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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION**

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Unpublished Opinion No. 2022-UP-422 (S.C. Ct. App. filed Nov. 23, 2022)  
Appellate Case No. 2019-001380

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Paula Russell, Claimant, Petitioner,

v.

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

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**RETURN TO PETITION  
FOR WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

- I. Has Petitioner stated any grounds upon which this Honorable Court should grant a writ of certiorari?

## **STATEMENT OF THE CASE**

On November 3, 2009, Paula Russell (hereinafter “Petitioner”) sustained an admitted injury to her back arising out of and in the course of her employment with Wal-Mart. A hearing was held on April 13, 2011, and on June 8, 2011, the Commission ordered that Petitioner reached maximum medical improvement for her work-related injury on February 2, 2011, and was entitled to a 7% permanent partial disability to the back and ongoing pain medication.

On December 9, 2011, Petitioner filed a Form 50 claiming she was experiencing a change of condition for the worse. 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 Petitioner suffered a change of condition for the worse and ordered Respondents to provide Petitioner 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 Petitioner 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. Petitioner 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 Petitioner experienced a change of condition by a preponderance of the evidence in the record.

The case was remanded to Commissioner Michael R. Campbell, who found that Petitioner 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*. Petitioner 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. Petitioner 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 Petitioner did not suffer a change of condition for the worse based on the record as a whole, considering both the subjective and objective evidence. Petitioner appealed to the Court of Appeals, which affirmed the Full Commission's decision in full by Opinion filed November 23, 2022. Thereafter, Petitioner filed a Petition for Rehearing with the Court of Appeals, which was denied. Petitioner subsequently filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on March 10, 2023.

## ARGUMENTS

### **I. PETITIONER STATES NO GROUNDS UPON WHICH THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.**

The South Carolina Appellate Court Rules state that a writ of certiorari “will be granted only where there are “special and important reasons.” SCACR Rule 242. Rule 242 sets forth five main reasons that the Supreme Court will grant a writ of certiorari: (1) Where there are novel questions of law, (2) where there is a dissent in the decision of the Court of Appeals, (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, (4) where substantial constitutional issues are directly involved, and (5) where there is a federal question. None of these reasons apply to the instant case.<sup>1</sup> However, in response to Petitioner’s questions presented and related arguments, Respondents offer the following arguments in support of their position that this Honorable Court should not grant a writ of certiorari.

#### **A. This case presents no novel question of law.**

Petitioner has raised no novel questions of law. It is well-settled what a workers’ compensation claimant must establish in order to prove a change of condition for the worse. The law is equally clear that objective evidence is not required to prove a change of condition for the worse by a preponderance of the evidence, which is explicitly acknowledged and applied by the Commission in its Order. (Conclusion of Law #6, R. p. 10). The near entirety of Petitioner’s Petition for Writ of Certiorari discusses issues of fact, not law. Petitioner wishes to create unclarity and novelty where none exists. An unfavorable factual decision does not inherently make for a “special or important reason” upon which this Court should grant certiorari.

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<sup>1</sup> While Petitioner has stated no grounds upon which a writ of certiorari should be granted, it is specifically unquestionable that no dissent, constitutional issue, or federal question is involved in this case.

**B. The decision of the Court of Appeals does not conflict with prior decisions of this Honorable Court.**

Petitioner contends that the most recent (2022) decision of the Court of Appeals conflicts with this Court’s 2019 decision in this matter. First, Petitioner alleges that these decisions conflict because of differing characterizations of the evidence. However, as Petitioner states in her Petition for Writ of Certiorari, “[this] Court reviewed this matter on procedural grounds and on a limited appendix in 2019; no record on appeal was generated.” (Petition for Writ of Certiorari, p. 19). Moreover, this Court made no holdings with regard to the merits of the case and remanded the case back to the appellate panel for “immediate and final review of the original commissioner’s August 5, 2013 order in accordance with the 2016 holding of the court of appeals”. *Russell v. Wal-Mart Stores, Inc.* 426 S.C. 281, 291, 826 S.E.2d 863, 868 (2019). Likewise, the 2016 decision of the Court of Appeals specifically declined to consider the merits of Petitioner’s change of condition claim and remanded the case to the Commission for determination. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct.App. 2016). As such, there is no conflict between the 2022 decision of the Court of Appeals and any previous appellate decisions.

Secondly, Petitioner alleges that “[t]he court of appeals fails to require the [C]ommission correct the error found in *Russell I.*” (Petition for Writ of Certiorari, p. 17). Just as she did before the Court of Appeals, Petitioner continues to argue that “... the order of the [C]ommission shows it only reiterated the appropriate standard, without correcting the errors raised by the [C]ourt of [A]ppeals in 2016 and without reviewing the evidence properly.” *Id.* Specifically, Appellant alleges that the Commission’s order indicates a continued reliance on an objective standard; the words “objective” and “subjective” are used throughout.” *Id.* However, a plain reading of the Commission’s Order proves this argument to be incorrect.

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

Petitioner further argues that the Commission did not contemplate the opinions of the physicians as directed by the Court of Appeals in its 2016 decision, resulting in the requirement of objective evidence. However, the Commission clearly indicates it considered the medical reports, the diagnostic tests, the testimony of Dr. Merritt, the testimony of Dr. Edwards, and the testimony of Petitioner. (Findings of Fact #8, #9, and #11, R. p. 8). In her Petition for Writ of Certiorari, Petitioner attempts to manufacture a reliance on an objective standard by improperly categorizing the medical evidence in this case into three conclusive categories: No change [of condition], neutral, and change [of condition]. (Petition for Writ of Certiorari, p. 8). This is a great

oversimplification and mischaracterization of this evidence. The medical evidence in this case is complicated and often times contradictory. Such evidence must be considered in conjunction with the medical records, expert testimony, diagnostic imaging, and Petitioner's testimony from both before and after the original hearing. More importantly, it is within the sole discretion of the Commission to adjudicate and weigh this evidence. *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (2000) (the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel of the Workers' Compensation Commission). Petitioner acknowledges this well-settled principle in addressing the Court of Appeal's citation to its decision in *Robbins v. Walgreens & Broadspire Servs., Inc.* (Petition for Writ of Certiorari, p. 10 ("Robbins permits the commission weigh the testimony and give greater weight to portions of the evidence").

Similarly, Petitioner contends that "the significance the [C]ommission placed on the MRIs is improper" and incorrectly states that "the only evidence upon which the Commission's [O]rder is or can be based on is its interpretation of the significance of the MRIs." (Petition for Writ of Certiorari, p. 8-9). This is an argument as to weight of evidence. Petitioner is mischaracterizing the Commission giving weight to certain evidence as conclusive proof that no other evidence was considered. As discussed in Respondents' Final Brief submitted to the Court of Appeals, the Commission did not solely or inappropriately rely on the MRI scans in making its decision. In fact, the Commission expressly states in its Order that it gave more weight to the medical records, the diagnostic tests, *and* the testimony of the medical experts, "which they found to be more persuasive than Petitioner's testimony when considering the record as a whole." (R. p. 11). Attributing more weight to an objective piece of evidence under the specific set of facts in this case does not equate to a requirement by the Commission that a change of condition claim be proven with objective

evidence. The Commission did not prohibit, ignore, or disallow evidence that was not objective evidence. In fact, the plain language of the Commission's Order makes it extremely clear that the Commission considered and weighed *all* of the evidence, both objective and subjective. Simply because a piece of evidence was ultimately weighed unfavorably to Petitioner does not mean that the evidence was not duly considered or properly weighed by the Commission.

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

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

The South Carolina Administrative Procedures Act ("APA") establishes the "substantial evidence" standard for judicial review of decisions of the Workers' Compensation Commission.

*Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); S.C. Code Ann. § 1-23-380 (Supp. 2007). In workers' compensation cases, the Commission is the ultimate finder of fact. *Hunter v. Patrick Const. Co.*, 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); *Ross v. American Red Cross*, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). The determination of whether a claimant experiences a change of condition is a question for the fact finder and must be affirmed if substantial evidence supports the Commission's finding. *Clark v. Aiken County Government*, 366 S.C. 102, 111, 620 S.E.2d 99, 103 (S.C. Ct. App. 2005) (citing *Gattis v. Murrell's Inlet VFW #10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (S.C. Ct.App. 2003); *Solomon v. W.B. Easton, Inc.*, 307 S.C. 518, 415 S.E.2d 841 (S.C. Ct. App. 1992)). An appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. *Bentley v. Spartanburg County*, 398 S.C. 418, 421, 730 S.E.2d 296, 298 (2012) (citing S.C. Code Ann. § 1-23-380(5)). Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 272, 274 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. *Id.*

Petitioner alleges that the Court of Appeals must have not reviewed or considered aspects of the evidence and Petitioner's argument in affirming the Commission's decision, as there is no other way to reach the Court's ultimate conclusion. (*See* Petition for Writ of Certiorari). Respondents respectfully disagree. As noted by the Court of Appeals in its 2022 decision, there is evidence on both sides of this case, and the Court properly found that substantial evidence exists to support the Commission's decision after giving due consideration to the facts, law, evidence, and positions of the parties.

Petitioner also contends that the Court of Appeals erred in failing to find that Petitioner's prior complaints and surgical candidacy are "of no consequence" when determining whether she sustained a change of condition for the worse. (Petition for Writ of Certiorari, p. 12). In her Petition for Rehearing filed with the Court of Appeals, Petitioner contends that having the same or similar "symptoms or surgical candidacy prior to the final adjudication is not evidence that her condition has not worsened." (Petition for Rehearing, p. 6). She maintains this position in her Petition for Writ of Certiorari to this Court. Of course, this argument is incorrect. As argued at length in Respondents' Final Brief submitted to the Court of Appeals, the medical evidence and Petitioner's own testimony indicate that Petitioner had long-standing radicular buttock and leg pain since 2009. (R. p. 190, lines 21-25; R. p. 192, lines 2-23; 242, line 21; R. p. 243, line 1). Dr. Edwards also affirmed Petitioner had disc protrusion that has been contacting the nerve root and causing irritation *throughout the course of her claim*; she has not developed any weakness in her muscles innervated by that particular nerve; and her reflexes have remained the same. (R. p. 221, lines 17-21; R. p. 222, lines 9-12) (emphasis added).

While a new MRI was ordered by Petitioner's treating provider due to her supposedly new complaints of pain, Dr. Merritt testified that he didn't think there was a major change. (R. p. 237, lines 13-24). However, he deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans; Dr. Edwards opined that there was no difference to be noted in the MRI scans from before and after the first hearing. (R. 210, lines 14-17; R. p. 211, lines 5-7; R. p. 212, lines 8-10; R. p. 221, line 22 – p. 222, line 25; R. p. 247, lines 3-19). Ultimately, Dr. Edwards was unable to say whether Petitioner had a physical change in her condition. Neither the testimony of Dr. Edwards nor any other witness was "corrupted" by

Respondents' questioning. (Petition for Writ of Certiorari, p. 20). All witnesses were subject to cross-examination by Petitioner. As properly noted by the Court of Appeals, this constitutes substantial evidence to support the factual findings of the Commission.

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

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

Moreover, Petitioner argues that the Court of Appeals failed to review the Commission's credibility findings. (Petition for Writ of Certiorari, p. 8). Petitioner contends that, "[t]o justify its *sole* reliance on the objective evidence and disregard for the subjective evidence in this case, the [C]ommission made nonsensical credibility findings." (Petition for Writ of Certiorari, p. 12). Petitioner asserts that the credibility determinations made by the Commission are not immune from appellate review. *Id.* (citing *Crane v. Raber's Discount Tire*

*Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020); *Able Communications, Inc. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151 (1986)). It is clear that Petitioner misapprehends the Court's decision in *Able Communications, Inc. v. SCPSC*, which requires that an administrative body make findings of fact that are sufficiently detailed to allow for appellate review – it does not empower an appellate court to substitute its judgement for that of the Commission on issues of credibility. 290 S.C. at 409, 351 S.E.2d at 151. The Commission's Order in this case expressly details the bases for its findings, including the flaws it found in Petitioner's testimony. (*See e.g.*, Finding of Fact #7, R. p. 8). The Commission's Order also describes how it weighed the Petitioner's testimony and all other evidence in the record to make a determination. (*see e.g.*, Findings of Fact #7, 8, 11, R. p. 8).

In attempting to demonstrate the Commission's supposed error, Petitioner alleges that Respondents agree that Petitioner's symptoms have worsened. (Petition for Writ of Certiorari, p. 14). This is categorically false. It has always been the position of Respondents that a preponderance of the evidence as a whole – both subjective and objective – does not support a finding that Petitioner has sustained a change of condition. 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 argument, which has not gone unnoticed by the Justices of this Court. (See R. p. 102, line 17 – p. 103, line 4; R. p. 118, lines 10-12; R. p. 118, line 15; R. p. 119, line 3; *see also* Respondents' Final Brief to the Court of Appeals, p. 10-11). In fact, the majority of Petitioner's Petition for Writ of Certiorari is spent discussing prior positions allegedly taken by Respondents and rehashing prior opinions from the Commission and the appellate courts that are not on appeal and/or subject to review.

Petitioner argues that there is evidence in the record that suggests she has a change of condition; therefore, the Court of Appeals must have erred in affirming the Commission's decision. The Commission readily acknowledges in its Order that "there is *some* evidence that Petitioner may have suffered a change of condition;" however, in its discretion, the Commission ultimately concludes that Petitioner failed to prove a change of condition by a preponderance of the evidence. (Finding of Fact #15, R. p. 9). This Court has long held, "...the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Palmetto All., Inc. v. S.C. Pub. Serv. Com.*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Further, when there is a conflict in the evidence, the Appellate Panel's findings of facts are conclusive. *Steed v. Mount Pleasant Seafood Co.*, 236 S.C. 253, 256, 113 S.E.2d 827, 828 (1960). There is substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, to allow a reasonable person to come to the same conclusion as the Commission: Petitioner failed to prove a physical change of condition after the original award based on a preponderance of the evidence. Therefore, the Court of Appeals properly affirmed the Commission's decision, and there is no basis on which this Court should grant a writ of certiorari.

### **CONCLUSION**

Petitioner has stated no grounds upon which this Court should grant a writ of certiorari. This case raises no novel issue of law, nor does it conflict with a prior decision of this Court. The Commission's decision is supported by substantial evidence in the record, and no special or important reason has been raised by Petitioner on which to grant certiorari. For the foregoing

reasons, Respondents respectfully ask that This Honorable Court decline to grant a writ of certiorari.

Respectfully submitted,

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April 6, 2023

BY:  \_\_\_\_\_

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