

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2019-001064
W.C.C. No. 1121370

Patricia Pate, Employee/Claimant,.....Appellant,

v.

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

INITIAL BRIEF OF THE RESPONDENTS

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Statement of Issues on Appeal

- I. Should the Workers' Compensation Commission's finding that Pate suffered a 40% loss of use of the back and the award under S.C. Code Ann. § 42-9-30 be affirmed based upon substantial evidence in the record and the applicable law?
- II. Does the Workers' Compensation Commission or the Court of Appeals have the authority or jurisdiction to address new claims raised by Pate for the first time on appeal?
- III. Should the Workers' Compensation Commission's finding that Pate's depression is not causally-related to the work accident be affirmed based upon substantial evidence in the record and the applicable law?
- IV. Should the Workers' Compensation Commission's finding that Pate's injury is limited to a single, scheduled body member (the back) be affirmed based upon substantial evidence in the record and the applicable law?
- V. Should the claim for permanent and total disability benefits be denied as a matter of law because the December 14, 2011 accident is not the proximate cause of Pate's loss of wage-earning capacity?

Statement of the Case

The Appellant, Patricia Pate, apparently experienced low back pain while assisting a co-worker with a box on December 14, 2011. Pate was subsequently

diagnosed with degenerative changes in her lumbar spine. She received treatment from Dr. Joseph Marzluff, who placed her at maximum medical improvement on September 12, 2012, at which time Pate returned to her regular, full-time job as the Assistant Manager of the College of Charleston's Copy Center. Pate continued working in this position, earning her regular, pre-accident wages for over two years.

In September 2014, Pate was hospitalized for multiple pulmonary emboli, which were wholly unrelated to her employment or her workers' compensation claim. As a result of the multiple pulmonary emboli and necessary anticoagulant therapy, Pate was placed on work restrictions by Dr. Edward Nolan, who stated that with previous injection therapy for her low back, Pate "continued to perform her job duties;" however, due to her new need for anticoagulant therapy she was unable to "resume injection therapy until her pulmonary embolisms are resolved," resulting in his recommendation "that she be placed out of work." (APA p. 257). Dr. Nolan specifically stated that "due to pulmonary embolisms we recommend that she be placed out of work." (APA p.70). Therefore, the Respondents argued that, despite her work-related low back problem, Pate would be working her regular, full-time job, earning her regular wages, "but for" the fact of the newly-required anticoagulant therapy. Therefore, the proximate cause of any loss of wage-earning capacity was the pulmonary emboli in 2014, not the work accident of December 14, 2011.

A hearing was held before Commissioner Aisha Taylor on July 14, 2015, to determine issues as set forth in the Form 21 and Forms 50¹ and 51. Prior to the

¹ Pate filed her initial Form 50 on November 19, 2012, alleging only an injury to the back. An amended Form 50 was filed on August 28, 2014 alleging injuries to the back,

scheduled hearing, Pate filed a Form 58, Pre-Hearing Brief dated July 14, 2015, alleging injuries to the “[b]ack, legs, psyche (depression).” By Form 58 dated June 29, 2015, the Respondents argued that Pate was at maximum medical improvement for the low back injury of December 14, 2011 and that Pate was not entitled to any benefits under S.C. Code Ann. § 42-9-10 or § 42-9-30 as a matter of law because Pate’s multiple pulmonary emboli in 2014 aggravated her work-related low back injury and resulted in increased pain and new work restrictions that were not previously required. The Respondents further denied Pate was entitled to any benefits for depression, as the record reveals that her depression was related to her long-term bowel incontinence, her brother’s recent battle with pancreatic cancer, and her own near-fatal pulmonary emboli.

After receiving documentary evidence and testimony, Hearing Commissioner Taylor filed a Decision and Order on May 16, 2016, finding, *inter alia*, that

1. On December 14, 2011, [Pate] 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. [Pate] received all appropriate medical care at the direction of

legs, and depression. Subsequent Forms 50 filed on September 10, 2014 and February 2, 2015 also alleged injuries to the back, legs, and depression. No Form 50 was ever filed to claim any injury to the sacroiliac joint. By Forms 51 dated December 2, 2012; September 29, 2014, November 16, 2014, and March 3, 2015, the Respondents admitted an injury to the low back only.

the [Respondents] with Drs. Marzluff and Nolan.

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

5. Prior to [Pate's] pulmonary embolisms, Dr. Nolan placed [Pate] 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 [Pate's] multiple pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to [Pate'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 [Pate'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. [The College of Charleston] could not accommodate her increased restrictions required by the pulmonary embolisms

after having accommodated the prior restrictions for almost three years.

c. [Pate] 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. [Pate] 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. [Pate] also alleges a psychological injury as a result of her original work injury. I find [Pate] 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 [Pate] has any disability or work restrictions as a result of any alleged psychological condition. No physician has opined to a reasonable degree of medical certainty that [Pate's] alleged psychological condition is causally-related to her original work injury to her lower back. [Pate's] personal history, prior medical history, and current unrelated medical conditions have weighed into this finding as well.

8. [Pate] 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. [Pate] 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 [Pate] was able to work full time, with her pain well controlled, prior to the pulmonary embolisms in September 2014. Due to [Pate's] subsequent, intervening pulmonary embolisms, I find any increase above the permanent impairment would require impermissible surmise, conjecture and/or speculation. [Pate's] current condition, subjective complaints, need for medical treatment, and work restrictions have all been significantly increased and aggravated by the subsequent, intervening pulmonary embolisms.

11. [Pate] 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 [Pate's] pain levels and need for medical treatment have increased significantly as a result of her subsequent, intervening pulmonary embolisms. Dr. Nolan, [Pate'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 [Pate's] medical treatment, he has not evaluated [Pate] since 2012. [Pate's] inability to continue injection therapy due to her subsequent, intervening, personal health issues have weighed into this decision as well.

Despite these findings, Hearing Commissioner Taylor awarded Pate "benefits

representing the 23% loss of use of the back causally-related to the December 14, 2011 accident.”

On May 27, 2016, Pate filed a Form 30, Request for Commission Review, alleging 13 grounds for appeal. In her brief to the Appellate Panel dated July 18, 2016, Pate argued only five: (1) “[a]n unrelated medical condition cannot constitute an intervening cause sufficient to break the chain of causation”; (2) “[Pate’s] work restrictions and need for ongoing medical treatment are directly related to her workplace injury”; (3) “[Pate] met the legal standard for post-MMI medical treatment”; (4) [Pate’s] injury was not limited to her back in that she suffered from radiculopathy and psychological overlay”; and (5) “[t]he 23% permanent partial disability award to the back is based on legal error in that the [hearing] Commissioner mistakenly concluded she could not award more than Dr. Nolan’s impairment rating.”

The Respondents filed their Brief to the Appellate Panel on August 1, 2016. At that time, the Respondents specifically argued that it was improper for Pate to raise new claims for the first time on appeal; specifically her new argument that she was entitled to a general disability award under S.C. Code Ann. § 42-9-10 based upon an alleged non-scheduled injury to the sacroiliac joint. Pate had previously made no allegation concerning a sacroiliac joint injury in her four previous Form 50s, her Form 58, at hearing before Commissioner Taylor, or in her May 27, 2016 Form 30, Request for Review by the Appellate Panel. The Respondents requested that the Hearing Commissioner’s May 16, 2016 Decision and Order be affirmed in accordance with the greater weight of the evidence and the applicable law.

Oral arguments were held before the Commission’s Appellate Panel, which consisted of Commissioners James, Wilkerson, and Campbell, on August 16, 2016. The

Appellate Panel issued its Decision and Order on December 22, 2016, affirming the Hearing Commissioner's findings and conclusions regarding the nature and extent of Pate's work-related injury, but determined that the Hearing Commissioner erred in concluding that Pate's non-work-related pulmonary emboli constituted a subsequent intervening accident. The Appellate Panel remanded the issue of Pate's causally-related loss of use of the back to Hearing Commissioner Taylor for reconsideration.

Thereafter, Pate filed a Petition for Rehearing or Reconsideration on January 23, 2017, arguing that her back injury affected the buttocks and left leg and resulted in a psychological injury. Of course, Pate never filed any claim for any alleged injury to the buttocks related to the December 14, 2011 accident. The Claimant's Petition was denied by Order dated February 21, 2017. Pursuant to a March 15, 2017 Consent Order, the parties agreed that under Bone v. U.S. Food Service, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013), the Appellate Panel's Order was not immediately appealable, as it remanded the case to the jurisdictional commissioner for further findings of fact and was; therefore, interlocutory.

On May 24, 2018, Hearing Commissioner Taylor issued a Decision and Order on Remand without taking additional evidence or hearing any additional arguments from the parties. According to the May 24, 2018 Order, the Hearing Commissioner made new findings of fact that Pate's injury was "a single-member injury affecting [Pate's] lower back only" and that Pate was entitled to benefits for a 40% loss of use of the back under S.C. Code Ann. § 42-9-30.

On June 7, 2018, Pate filed her second Form 30, Request for Commission Review, alleging four grounds for appeal of the Hearing Commissioner's Order on remand. Pate then submitted a Brief to the Appellate Panel on September 17, 2018,

raising only two arguments: (1) “Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back;” and (2) Pate’s “injury was not limited to her back in that she suffered from radiculopathy and psychological overlay.” The Respondents timely filed their Brief to the Appellate Panel on October 1, 2018, contending that the Hearing Commissioner properly determined that Pate is not permanently and totally disabled under S.C. Code Ann. § 42-9-30 because her causally-related loss of use of the back does not exceed 50% (and she is not entitled to pursue benefits under S.C. Code Ann. § 42-9-10).

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

The Appellate Panel issued its Order on May 31, 2019, affirming the Decision and Order of the Hearing Commissioner on remand, with amendment of the scriveners’ error contained in Finding of Fact #9. Thereafter, Pate filed the present action in with the Court of Appeals.

Evidence Summary

Prior to the December 14, 2011 work accident and in the years that followed, Pate was employed by the Copy Center at the College of Charleston. She described her duties

as answering the phone, greeting customers, collating and binding papers, and some computer work.

After the December 14, 2011 accident, Pate underwent a surgery at L4-5 on May 15, 2012, which was performed by Dr. Joseph Marzluff. (APA p. 152). Dr. Marzluff released Pate at maximum medical improvement on September 19, 2012, at which time he stated that Pate had “returned to work on a limited duty bases [sic] and seems to be tolerating that well.” (APA p. 160). Dr. Marzluff rated her impairment at 30% of the whole person, which translates to a regional impairment rating of 40% of the lumbar spine.” (Marzluff T. pp.11–12). Dr. Marzluff has not evaluated Pate since September 2012.

After being out of work for only three months, Pate was able to return to full duty at the College’s Copy Center and she continued working her regular pre-accident job duties for another two years without incident. The College of Charleston documented her return to work and her ability to perform her regular job duties on August 30, 2012. (APA p. 290). Pate’s supervisor, Ms. Cheryl Connor, who manages the College of Charleston’s Copy Center, testified that this job was available to Pate indefinitely.

Dr. J. Edward Nolan’s records were also submitted into evidence. Dr. Nolan reported on February 13, 2014 that Pate “continues to report good pain relief with her injection therapy and medication management and work restrictions.” (APA p.8). As of February 13, 2014, Dr. Nolan stated that Pate was at maximum medical improvement

and later issued an impairment rating of 23% to the spine.¹ (APA p.126a). Dr. Nolan noted that Pate “returned to work full time with no restrictions on April 11, 2014.” As of September 4, 2014, Pate rated her pain as a “4/10 overall,” despite the fact that she was working full time. (APA p. 58).

While Pate attempted to deny having any pre-existing problems with low back pain prior to the December 14, 2011 work accident at the hearing, she was confronted with the medical records of her own family physician, Dr. Hanna, which plainly show that Pate was being prescribed Percocet, Flexeril, Lortab, and Flector patches for low back pain prior to December 14, 2011. (APA pp. 174--179). Pate also required a two-month medical leave in 2011, prior to the work accident, despite the fact that her job duties were physically-limited. (APA pp. 290—292).

The Carolina Family Medicine record detail Pate’s need for narcotic pain medication and muscle relaxers prior to the December 14, 2011 work accident, as well as her diagnosis with multiple pulmonary embolisms in September 2014. At that time, Pate was suffering from shortness of breath, in addition to the stress of her brother dying from pancreatic cancer. (APA p.205). In November 2014, Pate complained to Carolina Family Medicine that she had a new pain in her left lower leg and behind her left knee, which was aggravated by weight bearing, standing, walking, and bending her knee. (APA p.209).

Pate admitted that she began having new and different symptoms in her legs (including discoloration, swelling, and numbness) in the summer of 2014 and she also

¹ According to Dr. Nolan, the 23% impairment rating was inclusive of the prior impairment rating issued by Dr. Marzluff on September 19, 2012. (APA p. 126a).

began experiencing serious shortness of breath. Pate was ultimately diagnosed with multiple pulmonary emboli and she was hospitalized for several days in September 2014, which rendered her unable to work. Pate's supervisor, Ms. Connor, testified that as a result of the pulmonary emboli, Pate was completely out of work from September until December 2014.

In addition, because of the multiple pulmonary emboli and her new need for anticoagulant therapy, Pate admitted that the treatment for her low back prescribed by Dr. Nolan changed significantly after September 2014, as she was no longer able to receive injection therapy that had helped her in the past. (T. p.23). Pate admitted that none of the treatments she received for her back after the pulmonary emboli worked as well as the treatment she received before the pulmonary embolisms and, as a result, she suddenly required more oral medications than she had prior to the pulmonary emboli. Pate also admitted that her low back pain increased significantly after the pulmonary emboli. Pate admitted that because she was no longer able to have injection therapy for her back, she was taken out of work by Dr. Nolan, who restricted her to working only four (4) hours a day and four (4) days per week. (T. p.24--25).

According to a statement issued by Dr. Nolan on October 3, 2014, Pate had

“been hospitalized on 9/17/14 resulting in a diagnosis of pulmonary embolism which will require daily use of an anticoagulant ...The addition of this medication will hinder my ability to continue injection therapy until this issue has resolved. She has received benefit from injection therapy and with treatment she continued to perform her job duties. She presented to my office today and on exam I am concerned about her ability to continue to perform

her job as required. In light of this and our inability to resume injection therapy until her pulmonary embolisms are resolved, I recommend that she be placed out of work for a period of two (2) months and her work status will be evaluated at each visit to our office...Several measures have been taken to try to provide her some form of pain relief to include increasing pain medication strength and frequency and adding physical therapy until we are able to resume treatment with injection therapy.” (APA p. 257).

On September 22, 2014, Dr. Nolan had noted that Pate was “not getting as much relief from the Oxycodone IR 5 mg therefore we will ask her to start doubling what she has to 10 mg.” (APA p.66).

By October 3, 2014, Dr. Nolan noted that, despite doubling her pain medication,

“she is ultimately unable to perform her job duties as required. Due to her inability to receive needed injection therapy until 02/2015 due to pulmonary embolisms we recommended she be placed out of work at this...” (APA p. 70).

Because of the blood thinner (anticoagulant therapy), Pate was also unable to take Percocet, which she felt had helped more than the pain medications she was forced to take after her pulmonary emboli. (APA p. 81). Pate was still taking the anticoagulant medication Xarelto at the time of the hearing before Commissioner Taylor in July 2015.

In December 2014, Pate’s new restrictions from Dr. Nolan regarding her hours (limiting her to four hours per day/four days per week) were accommodated because school was in recess, but the College could no longer afford Pate as a part-time employee as of January 2015 when classes resumed. Ms. Connor testified that she was able to

accommodate all of Pate's *physical* work restrictions, only the new *time* restrictions issued after her pulmonary emboli were problematic going forward. But for Pate's pulmonary emboli, she would have been able to continue working her regular job, earning her regular wages, at the Copy Center indefinitely.

Standard of Review

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct.App.2004). A reviewing court may only reverse or modify a decision of the Commission if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct.App.2005); S.C. Code Ann. § 1-23-380(A)(6)(e) (2005). Thus, an appellate court's review is limited to deciding whether the Commission's decision is unsupported by "substantial evidence" or is controlled by some error of law. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct.App.2004)

"Substantial evidence" is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). However, the final determination of witness credibility and the weight to be accorded evidence is reserved to the

Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000).

Furthermore, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004). Instead, where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002).

Indeed, the findings of the Commission are presumed correct. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001); Hicks v. Piedmont Cold Storage, Inc., 335 S.C. 46, 515 S.E.2d 532 (1999). Therefore, it is not within the province of the appellate courts to reverse findings of the Commission that are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct.App.1999).

Arguments

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

Pate alleges that she is entitled to a presumption of permanent and total disability under S.C. Code Ann. § 42-9-30 because she is not currently working. However, Pate has failed to cite any legal authority for her argument that scheduled awards should be based upon a claimant's work status. More importantly, Pate fails to recognize that her

current work status is not causally-related to the December 14, 2011 work accident, but, instead, is the proximate result of her non-work-related pulmonary emboli in September 2014. Therefore, even if Pate's work status were germane to the Commission's determination of physical loss of use under S.C. Code Ann. § 42-9-30, Pate's work status in the present case is not relevant.

According to our Supreme Court, there are

“Two competing models of workers' compensation...The first, the economic model, defines disability and incapacity in terms of the claimant's loss of earning capacity as a result of the injury. The second, the medical model, provides awards for disability based upon degrees of medical impairment to specified body parts.” Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E.2d 100 (2003) (internal citations omitted).

Here, Pate is not entitled to an award based upon the “economic model,” because her work injury affects only a single-scheduled injury to her back. *See* Appellate Panel Finding of Fact #1. Therefore, Pate's only available remedy is under the “medical model” set forth in S.C. Code Ann. § 42-9-30, which compensates for “physical ailments.” Wigfall, *supra* (citing Jewell v. R. B. Pond Co., 198 S.C. 86, 15 S.E.2d 684 (1941)). Pate's physical ailment (lumbar degenerative disc disease) resulted in a medical impairment rating of 23% from her current treating physician, Dr. Nolan, which was then increased a full 74% by Commissioner Taylor, who awarded Pate benefits for a 40% loss of use of the back. (see APA p.254).

Apparently, Pate believes her medical impairment rating should at least have been doubled to something in excess of 50% of the back, due to alleged economic considerations. However, under S.C. Code Ann. § 42-9-30's "medical model," the Legislature has already "statutorily presumed lost earning capacity" for her scheduled injury. Wigfall, *supra* footnote 2 (citing G.E. Moore Co. v. Walker, 232 S.C. 320, 102 S.E.2d 106 (1958) and LARSON'S WORKERS COMPENSATION LAW § 86.02 (1999)). Essentially, Pate takes issue, not with her treating physician's impairment rating, but with the amount of compensation the Legislature designated to correspond with her degree of impairment. Of course, the Commission was without authority to overrule the Legislature in this regard, but was constrained to weigh the evidence, including the medical impairment ratings and Pate's limited testimony that she has "nagging pain" that affects her activities "at times." (Hrg. T. p.16). The Court of Appeals is similarly constrained in determining whether the impairment ratings and this testimony constitutes "substantial evidence" in support of the Commission's finding of a 40% loss of use of the back, as there was clearly no legal error implicit in this finding. Grant v. Grant Textiles, 361 S.C. 188, 191, 603 S.E.2d 858, 859 (Ct.App.2004)

Furthermore, Pate does not take issue with the credibility of her treating physician's 23% impairment rating – she did not even seek to cross-examine Dr. Nolan on this, or any other issue. In addition, there is no evidence that Dr. Nolan, who was in the best position to observe Pate and her medical problems, and who was in the best position to apply the AMA'S GUIDE TO THE EVALUATION OF IMPAIRMENT, underestimated that impairment. Dr. Nolan's rating is consistent with his report on February 13, 2014 that Pate "continues to report good pain relief with her injection therapy and medication management and work restrictions." (APA p.8). By September 4, 2014, Pate rated her

pain as a “4/10 overall,” despite the fact that she was working full time in her regular job. (APA p. 58). These reports are simply not support a finding that Pate’s physical loss of use of the back exceeds 50%, nor does it support a conclusion that she is permanently and totally disabled as a result of the December 14, 2011 accident.

While Pate does not challenge Dr. Nolan’s impairment rating, Pate does appear to take issue with the impairment rating issued by her previous physician, Dr. Marzluff, and goes so far as to completely misrepresent his impairment rating in her Brief to the Court of Appeals. Pate would have the Court believe that Dr. Marzluff rated her impairment as “a 40% spine rating and a 36% whole person rating.” (Brief p.20). This statement is disingenuous at best, as it is plainly contrary to the records and testimony of Dr. Marzluff. In his 2013 deposition, Dr. Marzluff testified that he believed Pate to have a “40% regional rating to her lumbar spine,” which he translated as, and *not added to*, a “30% whole person rating.” (Marzluff T. pp.11–12). Dr. Marzluff further testified that he has already inflated both of these impairment ratings by adding another “ten percent or so” over and above what would be appropriate under the AMA GUIDES to account for what he termed “chronic pain.” (Marzluff T. p. 9, p.19). Therefore, Dr. Marzluff’s impairment rating is actually commensurate with the 23% rating issued by Pate’s current treating physician, Dr. Nolan. In addition, the Commission further inflated Dr. Marzluff’s ratings by an additional 33% by awarding Pate benefits for a 40% loss of use of the back, based upon Pate’s subjective complaints and work restrictions. Therefore, there is simply no competent evidence in the record that the Commission in any way underestimated Pate’s physical loss of use of the back in awarding her benefits under S.C. Code Ann. § 42-9-30.

Pate further argues that, after her impairment ratings were issued, “her condition worsened” and that this worsening somehow supports mandated an even greater inflation of the medical impairment ratings by the Commission. Of course, even Pate admits that the worsening of her condition following her multiple pulmonary emboli in September 2014 is not causally-related the December 14, 2011 work accident and; therefore, the worsening of her condition is not the responsibility of the Respondents, nor relevant to the determination of her loss of use of the back caused by the December 14, 2011 accident. Furthermore, Dr. Nolan, who was treating Pate during this time, did not amend or inflate his impairment rating after the pulmonary embolism worsened her low back pain.

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

II. It is improper for Pate to raise new claims for the first time on appeal; therefore, neither the Commission, nor the Courts, have jurisdiction or authority to address such claims.

In her July 18, 2016 Brief to the Appellate Panel, Pate argued for the very first time that she is entitled to a general disability award under S.C. Code Ann. § 42-9-10 based

upon a newly-alleged, unscheduled injury to her “sacroiliac joint.” However, Pate filed Forms 50 on November 19, 2012, August 28, 2014, September 10, 2014, and February 2, 2015— none of which allege any injury to the sacroiliac joint. Similarly, Pate’s Form 58, Pre-Hearing Brief, dated June 29, 2015 makes absolutely no mention of any alleged injury to the sacroiliac joint. In fact, at the hearing before Commissioner Taylor, Pate’s attorney was given a broad opportunity to restate the issues to be addressed, but said nothing about any alleged injury to the sacroiliac joint and made no claim for benefits for any sacroiliac injury. Pate herself gave no testimony regarding her sacroiliac joint. Furthermore, Pate’s Forms 30 make no mention of any alleged injury to the sacroiliac joint. Yet, Pate now argues that the Commission’s failure to award benefits for an alleged sacroiliac injury somehow “commands reversal.” This argument is wholly without merit.

First, it is fundamental that the Commission can only address such issues as are actually presented by the parties. Obviously, Hearing Commissioner Taylor committed no legal error in failing to award benefits for a claim that was never made by Pate herself. More importantly, the issue of whether Pate is entitled to general disability benefits for an alleged injury to the sacroiliac joint is not preserved for review by the Appellate Panel or the Court of Appeals, as it was not raised before the Hearing Commissioner. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”); *see also Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (“Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.”); *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662

S.E.2d 438, 443 (Ct. App. 2008) (noting a party cannot raise an issue for the first time on appeal).

Therefore, the Commission committed no legal error in refusing to award benefits to Pate for any alleged injury to the sacroiliac joint. The claim having never been raised before or ruled upon by the Hearing Commissioner, the claim was not preserved for review by the Appellate Panel or the Court of Appeals. As such, the Commission's Decision and Order should be affirmed in accordance with the Administrative Procedures Act because it is supported by substantial evidence and otherwise not affected by any error of law. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

III. The Commission's finding that Pate's depression is not causally-related to the work accident is supported by substantial evidence and the applicable law and; therefore, should be affirmed.

Claims for mental injuries are compensable only if the employee proves by a preponderance of evidence that they are caused by a work-related physical injury, or by extraordinary and unusual conditions of employment. Pack v. State Dep't of Transp., 381 S.C. 526, 538, 673 S.E.2d 461, 467 (Ct.App.2009). To meet this burden, S.C. Code Ann. § 42-1-160(D) requires that the employee present an opinion from a "physician" (*i.e.*, a medical doctor) that the alleged mental injury is "causally-related or connected the injury or accident." While Pate alleges that she suffers from depression as a result of the December 14, 2011 accident, she presented no such evidence from any "physician" and; therefore, she is not entitled to benefits for a mental injury as a matter of law.

Not only did no physician opine that Pate has any disability or work restrictions as a result of any alleged mental injury, no physician opined that Pate's depression is causally-related to the December 14, 2011 accident or her low back problem generally. In fact, the reports authored by Pate's treating physicians, Dr. Marzluff and Dr. Nolan, make absolutely no mention of any mental injury or depression.¹ Therefore, the Commission's denial of her mental injury claim is also supported by substantial evidence in the record.

According to the Commission, the evidence in the record actually weighed *against* Pate's claim for depression. According to the Commission, Pate's personal history, her prior medical history, and her other unrelated medical conditions, which include a long-term battle with bowel incontinence and a near-fatal pulmonary emboli, were all causative factors in her mental issues and were all unrelated to the December 14, 2011 accident. This finding is supported by the records of Pate's personal physicians at Carolina Family Medicine, who noted that Pate's "stress" actually began well before the December 14, 2011 accident. In addition, Carolina Family Medicine repeatedly described the "aggravating factors" in Pate's "stress" as "work stressors, brother dying

¹ As discussed below, in the 160 pages of records from Trident Pain Center in evidence, there are only 2 pages containing any reference to any mental issue. (APA p.55 and p.59) Both of these office notes were authored by a Nurse Practitioner, Allison Davis. There is no report authored by Dr. Nolan referencing any mental issue contained in the record. Therefore, Pate's allegation in her Brief to the Court of Appeals that there are "multiple references of [sic] psychological overlay from Dr. Nolan" (p.12) is simply false.

from pancreatic cancer,” without reference her back injury or the December 14, 2011 accident. (APA pp. 185, 190, 192, 207, 205, 209, 214, 217).

Around the time of her hospitalization for multiple pulmonary emboli in September 2014, Pate complained of depression to a nurse practitioner, Allison Davis, who opined that it was “due s/t [sic] pain and increased pressures/stressors ... She states that she feels work is ‘trying to push her out, that they don’t want her there anymore.’” (APA p.55).¹ As a result, Pate was evaluated by a psychologist, William Kee; however, Kee did not address causation of any alleged mental injury. More importantly, neither Kee, nor Davis, are a “physician,” and; therefore, their opinions cannot satisfy S.C. Code Ann. § .

Dr. Dyana Lowndes-Rosen, a psychiatrist and actual physician specializing in mental disorders, evaluated Pate on January 13, 2015, but did not diagnose any mental injury. Instead, Dr. Lowndes-Rosen concluded

¹ According to the plain language of S.C. Code Ann. § 42-1-160, mental injuries allegedly resulting from “any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions demotions, salary reviews, or terminations” are not compensable, “except when these actions are taken in an extraordinary or unusual manner.” At no time has Pate ever alleged any extraordinary or unusual events in her employment relationship; therefore, any alleged mental issue connected to her “stress” at work is not compensable as a matter of law.

“I have no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. [Pate] also expressed her belief that she has no need for mental health involvement” (APA p. 289).

Dr. Lowndes-Rosen’s opinion alone constitute substantial evidence in support of the Commission’s denial of the mental injury claim.

Not even Pate’s own testimony at the July 14, 2015 hearing supports a finding that she has any mental injury as a result of the December 14, 2011 accident. In her testimony before Commissioner Taylor, Pate made no mention of depression or any other mental problem. She was not asked by her own lawyer about depression or any alleged mental injury, nor did she describe any symptoms of depression or any alleged mental injury when testifying about her condition following the accident. However, on cross-examination, Pate admitted that she had been under significant “stress” after she was hospitalized with life-threatening, multiple pulmonary emboli in September 2014 and that shortly thereafter, her brother died as a result of pancreatic cancer, which Pate admitted was also very stressful for her. (T. p.26).

Of course, regardless of the multiple causes for any mental injury or depression in Pate’s life, the fact remains that at the time of the hearing, no “physician” connected such problems to the December 14, 2011 injury, as required by S.C. Code Ann. § 42-1-60. At best, the evidence on the issue is in conflict. However, it is well-established that the possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s findings from being supported by substantial evidence, instead, where there are conflicts in the evidence over a factual issue, the findings of the Commission are conclusive. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d

102 (1999); DuRant v. South Carolina Dep't of Health & Envtl. Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App.2004); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App.2002). This is because the final determination of the weight and credibility of the evidence is reserved exclusively to the Commission. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000). Therefore, the Respondents respectfully request that the Commission's Decision and Orders be affirmed, as it is supported by both substantial evidence in the record and the applicable law.

IV. The Commission's finding that Pate's injury is limited to a single, scheduled body member (the back) is supported by substantial evidence and the applicable law and; therefore, should be affirmed.

In addition to claiming an injury to her back and depression, Pate's Forms 50 and Form 58 alleges that she sustained an unspecified injury to her "legs." In her Brief to the Court of Appeals, Pate argues that she should be entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10 because Pate testified that she has pain that

"sometimes ...leads down to my – into my right thigh through my buttocks." (T. p.16, ll.11-15) (emphasis added).

However, intermittent subjective complaints are legally-insufficient. Therefore, the Respondents respectfully contend that the Commission's finding that "the December 14, 2011 accident did not result in any injury to, or otherwise affect" Pate's legs is supported

by substantial evidence in the record and the applicable law and should be affirmed.

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

"[w]here the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation [pursuant to S.C. Code Ann. § 42-9-30].... To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960) (emphasis added).

Under *Singleton*, an employee with a single, scheduled-member injury is limited to recovery under S.C. Code Ann. § 42-9-30 alone. See Wigfall v. Tideland Utilities, 354 S.C. 100, 106, 580 S.E.2d 100, 103 (2003). The principle espoused in *Singleton* recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." *Id.* 254 S.C. 106-07, 580 S.E.2d at 103 (internal citation omitted) (emphasis added). The *Singleton* court further intended for "impairment" in this regard to encompass a "physical deficiency." *Id.* Accordingly, the question of whether an employee is entitled to recover benefits for permanent and total disability benefits under S.C. Code Ann. § 42-9-10 requires not only such an additional "physical deficiency," but importantly "turns on whether her initial injury had a 'disabling effect' on other parts of

her body.” Colonna v. Marlboro Park Hosp, 404 S.C. 537, 545,745 S.E.2d 128 (2013) (*cert. dismissed as improvidently granted*) (emphasis added).

Here, there is absolutely no evidence that Pate’s back injury caused a “physical deficiency” or otherwise had a “disabling effect” on her legs (or any other part of her body aside from her low back). No doctor ever issued an impairment rating for Pate intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source. According to Dr. Nolan (Pate’s pain management physician), the location of Pate’s pain was repeatedly stated to be simply “lower back” (APA pp. 1, 4, 31, 82, 87, 99, 111, 118, 125) or “low back” (APA pp.7, 16, 34, 36, 42, 51, 58, 68, 69, 71, 72, 80, 84, 104, 107, 108, 123). At no time did Dr. Nolan ever suggest that any intermittent leg complaint was a factor in his spinal impairment rating, nor did he suggest that Pate required any work restrictions as a result of any leg problem. Furthermore, according to Pate’s surgeon, Dr. Marzluff, the only body part “injured” on December 14, 2011 was Pate’s “back” and the only body part “affected” was her “spine.” (APA p.161). Even at his deposition, Dr. Marzluff never suggested that Pate had any permanent impairment of her leg, nor did he suggest that his spinal impairment rating was based on any such complaint or that she was in any way disabled or limited by any alleged leg problem. The issue simply was not raised by Pate’s attorney.

In addition, Pate admits that in 2014 she began having new and different symptoms with respect to her legs, including swelling and discoloration. (T. p.21, ll.19-21). According to her personal physicians’ records, in May 2014, she began noticing new symptoms in both feet and legs. (APA p.198). She was diagnosed with “Edema/Bilateral peripheral – New” in August 2014. (APA p.201). Pate testified that she initially assumed these leg symptoms were caused by an ankle and foot injury she

sustained in April 2011, prior to the work accident. (T. p.22, APA pp.177--180).

However, her hematologists subsequently diagnosed her with chronic venous stasis in the legs and non-pitting edema due to her pulmonary emboli. (APA #10). By November 2014, Pate was complaining of a “new” problem”

“pain to the left lower leg and behind the left knee, which did not result from an injury which began 1 month ago. The patient characterized it as stabbing pain when standing up. Severity – worsening. Aggravating factors: weight bearing, standing, walking and bending knee. Relieving factors: nothing. On Xarelto. History of multiple pulmonary embolisms.” (APA pp. 209--210).

Therefore, it is not clear that any alleged problem with Pate’s legs at the time of the hearing was even proximately-caused by the December 14, 2011 accident. More importantly, there is simply no competent evidence that any alleged leg problem was disabling. Quite simply, the vague, intermittent leg symptoms of which Pate complains do not rise to the level of a “physical deficiency,” nor is there any evidence that they have had any “disabling effect,” as required by law. As such, the Respondents respectfully request that the Decision and Order of the Commission be affirmed based upon the substantial evidence in the record and the applicable law.

V. The December 14, 2011 accident is not the proximate cause of Pate’s loss of wage-earning capacity and; therefore, she is not entitled to permanent and total disability benefits as a matter of

law.

Even assuming, *arguendo*, that Pate was entitled to pursue benefits under S.C. Code Ann. § 42-9-10, Pate is not entitled to benefits for permanent and total disability as a result of the December 14, 2011 accident as a matter of law. The Workers' Compensation Act defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury"). *See* S.C. Code Ann. § 42-1-120. Further, S.C. Code Ann. § 42-9-10 specifically requires proof that "the incapacity for work resulting from an injury is total" and "permanent." (emphasis added). In fact,

"The burden, of course, was upon the employee to prove...that he was unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist. An award in his favor may not rest on surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43 (1965) (internal citations omitted).

Pate was working in her regular, full time position as the assistant manager of the College of Charleston Copy Center earning her regular, pre-accident wages for more than two years after the December 14, 2011 work accident. Therefore, she had no "incapacity for work resulting from" the December 14, 2011 injury back injury during this period, but had a dependable job. Pate's had no loss of wages, or even loss of wage-earning capacity, until she was hospitalized for multiple pulmonary embolisms in September 2014, which aggravated her back condition and resulted in new work

restrictions that she had not previously required as a direct result of the December 14, 2011 accident. Therefore, it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have.

In Geathers v 3V, Inc, 371 S.C. 570, 641 S.E.2d 29 (2007), the Supreme Court reaffirmed the well-established “Gordon Rule,” which requires proof of proximate causation, as opposed to mere concurrent causation in South Carolina workers’ compensation claims. In applying the “Gordon Rule” to the facts *sub judice*, the questions presented are whether Pate’s work-related back injury was non-disabling prior to the pulmonary emboli in September 2014, and whether her non-work-related pulmonary emboli resulted in a new loss of wage-earning capacity? The answer to these questions is undoubtedly “yes.”

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

Regarding the second question, it is equally clear that Pate’s disability after September 2014 is the direct result of the multiple pulmonary emboli she suffered in September 2014. Even Pate’s treating physician, Dr. Nolan, stated “due to pulmonary embolisms we recommended she be placed out of work.” (APA p. 70). There is simply no evidence to suggest that Pate would suddenly have ceased working and earning

wages after two years in a dependable job that was available to her “indefinitely” without an intervening cause such as the multiple pulmonary emboli.

In addition, it is equally clear that Pate’s multiple pulmonary emboli and anticoagulant therapy after September 2014 aggravated her low back problems. At the hearing before Commissioner Taylor Pate admitted that her back pain increased after the pulmonary emboli. (T. p. 25). This aggravation is also clearly documented in the records of Dr. Nolan. For example, after being diagnosed with the pulmonary emboli in September 2014, Dr. Nolan doubled Pate’s pain medications because she was no longer able to get the relief from the medication and treatments she availed herself of prior to the anticoagulant therapy. (APA p. 66). Dr. Nolan opined that “[d]ue to her inability to receive needed injection therapy...due to pulmonary embolisms we recommend she be placed out of work.” (APA 70).

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

According to our Supreme Court, “[p]roximate cause requires proof of (1) causation in fact and (2) legal cause.” Bramlette v. Charter-Medical-Columbia, 302 S.C.

68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact is demonstrated by establishing that Pate would not have become disabled “but for” the pulmonary emboli, while legal cause is proved by establishing foreseeability. If Pate’s sudden disability in September 2014 was not the natural and probable consequence of the December 14, 2011 work injury, such sudden disability after more than two years of full employment was not foreseeable. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct.App.1996). Therefore, Pate’s work-related back injury was not the proximate cause of her disability and; therefore, this disability is not the responsibility of the Respondents under S.C. Code Ann. § 42-9-10 as a matter of law.

Conclusion

Based on the arguments set forth herein above, the College of Charleston and the South Carolina State Accident Fund respectfully request that the final Decision and Order of the South Carolina Workers’ Compensation Commission be affirmed in accordance with the Administrative Procedures Act, as it is supported by substantial evidence in the record and the applicable law.

Respectfully submitted,



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Attorneys for the Respondents

October 21, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2019-001064
W.C.C. No. 1121370

RECEIVED
OCT 23 2019
SC Court of Appeals

Patricia Pate, Employee/Claimant,.....Appellant,

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that the above-referenced Appellant, Patricia Pate, and Margaret M. Urbanic, Esq. and Mikell H. Wyman, Esq., Respondents, were served with a copy of the attached Initial Brief of the Respondents and Designation of Matter this 21st day of October 2019, by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to the parties of record, as follows:

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October 21, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Patricia Pate v. College of Charleston
W.C.C. File No.: 1121370
Appellate Case No.: 2019-001064
Carrier File No.: 2011-4217
Date of Accident: December 14, 2011

RECEIVED
OCT 23 2019
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Brief of the Respondents and Designation of Matter, with accompanying Proof of Service, in the above-referenced case. By copy of this letter, I am serving the other counsel of record with a copy of these documents. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

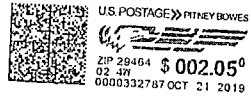
Kirsten L. Barr

Kirsten L. Barr

KLB/cab/les
Enc.

cc: David Edwards, State Accident Fund (w/en c.) (email only)
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