IN 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 South Carolina State Accident Fund, Carrier,.....Respondents.

FINAL BRIEF OF RESPONDENTS

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1. Whether substantial evidence supports the Workers' Compensation Commission's finding that Appellant sustained a permanent partial disability under S.C. Code Ann. §42-9-30, rather than a finding that she is permanently and totally disabled under S.C. Code Ann. §42-9-10

STATEMENT OF THE CASE

This matter involves an admitted claim in which Appellant suffered initial injuries to her right elbow, right hip and back on March 22, 2011 after she was pushed by a consumer and fell onto her right hip and right elbow. Following the initial treatment for these injuries, the treatment focused entirely on Appellant's low back. Dr. LaMotta released her at MMI for that injury on November 12, 2015.

Respondents filed a Form 21 on January 21, 2016 seeking to stop the payment of temporary total disability benefits, a determination of permanency and the amount of compensation due, and also a credit of overpayment of TTD to the date of MMI; if not the date of MMI to the date of the filing of the Form 21.

In response to Respondents' Form 21, Appellant filed a Form 22 admitting that Appellant was at MMI, but asserting that, as a result of this work-related accident, the Appellant was permanently and totally disabled. Further, Appellant denied in her Form 22 that Respondents were entitled to any credit for overpayments of TTD.

A hearing came before the Commission on Respondents' Form 21 on February 15, 2017. The Respondents asserted at the hearing that the Appellant was at MMI and was not permanently and totally disabled as the result of her work-related accident. Rather, Respondents argued that Appellant was limited to recovery under S.C. Code Ann. §42-9-30 pursuant to the decisions in *Singleton* and *Colonna*. Respondents contended that the Appellant had at most sustained a permanent injury or impairment only to the low back, and that there was no permanent injury or impairment to any other injured body part. Respondents further argued that there was no evidence that Appellant had sustained greater than fifty percent loss of use to the back. Therefore, Respondents maintained that Appellant was entitled to a permanent partial disability

award under S.C. Code Ann. §42-9-30.

Following the hearing, the Single Commissioner issued an Order and Decision on October 6, 2017 finding Appellant sustained a permanent partial disability of twenty percent (20%) to the back. He further held that Respondents were entitled to a credit for overpayment of temporary total disability from the date of the Form 21. As to future medical treatment, the Hearing Commissioner found that Appellant is entitled to causally-related future medical treatment for her back, as recommended by Dr. Hutcheson per the referral by Dr. LaMotta in his November 20, 2016 medical report.

Appellant filed a Form 30 appealing the Hearing Commissioner's ruling. Appellant's Form 30 listed five issues on appeal. However, in his brief, Appellant's consolidated his issues into one argument: that the evidence in the record shows that Appellant is permanently and totally disabled under S.C. Code Ann. §42-9-10.

Following argument on January 22, 2018, the Full Commission issued an Order dated June 5, 2018 in which it affirmed the decision of the Single Commissioner, with amendments. Specifically, the Full Commission noted in their request for a proposed decision and order:

> Claimant's EMG is normal. A diagnostic test to which we accord great weight (p. 115 of the APA). We give this objective study greater weight than her subjective complaints upon which the impairment rating was assigned. We give great weight to the 2nd video which is inconsistent with claimant's subjective statement to providers (upon which, in part, her vocational expert bases his conclusion). We find the video compelling. We, therefore, give greater weight to defendant's vocational report, but note that neither expert viewed the video.

The Full Commission affirmed the Single Commissioner's other holdings, including that Appellant sustained a permanent partial disability of twenty percent (20%) to the back. Appellant filed an appeal from that decision.

STATEMENT OF THE FACTS

The medical records from Appellant's treatment for her work injuries reflect that Appellant first treated at Lexington Medical Center Urgent Care on March 26, 2011 for her injuries arising out of her March 22, 2011 work accident.[1] (R. p. 61) She complained of pain in her right elbow with movement and right hip with walking and sitting. (R. p. 61) X-rays of her elbow and hip were normal. (R. pp. 61, 63-64) She was diagnosed with a right elbow contusion and right hip pain. (R. p. 61) She was restricted from heavy lifting and prolonged standing. (R. p. 61)

Appellant next treated at First Care on March 31, 2011, at which time she complained of continuing pain in her right elbow and right hip. (R. p. 47-48) Appellant was again diagnosed with an elbow contusion. (R. p. 48) She was placed on work restrictions with the expectation that she would be able to resume full duty on April 7, 2011. (R. p. 48) Appellant returned to First Care on July 28, 2011, at which time she stated that her elbow problems had resolved, but she was still having pain in her right hip/right lower back, radiating down her leg. (R. pp. 49-50) X-rays of her hip were normal and she was diagnosed with a hip sprain. (R. pp. 49-50) She was also referred to physical therapy, and advised to continue current duties. (R. p. 50) When she continued to have pain, Dr. Izard ordered an MRI of Appellant's right hip on October 3, 2011. (R. pp. 54-55) The MRI was normal, and on October 18, 2011, Dr. Izard released Appellant to regular duty and advised her to follow up with her family doctor. (R. pp. 56-57) On December 13, 2011, Dr. Izard opined that Appellant had suffered no permanent impairment as a result of her work injury. (R. p. 58)

Appellant next treated for her workers' compensation injuries with Doctors Express on

[1]The medical report from that visit indicates that Appellant had been treated by the onsite physician on the date of her injury, and was given Naproxen. (R. p. 61)

September 25, 2012, nine months after her release by Dr. Izard. (R. p. 73) At that time, she complained of continuing back and right hip pain. (R. p. 73) She was diagnosed with lumbago, muscle spasms, and sciatica and was placed under work restrictions. (R. p. 74) Appellant returned to Doctors Express on October 2, 2012 with continuing complaints of back and right hip pain. (R. p. 79) Her work restrictions remained the same. (R. p. 80) Appellant continued to follow up with Doctors' Express until she was released from their care on February 11, 2013, at which time it was noted that she was 60% improved with physical therapy. (R. pp. 121-122) Appellant was placed at maximum medical improvement. (R. p. 122) She was released to return to work with restrictions of no bending, no twisting, no prolonged sitting, standing, squatting or ladder-climbing, no lifting over shoulder greater than 15 pounds, no lifting from waist to shoulder greater than 15 pounds, no listing below waist of greater than 15 pounds, and no pushing or pulling greater than 20 pounds. (R. p. 122) The record notes that Appellant could "go back to work full duty with a change to another residential facility with less 'total care' responsibilities." (R. p. 122)

Pursuant to a Consent Order signed on January 3, 2014, Appellant's low back was accepted and Dr. Ivan LaMotta became Appellant's authorized treating physician. (R. pp. 1-3) Appellant was first seen by Dr. LaMotta on October 24, 2013. (R. p. 127) Dr. LaMotta diagnosed Appellant with lumbosacral radicular syndrome of the right side, foraminal disc herniation of the right L5-S1, and L5 radiculopathy. (R. p. 129) He opined that Appellant was not at maximum medical improvement. (R. p. 129) He further opined that Appellant could participate in sedentary type duties and that future medical care may include epidural steroid injections, selective nerve root blocks, facet blocks, as well as lumbar surgery. (R. p. 130)

On January 23, 2014, based on his evaluation and assessment of Appellant, Dr. LaMotta

recommended nonoperative therapy for Appellant. (R. p. 133) He referred Appellant to the pain management specialist for epidural steroid injections at right L5-S1. (R. p. 133) He further left it to the pain management doctor's discretion whether she would be considered for a selective nerve root block. (R. p. 133) Dr. LaMotta indicated Appellant would only be considered a surgical candidate if she were to fail extensive nonoperative care. (R. p. 133)

On March 19, 2014, Appellant received a lumbar epidural steroid injection at the L5/S1 administered by Dr. Thomas Armsey. (R. p. 137) Appellant returned to see Dr. LaMotta on March 27, 2014. (R. p. 142) Appellant advised that she was no better after the ESI. (R. p. 142) Dr. LaMotta ordered a CT myelogram and EMG to see if Appellant was a surgical candidate. (R. p. 144)

Dr. Devin Troyer conducted the EMG/NCS on May 5, 2014. (R. p. 167) It was a normal study with no evidence of peripheral nerve impingement, peripheral polyneuropathy, or radiculopathy on needle exam of the tested right lower extremity. (R. p. 168) Dr. Troyer further opined, "the axonopathy seen in the foot FDI may be more due to local trauma with obesity and swelling." (R. p. 168)

On May 29, 2014, after reviewing the CT myelogram, Dr. LaMotta noted that, based on her complaints of pain, Appellant was at a mild to moderate pain category. (R. p. 151) He indicated that Appellant was "not truly interested in surgery because her condition is not severe enough to warrant surgical intervention." (R. p. 151) Dr. LaMotta agreed with Appellant's opinion, and further opined that, if Appellant's "condition were to significantly worsen, she may be a candidate for decompression and fusion of the L5-S1 segment." (R. p. 151) In the meantime, Dr. LaMotta referred Appellant to pain management. (R. p. 151)

Appellant first treated with Dr. Justin Hutcheson on December 30, 2014. (R. p. 169) Dr.

Hutcheson noted Appellant's lack of relief from the midline ESI, and recommended a right L5 selective nerve root block. (R. p. 171) The selective nerve root block/transforaminal epidural steroid injection was administered on February 27, 2015. (R. p. 174) Appellant noted a decrease in pain following the injection. (R. p. 174)

Appellant returned to Dr. Hutcheson on March 11, 2015, at which time Dr. Hutcheson noted Appellant had greater than 50% relief of her back and right lower extremity pain following the selective nerve root block. (R. pp. 177-178) Dr. Hutcheson recommended a second selective nerve root block. (R. p. 178) The second elective nerve root block/transforaminal epidural steroid injection was performed on April 7, 2015. (R. p. 179) Appellant noted a decrease in pain following the injection. (R. p. 179)

Appellant testified that she delivered a sermon at her son Fred's church[2] on May 5, 2015, which was videotaped and put on Facebook. Appellant testified at the hearing that her condition at the time she gave the sermon was the same as her current condition as of the hearing, but claimed that she had received "a shot" from Dr. Hutcheson a little before that.[3] (R. p. 484 lines 23-25; p. 485, lines 1-6) Appellant found out later that the video from her sermon was placed on Facebook. (R. p. 485, lines 11-13) Appellant identified a picture of her delivering that sermon as well as the Facebook video of her delivering the sermon, which was played for Appellant and the Hearing Commissioner. (R. p. 485, lines 14-24) Appellant testified "that day [she] was feeling particularly good" and that she thought "that was one of the best days [she] ever felt." (R. p. 485, lines 24-25; p. 52, lines 2-3) The Facebook video, which was about a minute and a

[2]Appellant testified that her son, Fred, is a pastor at a church and that she attends his church on Wednesdays and Sundays. (R. p. 457, lines 13-16) She testified that her injury presents limitations to her participation in church activities as she cannot sit or stand for long. (R. p. 457, lines 17-24) She is a church mother at his church. (R. p. 483, lines 23-25) In that position, she helps with dealing with the young ladies about how to carry themselves and how to be good wives and good mothers. (R. p. 484, lines 1-5) That is not a paid position. (R. p. 484, lines 13-14)

[3] This appears to be the selective nerve root block/transforaminal epidural steroid injection that was performed on April 7, 2015.

half long, showed Appellant continually moving back and forth with ease while delivering a sermon in church. (R. Enclosed CD) Appellant testified that she does not remember how long her sermon was. (R. p. 486, lines 21-25; p. 487, lines 1-11)[4]

Appellant returned to Dr. Hutcheson on May 8, 2015, at which time Appellant noted that she had only one week of relief following the second selective nerve root block.[5] (R. p. 182) Dr. Hutcheson recommended another selective nerve root block, adding the L4 level. (R. pp. 183-184) Dr. Hutcheson's medical report from July 14, 2015 reflects that Appellant advised Dr. Hutcheson that she only had temporary relief from the selective nerve root block and did not want any more injections. (R. p. 186) She advised that she was ready to return to Dr. LaMotta for surgical options. (R. p. 186) Therefore, Dr. Hutcheson noted that he was referring Appellant back to Dr. LaMotta per her request. (R. p. 187)

Appellant returned to Dr. LaMotta on August 27, 2015. (R. p. 152) She advised Dr. LaMotta that injection therapy had not been helping, and that she was hurting more then than the year prior. (R. p. 152) She noted pain in the lumbar spine, to the buttocks, and shooting down the right leg. (R. p. 152) Dr. LaMotta opined that Appellant's signs and symptoms were consistent with nerve impingement. (R. p. 153) Dr. LaMotta recommended Appellant for an MRI examination of the lumbar spine. (R. p. 153)

On October 1, 2015, based on the results of the MRI, Dr. LaMotta again opined that Appellant would benefit from nonoperative treatment and recommended her for a course of physical therapy. (R. pp. 155-156) On November 12, 2015, Appellant noted that she had no major improvement with physical therapy. (R. p. 158) At that time, Dr. LaMotta placed

[4] The video was removed from her son's Facebook page prior to the hearing. Appellant testified that she does not know why the video was removed. (R. p. 487, lines 18-22)

[5] It appears based on Appellant's medical records that the relief afforded by the April 7 injection wore off almost three weeks prior to the date Appellant delivered the sermon at her son's church.

Appellant at maximum medical improvement. (R. p. 159) Based on the American Medical Association Guides for the Evaluation of Permanent Impairment, 5th Edition, he assigned a 5% whole person impairment rating and a regional impairment rating of 7% for the lumbar spine. (R. p. 159) He opined that Appellant's future medical care included repeat orthopedic visits, repeat therapy and repeat injections. (R. p. 159) Dr. LaMotta noted that he did not see any surgical indications for Appellant at that time based on the severity of her symptom etiology. (R. p. 159) He further stated that he did "not see any contraindications for [Appellant] to participate in sedentary duties." [6] (R. p. 159)

Appellant returned to Dr. LaMotta on November 10, 2016. (R. p. 160) Appellant testified that she did not have any treatment for her work injuries between when Dr. LaMotta placed her at MMI in November 2015 and when she returned to Dr. LaMotta in November 2016. (R. p. 476, lines 11-17) She testified that she discovered she had additional medical options after she talked to her attorney. (R. p. 476, lines 21-22) Dr. LaMotta again opined that surgery was not indicated for Appellant, and further opined that her pain was due to nerve irritation. (R. p. 161) Dr. LaMotta referred her to Dr. Hutcheson for pain management, and again indicated that there were "no contraindications for her to return to work with sedentary-duty lifting restrictions." (R. p. 161)

In addition to her authorized treatment, Appellant's counsel sent Appellant for two evaluations with Dr. Poletti with Southeastern Spine Institute in Charleston. After Appellant was released from Doctors Express for her work injuries in February 2013, Appellant was seen for an independent medical evaluation with Dr. Steven Poletti on May 7, 2013. (R. p. 338) Dr. Poletti opined that Appellant's symptoms were consistent with lumbar radiculopathy. (R. p. 338) Dr. Poletti further opined that this was likely secondary to a disc protrusion in Appellant's lumbar

[6] Dr. LaMotta did not set forth a basis for these restrictions.

spine. (R. p. 338)

Despite the fact that Appellant agreed to Dr. LaMotta as the authorized treating physician in a Consent Order dated January 3, 2014, Appellant returned to Dr. Poletti for a second independent medical examination on March 7, 2016. (R. p. 339) Dr. Poletti noted that Appellant has received "comprehensive nonoperative care" since he had last seen her. (R. p. 340) Dr. Poletti noted Appellant's diagnosis of lumbar radiculopathy secondary to a foraminal disc herniation at the L5-S1 level. (R. p. 340) He assigned a 13% impairment rating based on the AMA Guides, 5th Edition, and noted that the impairment rating would increase to 28% to the whole person should she undergo a minimally invasive decompression and fusion as noted in Dr. LaMotta's October 2015 medical note. (R. p. 340) Dr. Poletti further opined that Appellant had an additional 2% whole person rating due to radiating pain in her right leg. (R. p. 341) He additionally opined that Appellant had two options for future treatment: continued conservative care with Dr. Hutcheson or surgical intervention. (R. p. 341) Dr. Poletti agreed that Appellant had a sedentary work status. (R. p. 339)

With regard to her two evaluations with Dr. Poletti, Appellant testified that she saw him at his office in Charleston. (R. p. 488, lines 1-4) The first time she went for an evaluation her son drove her, and the second time a company drove her. (R. p. 488, lines 6-7) The drive took about an hour and a half, and she thinks she took two breaks during the drive. (R. p. 488, lines 8-14) Appellant testified that she was in pain when she arrived at Dr. Poletti's office. (R. p. 488, lines 15-18) Dr. Poletti did not provide any actual treatment, but rather just did evaluations. (R. p. 488, lines 19-21)

Appellant was referred for two vocational assessments. Appellant's counsel referred Appellant for a vocational assessment with Glen K. Adams on May 12 2016. (R. pp. 365-372)

Mr. Adams noted Appellant's complaints, medical history, employment history, educational history, and skills and further noted that Appellant "expressed no plans to resume employment." (R. p. 365-369) Mr. Adams opined that Appellant had "incurred a total loss of access to the competitive labor market." (R. p. 372) He further opined that Appellant was "classified as **totally vocationally disabled** as a result of injuries sustained on March 3, 2011 while working for the S.C. Department of Disabilities and Special Needs." (R. p. 372- emphasis in original)

Respondents referred Appellant for an employability analysis and labor market survey with Jacqueline Kennedy-Merritt on June 29, 2016. (R. pp. 190-202) Ms. Kennedy-Merritt also took note of Appellant's complaints, medical history, employment history, educational history, and skills. (R. pp. 190-202) Upon review of the medical documentation provided to her by Respondents and by Appellant, "conducting the face to face vocational evaluation, the employability analysis, the labor market review and published data" Ms. Kennedy-Merritt expressed her "professional vocational opinion that there are appropriate positions that exist within the local labor market that [Appellant] can participate in." (R. p. 201) She noted that her opinions were "rendered with a reasonable degree of professional vocational certainty and are based upon information obtained from [her] review of all documentation and information provided with regard to" Appellant. (R. p. 202)

Appellant testified that she would like to work. (R. p. 479, line 21) She testified that she did not know how to contact Vocational Rehabilitation or Department of Education and Work Force to see if they had any training or jobs that they could recommend for her. (R. p. 479, lines 22-25; p. 480, lines 1-2) Appellant testified that she did apply to some of the jobs listed in Ms. Kennedy-Merritt's report. (R. p. 481, lines 2-4) She testified that, if any of the employers that Ms. Kennedy-Merritt had suggested would have hired her, she would have tried to do those jobs.

(R. p. 474, lines 10-13) Appellant testified that she has not tried to search for or obtain any kind of help in finding jobs that she might be able to do that are within her restrictions. (R. p. 480, lines 20-24) She does not know if she is capable of returning to work in any capacity. (R. p. 481, lines 5-7) She enjoyed working as a masseuse, but does not believe she can still do massage. (R. p. 481, lines 18-25; p. 482, line 1) However, she testified that her massage license was set to expire in June 2016, but she renewed it. (R. p. 482, lines 6-11)

Appellant also had two functional capacity evaluations. Appellant's attorney referred Appellant for a functional capacity evaluation at Columbia Rehabilitation Clinic, Inc. on February 17, 2016. (R. p. 343) Ms. Hill opined Appellant qualified for limited sedentary to limited light work. (R. p. 344)

Respondents referred Appellant for a functional capacity evaluation with CORA Rehabilitation on September 29, 2016. (R. pp. 203-227) At the conclusion of that FCE, Randi Scherer, DPT, noted that Appellant "demonstrated self-limiting behaviors, with subjective fear of increased pain" and further noted that "[a]ppropriate physiological/biomechanical responses... were not noted during lifting tasks." (R. p. 203) Ms. Scherer opined that, "[d]espite self-limiting behaviors, and fear of pain with material handling" Appellant was able to function during the FCE at the light physical demand category. (R. p. 203) Ms. Scherer noted her belief, based on the behaviors demonstrated by Appellant that she was capable of functioning at higher levels than indicated within the FCE. (R. p. 203)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the "substantial evidence" standard of review for decisions by the South Carolina Workers' Compensation Commission and other state agencies. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-134, 276 S.E. 2d 304, 307 (1981). Under this standard, the Court of Appeals' review "is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E. 2d 262, 266 (Ct. App. 2006) (citing S.C. Code Ann. §1-23-380). "The commission's decision **must** be affirmed if the factual findings are supported by substantial evidence in the record." *Jennings v. Chambers Dev. Co.,* 335 S.C. 249, 259, 516 S.E.2d 453, 458 (Ct. App. 1999) (quoting *Minor v. Philips Prods.* 329 S.C. 321, 493 S.E.2d 819 (1997)) (emphasis added).

The South Carolina Supreme Court has defined "substantial evidence" as "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." *Lark*, 276 S.C. at 135, 276 S.E.2d at 206 (quoting *Laws v. Richland Cnty School Dist. No. 1*, 270 S.C. 492, 243 S.E.2d 192 (1978). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 319 S.E. 2nd 695, 696 (1984). Therefore, even if the Court of Appeals disagrees with the decision of the Full Commission, the Court of Appeals must, nonetheless, affirm if the decision is supported by substantial evidence. *Jennings*, 335 S.C. at 516 S.E.2d at 438.

ARGUMENT

1. **The evidence in the record supports the Commission's finding that Appellant sustained permanent partial disability to the back only under S.C. Code Ann. §42-9-30 and Appellant is not entitled to a finding that she is permanently and totally disabled under S.C. Code Ann. §42-9-10**

The Respondents contend that the Worker's Compensation Commission's finding that Appellant sustained a 20% permanent partial disability to her back is fully supported by substantial evidence and should be affirmed. Further, as the Commission found that Appellant only sustained permanent disability to one body part, and further found that Appellant's disability to her back was less than 50%, the Commission properly did not make a finding that Appellant is permanently and totally disabled under S.C. Code Ann. §42-9-10.

Appellant claims in her brief that she was denied "the opportunity to establish a greater disability than [she] would receive under the scheduled member statute." She further appears to argue that she should have been awarded disability under the general disability statute rather than the scheduled member statute because it is the greater of the two. She notes the sedentary restrictions recommended by Dr. LaMotta and Dr. Poletti, her low scores on Glenn Adams' skills testing, and limited work history. However, Appellant failed to establish that she is entitled to a finding of permanent and total disability under §42-9-10 for the reasons set forth below. Further, even if evidence in the record supports Claimant's contention that she is permanently and totally disabled, the issue for the Court to consider is whether the Commission's decision is supported by substantial evidence. Critically, Appellant has failed to establish that substantial evidence does not support the decision of the Commission that she sustained a permanent partial disability to her back under §42-9-30.

In the present case, Appellant was permitted to present a claim under §42-9-10 in order to try to establish a right to recovery beyond that permitted under §42-9-30; however, the

Commission was not required to award her permanent and total disability under §42–9–10. It is the burden of a claimant to provide that he/she is permanently and totally disabled pursuant to §42-9-10. *Coleman v. Quality Concrete Products, Inc.*, 245 S.C. 625, 630, 142 S.E. 2nd 43, 45 (1965). Further, Appellant's ability to recover under §42–9–10 required her to establish an additional injury or impairment to at least two body parts. The Supreme Court in *Singleton v. Young Lumber Co.*, 236 S.C. 454, 114 S.E.2d 837 (1960) held that:

> Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation, **even though** other considerations such as age, lack of training, or other conditions peculiar to the individual, effect a total or partial industrial incapacity. To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected. *Singleton,* 236 S.C. at 471, 114 S.E.2d at 845 (emphasis added).

The Court in *Wigfall v. Tideland Utilities, Inc.* expanded on that ruling when it specifically held, "The Singleton Court did not intend for the additional 'impairment' to be a loss of earning capacity, age, lack of training or any other economic factor." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003)

In *Colonna v. Marlboro Park Hosp.*, the Court of Appeals considered what sort of injury is sufficient to satisfy the requirement for an additional injured body part. The Court found " that a more thorough reading of Singleton and subsequent cases demonstrates that a claimant must prove not only that another body part was affected ... but that another body part was impaired or injured for section 42–9–10 to apply." *Colonna v. Marlboro Park Hosp.*, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013); see also *Bixby v. City of Charleston*, 300 S.C. 390, 397, 388 S.E.2d 258, 262 (Ct.App.1989) (analyzing whether the claimant's injury to a scheduled member "affected" another body part by analyzing whether the claimant "suffer[ed] a residual disability as a result" of the compensable injury).

Appellant cites to the Supreme Court's decision in *Hutson v. S.C. State Ports Authority*, 399 S.C. 381, 732 S.E.2d 500 (2012) for support of her contention that she is entitled to a finding of permanent and total disability under §42-9-10. Specifically, Appellant contends that *Hutson* stands for the proposition that radiculopathy into the leg satisfies the two body part rule. However, the issue in *Hutson* was not whether radiculopathy satisfied the second body part requirement under *Singleton*. In the matter before the Commission in *Hutson*, the hearing commissioner made a finding of fact that Mr. Hutson had "suffered radicular symptoms in his right leg that affected the functioning of the limb." *Hutson v. S.C. State Ports Authority*, 390 S.C. 108, 117, 700 S.E.2d 462 (Ct. App. 2012) The hearing commissioner further noted that, but for Mr. Hutson's testimony that he was capable of running a restaurant, "he would have found Hutson to be permanently and totally disabled 'with affects to the right leg.'" *Id.* The Court of Appeals specifically noted that the Respondents did not appeal these findings. *Id.* Therefore, by the time the matter was in front of the Court of Appeals and Supreme Court, it was the law of the case. Based on these unappealed findings by the hearing commissioner, the issue before the Court of Appeals was whether Appellant was entitled to an award to the leg under S.C. Code Ann. §42-9-30, and before the Supreme Court, whether Appellant was entitled to an award for wage loss under S.C. Code Ann. §42-9-20[7]. In the present matter, the Commission found that Appellant only sustained permanent disability to a single body part, Appellant's back. Further, there is nothing in the record to support that Appellant has any permanent impairment to any other body part.[8] Therefore, the Commission properly held that Appellant was entitled to a recovery under S.C. Code Ann. §42-9-30.

[7] In fact, Hutson's ability to recover under S.C. Code Ann. §42-9-10 was never raised to the appellate courts.

[8] With regard to Appellant's alleged radicular symptoms, as the Commission noted in the Order of the Appellate Panel, the EMG/NCS performed on May 5, 2014 "was a normal study with no evidence of peripheral nerve impingement, peripheral polyneuropathy, or radiculopathy on needle exam of the tested right lower extremity."

Nevertheless, even should the Full Commission find that Appellant sustained an impairment to more than one body part such to satisfy the requirement of *Singleton*, which Respondents strenuously deny, Respondents would assert that Appellant is still not entitled to a finding of permanent and total disability under S.C. Code Ann. §42-9-10. Rather, at most she would be entitled to a finding of partial wage loss under §42-9-20 pursuant to the vocational assessment of Jacqueline Kennedy-Merritt.

In her brief, Appellant attempts to discredit the vocational assessment of Ms. Kennedy-Merritt and to bolster the vocational assessment of Glenn Adams, which was obtained by Appellant's counsel. She first attempts to discredit Ms. Kennedy-Merritt with an entirely unfounded claim that her employer "is a company providing cost savings to workers' compensation insurance companies through utilization reviews, nurse case managers, and vocational experts." The apparent implication is that Ms. Kennedy-Merritt's company is biased against injured workers and towards workers' compensation insurance companies.[9] This is entirely inconsistent with her report and with her testimony regarding her background and her approach in conducting vocational assessments.

Appellant further attempts to discredit Ms. Kennedy-Merritt's vocational assessment by claiming that her opinion is flawed because it is based on "possibilities rather than probabilities." Her support for his proposition is the fact that Ms. Kennedy-Merritt testified that the jobs listed in her labor market survey are possible jobs Appellant could do based on her restrictions. Ms. Kennedy-Merritt was opining concerning the labor market that is available to Appellant, she was

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Additionally, the doctor who performed the testing noted that the issues present in Appellant's foot was more likely due to her obesity.

[9] It appears this is not only an attempt to discredit the report by Ms. Kennedy-Merritt in the present claim, but to discredit any reports by this company in any other cases before this Commission, rather than to actually address the merits of the claims within the individual reports in each claim. Respondents would strongly object to this implication, as it is unfounded and improper.

not asked to actually find Appellant a job.[10] Further, Ms. Kennedy-Merritt's opinion clearly meets the standard for an expert opinion. She reviewed the medical documentation provided to her by Respondents and by Appellant[11], "conducting the face to face vocational evaluation, the employability analysis, the labor market review and published data" Ms. Kennedy-Merritt expressed her "professional vocational opinion that there are appropriate positions that exist within the local labor market that [Appellant] can participate in." (R. p. 201) She noted that her opinions were "rendered with a reasonable degree of professional vocational certainty and are based upon information obtained from [her] review of all documentation and information provided with regard to" Appellant. (R. p. 202)

Notably, Ms. Kennedy-Merritt is not the only expert who opined that Appellant could work. Dr. LaMotta also expressed his belief that Appellant could return to work, at least at sedentary duties.[12] Appellant was able to briefly return to work for about two months after her injury. During that time, she did filing or cleaned out and changed clothes in the clients' drawer. Appellant testified that there was not enough work to keep her busy and she was terminated when her employer no longer had work for her. Appellant also testified that she would like to work and has maintained her massage license. She testified that she applied to two of the jobs[13] listed by Ms. Kennedy-Merritt in her vocational report, and would have tried to work in those positions if hired. She testified that she has not attempted to find any jobs outside of the jobs

[10] In fact, it appears based on Appellant's testimony that she has not contacted any agencies, such as Vocational Rehabilitation, which would actually assist her in trying to find employment.

[11] In fact, at the time Ms. Kennedy-Merritt evaluated Appellant, she was provided opinions by Appellant's counsel, including Columbia Rehabilitation Clinic, Inc.'s FCE, the report from Dr. Poletti's March 7, 2016 evaluation of Appellant, and Glen Adams' report, that were not provided to Defendants until several weeks later, after Ms. Kennedy-Merritt completed her report.

[12] Dr. Poletti opined that Appellant had a sedentary work status.

[13] Appellant contends in her brief that she contacted "all seven potential employers [listed in Ms. Kennedy-Merritt's report] and testified none were interested in hiring her." In actuality, Appellant only testified concerning inquiring about or applying to two of the jobs listed in Ms. Kennedy-Merritt's report. As to the other jobs, Appellant merely testified as to her belief that she could not do those jobs.

listed by Ms. Kennedy-Merritt, and claimed she did not know how to contact Vocational Rehabilitation or Department of Education and Work Force to see if they had any training or jobs that they could recommend for her. Therefore, Appellant's own testimony indicated both a willingness and apparent belief that she could return to work in some capacity. In fact, the only person with the opinion that Appellant is unable to work is Glen Adams.

For the reasons set forth above, Respondents contend that the finding of a 20% permanent disability only to Appellant's back is fully supported by substantial evidence in the record, and should be upheld. In the alternative, should the Court of Appeals find that Appellant sustained a permanent impairment to more than one body part such to satisfy the requirement of *Singleton*, Respondents would assert that Appellant is still not entitled to a finding of permanent and total disability under S.C. Code Ann. §42-9-10 and is, at most, entitled to a finding of partial wage loss under §42-9-20 pursuant to the vocational assessment of Jacqueline Kennedy-Merritt and the matter should be remanded to the Workers' Compensation Commission to make a determination of the amount of her wage loss.

CONCLUSION

The Workers' Compensation Commission's decision that Appellant suffered a 20% permanent impairment to the back is fully supported by substantial evidence and the Respondents respectfully request that the Court of Appeals affirm the Decision and Order of the South Carolina Workers' Compensation Commission. In the alternative, should the Full Commission find that Appellant sustained a permanent impairment to more than one body part such to satisfy the requirement of *Singleton*, Respondents would assert that Appellant is still not entitled to a finding of permanent and total disability under S.C. Code Ann. §42-9-10 and is, at most, entitled to a finding of partial wage loss under S.C. Code Ann. §42-9-20 pursuant to the

vocational assessment of Jacqueline Kennedy-Merritt and Respondents request the matter should be remanded to the Workers' Compensation Commission to make a determination of the amount of her wage loss.

Respectfully Submitted,

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April 1, 2019

IN 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 South Carolina State Accident Fund, Carrier,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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