

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**Apr 27 2023**

**S.C. SUPREME COURT**

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

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Appellate Case No. 2023-000403

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company,

Respondents.

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**REPLY TO PETITION FOR A  
WRIT OF CERTIORARI**

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## Argument

### I. **This Court May Correct Errors of Law, May Reverse Fact Finding Unsupported by Substantial Evidence, and May Reverse Fact Finding as to Credibility that is Unsupported by Substantial Evidence.**

In an appeal from the South Carolina Workers' Compensation Commission's appellate panel (hereinafter, "the commission"), this Court is empowered to correct errors of law, reverse fact finding that is unsupported by substantial evidence, and reverse fact finding as to witness credibility when that finding is unsupported by substantial evidence. Workers' compensation cases are not immune from appellate review; instead,

[t]he [supreme] court may reverse or modify the decision [of the commission] if substantial rights of the appellant have been prejudiced because the administrative *findings, inferences, conclusions, or decisions* are:

- (a) in violation of constitutional or statutory provisions;
- ...
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380 (Emphasis added).

The commission may not give artificial importance to a credibility determination when credibility is not a reasonable and meaningful basis on which to decide a question of fact. "When the commission's factual finding is not 'founded on evidence of sufficient substance to afford a reasonable basis' for the finding, [the supreme court] will not uphold it." *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636, 842 S.E.2d 349 (2020) (citing *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 502 (2012)). "In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact." *Id.* at 646, 842 S.E.2d at 354. "To make a proper review of a factual determination by the

commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding, and must be able to understand the reasons credibility supports the commission's decision.” *Id.* at 646-47, 842 S.E.2d at 354.

In the case at bar, the commission erred in its application of the Workers’ Compensation Act; it erred—as a matter of law—in its fact finding; its fact finding is unsupported by substantial evidence; its fact finding is clearly erroneous; its credibility findings are not a reasonable basis for deciding the facts of this case; and its credibility findings are unsupported by substantial evidence. The commission found no change of condition because it “gives more weight to the medical records, the diagnostic tests, and the testimony of the medical experts” and because “Dr. Edwards’ testimony and opinion is more persuasive than [Petitioner’s] testimony. R. p. 8. Those credibility findings are fundamentally an improper basis for deciding if a change of condition occurred, as Petitioner’s testimony is consistent with that of the medical records and medical providers. *See e.g.*, R. pp. 5, 68. Moreover, as this Court explained in *Crane*, a credibility determination is not inherently determinative of the issues before the commission. *Crane*, 429 S.C. at 646, 842 S.E.2d at 354.

As explained with greater detail on pages 10 and 11 of the Petition, the commission order fails to cite substantial evidence in support of its credibility findings and its findings are capricious. The findings directly contrast those of every commissioner who heard Petitioner’s testimony live. (R. pp. 86, 92). Commissioner Wilkerson found Petitioner credible in 2011, but inexplicably found she lacked credibility in 2019. (R. pp. 8, 92). Respondents do not meaningfully attempt to defend the credibility findings of the commission; instead, they argue only that the findings of the commission on credibility are conclusive and not subject to review. As the Court held in *Crane*,

the findings of the commission as to credibility are not fundamentally inerrant or inevitably conclusive. The Court of Appeals erred in failing to address the erroneous fact finding of the commission.

**II. The Medical Records and Expert Testimony do not Support the Order of the Commission.**

The medical records and expert testimony do not support the order of the commission. The commission and Respondents assert the “medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse.” (R. p. 8). The commission, however, provides no citations or references to the medical records in support of its conclusion. Moreover, as the court of appeals found in its 2016 decision, both doctor’s concluded, to a reasonable degree of medical certainty, Petitioner suffered a change of condition for the worse. (R. pp. 8, 68). In 2016, the court of appeals reasoned the commission erred as a matter of law by applying the wrong burden of proof and found errors in the commission’s fact finding. (R. p. 68).

The records, consistent with the physician testimony, include notes from Dr. Merritt that he believes “since [Petitioner] is getting increasing pain that the condition has worsened and [he] think[s] that [his office] need[s] to continue to treat her.” (R. p. 258). Likewise, Dr. Edwards’ records state Petitioner “appears to have worsening radicular symptoms predominantly on the right side.” (R. p. 262). Of course, Dr. Edwards’ records contain references to his impression of the MRIs, but such references do not constitute additional evidence in support of the commission order, particularly when those impressions do not control his ultimate opinion. (*See e.g.*, R. p. 262). Consequently, only the commission’s inferred significance of the MRIs, which differs from the physicians’ opinions, supports the commission order.

That, therefore, is why Petitioner’s argument is not one of the weight of the evidence. The Court does not review workers’ compensation cases under an any evidence standard. The order

must be supported by substantial evidence. The commission's assumptions as to the significance of a particular medical test is not substantial. Substantial evidence cannot support an order of the commission when that order is supported solely by the commission's own interpretation of the MRI results in contrast to the conclusions of the physicians. Holding otherwise is to hold that objective evidence is required to prove a change of condition. The commission reached its decision in 2014 based on the MRIs, only. When considered in light of the testimony of the Petitioner, Dr. Merritt, and Dr. Edwards, the commission's interpretation of MRI reports is unsubstantial. The commission failed to reconsider its original decision.

In justifying its order, the commission claims it considered all evidence and reached its decision because, as Respondents stated, the commission "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.'" This statement, however, is not evidence of the commission applying the correct standard. If Petitioner's testimony differed from the physicians' testimony, then the commission statement could make sense. But, their testimony is consistent: Her symptoms worsened and she suffered a change of condition. The same is true of the medical records. When the evidence the commission cites in support of its order, and the evidence the commission asserts it affords greater weight, contrasts with its own order, the only reasonable conclusion is the commission continued to rely solely upon the MRIs.

The Court need not inherently find the commission acted "sinister[ly]" or "deliberately dishonest[ly]" to find the commission issued an order that reached the commission's desired outcome, even though that outcome is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. As the commission order is unsupported by

substantial evidence and is clearly erroneous, Petitioner respectfully requests the Court grant her Petition.

### **Conclusion**

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

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