't know how to  
11 pronounce that medical word where the -- where the  
12 disc was touching a nerve.

13 Q All right. And for a time at the Department  
14 did they have you working what was supposed to be a  
15 light or sedentary duty job?

16 A Yes. After Dr. Jones had recommended to put  
17 me back on light duty they did for two months.

18 Q Okay. What did you do during that time?

19 A Filing, going through the papers and make  
20 sure the name was in the right order, then if it  
21 didn't have that then my supervisor had me go, you  
22 know, clean out -- you know, change the clothes in the  
23 guys' drawer.

24 Q Was there enough work to keep you busy?

25 A No, not really.

1 Q Most of the time you just sat around?

2 A In a sense.

3 Q Eventually were you told they no longer had  
4 work for you and you were terminated from the State?

5 A Right.

6 Q Okay. Now, sometime then you started  
7 treating with Dr. LaMotta?

8 A Yes.

9 Q And did Dr. LaMotta refer you to Dr.  
10 Hutchison for pain management?

11 A Yes.

12 Q Okay. You went to Dr. Hutchison to get  
13 injections?

14 A Yes.

15 Q How long did they help for?

16 A About a week.

17 Q Okay. There was a discussion in the record  
18 about recommending a spinal cord stimulator for you.  
19 Were you ever given the option to test out a spinal  
20 cord stimulator?

21 A He mentioned it and he gave me a DVD to see  
22 what it's like and that's all far that went.

23 Q You were then sent back, I believe, to Dr.  
24 LaMotta?

25 A Yes.

1 Q What was that about?

2 A After -- am I allowed to say what he said?

3 THE COURT: Don't tell me what he told you, but  
4 you can tell me what he did for you or what your  
5 understanding about his recommendations were.

6 A Well, I remember the last time he gave me a  
7 shot then he told me -- and it's like it was the same  
8 thing when he give me the shot it lasted about a week  
9 then he said he was going -- he told me he was sending  
10 me back to Dr. LaMotta.

11 THE COURT: So he recommended you back to Dr.  
12 LaMotta?

13 A Right.

14 BY MR. SAMUELS:

15 Q There's some mention in the records about  
16 possible surgery. Is there a reason you did not have  
17 surgery?

18 A Yes, he -- Dr. LaMotta said -- well, --  
19 because --

20 Q What's your understanding of why you didn't  
21 have surgery?

22 A Okay. Because my weight, it was, you know,  
23 a little -- because of my weight.

24 Q Okay. And then at some point it -- it  
25 appears that you -- no surgery, there was nothing more

1 for Dr. LaMotta to offer you? Did you realize at that  
2 point that you still had medical options?

3 A No, I did not.

4 Q At some point you found out that you had  
5 more medical options? Were you then sent back to Dr.  
6 LaMotta in December of 2016?

7 A November -- right, November.

8 Q Okay. Did Dr. LaMotta treat you or did he  
9 refer you to somebody else?

10 A He referred me back to Dr. Hutchison.

11 Q And do you want to go back to Dr. Hutchison?

12 A Yes, I will go back to him.

13 Q Okay. Are you willing to accept any  
14 treatment that is offered you from pain medication to  
15 injections to a spinal cord stimulator?

16 A Yes.

17 Q Is there any medication that was prescribed  
18 for you that you weren't able to get authorization  
19 for?

20 A Yes.

21 Q What medication was that?

22 A Oh, gosh, how do you pronounce that word?  
23 Ly -- oh, I can't think of the name of the medicine.  
24 It's -- I know it's for the -- it's for my nerves, lor  
25 -- la, la, la, la, la. I can't think of the name of

1 the medicine.

2 Q Well, in the record there's a prescription  
3 for Lyrica.

4 A Right.

5 Q Is that the medicine you're talking about?

6 A Right. That's the medicine.

7 Q Okay. Were you able to get that approved  
8 and that prescription filled?

9 A No.

10 Q And what doctor prescribed that for you?

11 A Dr. LaMotta.

12 Q I want to talk to you about what physical  
13 problems you're having today because of your injury.  
14 So tell us if there's any -- any sensations that  
15 you're feeling because of your injury today?

16 A To -- okay, today or any time? Right now or  
17 any time?

18 Q Well, tell us both and explain.

19 A Okay. I just want to get that -- okay. The  
20 sensation I get is if I sit too long and I get up I  
21 get real stiff. Now if I stand too long my left heel  
22 will go to throbbing and it runs up my leg. And just  
23 -- and my right side it hurts and right on top of my  
24 hip and it runs down to my knee. Well, you know, on a  
25 bad day it runs all the way down my leg. And -- and

1       also within the bad day the pain is so -- is run  
2       across my back even into my groins and when it get  
3       like that I'm at a place I don't know what to do. I  
4       just, you know, try to lay around and that don't help  
5       and it's like it have to kind of wear off. I try to,  
6       you know, try to move around anyway to keep from  
7       getting stiff, but I try to limit not to, you know, do  
8       too much to make it worse. And the pain is, on a good  
9       day, on a scale it would be like a five. On a bad day  
10      I'd say about a eight and on a rainy day it's in  
11      between.

12           Q     So how is it today?

13           A     It's -- I can still kind of tolerate it, but  
14      it bothers me.

15           Q     What is a typical day for you? What do you  
16      do?

17           A     I -- I try to limit -- you know, I try to do  
18      work in my house. Sometime I go out to the store.  
19      Sometime to get out of the house I will go with my  
20      granddaughter to her therapy.

21           Q     Are you able to do any housecleaning?

22           A     I tries to do that. I do a little bit and I  
23      sit down and I do a little bit and I sit down.

24           Q     How about cooking?

25           A     Not too much of that if microwavable.

1           Q    How about working in the yard; do you do  
2 anything outside?

3           A    Oh, no. I don't do it.

4           Q    What helps with your pain?

5           A    Well, Dr. -- my -- I had went to see my  
6 primary care doctor. She gave me some Flexeril and  
7 that helps ease the -- you know, relax me somewhat.

8           Q    So you went out on your own to your family  
9 doctor?

10          A    Yeah, she know about my situation and -- and  
11 I was hurting and she gave me some Flexeril.

12          Q    I want to ask you about work. Now you  
13 remember -- you remember being evaluated by two  
14 vocational experts?

15          A    Yes.

16          Q    Okay. Both of those evaluations took place  
17 in the conference room in your attorney's office?

18          A    Yes.

19          Q    And the first one, that was a Mr. Glenn  
20 Adams. Did Mr. Adams have any suggestions for you on  
21 work that you could possibly do?

22          A    I don't remember him saying anything. I  
23 don't remember.

24          Q    The second one you had done was by a lady  
25 named Jacqueline Kennedy-Merritt. Did Ms. Merritt

1 have any suggestions about jobs you could possibly do?

2 A Yes.

3 Q And we are -- did she tell you those  
4 recommendations when you were with her or were -- were  
5 you shown a copy of her report later and -- to -- to  
6 look for jobs?

7 A I was shown the copy of her report.

8 Q Okay. I want to ask you about those  
9 specific jobs. Did you contact any potential  
10 Employers based on what Ms. Kennedy-Merritt is  
11 suggesting?

12 A Yes, I put in applications.

13 Q Okay. Did anybody hire you?

14 A No.

15 Q Okay. Now two of the jobs, one in Easley  
16 and one in Orangeburg are PBX operators. Do you know  
17 how to operate a PBX?

18 A No, I don't know what it is.

19 Q Do you believe you would be able to ride to  
20 Easley or Orangeburg for work every day?

21 A No.

22 Q Why not?

23 A I don't know where Easley is.

24 Q A lot of people don't know where Easley is.

25 Well, how about Orangeburg, would you be able to drive

1 to Orangeburg for work every day in your present  
2 condition?

3 A No. I'm sorry. No.

4 Q Okay. One of the jobs was a job with  
5 Republic Parking. Have you contacted Republic  
6 Parking?

7 A Yes.

8 Q Would you explain what happened with  
9 Republic Parking and did they offer you a job?

10 A I put in the application and the manager  
11 told me that they had -- did not have any openings.

12 Q Was the job described to you?

13 A Yes.

14 Q What's your understanding of the job  
15 description for Republic Parking?

16 A That I would be and out of the booth taking  
17 money and if they were having problem with their --  
18 the gate I have to go out and try to fix it, make sure  
19 it works.

20 Q Okay. But the job was more than just  
21 sitting and standing in a booth and taking money?

22 A Right.

23 Q Do you feel the extra requirements were  
24 something you could do?

25 A It -- it would have been very painful.

1 Q Was there also a job at Sears?

2 A Yes.

3 Q Okay. And did you try to get that job?

4 A Yes.

5 Q And what happened when you tried to get that  
6 job?

7 A No response.

8 Q Okay. I would ask you -- do you know  
9 anything about HVAC?

10 A What's that?

11 Q Heating and air conditioning. Could you do  
12 heating and air conditioning?

13 A Oh, no. I'm sorry. No, I don't.

14 Q Do you -- do you think you could work a job  
15 in retail that required walking and standing  
16 constantly?

17 A No.

18 Q One of the jobs was a job with USC  
19 monitoring student athletes. Do you believe you have  
20 the physical ability to walk around the University of  
21 South Carolina campus and go to class with the student  
22 athletes?

23 A No.

24 Q Okay. The last one, a mortgage processor.  
25 Do you know anything about mortgages?

1 A No.

2 Q Do you know how to use a computer?

3 A No.

4 Q Can you do anything on a computer?

5 A Games.

6 Q Games? Okay. Do you know how to use Word.

7 or Excel? Do those mean anything to you?

8 A No.

9 Q Do you have a computer at home?

10 A A laptop.

11 Q A laptop?

12 A Yeah.

13 Q Is it yours or your daughter's?

14 A Daughter's.

15 Q Okay. Have you ever used Facebook or email?

16 A Facebook. That's where the game's at.

17 Q All right. Those are like Candy Crush and

18 --

19 A Yes.

20 Q -- Farmville and that kind of stuff?

21 A Yes.

22 Q Ms. Folston, are you earning less money now

23 than you were making when you were working?

24 A Yes.

25 Q Is that a hardship for you?

1 A Yes.

2 Q If there was a way for you to find a job and  
3 get a job and make more money, if you were able to  
4 work, would you rather do that than keep getting  
5 workers' comp checks?

6 A Yes.

7 Q Okay. Can you think of any work, work for  
8 pay that you're able to do?

9 A Not the kind I'm used to doing.

10 Q If -- if any of those Employers that Ms.  
11 Kennedy-Merritt suggested could possibly hire you  
12 would you have accepted and tried to do those jobs?

13 A I would have tried it.

14 Q Would you rather be working?

15 A Yes.

16 MR. SAMUELS: I have no further questions.  
17 Please answer any questions Ms. Farthing has for you.

18 THE COURT: Thank you. Ms. Farthing?

19 MS. FARTHING: Actually before I -- before I  
20 start questioning, Mr. Samuels had indicated that the  
21 medical records indicated a prescription for Lyrica  
22 and I cannot find that in my medical records. So if  
23 you know where that is if you can point me in that  
24 direction?

25 MR. SAMUELS: I will search.



1 Q Did you discuss that prescription with Dr.  
2 LaMotta when you returned to him in November?

3 A I told him about it but I don't -- I don't  
4 know he wrote it down or not.

5 Q Did he prescribe you anything?

6 A Only the -- the Lyrica. Not -- no --

7 Q During that visit?

8 A No, that visit, no.

9 Q Okay. And -- and we'll discuss the Lyrica  
10 in a minute if I can figure out when that was  
11 prescribed. You indicated that you returned to Dr.  
12 LaMotta in November of 2016 after him -- he placed you  
13 at MMI in November of 2015; is that right?

14 A Yes, I saw him last year.

15 Q Any treatment between that time for your  
16 work injuries?

17 A No.

18 Q Okay. And you indicated in your testimony  
19 earlier that you didn't know that you have more  
20 medical options. How did you find out that you have  
21 more medical options?

22 A I talked to my attorney and I asked.

23 Q I'm sorry?

24 A I talked to my attorney and I asked.

25 Q Did you ever ask about the availability of

1 medical treatment prior to that date either from your  
2 attorney or from the State Accident Fund?

3 A Wait a minute. I'm not understanding what  
4 you said.

5 Q Between November of 2015 when you were  
6 released from Dr. LaMotta and -- and September of 2016  
7 when we received the initial request to -- to go back  
8 for treatment did you ever request any kind of  
9 treatment or inquire about the availability of any  
10 more -- any additional treatment from Dr. LaMotta  
11 during that time or Dr. Hutchison?

12 A Well, I didn't -- I didn't understand that.  
13 till after that particular time that I could go back  
14 to see a doctor, because I was in a -- between -- I  
15 didn't know what to do, and you know. I was -- being  
16 -- well, I was looking at, you know, what State Fund  
17 would do.

18 Q Now when Dr. LaMotta released you from  
19 treatment in November of 2015 he indicated that you  
20 might possibly need some future medication -- medical  
21 treatment in the form of orthopedic visits, physical  
22 therapy and injections. Did he advise you of that  
23 whenever he released you in November of 2015?

24 A Only thing he told me that he was releasing  
25 me and that he was sending the papers to State Fund.

1 Q Did you ever take a look at those reports --  
2 that report from that final visit?

3 A No. Only thing he gave me was a little  
4 sheet -- sheet about the -- the restriction and, you  
5 know, what I could do.

6 Q And it's my understanding that you testified  
7 earlier about the fact that Dr. Hutchison sent you  
8 back to Dr. LaMotta during the course of your  
9 treatment, and I believe his referral was on July 14th  
10 of 2015?

11 A Somewhere around there, because I know I saw  
12 Dr. LaMotta that November.

13 Q And I'm looking at his report from that date  
14 on July 14th, 2015 --

15 MS. FARTHING: And this is Defendants' APAs 134.

16 Q -- and under the assessment it indicates  
17 refer back to Dr. LaMotta per patient request. She  
18 did not tolerate pain meds and muscle relaxants very  
19 well. Did you request to be sent back to Dr. LaMotta?

20 A No.

21 Q Do you know why he would have said that in  
22 his report that you did?

23 A That's a good question -- I don't.

24 Q So you didn't ask to be sent back to Dr.  
25 LaMotta?

1 A No.

2 Q Were you having any success with the  
3 treatment options offered by Dr. Hutchison at that  
4 point?

5 A The -- the medicine -- when he gave me a  
6 shot it wasn't last -- it wasn't really lasting and I  
7 asked why did -- you know, it wasn't lasting any  
8 longer that he said it was, you know, should last.

9 Q How about the medications he had you on?

10 A He didn't put me on any medications other  
11 than the shot.

12 Q He didn't put you on any kind of pills or  
13 anything, muscle relaxants, anything like that?

14 A No.

15 Q You indicated earlier the type of work that  
16 you were doing when working light duty with the  
17 Department of Disabilities and Special Needs, is that  
18 type of work something you feel like you could return  
19 to doing; the filing, the paperwork, things like that?

20 A If that -- to put it -- I would love to  
21 work. I would like to work, if --

22 Q Have you contacted either Vocational  
23 Rehabilitation or Department of Education and Work  
24 Force to see if they have any training or any jobs  
25 that they could recommend you towards?

1           A     I didn't -- don't know how and didn't know  
2     how.

3           Q     And you indicated that you contacted some of  
4     the Employers listed in Ms. Kennedy-Merritt's reports  
5     about possibly going to work for them. Outside of  
6     those jobs have you either searched for jobs within  
7     your restrictions or applied for any jobs within those  
8     restrictions?

9           A     The jobs that I know how to do was --  
10    Walmart one time was hiring and that was I had to  
11    constant be on my feet and walking. And the jobs like  
12    -- you know, jobs like that.

13          Q     Did you apply to Walmart?

14          A     No, because I know my situation -- what my  
15    situation was -- is -- was and is.

16          Q     Have you applied or searched for any other  
17    jobs within your restrictions?

18          A     Only jobs that I know about doing is on my  
19    feet and using my hands.

20          Q     And I understand that. Have you -- have you  
21    tried to search for or obtain any kind of help in  
22    finding jobs that you might be able to do that are  
23    within your restrictions?

24          A     No, because I didn't what -- you know, the  
25    type of the job that the doctor said I can do that I

1           could do.

2           Q     Did you actually apply to any of the jobs  
3           that Ms. Kennedy-Merritt listed in her report?

4           A     Yes, I did.

5           Q     Do you believe that you are capable of  
6           returning to work in any capacity?

7           A     I don't know.

8           Q     And that's why I'm wondering if you're  
9           applying for jobs and inquiring into jobs why would  
10          you be taking that action if you don't feel like  
11          you're capable of working?

12          A     Because it's very depressing - it's very  
13          depressing being home and --

14          Q     I didn't mean to cut you off if you've got  
15          more to say. I'm sorry. I thought you were done.

16          A     No, I'm sorry. It's just - I'm trying to  
17          keep from crying.

18          Q     I took your deposition a while back in I  
19          think 2013 and in your deposition you indicated when I  
20          asked these same questions about any type of work that  
21          you could return to and what type of work you felt you  
22          could return to. You indicated at that time that you  
23          enjoyed massage therapy and felt that you would like  
24          to get back into doing massage. Is that still  
25          something that you enjoy doing?

1 A I enjoy doing it but I can't do it.

2 Q Do you still have your massage license  
3 current?

4 A Yeah, just, you know, to keep, you know, up  
5 to date to what's going on.

6 Q Okay. And I believe in what I saw it  
7 indicated that it expired in June of 2016?

8 A I think so.

9 Q And you renewed it at that time?

10 A Yeah, like I say I keep it update, but just  
11 keep it -- what's going on.

12 Q Have you applied for Social Security  
13 Disability?

14 A Back -- I think I -- I think it's been about  
15 a year or two that I applied for it and it was -- my  
16 understanding it was a little (inaudible) that I had  
17 to go through to get it which I didn't under -- you  
18 know, I tried to, you know, my daughter tried to, you  
19 know, help me do it through the computer.

20 Q Did you actually apply or you stopped prior  
21 to applying?

22 A No, we did it on the -- you know, she did it  
23 on the computer.

24 Q And what is the status of that application?

25 A It's -- I think it's in the -- what's the

1 way you --

2 Q Is it denied?

3 A When you -- oh, foot.

4 Q Is it on appeal?

5 A No, what I'm saying when I applied for it --  
6 oh, attorney did talk to me about it and called me  
7 after they read it online.

8 Q Okay.

9 A And said that I was at the right age, but I  
10 -- I don't know exactly the term they used by me  
11 getting it.

12 Q Okay. But you're not currently -- you were  
13 not -- your application was not -- you're not  
14 receiving social security at this time?

15 A No. No.

16 Q Do you have a bank account?

17 A Yes.

18 Q Are you able to read and write?

19 A Yes, I can read, limited.

20 Q Now your son Fred, you indicated that he  
21 works at a church, that he's a pastor at a church?

22 A Yes.

23 Q Do you have any positions within that  
24 church?

25 A What they call a church mother.

1 Q Okay. And what does that entail?

2 A That, you know, you help with mostly dealing  
3 with the young ladies, talking to the young ladies,  
4 you know. How to carry themselves and about being  
5 good wives, good mothers.

6 Q Did you have to do any sort of training or  
7 any kind of courses or anything like that to get into  
8 that position or how did that work?

9 A Yeah, you have to -- sometimes you have to  
10 stand up, but since what's been going on with me I  
11 really -- he haven't really been using me in there  
12 that much.

13 Q Are you -- is that a paid position at all?

14 A Oh, no, that's not pay.

15 Q Have you ever delivered any sermons at  
16 Fred's church?

17 A I did.

18 Q Was that the one on May 5th of 2015?

19 A Yes.

20 Q Have you ever given any others other than  
21 that date?

22 A No.

23 Q What was your condition at that time? Was  
24 it the same as current?

25 A Yes, and I had got a shot.

1 Q When had you gotten a shot?

2 A I had got the shot a little before that  
3 happened, you know, he asked me to do that, speak on  
4 Mother's Day.

5 Q And that was by Dr. Hutchison?

6 A Yes.

7 Q Was that shot done on April 7th of 2015;  
8 does that date sound about right?

9 A I'm not real sure, but I know I had got a  
10 shot.

11 Q Are you aware that that video -- the video  
12 of that sermon was placed on Facebook?

13 A I found out later.

14 Q I'm going to approach for this picture. Is  
15 this a picture from you delivering that sermon; a  
16 screenshot of that?

17 A Yeah, that's me.

18 Q Okay. I'm going to show you a video.

19 MS. FARTHING: And Commissioner, this is the  
20 video I mentioned earlier. Again I don't -- I don't  
21 -- and I know that we have better capabilities in  
22 which to view this.

23 Q Is this you delivering the sermon?

24 A Yeah, I admit -- yeah, that day I was  
25 feeling particularly good.

1 Q That day you were feeling particularly good?

2 A Yeah. I think that was one of the best days  
3 I ever felt.

4 Q And you -- do you have days like that  
5 currently? You said -- indicated earlier that your --  
6 I'm sorry. I don't know if this is interfering with  
7 -- okay. You indicated earlier that your condition at  
8 this time was similar to your condition currently. Do  
9 you still have days like this that are good days?

10 A No, that -- like I say, that's the best day  
11 I ever had.

12 THE COURT: Can you turn the audio down a little  
13 bit? I don't want it to interfere with --

14 MS. FARTHING: I'm sorry. I shouldn't have -- I  
15 shouldn't have put the volume on.

16 THE COURT: That's okay. I just didn't want it  
17 to interfere with not being able to hear her for the  
18 record.

19 -: And I apologize for that.

20 BY MS. FARTHING:

21 Q And it's - it's playing right now and it  
22 looks like it's about two thirds of the way done and  
23 it's about a minute at this point so I would assume  
24 it's probably about a minute and a half long video.  
25 Do you recall how long the sermon was that you

1 delivered that day?

2 A No, it wasn't that long because he don't  
3 allow you to go too long.

4 Q He doesn't allow you to go too long?

5 A No.

6 Q Do you recall was it more than ten minutes?

7 A I -- to be honest with you I really don't,  
8 but he --

9 Q Do you know if it was more than 20 minutes?

10 A Well, like I said, to be honest I really  
11 don't know exactly how long.

12 Q And you said you have not delivered a sermon  
13 at his church since?

14 A No.

15 Q Were you paid at all for delivering that  
16 sermon?

17 A No.

18 Q And that video is no longer on Facebook. Do  
19 you know why not? It was removed at some point prior  
20 to, I think, September or October of last -- of 2016.  
21 Do you know why it was removed?

22 A No. Good question.

23 Q I'm sorry.

24 A I said no, good question. I'm sorry. No.

25 Q Now you went for -- I know you went for two

1 evaluations with Dr. Poletti in this claim; one in  
2 2013 and one I believe in 2016 or the end of 2015.  
3 Did you see him at his office in Charleston?

4 A Yes.

5 Q How did you get to his office?

6 A I had to -- who drove me? First time my son  
7 drove me and the next time some company drove me.

8 Q How long did that drive take?

9 A I think about -- I think it was about a hour  
10 and a half, I think.

11 Q Did you take any breaks on the drive down?

12 A Yes.

13 Q How many breaks?

14 A I think it was two.

15 Q And what sort of condition were you in when  
16 you -- whenever you arrived at Dr. Poletti's office?  
17 Were you in pain; how were you feeling?

18 A Yes, I was in pain.

19 Q Did he provide any actual treatment to you  
20 or just evaluation?

21 A He just did the evaluation.

22 Q Now you indicated earlier that sometimes you  
23 help your granddaughter with therapy. What do you  
24 mean by that?

25 A Drive -- I drive her to her therapy --

1 speech therapy.

2 Q How old is your granddaughter?

3 A She's five.

4 Q How many -- do you have any other  
5 grandchildren?

6 A Yes.

7 Q How many grandchildren do you have?

8 A Altogether I have three.

9 Q And other than the five year old what are  
10 the ages?

11 A Nine and three.

12 Q Do you help care for your grandchildren at  
13 all?

14 A Sit, yeah.

15 Q I'm sorry?

16 A I sit at the house with them.

17 Q You sit at the house with them?

18 A Uh-huh.

19 Q How often do you do that?

20 A Sometime once -- once a -- sometime once a  
21 week, sometime.

22 Q Okay. It's not a daily -- is there any week  
23 that you watch them all -- all week?

24 A Oh, no. Huh-uh.

25 MS. FARTHING: Did you find the Lyrica record?

1           MR. SAMUELS: Yeah. 113B and that's the November  
2 10th, 2016 -- 113B, yeah, the November 13th, 2016 is  
3 the last report.

4           MS. FARTHING: 113B?

5           MR. SAMUELS: 113B.

6           BY MS. FARTHING:

7           Q     Okay. And it indicates that you were  
8 prescribed Lyrica by Dr. LaMotta and not authorized to  
9 get it. When did he prescribe the Lyrica?

10          A     That was -- I think that was November the  
11 -- 2015.

12          Q     Okay. Did you actually receive a  
13 prescription for that?

14          A     Yes, I did.

15          Q     Did you provide that prescription to the  
16 South Carolina State Accident Fund?

17          A     I gave it to the -- I went to the pharmacy  
18 with it.

19          Q     Do you know if any copy of that prescription  
20 was ever provided to The State Accident Fund?

21          A     I don't know.

22          Q     Did you ever inquire with The State Accident  
23 Fund or inquire with your attorney so that he could  
24 inquire with The State Accident Fund regarding why  
25 that prescription was not prescribed -- was not

1 filled?

2 A I passed it on to my attorney about it.

3 Q Was that the only occasion that he ever  
4 prescribed Lyrica?

5 A Right. Then when he went -- when I went  
6 back he asked me how they worked. I said I never did  
7 get authorization to take it, so I didn't get to get  
8 the pills.

9 Q Did he indicate whether he was sending the  
10 prescription or any information on to The State  
11 Accident Fund?

12 A No, he didn't say.

13 Q Do you have a copy of the prescription for  
14 the Lyrica that he prescribed you?

15 A No, I -- I never did get it back.

16 Q Okay.

17 MS. FARTHING: That's all that I have. Thank  
18 you.

19 THE COURT: Thank you. Mr. Samuels?

20 REDIRECT EXAMINATION

21 BY MR. SAMUELS:

22 Q Ms. Folston, your son is the pastor for the  
23 church; is that right?

24 A Yes.

25 Q Does the church have a Facebook page?

1           A     They have -- they have what you -- something  
2     called Favorite (inaudible), only a few peoples can  
3     get on it.

4           Q     But your son has a Facebook page?

5           A     Yes, he do.

6           Q     Does he put a lot of stuff on -- about the  
7     church on the Facebook page?

8           A     Yes.

9           Q     Okay. How active is he on -- on the  
10    Facebook page with things about the church?

11          A     Pretty active.

12          Q     Okay. Are you the only person that's ever  
13    been shown on his Facebook page giving a sermon?

14          A     No.

15          Q     Okay. And presuming that -- well, let me  
16    ask you this. Was he proud of you that you were able  
17    to give a sermon that day?

18          A     Yes.

19          Q     Isn't that a special day?

20          A     Yes.

21          Q     And from looking at this photograph from his  
22    Facebook page, it says, "What a great day and my  
23    mother preached the Word this morning. Sarah Folston,  
24    take a look." And how many times did he put you on  
25    Facebook giving a sermon?

1           A     That's the only time I know about, you know,  
2     I did it.

3           MR. SAMUELS: No further questions, Your Honor.

4           THE COURT: Okay. Thank you. Ms. Farthing?

5           MS. FARTHING: Nothing further from the  
6     Defendants.

7           THE COURT: There aren't any additional  
8     witnesses?

9           MS. FARTHING: Otherwise we rely on the medicals,  
10    no sir.

11          THE COURT: There being nothing further that  
12    concludes this proceeding.

13          (The hearing concluded at 2:03 p.m.)

14

15

16

STATE OF SOUTH CAROLINA )  
 ) CERTIFICATE  
 COUNTY OF LEXINGTON . )

BE IT KNOWN THAT I TOOK THE FOREGOING WORKERS'  
 COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN AND  
 FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT CONSISTING OF 59  
 TYPEWRITTEN PAGES REPRESENTS A TRUE, ACCURATE AND  
 COMPLETE TRANSCRIPTION OF THE TESTIMONY SO GIVEN AT  
 THE TIME AND PLACE AFORESAID TO THE BEST OF MY SKILL  
 AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF  
 ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE  
 OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES  
 HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

WITNESS MY HAND AND SEAL THIS 16TH DAY OF MARCH,  
 2017.

---

CORA ELLIS BRUTON  
 NOTARY PUBLIC FOR SOUTH CAROLINA  
 MY COMMISSION EXPIRES DECEMBER 31, 2024

CORA ELLIS BRUTON - COURT REPORTER  
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073  
 803-397-0189

Transcript of the Testimony of  
**FOLSTON V. DEPT. OF DISABILITIES AND  
SPEC. NEEDS, ET AL.**

**Date:** January 22, 2018



CREEL COURT REPORTING, INC.  
Condensed Transcript and Word Index

1230 Richland Street  
Columbia, SC 29201  
Phone: (803) 252-3445 / (800) 822-0896  
Fax: (803) 799-5668  
Email: [contact@creelreporting.com](mailto:contact@creelreporting.com)  
Internet: <http://creelreporting.com/>

STATE OF SOUTH CAROLINA  
BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC No. 1108515

Sarah Folston, )  
 )  
Employee/Carrier, )  
 )  
v. )  
 )  
Department of Disabilities and )  
Special Needs, )  
 )  
Employer, )  
 )  
and )  
 )  
State Accident Fund, )  
 )  
Carrier/Defendants. )  
\_\_\_\_\_ )

FULL COMMISSION HEARING

\*\*\*\*\*

Monday, January 22, 2018  
3:55 p.m. - 4:13 p.m.

The Full Commission Hearing was heard before Commissioners Susan S. Barden, Aisha Taylor and Gene McCaskill; Chair, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 22nd day of January, 2018, before Roderick S. Fitzgerald, Court Reporter and Notary Public in and for the State of South Carolina.

1 APPEARANCES

2 Stephen B. Samuels, Esquire  
3 Samuels Law Firm  
4 1320 Richland Street  
5 Columbia, South Carolina 29201  
6 Attorney for the Claimant/Appellant

7 Erin F. Farthing, Esquire  
8 State Accident Fund  
9 800 Dutch Square Boulevard, Suite 160  
10 Columbia, South Carolina 29210  
11 Attorney for the Defendants/Respondents

12 INDEX

PAGE

13	CALL TO ORDER:	
14	COURT REPORTER . . . . .	3
15	APPELLANT'S ARGUMENT:	
16	MR. SAMUELS. . . . .	3
17	RESPONDENT'S ARGUMENT:	
18	MS. FARTHING . . . . .	9
19	APPELLANT'S REPLY:	
20	MR. SAMUELS. . . . .	16
21	Certificate . . . . .	20

22 EXHIBITS

23 (There were no exhibits marked during this  
24 hearing.)

25 STIPULATIONS

26 It is stipulated and agreed that this hearing  
27 is being taken pursuant to the Administrative  
28 Procedures Act and the South Carolina Rules of Civil  
29 Procedure.

1 CALL TO ORDER:

2 COURT REPORTER: Today is January 22nd, 2018. This  
3 is the South Carolina Worker's Compensation  
4 Case Number 1108515. This is the case of Sarah  
5 Folston, Claimant, versus Department of DSN,  
6 Employer, and State Accident Fund -- State  
7 Accident Fund, Carrier. The Appellant is the  
8 Claimant, Represented by Stephen B. Samuels.  
9 The Respondent is represented by Erin Farthing.  
10 Each side is allowed ten minutes for oral  
11 argument and the Appellant three minutes in  
12 reply. You are requested to argue the grounds  
13 of exception and stay within the record.

14 MR. CHAIR: All right. Mr. Samuels.

15 APPELLANT'S ARGUMENT BY MR. SAMUELS:

16 MR. SAMUELS: Your Honor, may it please the Court.

17 I represent Sarah Folston. Ms. Folston is 60  
18 years old. She's a high school graduate,  
19 although she reads at the 4th grade level,  
20 bottom three percentile, does math at a 5th  
21 grade level. She's never used a computer at  
22 work. She's never worked a sedentary job,  
23 except after she was hurt and the DMH -- or for  
24 special needs, allowed her to work sedentary  
25 duty for 180 days and then laid her off

1 November 26, 2012. That is the last day that  
2 she worked. This was an admitted accident,  
3 March 22nd, 2011. She was assisting disabled  
4 individual in a wheelchair, pushed her  
5 backwards, she was twisted and fell to the  
6 floor. The case was tried and pled as a  
7 permanent total disability case before  
8 Commissioner Campbell, and Commissioner  
9 Campbell did not find she was permanently and  
10 totally disabled. He awarded 20 percent of the  
11 back under Section 42-9-30. To kind of go  
12 through the issues, one of the findings that  
13 was not made, one way or the other, and needs  
14 to be made was whether there was a second body  
15 part involved. Now, the parties entered a  
16 Consent Order January 3rd, 2014, where  
17 Defendants admit injuries to Claimant's right  
18 hip and right elbow. Upon further discovery,  
19 medical evaluation, including a lumbar MRI, it  
20 was determined that Claimant had injured her  
21 back, causing sciatic pain into her right leg.  
22 And Defendants filed that injury to the back.  
23 The evidence is all one way on radiculopathy.  
24 Dr. LaMotta diagnosed her with lumbar sacrum  
25 radicular syndrome and L5 radiculopathy. Dr.

1 Poletti signed a 13 percent whole person  
2 impairment rating and assigned additional 2  
3 percent impairment rating for right leg  
4 radiculopathy. Pain management doctor, Dr.  
5 Hutcheson, his last report before the hearing  
6 is, back pain to right foot in L4 and L5  
7 pattern. And the physical therapist Tracey  
8 Hill gave it a 13 percent on person impairment  
9 rating for radiculopathy. She testified to  
10 radiculopathy. So the -- that's the evidence  
11 that this lady has a back injury with continuing  
12 radiculopathy, which would qualify under the  
13 Hudson case, as a second body part. Having  
14 moved past that, we then get into the question  
15 of what is the evidence of disability. Doctors  
16 LaMotta and Poletti both say sedentary.  
17 Columbia Rehabilitation limited her to  
18 sedentary limited light work, and both  
19 vocational experts concluded that her  
20 restrictions would be sedentary. Glenn Adams,  
21 Claimant's vocational expert, he opined she was  
22 totally vocationally disabled. And what we  
23 really come down to, if you will, Your Honors,  
24 is a battle of the experts. Glenn Adams is  
25 independent, he works for both sides. The

1 Defendants retained Jacqueline Kennedy-Merritt  
2 of The Directions Group. There is an enormous  
3 qualitative difference in the opinions. Ms.  
4 Merritt was deposed. She testified that of the  
5 60 to 90 vocational reports she's written in  
6 workers' compensation cases, there's only one  
7 report she's written in regards to the  
8 individual not being able to maintain or  
9 sustain competitive employment. Just one. A  
10 hundred percent of the workers' comp  
11 evaluations she's done in the past year for the  
12 employer and in this case she only found seven  
13 jobs that theoretically Ms. Folston could  
14 perform. However, when you take a look at  
15 those jobs, it's either part time, they're  
16 outside her qualifications, they're outside her  
17 restrictions. And Ms. Merritt, in her report,  
18 left out all the details about the restrictions  
19 and pay. Frankly, very misleading. But the  
20 key, the reason her report fails as a matter of  
21 law is because she based her opinion on  
22 possibilities rather than probabilities. And  
23 where there's workers' comp or civil law, it's  
24 very well established that an opinion has to be  
25 most probably more likely than not, probably.

1 It is not sufficient to say a possibility. And  
2 her opinion -- she testified in the deposition  
3 Page -- Pages 78 and 79, she says my vocational  
4 opinion says that with the limitations that are  
5 provided, these are possible jobs that she  
6 could do. Later she goes on to say, on the  
7 other hand, she would need help going to these  
8 types of jobs. That's why I'm saying she just  
9 can't walk out the door and go get them. I  
10 believe based on my vocational knowledge and  
11 educational experience, that with some help  
12 these jobs she could possibly do these jobs.  
13 Your Honor, that's a fatal flaw. That renders  
14 her opinion, not competent evidence.

15 COMMISSIONER BARDEN: Did either vocational expert  
16 look at the videotape?

17 MR. SAMUELS: To my knowledge, no.

18 COMMISSIONER BARDEN: Okay.

19 MR. SAMUELS: And there's no -- I mean, Ms. Folston  
20 is not -- she is disabled, she was disabled  
21 from being able to work, but as to her ability  
22 to stand and walk for several minutes,  
23 certainly ---

24 COMMISSIONER BARDEN: Wasn't she ---

25 MR. SAMUELS: --- she can do that.

1 COMMISSIONER BARDEN: --- wasn't she running in a  
2 couple of those segments of that tape?

3 MR. SAMUELS: I -- I -- I wouldn't say I'd call it  
4 running. I mean, I -- I agree she's not  
5 walking slowly. But there are other things  
6 that I think are equally important. For  
7 example, one of the things that Ms. Kennedy-  
8 Merritt noticed and the doctors noticed, is  
9 that, for example, she has difficulty standing  
10 up but out of a chair.

11 COMMISSIONER TAYLOR: Right.

12 MR. SAMUELS: You know, and she has very limited  
13 sitting -- sitting time of what she can do.  
14 There's no evidence she's qualified to do any  
15 kind of sitting job, even if she could sit  
16 there long enough to do it. And that becomes  
17 the point. I -- frankly, Commissioner Barden,  
18 I didn't put a whole lot of stock in the -- in  
19 the video. It didn't seem to -- to weigh  
20 heavily in the single commissioner's decision.  
21 I mean, ultimately, what you got to go on here  
22 are the medical restrictions, the medical  
23 diagnoses and the testimony. And, you know,  
24 when you've got a vocational expert that can  
25 only give her opinion and possibilities, that

1 has no probative value as a matter of law. So  
2 what you're left with is a woman who is limited  
3 to sedentary duty, has no prior history, no  
4 qualifications to do it, she's now 60 years old  
5 and has been out of work for six years and has  
6 very limited educational skills with 3rd grade  
7 and 5th grade reading and math, unable to  
8 return to any work she's done before. So with  
9 the test of disability, it doesn't require  
10 complete helplessness, it just requires that  
11 there are no -- no jobs in the open market that  
12 she could compete for. And that's what you  
13 have here. Therefore, request that Your Honors  
14 reverse the single commissioner and find that  
15 she has injury to her back with effects on her  
16 right leg through the radiculopathy that meets  
17 the second body part rule, and that with the  
18 restrictions she has, and the capabilities  
19 she's shown, she should be found permanently  
20 and totally disabled based on the opinions of  
21 the doctors and of Glenn Adams. Thank you,  
22 Your Honors.

23 MR. CHAIR: All right. Thank you very much. All  
24 right. Ms. Farthing.

25 RESPONDENT'S ARGUMENT BY MS. FARTHING:

1 MS. FARTHING: Thank you. Thank you, and may it  
2 please the Court, I'm here today on behalf of  
3 the Department of Disabilities and Special  
4 Needs, as well as the State Accident Fund. To  
5 be frank, I don't think most of the information  
6 that was presented as far as Ms. Folston's age,  
7 her abilities, her education level, are  
8 entirely irrelevant to a determination of  
9 permanent and total disability here, because we  
10 don't get past the single body part.  
11 Commissioner Campbell clearly, while I believe  
12 his Order noted the fact that there were  
13 additional body parts initially accepted, he  
14 found that the only body part to sustain a  
15 permanent disability or permanent injury was  
16 the back. The ra -- the radiating pain, any  
17 radiating pain at most arguably comes from that  
18 injury to the back. There's no indication of  
19 any kind of disability or limitation. There's  
20 no rating. Nothing like that to the leg.  
21 There's no indication of any kind of injury to  
22 that leg. And quite frankly this case appears  
23 to be exactly what was anticipated in  
24 Singleton, in Wigfall, in Calona (phonetic)  
25 where you have a woman that has an injury to a

1 single body part and because of other  
2 limitations such as age, lack of training or  
3 other conditions peculiar to Ms. Folston, could  
4 potentially limit her ability to work in the  
5 future, but Singleton's -- Singleton and the  
6 Court, in Wigfall specifically, held that's not  
7 enough. There has to be a second impaired or  
8 injured body part, and Calona went even further  
9 in noting that a more thorough ruling of these  
10 cases demonstrates that a Claimant must prove  
11 that not only another body part was affected,  
12 but that another body part was impaired or  
13 injured for 42-9-10 to apply. In this situ --  
14 in this case, we simply don't have that. The  
15 only permanent injury and the only permanent  
16 disability was with regard to Ms. Folston's low  
17 back, and Commissioner Campbell properly ruled  
18 that she was entitled only to award under 42-9-  
19 30 with respect to that disability. And I  
20 believe that Commissioner Campbell's Decision  
21 of an award of 20 percent to Ms. Folston's back  
22 is entirely supported by the evidence and was  
23 the correct Decision. And looking to the  
24 Hudson case, which the Claimant has argued,  
25 stands for the proposition that radiculopathy

1 into the leg satisfies that two body part rule,  
2 that wasn't the issue in Hudson. The single  
3 Commissioner in Hudson made a specific finding  
4 of fact that the Claimant in that case had,  
5 quote, suffered radicular symptoms into his  
6 right leg that affected the functioning of the  
7 limb and further noted that but for Mr.  
8 Hudson's testimony that he would -- he believed  
9 that he was able to work in the future and knew  
10 how to run a restaurant, that he would have  
11 found him to be permanently and totally  
12 disabled with the -- the affects to the right  
13 leg. Neither of those findings were -- were  
14 appealed by the Defendants and, in fact, I  
15 believe it was the Court of Appeals  
16 specifically noted that those -- those findings  
17 were not appealed by the Defendants. And so  
18 those became the law of the case. And that is  
19 simply, there's no such finding in this claim  
20 and it is not supported by the medical evidence  
21 or any of the evidence in the record. So I  
22 would -- I would argue that Hudson is clearly  
23 distinguished from this case and this situation  
24 won't -- what the argument is, is this finding  
25 that that -- that radicular -- or the radiating

1 pain into the leg satisfied the -- the second  
2 body part requirement, and that's just simply  
3 not what the Court found in Hudson either at  
4 the Court of Appeals or the Supreme Court. As  
5 far as if the -- if this commission does find  
6 that the two body part requirement is met and  
7 that this -- this does get to the consideration  
8 of the vocational assessments in this claim, I  
9 would argue that -- I -- I -- I guess I -- I --  
10 I very strongly disagree with the idea that Ms.  
11 Ken -- Ms. Kennedy-Merritt's report is  
12 unreliable or that her opinion did not meet the  
13 standard. The issues where she was talking  
14 about possibilities were jobs that she -- she  
15 conducted a labor market survey to show  
16 potential jobs that could be out there for  
17 potential wage loss claims. She was not  
18 charged with finding Ms. Folston a job. She  
19 was not -- that was not her job and -- and --  
20 and Ms. Folston specifically testified that she  
21 never went to any of the agencies or any of the  
22 groups that may help her in that endeavor, such  
23 as vocational rehabilitation or Department of  
24 Education and Work Force -- Employment and Work  
25 Force. So Ms. Kennedy-Merritt was certainly

1 talking about possible jobs, not probable jobs  
2 or definite jobs because that was not her  
3 charge. Where she was very firm in her -- in  
4 her opinion, both in her report and in her  
5 testimony was she did not believe Ms. Folston  
6 was permanently and totally disabled. And  
7 she's not the only one with that opinion. Dr.  
8 LaMotta noted that she could work at least  
9 sedentary -- sedentary work. There are two  
10 FCE's. One which Ms. -- in Tracey Hill's where  
11 it was limited -- light to limited sedentary,  
12 but noted that she could do light duty and that  
13 she was -- that she was not pushing -- she was  
14 lim -- self-limiting within the FCE.  
15 Additionally, I think that the video that we  
16 submitted into evidence and that was showed was  
17 compelling to the fact that she was shown on  
18 that video clearly and easily doing things that  
19 she was telling the people in her vocational  
20 assessment that she was not able to do. She  
21 was -- she was walking longer than she  
22 indicated that she could. She was standing  
23 longer that she indicated she could. Her  
24 movements were very fluid. And -- and  
25 certainly it was -- if it was not a run, it was

1 a saunter across the stage during much of that  
2 -- much of the video. So it certainly  
3 indicated that she was able to do things beyond  
4 what she was telling the -- the professionals  
5 in this situation that she could do. In fact,  
6 Ms. -- and actually, Ms. -- Ms. Folston herself  
7 indicated that she believed that she might be  
8 able to find some sort of employment. She  
9 actually applied to several of the jobs that  
10 Ms. Kennedy-Merritt listed in her report. She  
11 didn't go outside of that to find -- to do her  
12 own search for a job or to apply for any other  
13 jobs. And she noted that while she didn't  
14 think that she could continue to do massage  
15 therapy, she's a licensed massage therapist,  
16 she did note that her license expired in 2016  
17 and she renewed it at that time. So I -- I  
18 certainly don't think Ms. Kennedy-Merritt's the  
19 only individual in this -- in this case that  
20 has the opinion that Ms. Folston is capable of  
21 returning to work. In fact, the only person I  
22 believe who -- who issued the opinion that they  
23 did not believe she was able to return to work  
24 was Glenn Adams. But ultimately, as a -- as I  
25 argued at the beginning, we don't even think

1           that we get to the vocational assessments in  
2           this claim because we do believe that this is  
3           limited to a single member, which was the back,  
4           which is the only body part that is rated.  
5           Certainly, the only body part rated by an  
6           authorized treating physician that actually  
7           both parties agreed to, Dr. LaMotta, as the  
8           authorized treating physician in the Consent  
9           Order in this claim, so we believe that the  
10          recovery in this case is limited under  
11          Singleton and the -- the accompanying cases and  
12          we feel that the -- the single commissioner's  
13          Decision in this case is entirely supported by  
14          the evidence and that no other finding in this  
15          case would be supported by the evidence. Thank  
16          you.

17       MR. CHAIR: Thank you. All right. Mr. Samuels,  
18                three minutes.

19       APPELLANT'S REPLY BY MR. SAMUELS:

20       MR. SAMUELS: I naturally beg to differ at the  
21                suggestion that the back is the only body part  
22                to sustain a permanent injury. This case  
23                procedurally is virtually identical to Hudson.  
24                In fact, the issue on appeal in Hudson is --  
25                was the decision to limit Hudson's recovery to

1 loss of use of his back and the error of law.  
2 So that case was in the same posture that this  
3 case is in. Where the claimant had  
4 radiculopathy diagnosed by every doctor and in  
5 -- the only distinction is perhaps in that case  
6 the commission was more explicit in saying that  
7 the award to the back included the leg. But  
8 that loss of use of the back award still  
9 included the radiculopathy. And radiculopathy  
10 under this Hudson case as a matter of law is  
11 an effect on the second body part.  
12 Furthermore, there is a rating to the leg.  
13 There was a 2 percent separate rating to the  
14 leg from Dr. Poletti. I have also opined that  
15 Ms. Hudson -- not Ms. Hudson.

16 COMMISSIONER BARDEN: Ms. Folston.

17 MR. SAMUELS: --- Ms. Folston was a candidate for  
18 Social Security disability. As to age and  
19 qualifications, those things matter because you  
20 take the Claimant as you find it. And if  
21 they've -- because she is now 60, because she  
22 has these educational limitations, those are  
23 very much an important factor that would have  
24 to be considered in her vocational evaluations.  
25 As to Dr. -- as to the two doctors, Dr. LaMotta

1 and Dr. Hutcheson giving her sedentary  
2 restrictions, that is not to say -- that's not  
3 giving a vocational opinion one way or the  
4 other. That is simply opining what her  
5 physical ability is. And it's -- the -- the  
6 vocational experts have to rely on the  
7 restrictions by the doctors in reaching their  
8 opinions as to whether there is work available  
9 for someone in that situation. You know, in  
10 this case, the evidence will show that there is  
11 not. That Ms. Kennedy-Merritt's opinion was  
12 speculative and not stated most probably.  
13 Possibilities don't count. I think if Your  
14 Honors look through the medical records, you  
15 will see consistent radiculopathy and, of  
16 course, we have the Consent Order from 2014,  
17 specifically stating multiple body parts,  
18 listing them, and specifically stating that it  
19 was determined there was radiculopathy into the  
20 leg from the back injury. Therefore, we have  
21 met our burden on the two body part rule, we  
22 have met our burden of the restrictions and we  
23 met our burden on the vocational.

24 MR. CHAIR: Thank you very much.

25 MR. SAMUELS: Thank you, Your Honor.

1 MR. CHAIR: That concludes this proceeding. Good to

2 see you both.

3 (There being nothing further, the full commission

4 hearing concluded at 4:13 p.m.)

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

Appellate Case No.: 2018-001249

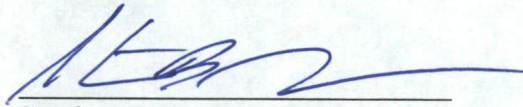
Sarah Folston, Claimant,.....Appellant,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and  
SC State Accident Fund, Carrier,..... Respondents.

CERTIFICATE OF COUNSEL

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



Stephen B. Samuels  
Samuels Law Firm, LLC  
1320 Richland Street  
Columbia, SC 29250  
(803) 779-4000  
[Stephen@samuelslawfirm.net](mailto:Stephen@samuelslawfirm.net)

Attorney for Appellant

March 15, 2019  
Columbia, South Carolina

**RECEIVED**  
MAR 15 2019  
SC Court of Appeals