THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2019-001380

Paula Russell, Claimant,

Appellant,

v.

Wal-Mart Stores, Inc., Employer, and
American Home Assurance, Carrier,

Respondents.

RETURN TO PETITION FOR REHEARING

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Wal-Mart Stores, Inc., and American Home Insurance (hereinafter "Respondents"), by and through their undersigned attorney, respectfully submit this Return to Appellant's Petition for Rehearing. Respondents assert that the Court of Appeals properly affirmed the decision of the Appellate Panel of the Workers' Compensation Commission (hereinafter "the Commission") by Opinion dated November 23, 2022. Consequently, Respondents respectfully request that Appellant's Petition for Rehearing be denied.

I. Appellant's Petition for Rehearing should be denied, as the Court properly affirmed the Commission's finding that Claimant did not meet her burden of proving a change of condition.

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640, 643 (2011) (citing *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999))).

A. The Court correctly found that the Commission properly reviewed and weighed the record as a whole and applied the correct standard, by a preponderance of the evidence, in accordance with the Directives given by the Court in the Court's 2016 Order.

Appellant contends that "[t]he Court ostensibly overlooked the [Commission's] failure to correct its errors as required by *Russell I*." (Petition for Rehearing, p. 7). Appellant argues that ". . . the [Commission's] order indicates that the [C]omission only stated the correct standard, without correcting the errors raised by the Court in 2016 or reviewing the evidence appropriately." *Id.* Specifically, Appellant alleges that the Court misapprehended or

overlooked the Commission's reliance on an objective standard." (Petition for Rehearing, p. 2). However, a plain reading of the Commission's Order proves this argument to be incorrect.

In finding that Appellant failed to meet her burden of proving a change of condition, the Commission states in Findings of Fact #6, #7, #8, #9, #10, #11, #12, #13, and #15, and Conclusions of Law #1 and #6, that it weighed all the evidence, both subjective and objective, in making that determination. (R. p. 8 – p. 10). Specifically, the Commission clearly notes that it did not rely on objective evidence alone, as that is not the correct standard. In Finding of Fact #11, the Commission expressly finds that "…objective proof is not required to establish a change of condition," and in Finding of Fact #16, the Commission states, "[t]he Commission does not find that in this, or any other case, that objective evidence is required to establish a change of condition. Our finding is that, based on our review of all the evidence, both *objective and subjective*, we assign more weight to the objective medical evidence including the MRI scans *and* the testimony and opinion of Dr. Edwards than to Claimant's subjective complaints." (R. p. 8 – p. 9) (emphasis added). Likewise, in Conclusion of Law #6, the Commission again mandates, "[w]e do not hold that in this, or any case, objective evidence is a prerequisite to establish a change of condition." (R. p. 10). The Order of the Commission properly recognizes the correct legal standard and weighs all of the evidence.

Appellant further argues that the Commission did not contemplate the opinions of the physicians as directed by this Court, resulting in the requirement of objective evidence. However, the Commission clearly indicates it considered the medical reports, the diagnostic tests, the testimony of Dr. Merritt, the testimony of Dr. Edwards, and the testimony of Appellant. (Findings of Fact #8, #9, and #11, R. p. 8). In her Petition for Rehearing, Appellant attempts to manufacture a reliance on an objective standard by improperly categorizing the medical evidence in this case

into three conclusive categories: No change [of condition], neutral, and change [of condition]. (Petition for Rehearing, p. 2). This is a great oversimplification and mischaracterization of this evidence. The medical evidence in this case is complicated and often times contradictory. Such evidence must be considered in conjunction with the medical records, expert testimony, diagnostic imaging, and Appellant's testimony from both before and after the original hearing. More importantly, it is within the sole discretion of the Commission to adjudicate and weigh this evidence.

Similarly, Appellant contends that "the significance the [C]ommission placed on the MRIs is improper" and incorrectly states that "the only evidence upon which the Commission's [O]rder is or can be based on is its interpretation of the significance of the MRIs." (Petition for Rehearing, p. 2-3). This is an argument as to weight. Appellant is mischaracterizing the Commission giving weight to certain evidence as conclusive proof that no other evidence was considered. As discussed in Respondents' Final Brief submitted to this Court, the Commission did not solely or inappropriately rely on the MRI scans in making its decision. In fact, the Commission expressly states in its Order that it gave more weight to the medical records, the diagnostic tests, *and* the testimony of the medical experts, "which they found to be more persuasive than Appellant's testimony when considering the record as a whole." (R. p. 11). Attributing more weight to an objective piece of evidence under the specific set of facts in this case does not equate to a requirement by the Commission that a change of condition claim be proven with objective evidence. The Commission did not prohibit, ignore, or disallow evidence that was not objective evidence. In fact, the plain language of the Commission's Order makes it extremely clear that the Commission considered and weighed *all* of the evidence, both objective and subjective. Simply because a piece of evidence was ultimately weighed unfavorably to Appellant does not mean that

the evidence was not duly considered and properly weighed by the Commission.

Appellant's argument in her Petition is that the Commission continued to use an objective evidence standard in deciding the change of condition claim even after remand from the Court of Appeals. If the Order of the Commission is taken at face value, this argument is incorrect and inaccurate. The Commission stated repeatedly in its order that it considered all evidence and was cognizant of the remand issues as set by the Court of Appeals, and the Commission properly gave more weight to certain evidence. This is what the Court of Appeals found in its most recent decision. To accept Appellant's argument in her Petition is to accept that there is something sinister and deceitful that was done by the Commission. To accept the argument of the Appellant, this Court must find that the Commission was being deliberately dishonest in expressly stating in its Order that it did not require and/or solely rely on objective evidence, when in reality the Commission actually required objective evidence despite its explicit and direct statements to the contrary. Appellant's argument is that the Commission said one thing but did another; frankly, there is no evidence to support such an argument and this argument must fail.

B. The Court correctly found that there is substantial evidence in the record to support the Commission's finding that Appellant failed to prove a change of condition by a preponderance of the evidence.

The determination of whether a claimant experiences a change of condition is a question for the fact finder and must be affirmed if substantial evidence supports the Commission's finding. *Clark v. Aiken County Government*, 366 S.C. 102, 111, 620 S.E.2d 99, 103 (S.C. Ct. App. 2005) (citing *Gattis v. Murrell's Inlet VFW #10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (S.C. Ct.App. 2003); *Solomon v. W.B. Easton, Inc.*, 307 S.C. 518, 415 S.E.2d 841 (S.C. Ct. App. 1992)). An appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Bentley v. Spartanburg County*,

398 S.C. 418, 421, 730 S.E.2d 296, 298 (citing S.C. Code Ann. § 1-23-380(5)). Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. *Id.*

Appellant alleges that the Court must have misapprehended or overlooked aspects of the evidence and Appellant's argument in affirming the Commission's decision, as there is no other way to reach the Court's ultimate conclusion. (Petition for Rehearing, p. 4, 8). Respondents respectfully disagree. As noted by this Court, there is evidence on both sides and the Court properly found that substantial evidence exists to support the Commission's decision after giving due consideration to the facts, law, and positions of the parties.

Appellant also contends that the Court "misapprehended the unimportance of [her] prior complaints." (Petition for Hearing, p. 5). She further contends that having the same or similar "symptoms or surgical candidacy prior to the final adjudication is not evidence that her condition has not worsened." (Petition for Rehearing, p. 6). Of course, this is incorrect. As argued at length in Respondents' Final Brief submitted to this Court, the medical evidence and Appellant's own testimony indicate that Appellant had long-standing radicular buttock and leg pain since 2009. (R. p. 190, lines 21-25; R. p. 192, lines 2-23; 242, line 21; R. p. 243, line 1). Dr. Edwards also affirmed Appellant had disc protrusion that has been contacting the nerve root and causing irritation *throughout the course of her claim*; she has not developed any weakness in her muscles innervated by that particular nerve; and her reflexes have remained the same. (R. p. 221, lines 17-21; R. p. 222, lines 9-12) (emphasis added).

While a new MRI was ordered by Appellant's treating provider due to her supposedly new complaints of pain, Dr. Merritt testified that he didn't think there was a major change. (R. p. 237, lines 13-24). However, he deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans; Dr. Edwards opined that there was no difference to be noted in the MRI scans from before and after the first hearing. (R. 210, lines 14-17; R. p. 211, lines 5-7; R. p. 212, lines 8-10; R. p. 221, line 22 – p. 222, line 25; R. p. 247, lines 3-19). Ultimately, Dr. Edwards was unable to say whether Appellant had a physical change in her condition. As properly noted by the Court of Appeals, this constitutes substantial evidence to support the factual findings of the Commission.

Appellant further alleges that Dr. Edwards's recommendation of spine surgery was based on her "new" symptoms. (R. p. 184, lines 4-23). However, Dr. Edwards opined Appellant could have been a candidate for a discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (R. p. 225, line 16 – p. 226, line 1). Based upon Dr. Edwards' testimony, Claimant's current condition is not new but is merely the same problem that she had before the original award.

As the ultimate fact finder, the Commission weighed the testimony of both Dr. Merritt and Dr. Edwards, in conjunction with the other evidence in the record, in determining that there was no physical change in condition. As noted by this Court, the Commission states in Finding of Fact #10 that, "[w]e are cognizant of the fact that testimony from both doctors and statements out of medical reports can be cherry-picked to support either position on this change of condition dispute . . . [h]owever, when reviewing the evidence as a whole and giving weight to the various pieces of evidence, it is our view that the preponderance of the evidence does not establish that Claimant has sustained a change of condition for the worse." (R. p. 8).

Moreover, Claimant argues that "[t]he Court ostensibly overlooked the [C]ommission's errors in its credibility determinations, as the Court did not address that portion of Russell's argument." (Petition for Rehearing, p. 8). Appellant contends that, "[t]o justify its *sole* reliance on the objective evidence and disregard for the subjective evidence in this case, the [C]omission made nonsensical credibility findings." (Petition for Rehearing, p. 8-9). Appellant asserts that the credibility determinations made by the Commission are not immune from appellate review. *Id.* (citing *Able Communications, Inc. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151 (1886)). However, is clear that Appellant misapprehends the Court's decision in *Able Communications, Inc. v. SCPSC*, which requires that an administrative body make findings of fact that are sufficiently detailed to allow for appellate review – it does not empower an appellate court to substitute its judgement for that of the Commission on issues of credibility. 290 S.C. at 409, 351 S.E.2d at 151). The Commission's Order in this case expressly details the bases for its findings, including the flaws it found in Appellant's testimony. (*See e.g.*, Finding of Fact #7, R. p. 8). The Commission's Order also describes how it weighed the Appellant's testimony and all other evidence in the record to make a determination. (*see e.g.*, Findings of Fact #7, 8, 11, R. p. 8).

In attempting to demonstrate the Court's supposed oversight, Appellant alleges that Respondents agree that Appellant's symptoms have worsened. (Petition for Rehearing, p. 11). This is categorically false. It has always been the position of Respondents that a preponderance of the evidence as a whole – both subjective and objective – does not support a finding that Appellant has sustained a change of condition. Appellant has a rather extensive history of falsely claiming that Respondents have taken a certain position in this case in order to fabricate support for her own argument, which has not gone unnoticed by the Justices of the South

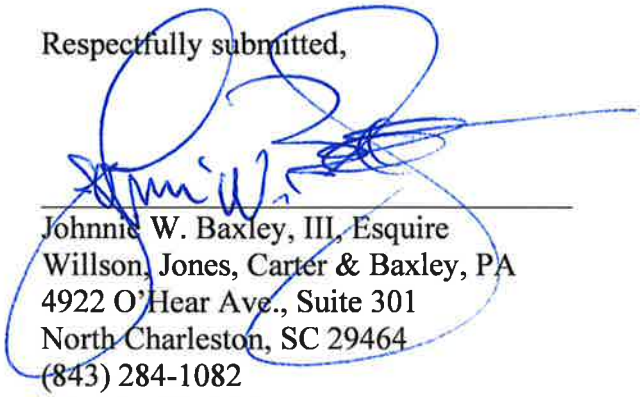
Carolina Supreme Court. (See R. p. 102, line 17 – p. 103, line 4; R. p. 118, lines 10-12; R. p. 118, line 15; R. p. 119, line 3; *see also* Respondents' Final Brief, p. 10-11).

Appellant argues that there is evidence in the record that suggests she has a change of condition; therefore, the Court must have misapprehended or overlooked the arguments in affirming the Commission's decision. The Commission readily acknowledges in its Order that "there is *some* evidence that Appellant may have suffered a change of condition;" however, in its discretion, the Commission ultimately concludes that Appellant failed to prove a change of condition by a preponderance of the evidence. (Finding of Fact #15, R. p. 9). The South Carolina Supreme Court has held, "…the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto All., Inc. v. S.C. Pub. Serv. Com.*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Further, when there is a conflict in the evidence, the Appellate Panel's findings of facts are conclusive. *Steed v. Mount Pleasant Seafood Co.,* 236 S.C. 253, 256, 113 S.E.2d 827, 828 (1960). There is substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, to allow a reasonable person to come to the same conclusion as the Commission: Appellant failed to prove a physical change of condition after the original award based on a preponderance of the evidence. As such, the Court did not misapprehend or overlook the evidence or arguments in this case and correctly affirmed the decision of the Commission.

For the foregoing reasons, Respondents respectfully request that Appellant's Petition for Rehearing be denied by This Honorable Court.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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December 19, 2022

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Paula Russell, Claimant, Appellant,

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CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, Attorney for the Respondents with **WILLSON JONES CARTER & BAXLEY, P.A.** in North Charleston, South Carolina, and that on **December 19, 2022**, I electronically served the foregoing **RETURN TO PETITION FOR REHEARING** to the following via e-mail pursuant to the Order of the South Carolina Supreme Court dated August 25, 2021:

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December 19, 2022

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December 19, 2022

Via E-mail Only
The Honorable Jenny Abbott Kitchings, Clerk
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Re: Paula Russell vs. Walmart Inc.
Appellate Case No. 2019-001380

Dear Ms. Kitchings:

In response to the correspondence received from your office, dated December 9, 2022, please find enclosed the following documents for filing in regards to the above-referenced case:

1. Respondents' Return to Appellant's Petition for Rehearing; and
2. Certificate of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB/mth

cc (w/ encl.): C. Daniel Vega, Counsel for Appellant (via e-mail)
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