THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-001064

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

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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1. Appellant's injury was not limited to her back as the evidence shows she suffered from radiculopathy into her left leg, injury to her SI joint and psychological overlay resulting from chronic pain and disability.

The Appellate Panel found "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [Order, page 9, Finding of Fact 1]. This was error, as Pate's accident resulted in radiculopathy and SI joint injury along with major depressive disorder. Respondents argue that these other conditions – despite being caused by Pate's injury – are "intermittent subjective complaints [which] are legally-insufficient."

A. Respondents' argument ignores the undisputed diagnosis of *radiculitis* and *radiculopathy* into the left leg [*In Reply to Respondents' argument IV at pages 26-28*].

In their argument, Respondents discuss Colonna v. Marlboro Park Hospital, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013). However, Colonna provides no support for their argument and is easily distinguished.

First off, Colonna affirmed the general principle applicable here, to wit: "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., *quoting*, Wigfall v. Tideland Utilities, Inc., 580 S.E.2d 100, 106-7, 354 S.C. 100, 103 (2003). The essential point made in Colonna is "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is *affected*." Id. (emphasis in original).

In Colonna, the claimant suffered from a foot and ankle injury, which ultimately required surgical implantation of a spinal cord stimulator to treat severe intractable felt in the foot due to the

complication of Reflex Sympathetic Dystrophy (RSD). The Commission made a partial disability award to the leg under S.C. Code Ann. § 42-9-30. Colonna appealed, contending that the surgical implantation of the spinal cord stimulator in her back necessarily resulted affected her back – thus enabling her to seek a permanent and total disability award under S.C. Code Ann. § 42-9-10.

The issue framed by the Court was whether the *successful* implantation of a medical device (without additional injuries from surgical complications) constituted an affected body part within the meaning of Wigfall and Singleton. This Court found "Colonna's argument flawed because she failed to demonstrate that the implantation of the spinal cord stimulator injured her back or caused additional back impairment." Colonna.

Colonna is distinguishable for two reasons: (1) it involved the situs of medical treatment rather than the situs of an injury;[1] and (2) and there was no evidence of impairment or injury to any part of the body other than the foot. In the instant case, Pate suffers from a medically documented injury with permanent impairment and injury to her back, SI joint, and right leg, along with somatic depressive disorder. As such, this case involves a very different issue and very different level of proof than Colonna.

The controlling case here is Hutson. In Hutson, the employee suffered a nonsurgical back injury for which he was assigned a 10% whole person impairment rating (far less than the impairment assigned by Drs. Nolan and Marzluff in the instant case). He was given medium duty permanent restrictions with lifting no more than thirty-five pounds on an occasional basis and no

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[1]Colonna did not reach the issue of whether the RSD that required implantation of the spinal cord stimulator was itself a separate injury. See Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002) ("Reflex Sympathetic Dystrophy ('RSD') is a rare condition affecting the sympathetic nervous system, usually in an extremity, resulting in ongoing cycles of extreme pain.").

more than twenty-five pounds on a frequent basis. However, even though the leg was not given a separate impairment rating, Hutson nonetheless "suffered radicular symptoms in his right leg that affected the functioning of the limb." This Court affirmed the award of 30% to the back, yet remanded for an additional award of permanent partial disability to the affected leg. Hutson v. S.C. State Ports Auth., 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010), *reversed on other grounds,* 399 S.C. 108, 700 S.E.2d 462 (2012).

Respondents contend under Colonna there is no "disabling effect" on Pate's legs because "[n]o doctor ever issued an impairment rating for Pate's intermittent leg complaints, nor does Pate have any restriction on the use of her legs from any source."[2] [Brief of Respondents, page 27]. Hutson shows the error of this interpretation, for Hutson had no separate impairment rating nor any separate restriction on the use of his legs. The presence of radicular symptoms was enough to have "affected the functioning of the limb." Id.

As to Pate's radicular symptoms, Respondents argue without citation to authority that "intermittent subjective complaints are legally-insufficient." [Brief of Respondents, page 25]. Respondents mischaracterize Appellant's argument (and omit much of the relevant evidence). Respondents state:

> 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

[2]On April 23, 2014, Dr. Nolan opined: "In order to keep pt working, pt cannot stand more than 1 hour at a time then must sit for at least 2 hours. She may require breaks during these times to change positions for a short period of time (5-10 minutes). She cannot lift more than 15 pounds." [APA page 29]. A restriction standing is inherently a restriction on the use of one's legs.

"sometimes ...leads down to my – into my right thigh through my buttocks."[3] [Brief of Respondents, page 25 (emphasis added by Respondents.)].

To read Respondents' Brief, one would assume Pate based her case entirely on this one line of testimony. This is manifestly not the case, as Pate's buttock and leg symptoms are verified throughout the medical records.

Respondents cite to several medical records from Dr. Nolan stating "the location of Pate's pain was repeatedly stated to be simply "lower back" . . . or "low back." [Brief of Respondents, page 27, citations to record omitted]. Once again, the devil is in the details, for one need only read the reports to see that Respondents (and the Commission) omitted, ignored or overlooked multiple consistent references to radicular effects in the legs and SI joint pain.

Dr. Nolan took over Pate's treatment on May 14, 2013. In his *very first* report (entered into evidence by Respondents, yet not referenced in their brief), he states: the pain is located in "lower

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[3]Pate continued her description of her pain and its effects testifying:

A. [The pain is] in my lower back, and sometimes it leads down to my – into my right thigh through my buttocks. I have more pain on the left side that what it is on the right.

Q. Does it affect your daily activities?

A. At times, yes.

Q. All right. And how does it affect your activities?

A. I have to sit down or lay down or take more medication, and that's it.

Q. How do you spend your days?

A. I get up and do the little odds and ends around the house that I can. Sometimes I get more involved than I should, and I pay the consequences for that, and that's about it.

[Tr. Page 16, lines 11-25].

back, buttocks, bilateral legs." As to physical examination, he writes: "Radiating Symptoms: moderate lumbar radiculitis pain with ROM in the bilateral S1 nerve distribution to the feet." [APA pages 223-224]. Pate returned the next day for epidural steroid injections into her "Bilateral L5 nerve root and S1 nerve root" because "[Patient's] low back pain and leg pain are the areas with the greatest pain and we will treat them today." [APA pages 225-227]. The diagnosis and treatment continued throughout Dr. Nolan's care of Pate from the initial visit on May 14, 2013 up to the last treatment visit on May 28, 2015 shortly before the trial.

In total, Pate was seen by Dr. Nolan *forty-six* times from May 14, 2013 through May 28, 2015. Each report begins with the notation **Reason for Appointment**. *Twenty-five* of the reports list some combination of back pain and leg pain (sometimes with buttocks pain). Other reports list "lower back pain" or "low back pain" under **Reason for Appointment**, but then go on to describe radiculitis, SI joint pain, pain over the iliac crest or other conditions. [APA pages 1-6, 22- 24, 36-37, 42-44, 51-53, 58,-59, 69-70, 72-74, 80-81, 84-85, 100-101, 245-246, 251-252], Still others list planned injections (for radiculopathy) at the L4 and L5 nerve roots. [APA pages 7-8]. Some other reports note physical examination was conducted on the previous visit and the patient is here for an injection only. [16-17,31-33, 96-98, 248-250].

A handful of reports lend at best a bare scintilla of credence to Respondents' argument. The reports from October 4, 2013 and November 15, 2013 do not mention leg pain or weakness nor SI joint pain (although the report from November 13, 2015 describes "Radiating Symptoms: moderate lumbar radiculitis pain with ROM in the left L5 nerve distribution and S1 nerve distribution to the foot."). [APA pages 242-243]. This absence is explained by the next visit on November 26, 2013, where Dr. Nolan addresses pain relief from the September 23, 2013 epidural steroid infection given

to treat left leg radiculopathy. He writes "significant (>80%) initial pain relief of low back pain and of leg pain. Duration of relief: the pain has slowly returned since her last injection." It was on this visit that Dr. Nolan increased Pate's work restrictions ("Job should remain more sedentary.") and requested authorization from the Carrier to treat Pate's significant SI joint pain.[4] [APA pages 245-247]. This report confirms that the radicular pain into the legs was temporarily alleviated by the injections; not that Pate did not have radiculopathy.

There are two more reports with no mention of leg pain or SI joint pain on February 18, 2015 and March 20, 2015. [APA pages 104-106, 108-110]. These are followed by the last two reports from Dr. Nolan in the record. The April 21, 2015 report list the location of pain as "lower back, buttocks, leg." [APA page 112-113]. The final report from May 4, 2015 also lists "lower back, buttocks, leg pain." [116-117]. Again, this confirms that treatment provided some degree of temporary relief; not a cure.

As much as one hates to belabor the contents of these reports, the Court should not be mislead into believing substantial evidence supports the Commission's finding that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [Order, page11, Finding of Fact 1]. At most, *three* or *four* of the *forty-six* reports from Dr. Nolan make no mention of any other body member or system. And these are followed by other reports showing the radiculitis, leg pain and numbness, and SI joint pain returned after the injections had worn off.[5]

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[4]Although Respondents contend the radiculopathy and SI joint injury are unrelated to the back injury, the Carrier authorized and paid for the injections to treat both conditions.

[5]Other providers documented the affect on the legs and SI joint. Dr. Marzluff operated on Pate for "back pain and discomfort with associated dysesthesias of the legs." [APA page 13]. He

There is no evidence on which a reasonable trier of fact could hold as the Commission did. See Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 (2008)(reversing Commission's denial of claim because the "only evidence of causation is that Claimant's mental injury was caused by her stress at work as stated by Dr. Lowe"); Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000)("Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached.").

For the Commission to disregard, ignore or overlook the medical evidence concerning the left buttocks and leg (and SI joint) from Dr. Nolan and other providers is an error of law. This is essentially the same error the Commission made in Burnette, where the Court reversed the Commission because "We find no evidence that challenges the conclusions of Burnette's doctors concerning her herniated disk at L5-S1, lower back pain, or development of radiculopathy." Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(finding of fact based on a

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testified "We sent her to pain management to try an eipidural steroid injection on the left side. . . . She was having more left-sided buttocks pain and thigh, and we decided to try her with an eipdural." [Marzluff, dep tr. Page 16, line 1-page 17, line 8]. In the functional capacity evaluation done on March 11, 2014, the therapist documents "weakness in bilateral hips left greater than right;. . . a constant dull, ache in low back left > right that intermittently radiates in left lower extremity from her back to her knee that she describes as a numbness/tingling." Following the test, she "demonstrated a slight increase in antalgic gait demonstrating decreased stance time on left LE post-test secondary to pain." [APA pages 260, 262, 267]. On September 22, 2014, her psychologist, Dr. Kee documented "Ms. Pate presents with constant left-sided low back pain, left hip and leg pain following an on the job injury in December 2011." [APA page 162]. Dr. Lowndes-Rosen recorded on December 10, 2014 that she was admitted for surgery because she was "continuing to be symptomatic particularly concerning her legs;" that "it has been Dr. Nolan's report that she has also had bilateral radicular leg pain;" and that "she has bilateral radiculopathy." [APA pages 285-289].

commissioner's own lay medical opinion is not substantial evidence and must be reversed). Ignoring competent medical evidence is an impermissible resort to rank speculation. See Hutson v. South Carolina State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)(reversing Appellate Panel's conclusion because "rank speculation" cannot outweigh competent evidence of disability). As such, the Court should reverse the finding that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." Pate's injury affected multiple body parts and she should be deemed disabled as a matter of law.

B. Injury to the sacroiliac joint [*In Reply to Respondents' argument II at pages 19-21*].

Respondents declined to address the SI joint injury on the merits.[6] Instead, Respondents argue the issue on the SI joint injury is not preserved. A review of the record and pleadings show that the issue of general disability for multiple body parts (including the SI joint) under Section 42-9-10 was raised and ruled upon (albeit against Pate, thus necessitating correction on appeal).

The issue was presented to the Single Commissioner. In her prehearing brief, Pate stated the facts in controversy were "Extent of disability/body parts." [Claimant's 58]. Conversely, Respondents contended the injury was limited to the lower back. [Tr. Page 5]. As noted earlier in this brief, the medical records are replete with diagnoses and treatment for SI joint injury and pain related to the original accident – all of which was authorized and provided for by the Carrier.

The Single Commissioner ruled "the December 14, 2011 accident did not result in injury to,

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[6]The Court has authority to treat Respondents' failure to respond to this issue as a confession that the Commission's finding that the SI joint was not injured or affected was reversible error. See First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

or otherwise affect, any other body member or system." [Order, page 9, Finding of Fact 1]. This finding was specifically appealed in the Form 30, where it is stated: "Whether the Single Commissioner erred as a matter of law in limiting the award to the back." [Form 30, Issue on Appeal 13].

Additionally the issue was raised and ruled upon by the Appellate Panel. In its first Order, the Appellate panel wrote "Dr. Nolan . . . treated Pate with SI joint injections . . . " [FC Order 1, page 2]. The issue was briefed by both parties. Indeed, Respondents made the same preservation issue they make here. The Appellate Panel declined to address Respondents' preservation argument, instead affirming the finding of the Single Commissioner that "the December 14, 2011 accident did not result in injury to, or otherwise affect, any other body member or system." [FC Order 1, page 11, Finding of Fact 1]. Inconsistently, even though the Appellate Panel stated it found no other body parts injured or affected, the Panel specifically ordered Respondents to provide SI joint injections. [FC Order 2].

Issue preservation, particularly in informal proceedings before the Commission, is liberally construed so as not to create a trap for the unwary. If the appellate court can fairly infer an issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296 S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)("it is inferable from the record that [claimant] raised this issue before the single commissioner"). The courts haves held issues are preserved where "it is questionable whether [the appellant] raised this issue to the single commissioner, it is clear it was raised before both the full commission and the circuit court, and was addressed by the circuit court

in its order." Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164 n. 1, 584 S.E.2d 390, 396 n. 1 (Ct. App. 2003). In fact, the appellate courts have ruled on issues even when explicitly raised for the *first time* to the Full Commission. See Swinton v. South Carolina Dept. of Mental Health, 314 S.C. 202, 442 S.E.2d 215 (Ct. App. 1994)("On appeal to the full commission, the employer and the carrier first raised the issue of their entitlement to a credit for all temporary total benefits paid to Swinton after May 21, 1990.").

Here, the Single Commissioner held the injury was limited to the back, thus excluding the SI joint. Given that ruling, Appellant had every right to appeal the issue. She did so – listing the issue on her Form 30 and arguing it in her brief. The Appellate Panel addressed the issue, albeit inconsistently, by ordering Respondents to provide treatment for the SI joint. [FC Order2, page 22]. As such, the issue is preserved and properly before the Court.

C. Psychological Overlay [*In Reply to Respondents' argument III at pages 21-25*].

Respondents begin their argument against the claim for psychological overlay by alleging there is no "opinion from a 'physician' (i.e., a medical doctor) that the alleged mental injury is 'causally-related or connected [to] the injury or accident.'"[7] This simply is not the case.

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[7]Respondents make an unnecessary and irrelevant argument, to wit: that an injured worker must prove that "mental injuries . . . are caused . . . by extraordinary and unusual conditions of employment." [Brief of Respondents, page 21]. This is a reference to the higher burden for so-called *mental-mental* injuries. A *mental-mental* injury is a mental injury unaccompanied by physical injury, such that the injury is entirely caused by unusual and extraordinary stress on the job. See S.C. Code Ann. § 42-1-160 (B)(2007)(requiring "mental injuries . . . unaccompanied by physical injury . . . are not considered a personal injury unless . . . the employee's employment conditions causing . . . the mental injury . . . were extraordinary and unusual in comparison to the normal conditions of the particular employment . . ."). As the mental injury here is accompanied by physical injury (hence it is denominated as a *physical-mental* injury), Pate need merely prove the causal connection by a preponderance of the evidence. Under Getsinger, it is sufficient that the depression include an element of stress from inability to work, as well as pain and disability.

Two *physicians* provided medical opinions. Indeed, Respondents own independent medical examiner, Dr. Dyana Lowndes-Rosen, is a physician. Dr. Lowndes-Rosen diagnosed Pate with *Somatic Symptom Disorder with Predominant Pain (300.82).* This diagnosis by definition establishes the causal connection, as it refers to "Disorders characterized by bodily symptoms caused by psychological factors." [2015 ICD-9-CM Diagnosis Code 300.82]. Dr. Lowndes-Rosen wrote "She recognizes *her emotional symptoms are a direct result of her pain and limitations*." [APA page 288 (emphasis added]. See Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)(opinion of doctor that inability to work precipitated depression "sufficiently establishes that [employee's] injury caused his depression.").

Respondents focus on a particular passage from Dr. Lowndes-Rosen's report. The full passage (with the portion referred to by Respondents in bold) states:

> Ms. Pate presented as a pleasant lady who is victim of chronic pain syndrome due to lumbar post laminectomy syndrome. She is maintained by her personal physician on an antidepressant drug. **I have no reason to believe that counseling would be of substantial benefit in that real physical pain is her primary complaint. She also expressed her belief that she has no need for mental health involvement.** She is faced with chronic pain syndrome and is a pain management patient.

[APA page 289 (emphasis added)].

Dr. Lowndes-Rosen confirms Pate suffered a psychological overlay with somatic symptom disorder as a result of the pain and disability resulting from her workplace injury. Her opinion that there may be no benefit to Pate from counseling – differing from Dr. Kee's opinion – goes to treatment; not diagnosis and not causation. Dr. Lowndes-Rosen states with certainty that Pate suffers from "real physical pain" which directly resulted in her emotional symptoms. Respondents' strained reading of the report should be given no credence.

Respondents ask the Court to reject Dr. Nolan's diagnosis and referral to Dr. Kee because,

they contend, the reports may have been "authored by a Nurse Practitioner, Allison Davis." [Brief of Respondents, page 22]. This argument is, well, silly. The reports are "Electronically signed by JOSEPH NOLAN, MD." [APA page 55, 59]. They *are* "medical records of an authorized physician." See S.C. Code Ann. § 42-1-160 (D)(2)(2007).

Moreover, Dr. Nolan states: "[Patient] is significantly depressed [secondary to] 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'. She does not appear to be coping well." Dr. Nolan referred Pate to Dr. Kee and prescribed Effexor (an anti-depressant) to treat depression. [APA page 55].

Dr. Nolan's records provide more than enough proof for Pate to have shown her depression directly resulted from her pain and limitations. The argument that his report is not written by a physician is a red herring. There is no substantial evidence to support the Commission's finding that "Claimant has not met her burden of proving a psychological injury causally-related to her original injury." [Order, page 20, finding of fact 7].

Respondents further argue that:

> 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." [Brief of Respondents, page 22].

This argument overstates what the Appellate Panel actually found. The Order states:

> 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 conditions. 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. [Order, page 20, finding of fact 7].

Nowhere does the Commission's order discuss "bowel incontinence."[8] Nor does the Commission discuss "near fatal pulmonary emboli."[9] Respondents base their argument on these embellishments, but they were not a basis for the Commission's decision. The Commission merely found Pate failed to prove her case – a conclusion shown to be erroneous upon review of the record.

The Commission appears to have made two conclusions, both of which are error. The first is "no physician has opined that Claimant has any disability or work restrictions as a result of any alleged psychological conditions." [Order, page 20, finding of fact 7]. Restrictions or disability are not essential elements. Most workers' compensation claims are considered *medical only* cases, where

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[8]Under *stress,* Pate's family doctor list two aggravating factors: "work stressors, brother dying from pancreatic cancer . . ." [APA page 185]. Her family doctor treated her for chronic stomach problems, including diarrhea. The family doctor notes she "is having severe diarrhea and bloating and wants to come off all meds until her stomach is better." [APA page 185]. On May 21, 2013, she was diagnosed with IBS (irritable bowel syndrome), after which the mention of diarrhea in her medical records virtually stop. [APA page 195]. There is no mention of the IBS as a stressor.

In his deposition, Dr. Marzluff is asked about the cause of the bowel incontinence. He states "One of the causes of bowel and bladder incontinence is spine problems," but he ultimately testified he had no opinion as to whether it was related to her spinal problems. [Marzluff dep. Page 5, lines 1-20].

The second mention of "incontinence of her bowels" comes from Dr. Lowndes-Rosen. She mentions Dr. Marzluff's January 13, 2013 report, noting that Pate had been "doing reasonably well following her surgery but she then complained to him of multiple problems, including incontinence of her bowels." [APA page 286]. Dr. Marzluff's January 13, 2013 report is not in the record. However, Dr. Lowndes-Rosen appears to be stating that the "incontinence of her bowels" began *after* her surgery. Regardless, Dr. Lowndes-Rosen did not attribute Pate's depression to her bowel issues; she attributed it to chronic pain syndrome due to her work-related injuries.

[9]Records from Dr. Jeffrey Rose, who treated Pate for the pulmonary embolus, do not describe it as life-threatening. [APA pages 273-282].

the employee receives treatment but no compensation.[10] There are many injuries and conditions which do not warrant work restrictions, yet require treatment under workers' compensation because they are caused by a work accident. See e.g., Dykes v. Daniel Constr. Co., 262 S.C. 98, 202 S.E.2d 646 (1974)(claimant entitled to additional medical treatment for eye even though he had returned to work and been compensated for 100% loss of eye); Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999)("an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement"). See also, Getsinger v. Owens-Corning Fiberglas Corp., 515 S.E.2d 104, 335 S.C. 77 (Ct. App. 1999)(claimant entitled to treatment for depression occurring five years after injury).

In the instant case, Dr. Kee opined Pate would benefit from treatment for the depression resulting from her chronic pain. [APA pages 164-165]. Dr. Nolan also ordered treatment, including counseling and medication. [APA page 55]. And although Dr. Lowndes-Rosen disagreed on counseling, she endorsed continuing the antidepressant medication. Dr. Lowndes-Rosen's diagnosis of Somatic Symptom Disorder shows that the psychological issues affect and worsen Pate's perception of her pain. [APA page 288].

As to the Commission's finding that no doctor opined as to the causal connection to the work

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[10]A *medical only* claim is a work-related injury which causes no compensable lost time and no permanent disability. Lost time claims are denominated as *compensable* claims. The Workers' Compensation Commission allows employers and carriers to provide medical treatment in such cases without the need to formally file the claim with the Commission. See S.C. Code Ann.Regs. 67-411 (2008) (describing procedure for "medical only" claims). Medical only claims are discussed in Mauldin v. Dyna-Color/Jack Rabbit, 416 S.E.2d 639, 308 S.C. 18 (1991)(holding provision of medical treatment under *medical only* claim tolled the statute of limitations until claimant "knew or should have known of her *compensable* injury.")(emphasis added).

injury, this is belied by the reports from Drs. Nolan and Lowndes-Rosen. One might also note that it is sufficient to prove the depression resulted from pain and disability, as in Getsinger. If the Commission is quibbling over the magic words "stated to a reasonable degree of medical certainty," that would be error. The statute sets forth multiple types of proof required for an aggravation of a preexisting psychological condition. Existing medical records do not require any particular language or phrasing.

The only type of report that must be "stated to a reasonable degree of medical certainty" is a forensic opinion, report or testimony. Opinions "noted in a medical record" do not contain this requirement. See Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(letter from doctor hired for purposes of litigation "does not constitute 'documents, records, or other material,' but is an 'opinion or testimony' that must be 'stated to a reasonable degree of medical certainty.'"). Indeed, the statute only requires that it be "noted in a medical record of an authorized physician that, in the physician's opinion, the condition is *at least in part* causally related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition." S.C. Code Ann. § 42-1-160(D)(2)(2007)(emphasis added). Dr. Nolan's report meets this standard. And while technically Dr. Lowndes-Rosen's report could have been objected to because she did not use the term *reasonable degree of medical certainty*, no objection was made. As Respondents introduced the report without objection, they cannot claim about its sufficiency on appeal.

The Commission erred by holding Pate failed to prove the causal connection between her physical injury and resulting depression. There is no substantial evidence to support the decision below. It must therefore be reversed and Pate found to have suffered additional disability due to psychological overlay and be entitled to treatment.

2. Pate is permanently and totally disabled as no employer is able to accommodate the restrictions resulting from her work injury [in Reply to Respondents' argument at pages 28-32].

In their Brief, Respondents repeat the canard that "it is the pulmonary emboli, not the work accident, that are the proximate cause of any disability Pate may now have." [Brief of Respondents, page 30]. The fatal flaw in this argument is that Respondents have already litigated and lost this issue. In its first Order, the Appellate Panel found as fact that "We reverse the Single Commissioner's finding that "Claimant's pulmonary embolisms are subsequent intervening acts sufficient to break the chain of causation as it relates to Claimant's disability and continued medical treatment." [FCOrder1, Finding of Fact 7, page 12]. The Appellate Panel further rejected the application of Geathers v. 3V to the case, concluding "The ruling below regarding Geathers has no support in the law and is an erroneous misapplication of Geathers. [FC order1, Conclusion of Law 18, page 15]. Respondents failure to appeal this ruling means they are bound by the law of the case. See, e.g., Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014)("Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.")

As to the merits, there is no evidence that Pate's condition, complaints, medical treatment and work restrictions were increased or aggravated by the now resolved pulmonary embolisms. It is her injuries that keep her out of work and render her disabled.

Respondents argue that Pate "returned to her regular, full time job . . . before she was hospitalized with multiple pulmonary emboli, unrelated to her employment. . . . Therefore, Pate's work related back injury was not disabling as a matter of law." [Brief of Respondents, page 30]. This argument is belied by the Commission's finding that "Pate *temporarily* stopped working on

September 15, 2014 when she was hospitalized for a pulmonary embolism." [FC Order2, Finding of Fact 5, page 20 (absence in original)]. While Pate did miss work due to the hospitalization, the absence was temporary. As Respondents point out, Dr. Nolan took her out of work (albeit temporarily) on October 3, 2014 due to the pulmonary embolisms. He "continue[d] to monitor her work status at each visit," before returning her to work one month later once the pulmonary embolism resolved. [APA page 70, 80-81]. From that point, she was under no work restrictions from the embolism. In fact, her hematologist, Dr. Rose, consistently "gave her words of encouragement regarding her job." [APA pages 273-282].

The reason Pate can no longer work is entirely due to the restrictions assigned by Dr. Nolan from her work-related injury. In December 2014, he restricted her to sedentary duty no more than 4 hours per day. [APA pages 93, 101]. The Copy Center could not accommodate her restrictions, placing her on leave without pay on January 29, 2015 and ultimately determining "there are no available positions at this time." [APA pages 173, 309-309; Tr. Page 38, .lines 19-23].

The evidence conclusively shows Pate is permanently and totally disabled due to her work-related injuries. As such, the Decision and Order below should be reversed.

3. Pate is presumed permanently and totally disabled as she has lost more than 50% use of her back [In Reply to Respondents' Argument at pages 15-19].

On remand, the Single Commissioner found Pate had sustained permanent partial disability (loss of use) of 40% of the back. The Appellate Panel affirmed. Respondents contend "Pate has failed to cite any legal authority for her argument that scheduled awards should be based upon a claimant's work status." [Brief of Respondents, page 15]. Appellant actually cited to numerous

decisions holding that a scheduled award should exceed the impairment rating.[11] Moreover, she cited to the authoritative treatise on workers' compensation for the proposition that the disability award is an appraisal of the injured worker's "present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment." Beard, Poteat, Lamar, Sumwalt, *The Law of Workers' Compensation Insurance in South Carolina* (3rd ed. 2003), § 11-24. Indeed, the Commission applied this principle in its award where it considered "Claimant's work restrictions at the time of separation from her employer . . ." [FC Order2, Finding of Fact 11, page 21].

The core issue is that when the restrictions are considered, they are inherently disabling. There is simply no work for someone with these restrictions, such that the true loss of use of the back necessarily exceeds 50%. This creates a rebuttable presumption of permanent and total disability. Respondents cannot rebut the presumption because the Employer cannot accommodate the restrictions nor, per the vocational evidence, can any other employer. [APA pages 166-171].

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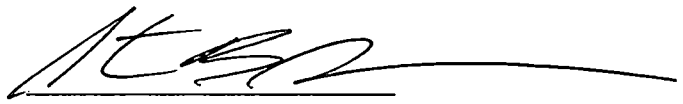
[11] See, e.g. Linen v. Ruscon Construction Co., 286 S.C. 67, 332 S.E.2d 211 (1985)(substantial evidence supported an award for a 50 per cent loss of use of the back even though the medical testimony "established, at most, a 30 [per cent] impairment rating."); Bundrick v. Powell's Garage and Wrecker Service, 248 S.C. 496, 151 S.E.2d 437 (1966)(50% loss of use of arm upheld even though medical experts testified to 10% and 20% impairment); Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% permanent partial *disability* to leg affirmed even though treating physician assigned 35% *impairment* rating to foot); Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct. App. 2010)(30% loss of use of back with 10% impairment rating with no surgery and medium duty restrictions)*reversed on other grounds,*732 S.E.2d 500, 399 S.C. 381 (2012); Lyles v. Quantum Chemical Co., 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(affirming greater than 50% loss of use of the back with 35% impairment rating); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (Ct.App. 1992)(affirming award of 15% to back when treating physician assigned 5% impairment rating); Cropf v. Pantry, Inc., 289 S.C. 106, 344 S.E.2d 879 (Ct. App. 1986)(affirming Commission's award of 30% to the back where highest impairment rating was 15% to the neck).

Therefore, the Court should hold the award must be greater than 50%, thus creating the presumption that Pate is permanently and totally disabled. As the Employer cannot accommodate these restrictions and the vocational evidence proves total disability, Pate should be deemed permanently and totally disabled.

CONCLUSION

For the foregoing reasons, the Decision and Order below should be reversed. The Court should hold: (1) Pate's back injury affected her left leg; (2) Pate injured her SI joint; (3) Pate suffered causally-related psychological overlay; (4) Pate is entitled to an award for permanent and total disability under § 42-9-10; (5) Pate sustained a 50% or more loss of use of her back such that she is entitled to an award for permanent and total disability under § 42-9-30.

Respectfully Submitted,



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December 2, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-001064

Patricia Pate, Employee ..... Appellant,

v.

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

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal for the Samuels Law Firm, LLC, have served the **Initial Reply Brief of Appellant** and **Supplemental Designation of Matter** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on December 2, 2019 addressed as follows:

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December 2, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Patricia Pate v. College of Charleston and State Accident Fund
Appellate Case No.: 2019-001064

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Initial Reply Brief of Appellant** and **Supplemental Designation of Matter** and **Proof of Service,** in the above case.

Please have your staff file the **Initial Reply Brief of Appellant, Supplemental Designation of Matter** and **Proof of Service** and return the extra clocked copy in the enclosed self-addressed stamped envelope.

With kindest regards, I am

Respectfully,

Stephen B. Samuels

SBS/wp
Enclosure(s) as stated

cc: Kirsten L. Barr, Esquire
Max Capper Sparwasser, Esquire