BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL

Patricia Pate v. Employee/Claimant, Appellant -vs- College of Charleston, Employer, and State Accident Fund Carrier, Respondents.	W.C.C. FILE NO. 1121370 **DECISION & ORDER FOLLOWING REMAND**

STATEMENT OF THE CASE

The Claimant experienced low back pain while assisting a co-worker with a box on December 14, 2011, and was diagnosed with degenerative changes in her lumbar spine. A hearing was held before Commissioner Aisha Taylor on July 14, 2015, to determine issues as set forth in the Form 21 and Forms 50 and 51. The Defendants contended that the Claimant reached maximum medical improvement ("MMI") for this injury by February 14, 2014, when she was assigned a 23% impairment rating to the spine by Dr. Nolan. They also sought a determination of the Claimant's entitlement to benefits under S.C. Code Ann. § 42-9-30 pursuant to the impairment rating and the fact that she was able to return to her regular full time job, earning her regular wages. The Defendants sought a credit for all temporary total disability paid after the date of MMI. Furthermore, the Defendants contended that the Claimant had not met her burden of

proving entitlement to any additional medical treatment under S.C. Code Ann. § 42-15-60.

The Defendants further contended that the Claimant had a subsequent intervening injury in September 2014, when she was hospitalized for multiple pulmonary emboli, which was unrelated to her employment. Due to the subsequent intervening injury, she was unable to receive injection therapy for her low back and was placed out of work by Dr. Nolan. Accordingly, the Defendants argued that the Claimant would be working and earning her regular wages despite her low back issues, but for her subsequent intervening pulmonary emboli and resulting treatment, which broke the chain of causation. Thus, the Defendants denied that the Claimant's current condition, need for medical treatment, or any alleged loss of wage-earning capacity was the responsibility of the Defendants.

The Claimant agreed that she reached MMI by February 13, 2014. However, she alleged permanent and total disability because the Defendants were unable to accommodate the new work restrictions she received following the pulmonary embolisms in September 2014. Lastly, the Claimant requested additional medical treatment.

Commissioner Taylor filed the Decision and Order on May 16, 2016, issuing the following:

Findings of Fact

1. On December 14, 2011, Claimant sustained an admitted injury to her lower back within the course and scope of her employment. Based upon the greater weight of the evidence in the record, the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system.

2. Claimant received all appropriate medical care at the direction of the Defendants with Drs. Marzluff and Nolan.

3. Claimant was initially placed at maximum medical improvement by Dr. Marzluff on September 12, 2012, at which time she returned to regular, full-time employment, with some accommodations pursuant to her restrictions, on August 30, 2012.

4. Claimant began pain management with Dr. Nolan while working full time and continued to do so until September of 2014 when Claimant suffered multiple pulmonary embolisms, which I find were unrelated to her employment and work injury.

5. Prior to Claimant's pulmonary embolisms, Dr. Nolan placed Claimant at maximum medical improvement from a pain management standpoint as of February 13, 2014, with future medical treatment to include injection therapy.

6. I find Claimant's multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to Claimant's disability and continued medical treatment. This finding is based on the evidence as a whole including, but not limited to, the following:

   a. Dr. Nolan increased Claimant's work restrictions as a direct result of her pulmonary embolisms and she is no longer able to work full time, despite doing so for nearly three (3) years after the December 14, 2011 accident. (APAs p. 70 & 257).

   b. Claimant's Employer could not accommodate her increased restrictions required by the pulmonary embolisms after having accommodated the prior restrictions for almost three years.

   c. Claimant can no longer receive causally-related injection therapy or other medications (Percocet) due to her need for anti-coagulates and as a result of her pulmonary embolisms. Claimant now requires additional medical treatments as a direct result of the pulmonary embolisms and anticoagulant therapy that she did not otherwise require following the December 14, 2011 accident.

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

8. Claimant is at maximum medical improvement for her December 14, 2011 low back injury as of February 13, 2014 per Dr. Nolan, the authorized

pain management physician.

9. Claimant has sustained a 23% permanent loss of use of her back as a result of her work injury. I base this finding on the impairment rating issued by Dr. Nolan, as well as the fact that the Claimant was able to work full time, with her pain well controlled, prior to the pulmonary embolisms in September 2014. Due to Claimant's subsequent, intervening pulmonary embolisms, I find any increase above the permanent impairment would require impermissible surmise, conjecture and/or speculation. Claimant's current condition, subjective complaints, need for medical treatment, and work restrictions have all been significantly increased and aggravated by the subsequent, intervening pulmonary embolisms.

11. Claimant is not entitled to future medical treatment, as none is currently recommended that would tend to lessen her period of disability directly related to the December 14, 2011 work injury. The record reveals that the Claimant's pain levels and need for medical treatment have increased significantly as a result of her subsequent, intervening pulmonary embolisms. Dr. Nolan, the Claimant's current treating physician, has not made any future medical recommendations to the requisite "reasonable degree of medical certainty." While Dr. Marzluff previously testified about Claimant's medical treatment, he has not evaluated Claimant since 2012. Claimant's inability to continue injection therapy due to her subsequent, intervening, personal health issues have weighed into this decision as well.

12. Claimant has an average weekly wage of $553.02, which yields a compensation rate of $368.70.

13. Claimant is entitled to a lump-sum award with Utica Mohawk SSA apportionment language.

14. Although Claimant was placed at MMI as of February 13, 2014 by Dr. Nolan, Defendants did not file a Form 21 requesting a credit until November 6, 2014. As such, Defendants are entitled to a credit back to date of the Form 21 filing only.

CONCLUSIONS OF LAW

1. The Claimant sustained an injury to her low back in an accident arising out of and in the course of her employment with the Employer on December 14, 2011. Based upon the greater weight of the evidence in the record, the Claimant did not sustain any injury to, or impairment of, any other body member as a result of that accident and her alleged psychological problems are not causally-related to her accident or low back injury.

2. The Defendants are entitled to terminate temporary total disability benefits pursuant to S.C. Code Ann. § 42-9-260 on the basis that Claimant

was released by her authorized treating physician and returned to work in a full time position with the Employer on August 30, 2012, at which time the period of temporary disability causally-related to the December 14, 2011 accident ended. The greater weight of the evidence indicates that Claimant is currently out of work due to a non-work-related personal health problem (pulmonary embolisms) and; therefore, any loss of wage-earning capacity is not the proximate result of the December 14, 2011 accident.

3. The Defendants are entitled to a credit for overpayment of temporary total disability compensation benefits after the date the Form 21 was filed, November 6, 2014, pursuant to S.C. Code Ann. § 42-9-210.

4. Claimant is not entitled to and the Defendants are not responsible for any benefits under S.C. Code Ann. § 42-9-10 or § 42-9-20 pursuant to the Supreme Court's holding in Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007). Claimant was working in her regular, full time position as the assistant manager of the College of Charleston Copy Center for more than two years after the December 14, 2011 accident and; therefore, her back injury was not disabling as a matter of law. Instead, the proximate cause of her loss of wage-earning capacity is the multiple pulmonary embolisms she suffered in September 2014, which aggravated her pre-existing back condition according to Claimant's own treating physician.

5. Claimant is not entitled to and the Defendants are not responsible for any benefits under S.C. Code Ann. § 42-15-60 pursuant to the Supreme Court's holding in Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007). Claimant's current subjective complaints and need for medical treatment are not causally-related to the December 14, 2011 accident because the subsequent intervening personal injury (pulmonary embolisms) resulted in increased pain, decreased function, and both changes and increases in medical treatment Claimant receives for her low back. Furthermore, there is no medical evidence stated to a reasonable degree of medical certainty that the Claimant currently requires any additional medical treatment to lessen the period of disability directly related to the December 14, 2011 accident.

6. Pursuant to S.C. Code Ann. § 42-9-30(21), Claimant is entitled to benefits representing the 23% loss of use of the back causally-related to the December 14, 2011 accident. Claimant is not entitled to and the Defendants are not responsible for any benefits for loss of use of any other body member.

ORDER

IT IS, THEREFORE, HEREBY ORDERED that the Claimant is entitled to and the Defendants are responsible for sixty-nine (69) weeks of compensation at the rate of Three Hundred Sixty-Eight and 70/100s Dollars

($368.70) per week, subject to the Defendant's credit for all benefits paid after November 6, 2014.

IT IS FURTHER ORDERD that the Claimant is not entitled to and the Defendants are not responsible for any additional medical or compensation benefits under the South Carolina Workers' Compensation Act at this time.

IT IS SO ORDERED!

Within the statutory period, on May 27, 2016, the Claimant/Appellant filed a Form 30 Request for Commission Review in the case setting forth thirteen (13) grounds for appeal. Such, together with all documentary evidence, was delivered by oral argument to the individual members of the Appellate Panel.

In her first Form 30 Application for Review dated May 27, 2016, the Claimant/Appellant raised the following issues:

1. *Whether the Single Commissioner erred as a matter of fact and law in finding tha*[sic] *"Claimant's multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to Claimant's disability and continued medical treatment."*

2. *Whether the Single Commissioner erred as a matter of fact and law in denying additional medical treatment when such treatment was necessary to treat Claimant's chronic pain resulting from her surgery.*

3. *Whether the Single Commissioner erred as a matter of law in holding an intervening act can break the chain of causation in a workers' compensation claim when there is no legal authority for such a holding.*

4. *Whether the Single Commissioner erred as a matter of fact and law in denying psychological injury.*

5. *Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant permanently and totally disabled.*

6. *Whether the Single Commissioner erred as a matter of fact and law in awarding 23% permanent loss of use of the back.*

7. *Whether the Single Commissioner erred as a matter of fact and law in ruling that "any increase above the permanent impairment would require impermissible surmise, conjecture and/or speculation."*

8. *Whether the Single Commissioner erred as a matter of fact and law in finding "Claimant's current condition, subjective complaints, need for medical treatment, and work restrictions have all been significantly increased and aggravated by the subsequent, intervening pulmonary embolisms.*

9. *Whether the Single Commissioner erred as a matter of fact and law in ruling "Claimant is not entitled to future medical treatment, as none is recommended that would tend to lessen her period of disability directly related to the December 14, 2011 work injury."*

10. *Whether the Single Commissioner erred as a matter of fact and law in ruling "any loss of wage-earning capacity is not the proximate result of the December 14, 2011 accident."*

11. *Whether the Single Commissioner erred as a matter of law in misapplying Geathers v. 3V, Inc.[,] 371 S.C. 570, 641 S.E.2d 29 (2007) when there was no later injurious exposure nor an intervening "accident."*

12. *Whether the Single Commissioner erred as a matter of law in denying further medical treatment by erroneously concluding "there is no medical evidence stated to a reasonable degree of medical certainty that the Claimant currently requires any additional medical treatment to lessen the period of disability directly related to the December 14, 2011 accident when it is undisputed that Claimant's need for pain management arises directly out of the work accident.*

13. *Whether the Single Commissioner erred as a matter of law in limiting the award to the back.*

The Claimant submitted her brief to the Appellate Panel on July 18, 2016, making the following arguments: (1) "An unrelated medical condition cannot constitute an intervening cause sufficient to break the chain of causation"; (2) "Claimant's work restrictions and need for ongoing medical treatment are directly related to her workplace injury"; (3) "Claimant met the legal standard for post-MMI medical treatment"; (4) Claimant's injury was not limited to her back in that she suffered from

radiculopathy and psychological overlay"; and (5) "[t]he 23% permanent partial disability award to the back is based on legal error in that the Single Commissioner mistakenly concluded she could not award more than Dr. Nolan's impairment rating."

The Defendants filed their brief on August 1, 2016. In response, the Defendants argued that it was improper for the Claimant to raise new claims for the first time on appeal, referring to the Claimant's argument that she was entitled to a general disability award based upon an unscheduled injury to the sacroiliac joint. The Claimant had previously made no allegation concerning a sacroiliac joint injury in her three previous Form 50s, Form 58, hearing before Commissioner Taylor, or in the Form 30.

Additionally, the Defendants contended that the Hearing Commissioner properly concluded that the Claimant was not entitled to benefits for an alleged psychological injury because no physician opined to a reasonable degree of medical certainty that the Claimant's alleged psychological condition was causally-related to her original work injury to the lower back. The Defendants also argued that the Hearing Commissioner's conclusion that the Claimant is not entitled to benefits under S.C. Code Ann. § 42-9-10 or § 42-9-20 should be affirmed in accordance with the greater weight of the evidence and the applicable law given the Supreme Court's holding in Geathers v. 3V, Inc., 371 S.C. 570, 641 S.E.2d 29 (2007), which reaffirmed the "Gordon Rule." Lastly, the Defendants/Respondents argued that the hearing commissioner properly determined that the Claimant is not entitled to any additional medical benefits as a matter of law due to the Claimant's September 2014 subsequent, intervening pulmonary emboli broke the chain of legal causation. Furthermore, Dr. Nolan, the Claimant's treating physician, had not made any future medical recommendations to the required "reasonable degree of medical certainty" standard.

The Claimant submitted her Reply Brief on August 7, 2016, making two arguments. She argued that an unrelated medical condition could not constitute an intervening cause sufficient to break the chain of causation. Additionally, she contended that she had preserved her claim for general disability under Section 42-9-10. She requested that an order be entered finding the Claimant permanently and totally disabled, the pulmonary embolus was not a sufficient intervening cause to break the chain of causation, and that the Claimant was entitled to ongoing treatment for her back, SI joint, psychological overlay, and radicular symptoms.

The parties were heard by the Appellate Panel, consisting of Commissioners James, Wilkerson, and Campbell, on August 16, 2016, to determine issues as set forth in the Claimant's Form 30. The Appellate Panel issued its Decision and Order on December 22, 2016, affirming the Single Commissioner's findings and conclusions regarding the nature and extent of her injury but determined that the Single Commissioner erred in concluding that the Claimant's non-work-related pulmonary emboli did not constitute a subsequent intervening accident and remanded the issue of the Claimant's causally-related loss of use of the back to the Single Commissioner for further determination, issuing the following:

APPELLATE PANEL FINDINGS OF FACT

Based on the preponderance of the evidence, the panel makes the following findings of fact:

1. On December 14, 2011, Claimant sustained an admitted injury to her lower back within the course and scope of her employment. Based on the greater weight of the evidence in the record, the December 14, 2011 accident did not result in injury to, or otherwise affect any other body member of system. This finding of the Single Commissioner is affirmed.

2. *Claimant received appropriate medical care at the direction of the Defendants with Drs. Marzluff and Nolan. The medical care tended to lessen her degree of disability.*

3. *Claimant was initially placed at maximum medical improvement by Dr. Marzluff on September 12, 2012, at which time she returned to regular, full-time employment, with some accommodations pursuant to her restrictions, on August 30, 2012.*

4. *Claimant began pain management on May 14, 2013 with Dr. Nolan while working full time in an accommodated position with the Employer.*

5. *Pate temporarily stopped working on September 15, 2014 when she was hospitalized for a pulmonary embolism. We affirm the Single Commissioner's Finding that the pulmonary embolism is unrelated to her employment and work injury.*

6. *On February 13, 2014, Dr. Nolan opined Pate was at MMI. He treated Pate with SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, and medications (OxyContin, Percocet and Tizanidine). He also ordered a lumbar back brace. He opined she would require ongoing palliative treatment including all these modalities. [APA pages 7-8]. Dr. Nolan assigned a 23% whole person rating based on DRE Category IV. [APA page 126(a)].*

7. *We reverse the Single Commissioner's finding that "Claimant's multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to Claimant's disability and continued medical treatment." The reversal of the Single Commissioner's finding is based on the evidence as a whole with particular emphasis on the medical records and events following the development of the blood clots.*

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

9. *We reverse and remand the Single Commissioner's finding that "Claimant has sustained a 23% permanent loss of use of her back as a result of her work injury." It was legal error of the Single Commissioner to*

conclude that the pulmonary embolisms were an intervening accident or intervening accident. The pulmonary embolisms did not and could not constitute an intervening accident or intervening cause as a matter of law. See McMahan v. S.C. Dept. of Education-Transportation, Op. No. 5415 (S.C.Ct. App. filed June 15, 2016) (Shearouse Adv.Sh. No. 24 at 56). We note the Single Commissioner did not have the benefit of the McMahan case which was released after the Decision and Order in this case.

10. We reverse the Single Commissioner's Finding that "Claimant is not entitled to future medical treatment, as none is currently recommended that would tend to lessen her period of disability directly related to the December 14, 2011 work injury." As noted above, the pulmonary embolisms are not a subsequent intervening cause. The matter is to be remanded to the Single Commissioner to address what, if any, future medical is causally related pursuant to the Act.

11. Claimant has an average weekly wage of $553.02, which yields a compensation rate of $368.70.

12. Claimant is entitled to a lump-sum award with James apportionment language. The jurisdictional Commissioner on remand is to make this determination. Claimant will be given leave to submit a supplemental order with an approved Form 61 which is to be incorporated into the Single Commissioner's order by reference.

13. We affirm the Single Commissioner's finding that "Although Claimant was placed at MMI as of February 13, 2014 by Dr. Nolan, Defendants did not file a Form 21 requesting a credit until November 6, 2014. As such, Defendants are entitled to a credit back to date of the Form 21 filing only."

14. This matter is remanded to the jurisdictional commissioner for a determination of causally related disability and for a determination of what, if any, medical treatment is causally related and should be awarded pursuant to the Act.

APPELLATE PANEL CONCLUSIONS OF LAW

1. We reverse the Single Commissioner's legal conclusion that "Claimant is not entitled to and the Defendants are not responsible for any benefits under S.C. Code Ann. § 42-15-60 pursuant to the Supreme Court's holding in Geathers v. 3V, Inc., 371[]S.C. 570, 641 S.E.2d 29 (2007)."

2. The pulmonary embolus is not a subsequent intervening cause sufficient to break the chain of causation. It was error of the Single Commissioner to deny ongoing medical treatment and disability compensation under the theory that the pulmonary embolus was an

intervening cause. The general rule is "Every natural consequence that flows from a work-related compensable injury is also compensable unless the consequence is the result of an independent, intervening cause sufficient to break the chain of causation." Whitfield v. Daniel Constr. Co., 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954).

The case law consistently requires an intervening cause to be a subsequent accident attributable to the claimant's own intentional conduct. See, e.g. Tims v. J.D. Kitts Constr., 393 S.C. 496, 713 S.E.2d 340 (Ct. App. 2011)(rejecting argument that heatstroke suffered by quadriplegic from being left in his caregiver's car was an independent intervening cause because "neither Claimant's decision to ride in his caregiver's car nor his caregiver's negligence was an independent, intervening cause sufficient to break the chain of causation."), citing 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 10.01, 0-1 (2010) (stating that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent, intervening cause attributable to the claimant's own intentional conduct).

3. The principle applying to this case is "that a nonwork-related condition is not a superseding, intervening event that breaks the causal connection between a work-related injury and a claimant's disability."[1] Brockel v. N.D. Workforce Safety & Ins., 843 N.W.2d 15, 23-24 (N.D. 2014). The rule was followed in South Carolina in Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996). In Orr, the claimant unexpectedly became pregnant following back surgery for her injury. Due to the pregnancy, she was unable to participate in physical therapy, spurring the carrier to seek to suspend her compensation. The Court of Appeals rejected this argument, reasoning "The fact that Orr 's pregnancy indirectly prolonged the period during which she was unemployable does not change the fact that her injury, not her pregnancy, rendered her unable to work." Id. at 449 (emphasis added).

4. The ruling below regarding Geathers has no support in the law and is an erroneous misapplication of Geathers. In Geathers, the Supreme

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[1] *A majority of jurisdictions – including South Carolina – follow this rule. See, e.g., Thurston v. Guys With Tools, Ltd., 217 P.3d 824 (Alaska 2009); Moore v. Component Assembly Sys., 158 Md.App. 388, 857 A.2d 549 (2004); Schock v. Morristown Mem'l Hosp./Atlantic Health Sys., 2010 WL 2793949 *6 (N.J.Super.A.D. July 2, 2019); Thomas v. Burggraf Restoration, 31 P.3d 402 (Okla.Ct.Vic.App.2001); Workmen's Comp. Appeal Bd. v. Chamberlain Mfg. Corp., 336 A.2d 659 (1975); Orr v. Elastomeric Prods., 323 S.C. 342, 474 S.E.2d 448 (Ct.App. 1996); Wood v. Fletcher Allen Health Care, 739 A.2d 1201 (1999).*[]

Court adopted the "last injurious exposure rule." The last injurious exposure rule:

places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. Consistent with the rule that an employer takes its employee as it finds her, the last injurious exposure rule makes the insurer at risk at the time of the second injury liable even if the second injury would have been much less severe in the absence of the prior condition and even if the prior injury significantly contributed to the final condition. Geathers v. 3V, Inc., *371 S.C. 570, 641 S.E.2d 29 (2007).*

The last injurious exposure rule is simply a rule to avoid apportionment and put liability on the carrier covering the most recent injury. It has no application to the facts of this case. It cannot be used as a means to deny further benefits when there is no subsequent carrier nor any later injurious exposure. There is no second accident in this case.

ORDER

IT IS THEREFORE ORDERED that the Decision and Order of the Single Commissioner is Affirmed in part, Reversed in part, and Remanded;

IT IS FURTHER ORDERED that the findings and conclusions of the Single Commissioner that the pulmonary embolisms are an intervening accident are reversed.

IT IS FURTHER ORDERED that this case is remanded to the Single Commissioner to determine the compensation due for Claimant's causally related permanent disability and causally related medical treatment pursuant to the Act consistent with the findings of fact and conclusions of law herein.

AND IT IS SO ORDERED.

The Claimant filed a Petition for Rehearing or Reconsideration on January 23, 2017, regarding the Appellate Panel's findings in the December 22, 2016 Appellate Panel Decision and Order, specifically whether the Claimant's back injury affected the buttocks and left leg and the Claimant's allegations of psychological overlay. The Claimant's Petition was denied on February 21, 2017.

Pursuant to a March 15, 2017 Consent Order, the parties agreed that under the Bone case, the Appellate Panel's orders are not immediately appealable, as the interlocutory order remanded the case to the jurisdictional commissioner for further findings of fact.

The Single Commissioner then issued the Decision and Order on Remand on May 24, 2018, with the following:

ADDITIONAL FINDINGS OF FACT

*Pursuant to the instructions on remand of the Appellate Panel, the following **ADDITIONAL FINDINGS OF FACT** are made:*

1. This is a single-member injury affecting Claimant's lower back only. As such, Claimant's requests for benefits is limited to S.C. code Ann. Section 42-9-30 (21).

2. I find Claimant has sustained 40% permanent partial disability as a result of her work injury. This finding is based on the evidence as a whole including Dr. Nolan's permanent impairment rating of 23% to the lumbar spine issued on March 10, 2014 as well as Claimant's work restrictions at the time of separation from her employer which included working 4 hours per day for 4 days per week, with specific restrictions of no bending, squatting, or crawling; no lifting greater than 15 pounds, and no pushing or pulling heavy objects. (Claimant's APA p. 93).

3. Claimant is entitled to future medical treatment to include SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medications (currently OxyContin, Percocet, and Tizanidine). Claimant is also entitled to a lumbar back brace as prescribed by Dr. Nolan. Claimant's future medical treatment is to be provided by Dr. Nolan or another physician authorized by Defendants to carry out the medical award in this matter.

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ADDITIONAL CONCLUSION OF LAW

*Pursuant to the instructions on remand of the Appellate Panel, the following **ADDITIONAL CONCLUSION OF LAW** is made:*

19. An order reversed on appeal is a nullity. See Tolbert v. Fouche, 123 S.E. 859 (SC 1924). The original order of the Single

Commissioner provided that Defendants were not liable for providing ongoing treatment. As that order was reversed by the Appellate Panel, it is a nullity — as if it never existed. Accordingly, Defendants are liable for paying for causally related treatment incurred by Claimant prior to this order to be paid pursuant to the South Carolina Workers' Compensation Fee Schedule. Claimant is entitled to reimbursement for any and all causally-related out of pocket expenses incurred during this time.

ORDER

IT IS THEREFORE ORDERED that the Claimant is entitled to a lump sum award for permanent partial disability of 120 weeks based on a loss of use of 40% of the back which shall be apportioned over Claimant's life expectancy pursuant to James v. Anne's;

IT IS FURTHER ORDERED that Claimant is entitled to causally-related future medical treatment pursuant to Section 42-15-60 to include SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medications (currently OxyContin, Percocet, and Tizanidine). Claimant is also entitled to a lumbar back brace as prescribed by Dr. Nolan. Claimant's future medical treatment is to be provided by Dr. Nolan or another physician authorized by Defendants to carry out the medical award in this matter.

IT IS FURTHER ORDERED that the Defendants shall pay for causally-related medical expense incurred during the period the Single Commissioner's order was in effect and no treatment was authorized pursuant to the South Carolina[sic] *Workers' Compensation Fee Schedule. Claimant is entitled to reimbursement for any and all causally related out-of-pocket expenses incurred during this same period.*

AND IT IS SO ORDERED.

Within the statutory period, on June 7, 2018, the Claimant filed her second Form 30 Request for Commission Review of the Hearing Commissioner's Order on Remand, setting forth four grounds for appeal. Oral argument was requested. Such, together with all documentary evidence, was delivered by oral argument to the individual members of the Appellate Panel on October 22, 2018.

In her second Form 30 Application for Review dated June 7, 2018, the Claimant raised the following issues:

1. *Whether the Single Commissioner and Appellate panel erred as a matter of fact and law in denying psychological injury.*

2. *Whether the Single Commissioner on remand erred as a matter of fact and law in failing to find Claimant permanently and totally disabled when her restrictions prevent her from obtaining suitable gainful employment.*

3. *Whether the Single Commissioner on remand erred as a matter of fact and law in awarding 40% permanent loss of use of the back when the evidence shows Claimant is presumed permanently and totally disabled due to 50% loss of use of her back and there is no evidence to rebut the presumption.*

4. *Whether the Single Commissioner and Appellate Panel erred as a matter of law in finding this is a single member case when Claimant suffers from radiculopathy affecting her left leg and an SI joint injury which is an injury to her back and pelvis.*

The Claimant submitted her brief to the Appellate Panel on September 17, 2018, making the following arguments: (1) the Claimant is presumed permanently and totally disabled as she has lost more than 50% use of her back; and (2) the Claimant's injury should not be limited to her back as she suffers from radiculopathy and psychological overlay. The Claimant request that the Hearing Commissioner's Order on remand be reversed and that a new Order be issued by the Appellate Panel, finding that the Claimant is permanently and totally disabled, the pulmonary embolus was not an intervening cause sufficient to break the chain of causation, and that the Claimant is entitled to ongoing treatment for her back, radicular symptoms, SI joint, and

psychological overlay. The Claimant also argued that, in the alternative, she is entitled to a permanent partial disability award based on the totality of the evidence.

The Defendants timely filed their Brief to the Appellate Panel on October 1, 2018, contending that the Hearing Commissioner properly determined that the Claimant is not permanently and totally disabled under Section 42-9-30 because the Claimant's loss of use of the back does not exceed 50%. The Defendants request that the Hearing Commissioner's Order on remand be affirmed, subject to the Defendants' right to appeal the Appellate Panel's reversal of the Hearing Commissioner's original Decision and Order and Findings of Fact and Conclusions of Law contained in the Appellate Panel's December 22, 2016 interlocutory order. The Defendants argue that the Claimant is not entitled to a presumption of permanent and total disability because the Claimant's inability to work is the result of her non-work-related emboli in September 2014.

Furthermore, the Defendants contend the Claimant is not entitled to an award of permanent and total disability based on the economic model because her work injury is a single-scheduled injury to the back. Instead, the Claimant's remedy is restricted to the medical model under S.C. Code Ann. § 42-9-30. The Claimant did not take issue with Dr. Nolan's 23% impairment rating and otherwise misstated Dr. Marzluff's impairment rating. Furthermore, the Claimant's assertion that her condition worsened after her impairment ratings were issued is untenable because the Claimant admitted that the worsening of her condition following her pulmonary emboli in September 2014 was not causally-related to the December 14, 2011 work accident, meaning that the

worsening of her condition was not relevant to a determination of the loss of use of the back causally-related to the December 14, 2011 accident.

The Claimant responded with her Reply Brief on October 11, 2018, reiterating that she should be presumed permanently and totally disabled under S.C Code Ann. § 42-9-30.

On October 22, 2018, counsel for the Defendants wrote the Commission to alert the Appellate Panel about an error in the Record, which is relevant to the issue on appeal. The Hearing Commissioner's May 22, 2019 Order on remand misquoted the Appellate Panel's Finding of Fact #9 by adding two additional sentences. At the Appellate Hearing, during oral argument, the Appellant and Respondents argued according to their submitted briefs.

DISCUSSION

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusion of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, the Panel **Affirms with Amendments** the Hearing Commissioner's Decision and Order on Remand. The single change to the Hearing Commissioner's Order on Remand is a deletion of two sentences from the Hearing Commissioner's reference to the Appellate Panel's prior Findings of Fact #9, which mistakenly added two sentences and attributed the same to the Appellate Panel, though

not included in the Appellate Panel's December 22, 2016 Decision and Order. The Appellate Panel's original Finding of Fact #9 correctly reads as follows:

> 9. *We reverse and remand the Single Commissioner's finding that "Claimant has sustained a 23% permanent loss of use of her back as a result of her work injury." It was legal error of the Single Commissioner to conclude that the pulmonary embolisms were an intervening accident or intervening accident. The pulmonary embolisms did not and could not constitute an intervening accident or intervening cause as a matter of law. See McMahan v. S.C. Dept. of Education-Transportation, Op. No. 5415 (S.C.Ct.App. filed June 15, 2016) (Shearouse Adv.Sh. No. 24 at 56). We note the Single Commissioner did not have the benefit of the McMahan case which was released after the Decision and Order in this case.*

CONCLUSION

After thoroughly reviewing the Record in this case and the arguments of the parties, the Appellate Panel affirms the Hearing Commissioner's decision on remand as follows:

Findings of Fact

1. On December 14, 2011, Claimant sustained an admitted injury to her lower back within the course and scope of her employment. Based on the greater weight of the evidence in the record, the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system.

2. Claimant received appropriate medical care at the direction of the Defendants with Drs. Marzluff and Nolan. The medical care tended to lessen her degree of disability.

3. Claimant was initially placed at maximum medical improvement by Dr. Marzluff on September 12, 2012, at which time she returned to regular, full-time employment, with some accommodations pursuant to her restrictions, on August 30, 2012.

4. Claimant began pain management on May 14, 2013 with Dr. Nolan while working full time in an accommodated position with the Employer.

5. Pate temporarily stopped working on September 15, 2014 when she was hospitalized for a pulmonary embolism. The Claimant's pulmonary embolism is unrelated to her employment and work injury.

6. On February 13, 2014, Dr. Nolan opined Pate was at MMI. He treated Pate with SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, and medications (OxyContin, Percocet and Tizanidine). He also ordered a lumbar back brace. He opined she would require ongoing palliative treatment including all these modalities. [APA pages 7-8]. Dr. Nolan assigned a 23% whole person rating based on DRE Category IV. [APA page 126(a)].

7. Claimant also alleges a psychological injury as a result of her original work injury. We find that Claimant has not met her burden of proving a psychological injury causally-related to her original injury. Her claim is not supported by the preponderance of the evidence. Specifically, no physician has opined that Claimant has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical

certainty that Claimant's alleged psychological condition is causally-related to her original work injury to her lower back. Claimant's personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well.

8. Claimant has an average weekly wage of $553.02, which yields a compensation rate of $368.70.

9. Although Claimant was placed at MMI as of February 13, 2014 by Dr. Nolan, Defendants did not file a Form 21 requesting a credit until November 6, 2014. As such, Defendants are entitled to a credit back to date of the Form 21 filing only.

10. This is a single-member injury affecting Claimant's lower back only. As such, Claimant's requests for benefits is limited to S.C. Code Ann. § 42-9-30(21).

11. Claimant has sustained 40% loss of use of the back as a result of her work injury. This finding is based on the evidence as a whole, including Dr. Nolan's permanent impairment rating of 23% to the lumbar spine issued on March 10, 2014, as well as Claimant's work restrictions at the time of separation from her employer, which included working 4 hours per day for 4 days per week, with specific restrictions of no bending, squatting, or crawling; no lifting greater than 15 pounds, and no pushing or pulling heavy objects. (Claimant's APA p. 93).

12. Claimant is entitled to future medical treatment to include SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medications (currently OxyContin, Percocet, and Tizanidine). Claimant is also entitled to a lumbar back brace as prescribed by Dr. Nolan. Claimant's future medical treatment is to be provided by Dr. Nolan or another physician authorized by Defendants to carry out the medical award in this matter.

Conclusion of Law

1. An order reversed on appeal is a nullity. See Tolbert v. Fouche, 123 S.E. 859 (SC 1924). The original Order of the Hearing Commissioner provided that Defendants were not liable for providing ongoing treatment. As that Order was reversed by the Appellate Panel, it is a nullity — as if it never existed. Accordingly, Defendants are liable for paying for causally related treatment incurred by Claimant prior to this order to be paid pursuant to the South Carolina Workers' Compensation Fee Schedule. Claimant is entitled to reimbursement for any and all causally-related out of pocket expenses incurred during this time.

ORDER

IT IS THEREFORE ORDERED that the Claimant is entitled to a lump sum award for permanent partial disability of 120 weeks based on a loss of use of 40% of the back, which shall be apportioned over Claimant's life expectancy pursuant to James v. Anne's;

IT IS FURTHER ORDERED that Claimant is entitled to causally-related future medical treatment pursuant to Section 42-15-60 to include SI joint injections, trigger point injections, epidural steroid injections, a TENS unit, pain medications (currently OxyContin, Percocet, and Tizanidine). Claimant is also entitled to a lumbar back brace as prescribed by Dr. Nolan. Claimant's future medical treatment is to be provided by Dr. Nolan or another physician authorized by Defendants to carry out the medical award in this matter.

IT IS FURTHER ORDERED that the Defendants shall pay for causally-related medical expense incurred during the period the Hearing Commissioner's order was in effect and no treatment was authorized pursuant to the South Carolina Workers'

Compensation Fee Schedule. Claimant is entitled to reimbursement for any and all causally related out-of-pocket expenses incurred during this same period.

AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Appellate Panel Chair

WE CONCUR:

Susan S. Barden, Commissioner

T. Scott Beck, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on May 31, 2019