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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2019-001380

Paula Russell,	Claimant, Appellant,
v.	
Wal-Mart Stores, Inc.,	Employer,
&	
Illinois National Insurance Company,	Carrier, Respondents.

PETITION FOR REHEARING &
SUGGESTION FOR REHEARING *EN BANC*

Appellant ("Russell") respectfully submits this petition for rehearing and suggestion for rehearing *en banc* pursuant to Rules 219, 221, and 240, SCACR. The Court issued its decision November 23, 2022. (Op. No. 2022-UP-422). This petition is timely per Rule 221(a). Russell wishes to preserve the arguments from her briefs for further review. In addition, Russell respectfully submits the Court may have overlooked or misapprehended parts of her argument.

*

The Workers' Compensation Act is not read literally. The Act is to be read liberally and in the injured workers' favor. *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 78, 7 S.E.2d 712, 718

(1940). This applies to all workers' compensation laws—the law "will be construed liberally to effect its beneficent purpose." *Cross v. Concrete Materials*, 236 S.C. 440, 446, 114, S.E.2d 828, 831 (1960). Every statute in the Act is to be read in a way that furthers the Act's purpose of protecting injured workers. Such liberality radiates from the Act and precedent. Section 42-17-90, governing changes of condition, is no different. The supreme court rejected "a literal and strict construction" of section 42-17-90 because the "well settled rule" was that "a liberal construction is required." *Allen v. Benson Outdoor Advert. Co.*, 236 S.C. 22, 30, 112 S.E.2d 722, 725 (1960).

Against that backdrop, the Court appears to have misapprehended or overlooked the commission's reliance on an objective standard. The evidence in this case can fairly be grouped into four categories: Russell's testimony, Dr. Merritt's testimony, Dr. Edward's testimony, and the MRI. Objectively assessing the evidence, it must be organized in one of three ways[1]:

No Change	Neutral	Change
MRI	Dr. Edwards	Dr. Merritt; Russell

No Change	Neutral	Change
MRI		Dr. Merritt; Dr. Edwards; Russell;

No Change	Neutral	Change
	MRI	Dr. Merritt; Dr. Edwards; Russell;

Dr. Edwards' opinion is either evidence showing a change occurred, or it is of no consequence. In either case, the only evidence upon which the Commission's order is or can be

[1] Russell presents three options here, in an effort to present the evidence as fairly as possible. This Court in 2016 stated both doctors concluded, to a reasonable degree of medical certainty, a change of condition occurred. (R. p. 68). That opinion was not appealed. In its 2022 opinion, upon the same record, the Court stated Dr. Edwards could not say there had been a physical change. Op. No. 2022-UP-422 p. 7. The physicians contest the conclusiveness of the MRI results on the ultimate question, as further explained, *infra*. (R. pp. 211-212; 237; 244).

based is its interpretation of the significance of the MRI. Moreover, the significance the commission assigned the MRIs is improper. It is but a singular piece of clinical data the physicians rely upon. It is not independently significant. *Herndon v. Morgan Mills, Inc.*, 246 S.C. 201, 216, 143 S.E.2d 376, 384 (1965) ("[W]here the subject is one for experts or skilled witnesses alone and concerns a matter of science or specialized art or other matters of which layman can have no knowledge, the unanimous opinion of medical experts on particular subjects may be conclusive."). Consequently, the commission required Russell prove her change of condition with objective evidence. If the commission's interpretation of a radiographical finding is substantial evidence, when unsupported by further evidence, then a change of condition requires, as a matter of law, objective or radiographical evidence.

The Court's citation and reference to *Robbins v. Walgreens & Broadspire Servs., Inc.*, seems to indicate its misapprehension as to the evidence of this case. 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007). There, no physician would testify a change occurred and the claimant testified his condition was the same as when his claim was first adjudicated. He testified directly that his pain never actually got better, but he told the employer otherwise. So, in *Robbins*, the claimant failed to meet his burden proof, as he had no physician testimony supporting his position, he did not have his own testimony supporting his position, and his MRI showed no change. To use the same table as above, the evidence in *Robbins* was grouped:

No Change	**Neutral**	**Change**
MRI The claimant's testimony	Dr. Chokshi Dr. Wingate	The claimant's work status

Robbins, therefore, is incongruent with the case at bar. *Robbins* does not stand for the proposition that an MRI interpretation alone is substantial evidence of there being no change of condition. Such a holding would result in an objective evidence standard, as a matter of law.

Furthermore, the deference afforded to the commission's fact finding in *Robbins* is not applicable to the case at bar. *Robbins* permits the commission weigh the testimony and give greater weight to certain portions of evidence. It does not permit the commission implement an objective evidence standard or reject uncontroverted evidence without competent evidence in support. *Brooks v. Benore Logistics System, Inc.*, 437 S.C. 376, 384, 879 S.E.2d 1, 5 (Ct. App. 2022).

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Furthermore, the Court appears to misapprehend other aspects of the evidence of this case, which affects its substantial evidence determinations. Most notably, the Court reached the exact opposite conclusion regarding Dr. Edwards' opinion as did the Court in 2016 (*"Russell I"*) (R. p. 68; Op. No. 2022-UP-422 p. 7). In 2016 the Court determined "Dr. Edwards testified to a reasonable degree of medical certainty there was chronic change in Russell's nerve, making it more painful or more symptomatic" and found "both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition." (R. p. 68). The Court in 2022, however, stated Dr. Edwards "could not say there had been physical change in Russell's condition."

The testimony from Dr. Edwards is at times convoluted, and he became frustrated during his deposition. The confusion and frustration, however, emanated from Wal-Marts' insistence upon an objective evidence standard, which Dr. Edwards acknowledged directly in the following exchange:

> [S]o it would imply to me that what you're saying is there's some – something we can look at and prove that has no subjective component to it that would indicate that the condition is worse and the answer to that is, no. But if you – if you rely on the physical examination and the demonstration of these parestesias that we're describing into this nerve distribution, that's part of an objective physical finding, though it does have a subjective component to it. So it's difficult to answer the question with a simple yes or no.

(R. p. 223). Any inference Dr. Edwards cannot testify as to change are driven by Wal-Mart's insistence he do so with objective evidence only. (R. pp. 223, 245, 247, 252). Dr. Edwards was forced, repeatedly, to constrain his opinions to those supported only by objective evidence. (R. pp. 223, 245, 247, 252). His testimony that he cannot say there was change without considering subjective evidence is not the same as he saying there was no physical change of condition. (R. p. 223). When permitted to consider objective and subjective evidence, Dr. Edwards' opinion was Russell suffered a physical change in condition. (R. p. 68, 212-215, 223).

Dr. Edwards explained why he did not rely solely on the MRI for his opinion stating "different radiologist, different MRI scans, and different backgrounds, professionally, can lead to a different description." (R. p. 211; *See also* R. pp. 237, 244). The Court in *Russell I* adopted Dr. Edward's reasoning, concluded that to do otherwise was equivalent to adopting an objective evidence standard, and concluded both doctors testified to a reasonable degree of medical certainty a change of condition occurred. (R. p. 68). The Court's 2022 opinion has deviated from the rationale of the Court in *Russell I.* Russell argues this deviation is without warrant, as the deviation is unsupported by competent evidence and can only be the result of a misapprehension of Dr. Edward's testimony.

***

Furthermore, the Court may have misapprehended the unimportance of Russell's alleged prior complaints when citing those findings as substantial evidence. The commission found, and the Court relied upon, statements as to whether and when Russell was a surgical candidate and when she experienced radicular symptoms. In doing so, however, the commission compared Russell's symptoms to irrelevant periods. A claimant suffers a change of condition when her

condition worsens "after the last payment of compensation." S.C. Code Ann. § 42-9-17. For this case, that is functionally a change after the case was adjudicated.

Symptoms Russell had prior to adjudication, but which had resolved, are of no consequence. The same is true for medical treatment for which she may have been a candidate. Russell's plight may be best understood with an exaggerated hypothetical:

> A pregnant woman is rendered quadriplegic in a work accident. Her doctors recommend surgery but opt to delay surgical intervention until her child is born. Surprising, she regains function during the course of her pregnancy and is adjudicated as having a 10% disability and no need for ongoing medical treatment. Six months later, she becomes paraplegic [or quadriplegic] and again her doctors recommend surgical intervention. The paraplegia [or quadriplegia] is undoubtedly related to her work place accident. Her MRI six months post adjudication is the same as her MRI immediately following the accident.

In that scenario, the claimant would be entitled to compensation for change of condition, for her condition would have worsened after the last payment of compensation (or adjudication). It would not matter that her condition six months after adjudication was precisely the same as it was immediately following the incident. If her new condition were paraplegia, it would not matter that her "worsened" condition was not as bad as it was immediately following the accident. Her entitlement to surgery is no way impacted by the fact she would have been a candidate for the same surgery immediately following the accident if she hadn't been pregnant.

The same applies here. Russell's symptoms or surgical candidacy prior to the final payment of compensation are not evidence that her condition has not worsened. When this matter was initially adjudicated, Russell had no symptoms in her legs and only needed ongoing NSAIDs. (R. p. 95). Because that was her status as of the last date compensation was paid, that is the condition upon which her alleged change must be compared. The commission's order cannot be supported by its citation to her prior surgical candidacy or prior radicular symptoms.

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Furthermore, the Court ostensibly overlooked the commission's failure to correct its errors as required by *Russell I*. While the Court correctly notes the commission stated it considered objective and subjective evidence, the order indicates the commission only stated the correct standard, without correcting the errors raised by the Court in 2016 or reviewing the evidence appropriately.

A review of the commission's order indicates a continued reliance on an objective evidence standard; the words "objective" and "subjective" are used throughout. (*E.g.* R. p. 5). The use of an objective evidence standard is pervasive. The chart below shows a smattering of quotes from the 2014 order that the Court found problematic in 2016 and that remained in the 2022 order.

2019 WCC	**2016 COA**	**2014 WCC**
"We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts." (R. p. 8).	Noting the order stated it "gave 'more weight to the medical records, the diagnostic tests, and the testimony of the medical experts,'" before showing that was untrue. (R. p. 68).	"We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts." (R. p. 79).
"We give limited weight to subjective testimony of the Claimant." (R. p 8).		"We give limited weight to the subjective testimony of the Claimant." (R. p. 79).
"The preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan[s]." (R. p. 8).	Showing reliance on objective evidence only: "The order also concluded, 'the preponderance of the evidence indicates that there was no objective difference between' the MRIs." (R. p. 68).	"The preponderance of the evidence indicates there was no objective difference between the Claimants MRI scan[s]." (R. p. 79).
"[T]he evidence shows that Claimant's radiographic condition has not worsened." (R. p. 9).	Showing reliance on objective evidence only: "'The evidence shows that Claimant's radiographic condition has not worsened.'" (R. p. 68).	"[T]he evidence shows that Claimant's radiographic condition has not worsened." (R. p. 80).
"[the] medical opinions do not support a physical change of condition for the worse." (R. p. 8).	"The order ignores that both doctors concluded to a reasonable degree of medical certainty that Russell suffered a change of condition." (R. p. 68).	"[The] medical opinions do not support a physical change of condition for the worse." (R. p. 79).

"Both Dr. Merritt and Dr. Edwards ultimately testified that [sic] was no objective or significant radiographical difference to be noted in the MRI scans." (R. p. 8).	"The Commission found both doctors 'ultimately testified that there was no objective or significant radiographical difference to be noted in the MRI scans.'" (R. p. 68).	"Both Dr. Merritt and Dr. Edwards ultimately testified that [sic] was no objective or significant radiographical difference to be noted in the MRI scans." (R. p. 80).
"We are cognizant of the fact that testimony from both doctors and statements out of medical records can be cherry-picked to support either position." (R. p. 8).	[2]	"We are cognizant of the fact that testimony from both doctors and statements out of medical records can be cherry-picked to support either position." (R. p. 8).
From the hearing transcript: "This is really an issue over the doctors' testimony and whether or not there's been an objective physical change." (R. p. 146).	Citing the hearing transcript as proof the commission relied only upon MRIs, "Wal-Mart argued '"This is really an issue over the doctors' testimony and whether or not there's been an objective physical change.'" (R. p. 67).	From the hearing transcript: "physical was synonymous with objective" "we still have the word physical. That has not been changed. We still have physical." (R. p. 6).

The commission failed to follow the instructions of *Russell I*. The commission initially decided this case based on the MRI results. It has refused to deviate from that analysis.[3] In doing so, it appears to be outcome driven. (*See e.g.*, R. p. 149).

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The Court ostensibly overlooked the commission's errors in its credibility determinations, as the Court did not address that portion of Russell's argument. To justify its sole reliance upon the objective evidence and disregard for the subjective evidence in this case, the commission made nonsensical credibility findings. Those erroneous credibility findings were an integral part to the commission's order and the Court's affirmation of that order.

[2] The Court cited this statement from the 2019 order in its 2022 opinion. That statement was also present in the 2014 order of the commission.

[3] The 2019 order of the Commission appears to be a scan of the original order, converted to editable text, with phrases added. (*See e.g.*, R. pp. 5-9 ("Dr. Merritt" is spelled "Dr. Merrill"); R. p. 4 ("Gattis" is spelled "Galtis"); R. p 4. (commas in case citations converted to periods); R. p. 7 ("Claimant" spelled "Clamant"); R. p. 9 ("tends" spelled "lends")).

The commission is tasked with making determinations of witness credibility, but those determinations are not immune from appellate review. *Able Communications, Inv. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). The commission describes Russell's testimony as "conclusory and self-serving" and offers in support of that finding that she was unable to establish she had new complaints, she was unable to establish when her condition worsened, and she was unable to establish her need for surgery was new. (R. p. 8). That explanation cannot withstand appellate review. When this case was first adjudicated, Russell only needed ongoing NSAIDS. Months after, she needed surgery. Whether she was previously a surgical candidate is of no consequence. The same follows for her new complaints. Her prior leg symptomology is of no consequence. The commission's conclusions are supported solely by Russell's prior reports of symptoms[4] and Dr. Edwards speculation as to her surgical candidacy well prior to the last payment of compensation.

The finding that she was incredible for not being able to establish when her complaints began is likewise unsupported and confusing. Russell testified her symptoms began in September or October of 2011, prior to her return to Dr. Merritt's office.[5] (R. p. 181). The commission is either requiring unreasonable specificity, or it is again making this finding based on her radicular symptoms prior to the claim's initial adjudication. Russell's testimony as to when her symptoms began is consistent with her medical records. Requiring specificity to the day is not reasonable. Her radicular symptoms were resolved at the time the claim was adjudicated and are not relevant.

The credibility findings of the commission seem connected with its outcome driven approach to this case. The commission frames the evidence as "doctor vs. claimant," but their

[4] The commission's inconsistent belief of symptoms appears outcome driven. In 2011, Commissioner Wilkerson believed Russell's account of her symptoms; in 2019, he did not. (R. pp. 8, 93; *see* also, discussion *infra* p. 9).

[5] Russell mistakenly stated the year as 2012 at this point; she corrected that error later in her testimony.

testimony is not inconsistent. Moreover, Dr. Edwards could be more credible than Russell, and she can still prove her case. A claimant does not automatically lose because he is not credible or is less credible than another witness. Further, the commission assesses the evidence of the case as "medical evidence" vs. "lay testimony." (R. p. 8). Medical evidence, as that term is defined in other parts of the Act, expressly includes medical reports and opinion testimony stated to a reasonable degree of medical certainty. S.C. Code Ann. § 42-1-172 (C). The MRIs may not show an obvious, objective change, but that does not mean the medical evidence on the whole does not support Russell's position. If Russell cannot prove a change of condition when the only contrary evidence is the MRIs, then no claimant could prove a change of condition absent a radiographical change.

Of note, this is not a scenario where a credibility finding is made based on a claimant's dodgy eyes, the way she answers questions, or a gut feeling. The commissioners on the appellate panel have never met or seen Russell, with the exception of Commissioner Wilkerson. Commissioner Wilkerson heard Russell's case in 2011, and after he "judge[d] her credibility as a witness" did not find she lacked credibility. (R. p. 92). Without specifying why, he years later signed an order finding her testimony was not believable. Commissioner Roche, who watched Russell testify, stated, "I find Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible." (R. 86). Commissioner Campbell, who issued an order later vacated on procedural grounds, found Russell credible based on his review of the record. (R. pp. 61, 166).

The credibility finding of the commission appears most inconsistent, however, when viewed in light of Wal-Mart's argument to the commission in 2014. There, counsel for Wal-Mart stated, "I would agree with Commissioner Roche that there was certainly a change in the subjective complaints. I would also agree with Commissioner Roche that Ms. Russell comes across really

well." (R. p. 166). Everyone agrees Ms. Russell is credible. Even counsel for Wal-Mart agrees she had a worsening of her symptoms. (R. p. 166). Nevertheless, the commission finds Russell's testimony as to her symptoms is only entitled to "limited weight as it is conclusory and self-serving." (R. p. 8).

The commission's credibility findings must specify why it reversed Commissioner Roche's finding of creditability. *Able Communications*, 290 S.C. at 411, 351 S.E.2d at 152. Russell did not testify before the commission's appellate panel. It nevertheless found her incredible, reversed the credibility findings of every preceding commissioner, including one sitting on the panel, and failed to provide adequate citations to the record as to why it reached that decision.

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As outlined above, the Court appears to have overlooked or misapprehended certain portions of Russell's arguments. Therefore, Russell respectfully requests the Court grant this petition and issue an opinion finding she sustained a compensable change of condition. This is a complex case with important issues. It has a tortured procedural history. This Court has reached differing conclusions as to pertinent portions of this case. Consequently, Russell suggests the rehearing of this matter be *en banc* to secure uniformity in the Court's decisions and to address the important issues raised in this appeal.

s/ James D. George, Jr.
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December 8, 2022

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APPEAL FROM THE SOUTH CAROLINA
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Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2019-001380

Paula Russell, Appellant,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 8, 2022, he served counsel for Respondents with the Appellant's Petition for Rehearing by emailing a copy of the same to his below listed email address as maintained in the Attorney Information System:

Johnnie W. Baxley, III
jwbaxley@wjcblaw.com

Enclosed with this Proof of Service is a copy of the transmittal email.

Respectfully Submitted,

s/ James D. George, Jr.
James D. George, Jr.
Chappell, Smith & Arden
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Columbia, SC 29205
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December 8, 2022

From: **James D. George Jr.** JGeorge@csa-law.com
Subject: Russell v. Wal-Mart App. No. 2019-001380
Date: December 8, 2022 at 2:58 PM
To: jwbaxley@wjcblaw.com
Cc: Danny Vega dvega@csa-law.com, James D. George Jr. JGeorge@csa-law.com, Kim W. Spicer kspicer@csa-law.com

JG

Johnnie,

Attached please find the Appellant's Petition for Rehearing of the above referenced matter. The Petition is served upon you only by email.

Momentarily, I will upload the Petition, a cover letter, and Certificate of Service to the Court of Appeal's OneDrive system. Additionally, I am hand delivering the a second cover letter, also attached, with a check for the filing fee associated with the Petition.

Best,

JDG

PDF

Petition for Rehear….22.pdf

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December 8, 2022

Via OneDrive Only
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appels
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RE: Paula Russell, Appellant vs. Wal-Mart Stores, Inc., Employer & Illinois National Insurance Company, Carrier, Respondents
Appellate Case No.: 2019-001380

Dear Ms. Kitchings:

Submitted with this letter, please find the following documents for filing regarding the above referenced matter:

1. Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc*;
2. Proof of Service.

These materials are submitted via OneDrive only. Per the supreme court's order of August 25, 2021, physical or additional copies are not being submitted at this time. Immediately upon notice from the Court, Appellant will submit any requested physical or additional copies per the Court's request.

The filing fee for the Petition will be hand delivered under separate cover.

Thank you for your assistance in this matter.

Very Truly Yours

Very Truly Yours,

s/ James D. George, Jr.
James D. George, Jr.
Attorney for Respondent

JDG/
Enclosures
cc: Johnnie W. Baxley, III, Esquire

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December 8, 2022

Via Hand-Delivery
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appels
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RE: Paula Russell, Appellant vs. Wal-Mart Stores, Inc., Employer & Illinois National Insurance Company, Carrier, Respondents
Appellate Case No.: 2019-001380

Dear Ms. Kitchings:

Appellant submitted her Petition for Rehearing and Suggestion for Rehearing *En Banc* via the Court's OneDrive system on December 8, 2022. Enclosed with this letter is the filing fee for that Petition.

Thank you for your assistance in this matter.

Very Truly Yours,

s/ James D. George, Jr.
James D. George, Jr.
Attorney for Respondent

JDG/
Enclosures
cc: Johnnie W. Baxley, III, Esquire

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December 8, 2022

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Columbia, SC 29211

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Appellate Case No.: 2019-001380

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Very Truly Yours,

s/ James D. George, Jr.
James D. George, Jr.
Attorney for Respondent

JDG/
Enclosures
cc: Johnnie W. Baxley, III, Esquire