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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, Petitioner,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

**PETITION FOR A
WRIT OF CERTIORARI**

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Certificate of Counsel

The South Carolina Court of Appeals issued its opinion in this matter on November 23, 2022. Counsel for Petitioner Paula Russell certifies that the petition for rehearing was filed and served on December 8, 2022, and denied on February 10, 2023.

Questions Presented

- I. Whether the court of appeals erred in affirming the workers' compensation commission's appellate panel order and concluding the panel did not impose an objective evidence standard?
- II. Whether the court of appeals erred in failing to reverse or remand on the commission's credibility findings and findings regarding the onset of Petitioner's symptoms?
- III. Whether the court of appeals affirmed an order of the commission that did not remedy the errors it was instructed by the court to remedy.

Statement of the Case

This appeal represents Petitioner Paula Russell's decade-long pursuit of medical treatment and workers' compensation benefits. At this point, the parties, Courts, and the Workers' Compensation Commission (hereinafter the "commission") have tortured the phrases "extensive procedural history" and "tortured procedural history," yet that history continues to grow. In 2009, Petitioner suffered injuries to her back while working at a Wal-Mart store in Conway, South Carolina. (R. p. 94). She pursued workers' compensation benefits as a result and after a 2011 hearing before Commissioner Avery Wilkerson, was awarded a permanent disability award of seven (7) percent and an entitlement to ongoing anti-inflammatory medications. (R. p. 94).

Later in 2011, Petitioner's condition worsened, so she filed a claim for benefits alleging a change of condition for the worse, per section 42-17-90(A). Commissioner Andrea Roche heard her claim on February 11, 2013, found Petitioner suffered a change of condition, and found she was entitled to medical treatment and temporary total disability benefits. (R. p. 83, 89). Respondents, Wal-Mart Stores, Inc. and American Home Assurance, appealed that order arguing Commissioner Roche erred because Petitioner "failed to meet her burden of proof demonstrating to a reasonable degree of medical certainty that there were any *objective* changes in her physical condition." (R. p. 279 (emphasis added)). The commission's appellate panel agreed and issued an order on January 30, 2014, finding Petitioner failed to meet her burden of proof. (R. p. 82).

Petitioner appealed to the court of appeals, which held the commission erred by requiring Petitioner prove her claim with objective evidence. (R. p. 68). The court of appeals stated the commission "ignore[d] that both doctors concluded, to a reasonable degree of medical certainty, that [Petitioner] suffered a change of condition." (R. p. 68). Therefore, the court reversed the order and remanded for the commission to apply the appropriate burden of proof. (R. p. 68).

Upon remand to the commission's appellate panel, the panel further remanded the matter to Commissioner Michael Campbell, II. Commissioner Campbell found Petitioner met her burden of proof and awarded medical and temporary disability benefits. (R. p. 64). Respondents then appealed that order to the commission's appellate panel, which reversed and remanded to Commissioner Campbell, with instructions to conduct a full evidentiary hearing and de novo review of the case. (R. p. 32). Petitioner appealed that commission appellate panel order to the court of appeals, which dismissed the appeal as interlocutory. (R. p. 12). This Court granted Petitioner's petition for certiorari, and issued an opinion on April 3, 2019, finding the matter was immediately appealable and finding the commission's appellate panel erred in ordering multiple remands. (R. pp. 13-15). Therefore, this Court reversed the appellate panel's remand order and remanded the matter to the appellate panel with instructions to review the 2013 order of Commissioner Roche in accordance with the 2016 holding of the court of appeals. (R. pp. 12-16).

On July 18, 2019, the commission issued a third order, again finding "[Petitioner's] Radiographic condition has not worsened; any alleged worsening in this case is solely based on [Petitioner's] subjective complaints; and Dr. Edwards admits there is nothing he could look at that does not have a subjective component to it to show [Petitioner's] condition is worse." (*Compare* R. p. 7 *with* R. p. 77). The commission added statements that "[w]hile we have considered [Petitioner's] testimony and given it due consideration, we give greater weight to the objective evidence." (R. p. 7). The commission found Petitioner was not entitled to benefits. (R. p. 9).

Petitioner thereafter appealed that order to the court of appeals, alleging four errors: 1) The commission again premised its order on the lack of objective evidence; 2) the commission again required objective evidence despite the 2016 court of appeals opinion; 3) the commission erred in denying Petitioner benefits based on its finding that her testimony was "conclusory" and "self-

serving”; and, 4) the commission erred in its fact finding. (Appellant final brief to COA). The court of appeals issued an opinion November 23, 2022, affirming the order of the commission. The court found the commission did not commit an error of law in the standard it applied to the case and found no factual errors in the commission order. (*Russell v. Wal-Mart Stores, Inc.*, No. 2022-UP-422 (S.C. Ct. App. Nov. 23, 2022)). The court specifically found “Dr. Edwards could not say there had been a physical change in Russell’s condition,” in direct contrast to its 2016 opinion. (*Compare* R. p. 69 *with* Russell, No. 2022-UP-422 at *7). Petitioner filed a timely petition for rehearing on December 8, 2022, asserting the court misapprehended the evidence of the case, misapprehended Petitioner’s four arguments, and overlooked the vital differences between the case sub judice and *Robbins v. Walgreens & Broadspire Servs., Inc.* (Dec. 8, 2022 petition for rehearing). The court of appeals denied that petition on February 10, 2023.

Petitioner’s most recent Appellant Brief, filed in the court of appeals, contains a lengthy recitation of the history and evidence of this case, but despite the multiple appeals, the evidence here is not extensive. The evidence arises from three sources: Dr. Edwards, Dr. Merritt, and the Petitioner. However, the commission considered a fourth source: its interpretation of Petitioner’s MRIs. Viewed objectively, that evidence must be grouped in one of three ways:

Option A	No Change	Neutral	Change
	MRI	Dr. Edwards	Dr. Merritt; Russell
Option B	No Change	Neutral	Change
	MRI		Dr. Merritt; Dr. Edwards; Russell;
Option C	No Change	Neutral	Change
		MRI	Dr. Merritt; Dr. Edwards; Russell;

In 2013, Commissioner Roche adopted Option C in finding the claim compensable. The court of appeals in 2016 adopted Option C. Commissioner Campbell, whose order was vacated indirectly by this Court in 2019, adopted Option C. The court of appeals in 2022, without explanation, changed course and adopted option A instead of Option C. The commission's appellate panel consistently adopts Option A, finding a lack of clear objective MRI evidence conclusive. Pursuant to this Court's 2019 opinion, no additional evidence has been considered. The evidence of this case is the same as it was in 2013.

Dr. Merritt testified plainly that a change occurred. (R. p. 240). That has not been meaningfully disputed. Counsel for Respondents pushed Dr. Merritt asking "Can you say to a reasonable degree of medical certainty that there has been a change in the objective status of her low back condition?" (R. p. 245). After seeking to have the question clarified, Dr. Merritt continued to testify he believed the MRI showed a change, but eventually conceded that Dr. Edwards is likely more of an expert on spine MRIs. Nonetheless, Dr. Merritt never wavered from his testimony that Petitioner suffered a change of condition for the worse. (R. p. 252). He testified Petitioner had some associated radicular symptoms early in treatment, those resolved, and after the claim was adjudicated, returned as a more significant issue. (R. p. 251). Dr. Merritt, an orthopedic surgeon, was an authorized treating physician, selected by the Respondents. (R. p. 233).

Dr. Edwards likewise testified that a change occurred in his opinion, when he was permitted to consider the subjective and objective findings of his evaluations. (R. p. 217-18 "I think clinically her symptoms are more significant now than they were when I first saw her."). When asked only to consider the MRIs, Dr. Edwards testified the MRIs "all look about the same." (R. p. 222). But, when asked, "I believe you said, predominantly, it's a sub --- subjective worsening; is that correct?," by counsel for Respondents, he again confirmed "that's right." (R. p.

222). Throughout Dr. Edward's deposition, Respondents sought opinion testimony that did not consider subjective evidence or differentiated the subjective and objective clinical findings. Dr. Edwards testified as to his perception of that differentiation stating:

So 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 paresthesias 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.

(R. p. 223). Dr. Edwards, in sum, testified he could not perceive a change on the MRIs, but that when considering the entirety of his physical examination, a change of condition occurred. Like Dr. Merritt, Dr. Edwards was a Respondent selected authorized treating physician. He is a spine surgeon. (R. p. 247). Dr. Edwards recommended surgery to Petitioner. (R. p. 218).

Finally, Petitioner testified a change of condition occurred. (R. p. 188). She testified that any symptoms in her legs prior to April of 2011 were of a different nature, not sharp, and occurred shortly after giving birth. (R. p. 191). Correspondingly, when this claim was first adjudicated by Commissioner Wilkerson in 2011, he found that after Petitioner gave birth, Dr. Merritt indicated no surgery was required and subsequently released her from treatment. (R. p. 93). Commissioner Wilkerson further stated "Claimant testified that her pelvic pain last surfaced during her FCE, but those problems have resolved." (R. p 93). In 2011, Commissioner Wilkerson found no impairment, disability, or symptomology in Petitioner's pelvis or leg when he adjudicated the claim and found her only future medical entitlement was anti-inflammatory medication. (R. pp. 94-96).

Arguments

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 Court rejects “a literal and strict construction” of section 42-17-90 because the “well settled rule” is that “a liberal construction is required.” *Allen v. Benson Outdoor Advert. Co.*, 236 S.C. 22, 30, 112 S.E.2d 722, 725 (1960).

Here, the court of appeals affirmed the commission's narrow findings, even though unsupported by substantial evidence. For that reason, Petitioner respectfully requests the Court grant her Petition. Moreover, this case involves important matters dealing with novel or unclear areas of the law, the court of appeals reached conflicting conclusions, and the court of appeals' opinion conflicts with this Court's 2019 opinion. *See* Rule 242(b), SCACR; *Compare Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 284, 826 S.E.2d 863, 864 (2019) (*Russell II*) (“[t]he [Commission] panel discounted the testimony and medical records of the two physicians.”) *and Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 400, 782 S.E.2d 753, 756 (2016) (*Russell I*) (“the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition.”) *with Russell*, No. 2022-UP-422 (*Russell III*) (“Dr. Edwards could not say there had been a physical change in Russell's condition.”); *See also Russell III* (“Dr. Edwards stated it was difficult to answer to a reasonable degree of medical certainty whether there had been any *physical* worsening of Russell's condition because although there was ‘an *objective*

physical finding of nerve distribution,’ it contained ‘a *subjective* component to it.’”). This matter is vitally important to Petitioner, who awaits medical treatment, but it is also special and important in a broader sense, such that further review is needed.

I. The Court of Appeals Erred in its Affirmation of the Commission’s Continued Reliance upon an Objective Evidence Standard.

The court of appeals erred in its affirmation of the commission’s continued reliance upon an objective evidence standard. In its December 2013 Order, the commission, according to the court of appeals, relied solely on objective evidence in denying Petitioner’s claim. The commission did so again in 2019. The evidence in this case comes from only four sources: Russell’s testimony, Dr. Merritt’s testimony, Dr. Edward’s testimony, and the MRI results. Objectively assessing the evidence, it must be organized in one of three ways¹:

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. The court of appeals 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 of appeals stated Dr. Edwards could not say there had been a physical change. *Russell III*. 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 MRIs. 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.”). 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 of appeals relied upon *Robbins v. Walgreens & Broadspire Servs., Inc.*, in reaching its decision. 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007). *Robbins* is fully distinguishable from the case sub judice and should not have been used to support the affirmation of the Commission. In *Robbins*, 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 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. 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 portions of evidence. It does not permit the commission implement an objective evidence standard, nor does it permit the commission 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).

Furthermore, the court of appeals reached the exact opposite conclusion regarding Dr. Edwards' opinion as did the court of appeals in 2016. (R. p. 68; *Russell III*). In 2016 the court of appeals 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 of appeals in 2022, however, stated Dr. Edwards "could not say there had been physical change in Russell's condition." The court either accepted the proposition that physical is synonymous with objective, or it failed to recognize Dr. Edwards' consternation with having to provide opinion testimony based solely on objective evidence, without any consideration of subjective findings. The court wrote, "Dr. Edwards stated it was difficult to answer to a reasonable degree of medical certainty whether there had been any physical worsening of Russell's condition because although there was 'an objective physical finding of nerve distribution,' it contained 'a subjective component to it.'" *Russell III*. The quotes relied upon by the court show plainly that Dr. Edwards' testimony is a result of his being constrained to objective evidence and led to believe that the physical standard meant objective or radiographic evidence, when read in context. In full, Dr. Edwards stated:

[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 paresthesias 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 suggestion Dr. Edwards cannot testify as to a change of condition is driven by Respondents' insistence he do so with objective evidence only. (R. pp. 223, 245, 247, 252).

Dr. Edwards was forced to constrain his opinions to those supported only by objective evidence. (R. pp. 223, 245, 247, 252). His testimony that he cannot say a change occurred without considering subjective evidence is not testimony there was no physical change of condition. (R. p. 223). When permitted to consider objective and subjective evidence, Dr. Edwards opined Russell suffered a physical change of condition. (R. p. 68, 212-215, 223). He stated plainly "that's correct" when asked by counsel for Respondents if the worsening was predominantly subjective. (R. p. 222). But, he did not question the worsening stating, "it's clear that the patient's symptoms are now worse. I don't have any --- I don't have any doubt about that . . . clinically." (R. p. 212); *Estridge v. v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 581 (Ct. App. 1997) ("A condition which is induced by a physical injury, is thereby causally related to that injury. It is a new symptom manifesting from the same harm to the body. In such circumstances, it may be properly compensated in a change of condition as part of the original injury.").

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 of appeal's 2022 opinion has deviated from the rationale of the court in *Russell I*. Petitioner argues this deviation is unwarranted, as the

deviation is unsupported by competent evidence and requests this Court grant her Petition to remedy that error.

II. The Court of Appeals Failed to Address the Commission’s Credibility Findings and Erred in its Reliance upon the Commission’s Findings Regarding the Onset of Petitioner’s Symptoms.

The court of appeals failed to address the commission’s credibility findings and erred in its reliance upon the commission’s findings regarding the onset of Petitioner’s symptoms. 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 findings were an integral part of the commission’s order and the court of appeals’ affirmation of that order. Petitioner raised, in her brief and petition for rehearing, those errors, but the court of appeals did not address them.

The commission is tasked with making determinations of witness credibility, but those determinations are not immune from appellate review. *Crane v. Raber’s Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020); *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 symptoms² and Dr.

² In 2011, the Commission believed Russell’s account of her symptoms; in 2019, it did not. (R. pp. 8, 93) (*See Infra* p. 14).

Edwards' speculation as to her surgical candidacy well prior to the last payment of compensation. *See* S.C. Code Ann. §42-17-90 (A) (“the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, 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).

The commission's finding that Petitioner was incredible for not being able to establish when her complaints began is unsupported and confusing. Petitioner testified her symptoms began in September or October of 2011, prior to her return to Dr. Merritt's office.³ (R. p. 181). Petitioner's testimony as to when her symptoms began is consistent with her medical records. The commission is either requiring unreasonable specificity, or it is making this finding based on her radicular symptoms well prior to the claim's initial adjudication. 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 court of appeals erred in not reviewing those findings.

The commission frames the evidence as “doctor vs. claimant,” but their testimony is not inconsistent. 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. Correspondingly, 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 commission's,

³ Russell mistakenly stated the year as 2012 at this point; she corrected the year later in her testimony. (*See e.g.* R. pp. 187, 196).

as opposed to the physician, presumed significance of 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 was 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 Petitioner, 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 further appears inconsistent when viewed in context of Respondents' argument to the commission in 2014. There, counsel for Respondent 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 Respondents agrees she had a worsening of her symptoms.⁴ (R. p. 166). Nevertheless, the commission finds Russell's

⁴ In their return to Petitioner's petition for rehearing, Respondents claim they did not take this position stating "[Petitioner] 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 arguments" (Respondent Return to Petition for Rehearing *8). The full quote from counsel's appellate panel argument is:

Commissioner Barden: Except as to subjective symptomology, which Commissioner Roche found was credible.

Mr. Baxley: Credible, yeah.

Commissioner Barden: --- based upon the Claimant's testimony.

Mr. Baxley: And frankly, Commissioner though --- there's got to be a physical change of the condition for the worse. I would agree with Commissioner Roche that there was certainly a change in the subjective complaints. I'd also agree with Commissioner Roche that Ms. Russell comes across really well.

(R. pp. 165-66). Despite, this, the commission found Petitioner not credible. (R. p. 8).

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; *Crane*, 429 S.C. at 646-47, 842 S.E.2d at 354. Petitioner 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. The court of appeals’ failure to review the credibility findings necessitates further review by this Court.

The court of appeals’ only adjacent conclusions regarding Petitioner’s credibility surround its affirmation of the commission’s findings regarding whether and when Petitioner was a surgical candidate and when she experienced radicular symptoms. In doing so, however, the commission compared Petitioner’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 Petitioner had prior to adjudication, but which had resolved, are of no consequence. *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 280, 678 S.E.2d 825, 830 (Ct. App. 2009) (“[r]eview of an award at a change of condition hearing is, therefore, concerned with the date at which the claimant’s condition was determined.”); *Estridge v. v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 581 (Ct. App. 1997) (“[a] symptom which is present and causally connected, but found not to impact upon the claimant’s condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her

condition” and “[a] condition which is induced by a physical injury is thereby causally related to that injury.”). The same is true for medical treatment for which she may have been a candidate.

Petitioner’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 had not 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 alleged prior surgical candidacy or prior radicular symptoms. The commission’s credibility findings are not supported by substantial evidence, and this Court must grant this Petition to rectify those errors.

III. The Court of Appeals Failed to Require the Commission Correct the Errors Found in *Russell I*.

The court of appeals failed to require the commission correct the errors found in *Russell I*. The order of the commission shows it only reiterated the appropriate standard, without correcting the errors raised by the court of appeals in 2016 and without reviewing the evidence properly. 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 of appeals found erroneous in 2016, but which remained in the commission’s 2019 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).

2019 WCC	2016 COA	2014 WCC
“[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).	5	“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. In doing so, it appears to be outcome driven. (*See e.g.*, R. p. 149).

Respondents asserted to the court of appeals that this Court authorized the commission blindly insert buzz words into its order and asserted this Court found Respondents never advocated

⁵ The court of appeals cited this statement from the 2019 order in its 2022 opinion. That statement was also present in the 2014 order of the Commission, but did not function to save the order from remand.

for an objective evidence standard.⁶ Specifically, when arguing in support of the commission order, Respondents rely upon statements made by Justice Hearn during oral arguments to argue issuing a new order only stating the commission considered subjective evidence would, without more, permit the order withstand appellate review. Petitioner believes this was not Justice Hearn's intent. (COA Brief of Respondent, p. 12).

Additionally, Respondents rely upon statements from Justice Kittredge at oral arguments to support the proposition that Respondents never argued for an objective evidence standard. (*See* Respondents' 2020 Final Brief pp. 10-11; Respondents' 2022 Return to Petition for Rehearing pp. 8-9). Respondents utilize the same statement from Justice Kittredge to argue it never conceded Petitioner was credible or had a subjective worsening. (Respondents' 2022 Return to Petition for Rehearing pp. 8-9). The Court reviewed this matter on procedural grounds and on a limited appendix in 2019; no record on appeal was generated. However, the record for this appeal shows plainly the court of appeals did not assign a straw-man argument to Respondents. They consistently advocated for an objective evidence burden of proof prior to this case's initial appeal.

To wit, when deposing Dr. Merritt in preparation for the change of condition hearing, Respondents' counsel asked Dr. Merritt, "Can you say . . . there has been a change in the objective status of [Petitioner's] low back condition?" and further asked "can you say there's been an objective change . . . ?" (R. pp. 245-46). When placing their position on the record for the 2013 hearing before Commissioner Roche, counsel for Respondents stated "we would contend there needs to be objective physical evidence of a change of condition." (R. p. 178). After Commissioner Roche found Petitioner suffered a change of condition, the sole argument made by Respondents was "The Hearing Commissioner erred in finding Claimant/Respondent sustained a

⁶Petitioner does not assert the court of appeals adopted these positions, but raises them due to her concern they affected the opinion of the court of appeals, as they were not addressed.

change of condition for the worse under Sec. 42-17-90 because Claimant failed to meet her burden of proof demonstrating to a reasonable degree of medical certainty that there were any objective changes in her physical condition.” R. p. 279. Of note, Respondents did not argue in 2013 that Dr. Edwards could not testify a change of condition occurred, instead, they argued only that “[Dr. Edwards] can not state to a reasonable degree of medical certainty that Claimant has sustained a change of condition for the worse based upon the objective radiographic studies.” (R. p. 282). In the argument before the appellate panel in 2013, counsel for Petitioners argued “this is really an issue over the doctors’ testimony and whether or not there’s been an objective physical change of condition for the worse.” (R. p. 162).

Furthermore, in 2017, before the appellate panel which issued the order this Court ultimately vacated in 2019, counsel for Respondent engaged in the following dialog: “Commissioner Barden: I was laboring under it, as I’ve said earlier today, other than this apprehension for 13 years, that physical was synonymous with objective. So we’ve been told --- Mr. Baxley: So was I.” (R. p. 146). Respondents advocated for an objective evidence burden until the court of appeal’s 2016 opinion. Their doing so corrupted the physician testimony in this matter. Viewed in light of that corruption, both Drs. Merritt and Edwards testified Petitioner suffered a change of condition for the worse. For those reasons, Petitioner respectfully requests the Court grant this Petition and provide further review of this matter.

Conclusion

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should grant this Petition and reverse the commission order.

[Signature Page to Follow]

s/ James D. George, Jr.
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March 10, 2023

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Mar 13 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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, Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on March 10, 2023, he served counsel for Respondents with the Petitioner's Petition for a Writ of Certiorari 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.

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March 10, 2023

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Mar 13 2023
SC Court of Appeals

Via OneDrive Only*

The Honorable Patricia Howard
Clerk of Court
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

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

Dear Ms. Howard:

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

1. Petitioner's Petition for a Writ of Certiorari;
2. Proof of Service;
3. Rule 242(d)(1), SCACR Certification;
4. Filing Fee.*

The Petition and Certification are submitted via OneDrive only. Per the Court's order of August 25, 2021, physical or additional copies are not being submitted at this time, and an appendix has not been prepared. Immediately upon notice from the Court, Petitioner 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,

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

JDG/

Enclosures

cc: Johnnie W. Baxley, III, Esquire