THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

RECEIVED
JAN 23 2020
SC Court of Appeals

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

Johnnie W. Baxley, III
Willson Jones Carter & Baxley, P.A.
421 Wando Park Blvd., Suite 100
Mount Pleasant, SC 29464
(843) 284-1082
jwbaxley@wjlaw.net
Attorney for Respondents

Other Counsel of Record:

C. Daniel Vega
Chapel Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
(803) 929-3600
dvega@csa-law.com
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes and Regulations

STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPLY THE CORRECT LEGAL STANDARD AND CORRECTLY DETERMINE THE APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD?

2. DOES SUBSTANTIAL EVIDENCE SUPPORT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE?

STATEMENT OF THE CASE

On November 3, 2009, Appellant sustained an admitted injury to her back arising out of and in the course of her employment with Wal-Mart. At hearings held on April 13, 2011, and on June 8, 2011, the Commission ordered that Appellant reached maximum medical improvement for her work-related injury on February 2, 2011, and she was entitled to a 7% permanent partial disability to the back and ongoing pain medication.

On December 9, 2011, Appellant filed a Form 50 claiming she was experiencing a change of condition for the worse with allegations of new and increased symptoms including radicular pain in her legs. A hearing on the change of condition claim was held on February 11, 2013, before Commissioner Andrea Roche. On August 5, 2013, Commissioner Roche found that Appellant suffered a change of condition for the worse and ordered Respondents to provide Appellant with medical care and attention for the change of condition and temporary total disability benefits starting on December 1, 2011 to the present.

The August 5, 2013 Order was timely appealed by Respondents, and a hearing was held before the South Carolina Workers' Compensation Commission ("Commission") on December 16, 2013. The Commission issued its Order on January 30, 2014, reversing Commissioner Roche and finding Appellant failed to prove by a preponderance of the evidence in the record that she sustained a change of condition for the worse. In making this ruling, the Commission considered all of the evidence as a whole but gave greater weight to the medical records, the diagnostic tests, and the testimony of the medical experts in reaching a decision. Appellant appealed the Decision of the Commission to the Court of Appeals, and oral arguments were held on October 20, 2015. On January 20, 2016, the

Court of Appeals issued a decision remanding the case back to the Full Commission with directives to determine whether the Appellant experienced a change of condition by a preponderance of the evidence in the record.

The case was remanded to Commissioner Michael R. Campbell, and he found that Appellant had suffered a change of condition for the worse. Respondents appealed that decision, and on September 15, 2017, the Full Commission ordered a complete reversal of the Single Commissioner's Order and remanded the case for a hearing de novo. Appellant appealed this ruling to the South Carolina Court of Appeals, and Respondents filed a Motion to Dismiss, arguing that the appeal was interlocutory. The Motion to Dismiss was subsequently granted on December 8, 2017. Appellant filed a petition for a Writ of Certiorari to the South Carolina Supreme Court regarding the appealability of the Commission's Order. The Supreme Court filed an opinion dated April 3, 2019, finding that the Commission's Order was immediately appealable. The Supreme Court reversed the Court of Appeals' dismissal, reversed the order remanding the case to a single commissioner, and remanded to the Commission for a review of Commissioner Roche's August 5, 2013 Order based on the 2016 holding of the Court of Appeals.

In line with the 2016 holding of the Court of Appeals, the Full Commission issued an Order on July 18, 2019, finding that Appellant did not suffer a change of condition for the worse based on the record as a whole, considering both the subjective and objective evidence. Appellant subsequently served a Notice of Appeal to this Court on August 15, 2019.

STATEMENT OF THE FACTS

Appellant sustained an admitted injury on November 3, 2009, and received appropriate medical treatment until she was released at maximum medical improvement. Commissioner Wilkerson awarded 7% permanent partial disability on June 8, 2011. After receiving her award, Appellant alleged that she suffered a change of condition for the worse under S.C. Code Ann. § 42-17-90. The issue was originally adjudicated before Commissioner Roche on February 11, 2013.

At the hearing, Appellant alleged she experienced new and increased symptoms including radiating pain into her legs that would require additional medical treatment to include surgery by Dr. Edwards. (R. p. 176, lines 3-6). Specifically, Appellant reported new complaints of pain down her legs to Dr. James O. Merritt. (R. p. 236, lines 9-10). However, at Dr. Merritt's deposition, he admitted he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (R. p. 242, line 19 – p. 243, line 1). In September of 2011, Dr. Merritt ordered an MRI to compare to Appellant's prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (R. p. 236, line 24 – p. 237, line 11). Although Dr. Merritt did not have the films from the MRIs to compare, he did not think there was a major change between the two. (R. p. 237, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (R. p. 237, lines 12-15 & lines 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (R. p. 246, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert

on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (R. p. 247, lines 3-19).

Dr. Merritt sent Appellant for further evaluation with Dr. William S. Edwards, a spine surgeon, who did review the actual MRI studies at issue in this case. (R. p. lines 14-17; R. p. 221, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies, that they looked substantially the same to him, and that there was no objective or significant radiographical difference to be noted in the scans. (R. p. 211, lines 5-7; R. p. 212, lines 8-10; R. p. 222, lines 1-3). Further, he opined Appellant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (R. p. 217, lines 24-25; R. p. 218, lines 5-6). In fact, Dr. Edwards explained that Appellant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root, that Appellant does not have any weakness in her muscles innervated by that particular nerve, and that Appellant's reflexes remain the same. (R. p. 221, lines 17-21; R. p. 222, lines 9-12). Dr. Edwards also opined that Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (R. p. 225, line 16 – p. 226, line 2).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the

reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 398 S.C. 418, 421, 730 S.E.2d 296, 297 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, "[i]n workers' compensation cases, the Appellate Panel is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 4381 442 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). 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.

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPLIED THE APPROPRIATE LEGAL STANDARD AND CORRECTLY DETERMINED APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD.

The record and the July 18, 2019 Decision and Order show that the Commission considered the record *as a whole* and reached a reasonable conclusion based on all of the evidence submitted by both parties. Contrary to the arguments of Appellant, the Commission did not apply the wrong legal standard or fail to consider any evidence in this matter.

S.C. Code Ann. § 42-17-90 provides, "the Commission may review an award and on that review make an award . . . on proof ***by a preponderance of the evidence*** that there has been a change of condition caused by the original injury, after the last payment of compensation." (emphasis added). In Gattis v. Murrells Inlet VFW #10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 255, 153 S.E.2d 697 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 237 S.C. 584, 118 S.E.2d 322, 323

(S.C. 1961)). 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 Full 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, 353 S.C. at 107, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (S.C. Ct. App. 1992)). Further, 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, 398 S.C. at 41, 730 S.E.2d at 298 (citing S.C. Code Ann. § 1-23-380(5)).

a. The South Carolina Workers' Compensation Commission correctly reviewed the record as a whole and in its discretion determined Claimant did not meet her burden of proving a change of condition by the preponderance of the evidence.

As indicated by the extensive case law cited above, the Claimant must prove by a preponderance of the evidence that there has been a change in the physical condition caused by the original injury after the last payment of compensation. It is the duty and obligation of the Commission, in its role as fact finder, to consider all of the evidence presented and, in reviewing the record as a whole, to use its discretion as to the weight given to the evidence submitted in forming findings and conclusions based on that evidence. This is precisely what the Commission did in this matter.

The Commission correctly applied the preponderance of the evidence standard and properly weighed the various evidence presented, as supported by various Findings of Fact in the July 18, 2019 Commission Order. 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 notes that it did not rely on objective evidence alone, as that is not the correct standard. In Finding of Fact #11, the Commission finds "...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, objective evidence is required to establish a change of condition." (R. p. 8 – p. 9). 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). It is disingenuous for the Appellant to argue that the Commission relied solely on objective evidence when the Commission itself explicitly says otherwise.

Appellant further argues that it was an error of law and fact to find Appellant failed to establish a change of condition because her testimony was "conclusory" and "self-serving." However, it has long been held by our courts that the Commission is empowered to adjudicate credibility of witnesses and weight of evidence, and the courts will not disturb those judgments. "It is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) (quoting Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)).

The Commission expressly detailed the flaws it found in Appellant's testimony. In Finding of Fact #7, the Commission states, "Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award." (R. p. 8).

Overall, the Commission indicated that Appellant's testimony simply did not meet the burden of proving a change of condition. Id. The Commission's July 18, 2019 Order also describes how the Commission weighed the Appellant's testimony, the medical records, and all other evidence in the record to make a determination. For example, in Finding of Fact # 7, the Commission says "[w]e give limited weight to the subjective testimony of the Claimant," in Finding of Fact 8, "Dr. Edwards' testimony and opinion is more persuasive than Claimant's testimony," and in Finding of Fact #11, "[b]oth Dr. Merritt and Dr. Edwards ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans... we assign it greater weight than Claimant's subjective complaints." (R. p. 8).

It is the function of the Commission to determine the weight of the evidence, and, in reading the Commission's Order, it is clear that the Commission fulfilled its obligation to consider and weigh all of the presented evidence in order to reach a determination as to whether the Claimant's legal burden, the preponderance of the evidence, had been met. The clear language of the Order indicates that all evidence was considered and which evidence was given more or less weight and the reasons therefore.

b. The South Carolina Workers' Compensation Commission correctly followed the Directives given by the Court of Appeals in the Court's 2016 Opinion.

The Commission expressly followed the specific instructions given by this Court in its 2016 Opinion. Appellant argues that the Commission denied Appellant's change of condition due to relying solely on objective evidence: Appellant's MRIs of her lower back. However, actual reading of the Commission's July 18, 2019 Order makes it clear that this allegation is both factually and legally false. Appellant has created this illusion in order to

form an argument against it. It is evident that Appellant is engaging in a straw-man's argument,[1] a logical fallacy. In reality, Appellant is substituting the Commission's actual findings with a distorted and exaggerated version of what the Commission found and then arguing a case against it.

Respondents never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard. Respondents' argument has always been about the weight given to the evidence–that the objective evidence in the record should be given more weight than the subjective. Almost every single case that comes before the Commission contains conflicting and competing evidence. For that reason, it is the Commission's job, as fact finder, to weigh the evidence, both subjective and objective, as it deems appropriate.

Appellant has used this straw-man argument for quite some time on this case, and it was adopted by the Court of Appeals. At Oral Arguments before the South Carolina Supreme Court, Case No. 2018-000354,[2] Justice John W. Kittredge points out, "[m]y concern is that it was sort of a straw-man argument by the Court of Appeals. It seems they attributed a position to the Employer that the Employer never took, and that was the basis of the remand." (R. p. 102, line 17 – p. 103, line 4). In speaking to Respondents' counsel, Justice Kittredge again observes:

> The Court of Appeals attributed an argument to you you didn't make. You never said that subjective evidence cannot ever be considered .... You're sitting there reading an opinion where they attribute to an argument you never made. It gets sent back. You tell them exactly what the law is in this case: remand on the record. They do just the opposite. You file a brief; you

[1] According to Black's Law Dictionary, a straw man is defined as "[a] tenuous and exaggerated counter-argument that an advocate makes for the sole purpose of disproving it. – Also termed straw-man argument." *Straw man*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] Respondents cite to these Oral Arguments not for precedential value, but to show this Court the observations made by the South Carolina Supreme Court.

> go over the fact of what you argued at the Court of Appeals and how it was mistaken that you – you've never argued that subjective evidence cannot be considered. You agree that it can be considered. And it's just replete with this.

(R. p. 118, lines 10-12; R. p. 118, line 15 – p. 119, line 3). Respondents did not make this argument, and the Commission explicitly states it did not use this standard: "[t]he Commission does not find that in this, or any other case, 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." (Finding of Fact #16; R. p. 9) (emphasis added).

Appellant argues that the Commission did not contemplate the opinions of the physicians as directed by this Court. 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 the Claimant. (Findings of Fact #8, #9, and #11; R. p. 8). 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.

Appellant has further argued that Claimant's testimony and complaints were ignored, but that is simply not the case. The Appellate Panel considered and weighed that evidence, and they found that the Claimant's lay testimony about her past and ongoing complaints did not carry the burden of proving a worsening of condition and that greater weight is given to the medical records, the diagnostic tests, and the testimony of the medical experts. (Findings of Fact #7, #8, and #9; R. p. 8). The Commission did not prohibit or disallow lay testimony by the Claimant; instead, the Commission reviewed and considered

Claimant's testimony but gave her statements less weight than the expert testimony of the medical providers. Id.

The Commission clearly followed the Directives of this Court in its 2016 Opinion and considered all of the evidence, not just the objective as Appellant claims. Even more telling, the Commission admittedly points out that there is *some* evidence that Claimant may have suffered a change of condition, but the proper standard is the *preponderance* of the evidence, and Claimant failed to meet this standard. (Finding of Fact #16; R. p. 9) (emphasis added). At oral arguments, Justice Kay Hearn[3] aptly points out:

> Let me go back to that law of the case, because maybe I wasn't clear. It seems to me that after the first remand order by the Court of Appeals, the Commission was given the opportunity to correct the perceived error–you know, we can argue about whether the Court of Appeals was right on that. All they [the Commission] had to do was issue a new order based on the record and make findings of fact that says they [the Commission] considered the subjective evidence too. That's all they had to do. They're the factfinder. And that would have been upheld on appeal.

(R. p. 130, lines 10-17). As fact finder, it is within the discretion of the Commission to make this determination.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE.

This Court should uphold the decision of the Commission because substantial evidence supports the Commission's finding that Appellant did not sustain a physical change of condition for the worse. In Gattis, 353 S.C. at 109, 576 S.E.2d at 196 (citing Causby, 249 S.C. at 227, 153 S.E.2d at 698), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original

[3] Again, Respondents are not citing to statements made at Oral Arguments for precedential value.

injury and occurring after the first award. (emphasis added). To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell, 237 S.C. at 588, 118 S.E.2d at 323). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id. Further, where one relies upon expert medical testimony to show a causal connection between an injury and a subsequent condition, the testimony must meet the "most probably" rule and it is not sufficient under our case law to establish the condition in question "possibly," "could have," or "might have" resulted from the injury. Gambrell v. Burleson, 252 S.C. 98, 101, 165 S.E.2d 622, 623 (S.C. 1969) (citing Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (S.C. 1960)). 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 Full Commission's finding. Clark, 366 S.C. at 103, 620 S.E.2d at 111 (citing Gattis, 353 S.C. at 107, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 307 S.C. at 520, 415 S.E.2d at 843).

In the case at hand, Appellant contends that she began to experience new complaints of pain in her legs after the June 8, 2011 Order issued by the single Commissioner that placed her at maximum medical improvement and assigned a seven percent impairment rating to her back. However, the medical evidence in the record indicates otherwise. On May 23, 2012, Claimant's treating provider, Dr. Merritt, testified

that Claimant had some complaints of pain going into the leg before she returned to see him in September of 2011. (R. p. 242, line 21 – p. 243, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (R. p. 190, lines 21-25; R. p. 192, lines 2-23). Nevertheless, she testified that she believed the pain in her right leg associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she "started receiving them." (R. p. 181, lines 11-21).

While a new MRI was ordered by Claimant's treating provider due to her supposedly new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case and testified that he didn't think there was a major change . . . "[n]othing I felt was extremely remarkable." (R. p. 237, lines 13-24). He then testified on cross examination that he would defer to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans from 2010 to 2011, agreed that Dr. Edwards probably has more experience in evaluating spine MRIs and would be more of an expert on spine MRIs than he was, and ultimately agreed with Dr. Edwards' opinion there was no change in the MRI scan before and after the first hearing. (R. p. 247, lines 3-19).

As indicated above, Dr. Edwards did review and compare the MRI studies from 2010 and 2011 after which he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (R. p. 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). Dr. Edwards

also opined Claimant's disc protrusion at L5-S1 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).

As fact finder, the Commission weighed the testimony of both Dr. Merritt and Dr. Edwards in determining that there was no physical change in condition. In Finding of Fact #10, the Commission states "[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). Appellant argues that this "cherry-picking" is factual error. However, 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).

The substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, support the Commission's finding that Appellant did not sustain a physical change of condition after the original award. The expert testimony of both Dr. Merritt and Dr. Edwards, the medical records, and the diagnostic tests constitute substantial evidence to support the finding that Appellant did not sustain a change of

condition for the worse.

Appellant also alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (R. p. 184, lines 4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Appellant could have been a candidate for 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). Specifically, he testified, "[w]e certainly try not to operate on pregnant people if we can get by without it." (R. p. 226, lines 1-2). He also opined that surgery for this type of problem is not something that "has" to be done the majority of the time; rather, it's something that is offered to patients in an effort to try to give them some relief for their pain. (R. p. 219, lines 4-11). 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.

Dr. Edwards further testified, "the worsening of [Appellant's] symptoms, anatomically, could be that there is now a chronic change in that nerve that makes it more painful or symptomatic." (R. p. 218, lines 11-14). When questioned on whether irritation of a nerve that continues over time would cause the nerve to worsen, Dr. Edwards testified, "[i]t can." (R. p. 217, lines 6-10). He then testified that radiographically Claimant's condition was not worsening and that her alleged "worsening" was predominantly a subjective or symptomatic worsening. (R. p. 217, line 24 – p. 218, line 6). While Dr. Edwards also opined that chemicals inside a disc can also cause nerve root irritation if those leak out, he could not state to a reasonable degree of medical certainty that Appellant has had chemical leaking affecting the nerve root and even stated that "there's just no way to

prove that one way or the other." (R. p. 223, line 15 – R. p. 224, line 14). In its Order, the Commission declined to base its decision on evidence from a doctor that something "could" be a cause especially where the doctor conceded that he could not offer his opinion to a reasonable degree of medical certainty.

In looking at the medical reports, deposition testimony of the doctors, and the Appellant's testimony, the substantial evidence in the record, both subjective and objective, supports the Commission's finding that there was physical change of condition for the worse.

CONCLUSION

Based on the foregoing, this Court should affirm the Full Commission Decision and Order.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III, Esquire
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
(843) 284-1082
jwbaxley@wjlaw.net
Attorney for Respondents

Date: January 27, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED
JAN 23 2020
SC Court of Appeals

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

January 22, 2020

Johnnie W. Baxley, III, Esquire
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mount Pleasant, SC 29464
(843) 284-1082
jwbaxley@wjlaw.net
Attorney for Respondents