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S.C. SUPREME COURT

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

Opinion No. 2022-UP-422 (Ct. App. Filed Nov. 23, 2022)

Supreme Court Appellate Case No. 2023-000403

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

BRIEF OF PETITIONER

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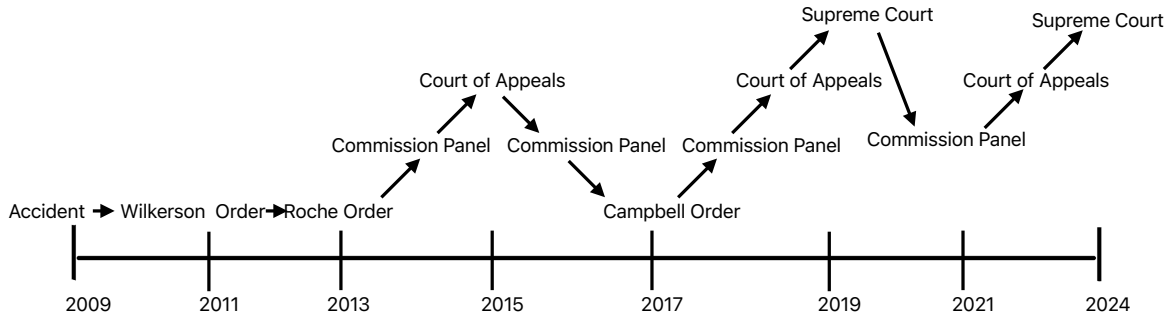
I. Whether the court of appeals erred in affirming the workers' compensation commission's appellate panel order and concluding the panel did not impose an objective evidence standard?

II. Whether the court of appeals erred in failing to reverse or remand on the commission's credibility findings and the commission's findings regarding the onset of Russell'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 of appeals to remedy.

Introduction

This appeal represents Petitioner Paula Russell's thirteen-year-long pursuit of medical treatment and workers' compensation benefits. The procedural history is extensive. The saga is detailed herein, but below is graphical representation of that history:



Despite the above, this case is not particularly complex. Russell was injured in 2009, she received a permanency award in 2011, and months thereafter, her condition worsened. So, Russell filed for change of condition benefits pursuant to section 42-17-90. Respondents, (hereinafter "Wal-Mart") opposed Russell's claim, but because both of Wal-Mart's doctors found Russell sustained a change of condition, Wal-Mart could not contest her entitlement to benefits on factual grounds. Wal-Mart, therefore, took the only position it could: a legal argument the burden of proof per section 42-17-90 is objective evidence. Wal-Mart required its doctors testify to that standard, because when they considered subjective evidence, both doctors opined a change occurred.

Commissioner Roche rejected that argument and awarded benefits. The workers' compensation commission's appellate panel (hereinafter "the commission") accepted Wal-Mart's argument. In 2016, the court of appeals held the commission erred in doing so and held the commission must consider subjective evidence. The commission issued a new order in 2019 but failed to correct the errors. In 2022, the court of appeals found no error in the commission's failure to remedy the errors and failed to address the commission's erroneous credibility findings. Russell respectfully requests the Court correct those errors.

Statement of the Case

In 2009, Petitioner Paula Russell suffered injuries to her back while working at Wal-Mart as an assistant manager. (R. p. 94). She applied for workers' compensation benefits and after an April 13, 2011, hearing before Commissioner Wilkerson, was awarded a permanent disability award of seven percent to the back and ongoing anti-inflammatory medications. (R. p. 94).

On December 9, 2011, Russell filed for change of condition benefits pursuant section 42-17-90(A). Commissioner Andrea Roche heard Russell's claim on February 11, 2013, found she suffered a change of condition, and held she was entitled to medical care and temporary disability benefits. (R. p. 83, 89). Respondents, Wal-Mart Stores, Inc. and American Home Assurance (hereinafter "Wal-Mart") appealed that order, arguing Commissioner Roche erred because Russell "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). The commission agreed and on January 30, 2014, found Russell failed to meet her objective evidence burden. (R. p. 82).

Russell appealed to the court of appeals, which held the commission erred by requiring Russell prove her claim with objective evidence. (R. p. 68). The court of appeals explained the commission "ignore[d] that both doctors concluded, to a reasonable degree of medical certainty, that Russell 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, the commission further remanded the matter to Commissioner Campbell. Commissioner Campbell found Russell met her burden of proof and awarded benefits. (R. p. 64). Wal-Mart appealed Commissioner Campbell's order to the commission, which reversed and remanded with instructions to conduct a full evidentiary hearing and *de novo* review of the case. (R. p. 32). Russell appealed that order to the court of appeals,

which dismissed the appeal as interlocutory. (R. p. 12). This Court granted Russell's petition for certiorari, and issued an opinion on April 3, 2019, finding the matter was immediately appealable and finding the commission erred in ordering multiple remands. (R. pp. 13-15). The Court remanded the matter to the commission 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 "[Russell's] Radiographic condition has not worsened; any alleged worsening in this case is solely based on [Russell'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 [Russell's] condition is worse." (*Compare* R. p. 7 *with* R. p. 77). The commission added statements that "[w]hile we have considered [Russell's] testimony and given it due consideration, we give greater weight to the objective evidence." (R. p. 7). The commission found Russell was not entitled to benefits. (R. p. 9).

Russell appealed to the court of appeals, alleging four errors: 1) The commission again premised its order on objective evidence; 2) the commission required objective evidence despite the 2016 court of appeals opinion; 3) the commission erred in finding Russell incredible; and 4) the commission erred in its fact finding. (Appx. p. 292). The court of appeals issued an opinion November 23, 2022, affirming the order. The court found no error of law in the standard the commission applied and found no factual errors in the commission order. (R. pp. 375-382). Russell timely filed a petition for rehearing on December 8, 2022, asserting the court misapprehended the evidence of the case, misapprehended Russell's four arguments, and overlooked the vital differences between the case *sub judice* and *Robbins v. Walgreens*. (Appx. pp. 383-393). The court of appeals denied the petition on February 10, 2023. Russell filed a petition for a writ of certiorari with this Court on March 10, 2023, which was granted on December 12, 2023.

Statement of Facts

While the procedural history detailing this case's history from 2009 to the present is convoluted, the facts underpinning her claim for workers' compensation benefits are not. Russell was first injured on November 3, 2009, while lifting at work. (R. p. 92). At the time of her injury, she was three months pregnant and received conservative treatment as a result. (R. p. 92). Commissioner Avery Wilkerson heard her case in April of 2011. After the hearing, Commissioner Wilkerson found: (1) Russell had reached maximum medical improvement February 2, 2011; (2) she suffered from a 7% permanent partial disability to the back pursuant to section 42-9-30; and (3) Russell was entitled to ongoing *Dodge* medicals in the form of anti-inflammatory medication. (R. pp. 94 – 95). The order was not appealed. Pursuant to section 42-17-90, Russell retained the right to file for change of conditions benefits should her condition worsen within the next year.[1]

Thereafter, Russell continued working for Wal-Mart as an assistant manager. (R. p. 85). In September of 2011, however, Russell began experiencing more intense back pain, as well as severe leg and buttock pain of a type she had not experienced before. (R. pp. 181-82). She reported this at her next appointment with Dr. Merritt, the Wal-Mart selected authorized treating physician, and he referred her for an MRI. (R. pp. 236-37). A reviewing radiologist said of her MRI: "[m]ild spondylosis most pronounced at L5-S1 where there is an annular tear centrally. The annular tear and disc protrusion contacts the transiting right SI nerve root and if patient's symptoms correspond with a right SI radiculopathy, this could be an etiology." (R. p. 270). In a November 21, 2011, letter, Dr. Merritt stated:

> I have reviewed Mrs. Russell's chart and I do feel that since she is getting increasing pain that *the condition has worsened,* and I do think that we need to continue to treat her with my recommendation at this time will be epidural injections due to

[1] Wal-Mart had the same right to file for a reduction of benefits if Russell's condition improved within one year, pursuant to S.C. Code Ann. section 42-17-90.

> this worsening pain. I do think this is medically necessary and could provide her with some relief.[2]

(R. p. 258 (emphasis added)).

Dr. Merritt's December 5, 2011, report indicated Russell was suffering from "pain in her back and right leg, with buttock pain radiating down the leg into the calf." (R. p. 259). He concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (R. p. 259). Russell filed a Form 50 alleging a change of condition for the worse on December 9, 2011. (R. p. 98).

In response, Wal-Mart sent Russell to Dr. Edwards for an independent medical evaluation. (R. p. 261). He stated "[s]ymptoms are now centered into the lower part of her back but radiate into the legs more on the right than the left side." (R. p. 261). Dr. Edwards noted that since a 2010 MRI performed at his office Russell had "more significant radicular symptoms in the right buttock and leg." (R. p. 261).

In March 2012, Dr. Merritt diagnosed Russell's radiculopathy as "chronic," and stated that if it worsened "within the year, [surgery] would be something reasonable and we will need to have the Workers' Compensation's company get her back to Dr. Edwards to discuss it." (R. p. 260). Another MRI was performed on July 24, 2012, after which Dr. Edwards recommended surgery because it would serve to provide a "measure of improvement" in her radicular pain. (R. p. 266).

Dr. Merritt gave deposition testimony on May 23, 2012. (R. p. 230). When asked to compare the 2011 MRI to the one taken in 2010, he stated there is "a slightly increased sized protrusion on the second one." (R. p. 237). He then testified the first MRI report did not "mention any contact of the transiting nerve roots. So my feeling is that it was probably not quite as big as

[2] Dr. Merritt placed Russell on light duty on November 5, 2011, and stated that if no light duty work was available, she could not work. Russell requested Wal-Mart provide accommodations due to her condition. She was terminated on December 1, 2011.

it is. If it's now pushing out enough to touch the transiting nerve roots at that level, it's probably a little bigger than it was before . . . ." (R. p. 238). He further opined, "I think if there was contact of the transiting nerve roots, I would have probably mentioned that in my dictation. So I'm assuming that that was not there and that this disk protrusion is slightly larger than it was previously." (R. p. 244). He felt a slightly larger disc protrusion constituted an anatomical difference. (R. p. 238).

Dr. Merritt further testified in September 2011. He testified Russell had "new complaints of pain more down in the legs . . . . In my first visit [in 2010] it was really mostly back pain." (R. p. 236). "The leg stuff was relatively new. It was never the main problem." (R. p. 251). He felt this was a new anatomical distribution; "she had not originally complained of pain down her legs at my visits. Although, she had some originally, I think, before I first saw her." (R. p. 236).

When asked directly about a change in Russell's condition, Dr. Merritt testified, "I would say there was a change. I mean, she was pretty clear during the first few visits that it was mainly just her back . . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort." (R. p. 240). Dr. Merritt based his opinion as to a change of condition "in part on her subjective complaints as far as the development of leg pain." (R. p. 252). He recommended additional medical care, possibly surgery, and testified any radicular pain had resolved before Russell reached maximum medical improvement on February 2, 2011. (R. p. 242-43, 248, 250).

Dr. Edwards provided deposition testimony on September 13, 2012. (R. p. 206). When asked to compare the 2010 and 2012 MRIs, Dr. Edwards stated that in his 2010 report he:

> didn't state one way or the other whether there was or there was not an annular tear on either of the scans. It's really - - I'm wanting to say that it's irrelevant, but there was pathology that at the disc at L5-S1 on both studies. It looked substantially the same [as the 2012 MRI] to me.

(R. p. 211). When asked if there was a difference between the MRIs, he stated,

> the answer to that's no, unfortunately, for - - for what you're asking me . . . . [I]t's clear that the patient's symptoms are now worse. I don't have any - - I don't have any doubt about that . . . clinically. But, radiographically, there's not a significant difference to be noted in those three scans.

(R. p. 212). He stated the MRIs were similar and showed "nerve root compression." (R. p. 214).

Dr. Edwards stated Russell's symptoms had progressively worsened and her pain complaints had increased since April 2011. (R. pp. 209 – 210). When asked about the cause of Russell's symptoms, Dr. Edwards stated he believed there was compression of the nerve root, and that 'compression' over an extended period, is most likely what's causing her worsening. (R. pp. 213 – 214). Dr. Edwards stated that Russell's "fairly significant radiculopathy" could be caused "without having pressure on…that nerve." (R. p 216). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (R. p. 215).

Dr. Edwards testified, "her symptoms are more significant now than they were when I first saw her. So you could . . . make . . . [the] conclusion" that "the nerve has worsened." (R. p. 217). He did not doubt Russell's condition worsened, stating, "[in Russell's] opinion it seems to be worsening, and I have no reason to doubt that, [so] it is reasonable to offer surgical intervention." (R. p. 218).

On cross-examination, counsel for Wal-Mart asked Dr. Edwards:

> And in this particular case the main issue is whether Ms. Russell has had a change of condition for the worse, and in South Carolina the case law and statute requires that there's - - requires that there is a physical change in her condition for the worse. And your opinion based upon the - - the MRIs, your evaluation of her, anything you've done on this particular claim, can you state to a reasonable degree of medical certainty that there's been any physical worsening of her condition in this claim?

(R. pp. 222-23). Dr. Edwards responded:

> You know, that's interesting that I have to respond to some statute there. But - - 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 opined Russell was not considered a candidate for surgery in 2010 "because she was pregnant at the time. We certainly try not to operate on pregnant people if we can get by without it." (R. pp. 225 – 26). However, at the time of his deposition, Dr. Edwards recommended surgery, and he stated he "would not have offered it if [he] didn't think that there was a really good chance of her getting some improvement in her - - again, predominately, the buttock and leg symptoms that she has." (R. p. 226). Commissioner Wilkerson specifically stated in his June 2011 order, "Dr. Merritt indicated no surgery was required." (R. p. 93).

The case ultimately proceeded to a hearing on February 11, 2013, before Commissioner Andrea C. Roche. (R. p. 173). Wal-Mart argued, "the depositions of Dr. Merritt and Dr. Edwards do not support a physical change of condition for the worse. That all the complaints are subjective and that the depositions bear that out." (R. p. 176). Counsel for Wal-Mart asserted the "case law of the [s]tatute is pretty clear there has to be a physical change of condition," but further argued the standard required "objective physical evidence of a change of condition." (R. p. 178). In response to Wal-Mart's assertion, counsel for Russell stated, "pursuant to 42-17-90 it's proof by a preponderance of the evidence. There's no phrase in the statute that requires an objective finding per MRI or some other manner that does not require an opinion of a doctor." (R. pp. 177-78).

Russell testified at the hearing that around September or October of 2011 she "started feeling sharp pains down [her] leg and pressure was more intense on [her] lower back." (R. p. 180). She testified she began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (R. p. 181). She remembered beginning to experience these new symptoms in either September or October of 2011, and those symptoms

were the reason she returned to Dr. Edwards' care. (R. pp. 181 – 82). When asked if her condition had changed since the initial disability determination, she replied, "Yes, it has." (R. p. 187).

When discussing the location of her pain prior to the 2011 hearing, Russell testified the pain centered on her lower back and pelvic area, and she did not have major symptoms in her leg. (R. p. 189). To the extent she experienced symptoms in her right leg well before the 2011 hearing, she indicated feeling "numbness," and described her new pain as "a sharp - the pain that I'm having now is like a - a - electrical - electrical pain down my leg." (R. pp. 189 – 190). She testified she had "pain into [her] left leg now as well." (R. p. 191). Any pain she had indicated previously was,

> not the same - the sharp pain from what I'm feeling now that when you're - when it - when it's coming down your leg and then you feel that like shakiness, it's like uncontrollable of your leg, it - that's not what I had in the beginning.

(R. p. 192).

Finally, Russell testified a change of condition occurred. (R. p. 188). She testified any symptoms in her legs prior to April 2011 were different 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 Russell gave birth, Dr. Merritt indicated no surgery was required and subsequently released her from treatment. (R. p. 93). Commissioner Wilkerson explained, "[Russell] testified that her pelvic pain last surfaced during her FCE, but those problems have resolved." (R. p 93). In April 2011, Commissioner Wilkerson found no symptomology in Russell's pelvis or leg, Russell testified she did not have those symptoms, and Commissioner Wilkerson found her only medical need was anti-inflammatory medications. (R. pp. 94-96).

The case proceeded to a hearing before Commissioner Roche, who issued an order on August 5, 2013, and found Russell "experienced an increase in symptoms, which she testified worsened with work and activity. [Russell] testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake." (R. p. 85).

Commissioner Roche further found that since "December 1, 2011, Wal-Mart has failed to provide her with work that complied with her treating physicians' work restrictions." (R. p. 85). She also found "[Russell's] testimony, stating that she suffered a worsening of symptoms, to be credible." (R. p. 86). Lastly, Commissioner Roche found Dr. Merritt and Dr. Edwards testified Russell suffered a change of condition for the worse and the change was a physical, anatomical change. (R. p. 87). Commissioner Roche concluded as a matter of law, "[Russell] suffered a change of condition for the worse," "[p]ursuant to 42-1-120, [Russell] is 'disabled,'" and "[p]ursuant to section 42-9-10, is entitled to temporary total disability benefits." (R. p. 88).

Wal-Mart filed an appeal to the commission's appellate panel. In its brief, Wal-Mart relied heavily on one statement from Dr. Edwards, that "any worsening was predominantly subjective." (R. p. 279). In its brief Wal-Mart argued, "[Russell] has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is any 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 280). Wal-Mart contended "any alleged worsening in this case is solely based on [Russell's] subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show [Russell's] condition is worse." (R. p. 282). During oral arguments counsel for Wal-Mart framed the case as "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).

The commission issued its order on January 30, 2014, reversing the ruling of Commissioner Roche. (R. p. 71). In its order, the commission focused its attention on the lack of differences between the MRIs. (R. pp. 74 – 75). The order left out Dr. Merritt's opinion, made to a reasonable degree of medical certainty, that a change of condition had occurred, and instead cited him as saying that he "could not say for sure whether there was an obvious objective change or not." (R.

p. 75). The commission similarly omitted Dr. Edwards's opinion, made to a reasonable degree of medical certainty, that a change of condition occurred, and instead cited his statement "there was no objective or significant radiographical difference to be noted in the scans." (R. p. 75).

The commission found, "[Russell] has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is any 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 76). Despite Commissioner Roche's finding Russell credible, as well as Wal-Mart's stipulation Russell was credible, the commission found she lacked credibility because she had right leg symtoms of a different nature in 2010. (R. p. 76). The commission held, "[i]n sum, [Russell]'s radiographic condition has not worsened; any alleged worsening in this case is solely based on Russell's subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show Russell's condition is worse." (R. p. 77). The commission ultimately held Russell failed to prove a change of condition and was not entitled to benefits. (R. pp. 81 – 82). The order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had occurred. (R. p. 68).

Russell appealed the 2014 commission order to the South Carolina Court of Appeals asserting three points of error. The commission erred by: (1) requiring a change of condition be established by objective evidence, (2) holding the preponderance of the evidence did not show a change of condition, and (3) finding Russell's statements were self-serving and conclusory. The court of appeals issued its opinion as *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016) (hereinafter, "*Russell, I*"). (R. p. 66).

Upon the court of appeal's review of the record and the commission's order, it found the commission exclusively relied upon the MRIs in finding Russell failed to objectively prove her

claim. (R. p. 67). The court of appeals noted the commission's order "ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition." (R. p. 68). Moreover, the court clarified, "A change of condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award," and, "[g]enerally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the Commission. Review for a change of condition is concerned with conditions that have arisen thereafter." (R. p. 67).

As a result, the court determined, "the commission relied exclusively on objective evidence, the MRIs, in denying Russell's claim" and the commission "erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence." (R. p. 68). Therefore, the court held a change of condition for the worse can be proven with subjective evidence and reversed the commission's requirement that Russell prove her claim with MRI evidence and remanded to the commission. (R. p. 68).

On remand from the court of appeals, the commission further remanded to Commissioner Michael R. Campbell, II who reviewed the record and issued a decision. Commissioner Campbell found the preponderance of the evidence supported a finding Russell suffered a change of condition for the worse. (R. p. 61). Wal-Mart appealed the Campbell order to the commission, which reversed the entire order and remanded for a hearing *de novo*. Russell ultimately appealed that commission order to this Court as an appealable interlocutory Order.

The Court heard oral arguments on this matter on February 21, 2019, and issued an opinion on April 3, 2019. In its decision, the Court held the commission's unreasonable delay, caused by a series of remands, left Russell without an adequate remedy. *Russell v. Wal-Mart*, 426 S.C. 281, 826 S.E.2d 863 (2019) (hereinafter, "*Russell II*") (R. pp. 12-16). Therefore, the Court reversed the

initial order of the commission remanding to a single commissioner and remanded to the commission's appellate panel for immediate and final review of Commissioner Roche's August 5, 2013, order in accordance with the 2016 holdings of the court of appeals. (R. p. 16). After the remand, the same appellate panel of the commission issued a new order denying Russell suffered a change of condition for the worse, denying her claim for benefits, and reversing the 2013 order of Commissioner Roche. (R. p. 10). The commission issued this decision and order without additional briefing and without oral arguments. The 2019 decision and order of the commission mirrors the 2014 order with few alterations. Russell, therefore, appealed to the court of appeals.

Before the court of appeals, Russell alleged four points of error: 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 Russell benefits based on its finding that her testimony was "conclusory" and "self-serving"; and 4) the commission erred in its fact finding. (Appx. p. 292). The court of appeals issued an opinion November 23, 2022, affirming the order of the commission. *Russell v. Wal-Mart Stores, Inc.*, No. 2022-UP-422 (S.C. Ct. App. Nov. 23, 2022) (hereinafter "*Russell III"*) (Appx. pp. 375-382). 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. (Appx. pp. 375-382). Russell timely filed a petition for rehearing on December 8, 2022, asserting the court misapprehended the evidence of the case, misapprehended Russell's four arguments, and overlooked the vital differences between the case *sub judice* and *Robbins v. Walgreens & Broadspire Servs., Inc.* (Appx. pp. 383-398). The court of appeals denied that petition on February 10, 2023. (R. p. 411). Russell thereafter filed a petition for a writ of certiorari with this Court on March 10, 2023. On December 12, 2023, the Court issued an order granting her petition.

Standard of Review

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions made by the commission. *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The commission's appellate panel is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). However, the APA provides the Court authority to "reverse or modify the decision [of the commission] if substantial rights of the appellant have been prejudiced. . . ." S.C. Code Ann. § 1-23-380(5). The Court may reverse the commission, when the commission's decision is made upon unlawful procedure or is affected by errors of law. *Id.* Likewise, the Court may reverse or modify the decision when it is "clearly erroneous" or "arbitrary" or "capricious." *Id.*

Pursuant to the substantial evidence standard of review, Court may reverse the commission's findings when those findings are unsupported by substantial evidence. S.C. Code Ann. § 1–23–380(A)(5)(e). Although an appellate court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, it may reverse where the decision is affected by an error of law or is unsupported by substantial evidence. *Grant v. Grant Textiles*, 372 S.C. 196, 200-01, 641 S.E.2d 869, 871 (2007). Substantial evidence is not synonymous with a mere scintilla of evidence; substantial evidence is evidence which would allow reasonable minds to reach the agency's conclusion. *Nicholson v. S.C. Dep't of Social Serv's*, 405 S.C. 537, 452-53, 748 S.E.2d 256, 259 (Ct. App. 2013).

Review of a prior compensation award by the commission is permitted "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." S.C. Code Ann. § 42-17-90. There is a change of condition when the claimant sustains a change in physical condition resulting from the original

injury, occurring after the original award. *Gattis v. Murrells Inlet VFW No. 10420,* 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003). "Review for a change of condition is concerned with conditions that have arisen thereafter." *Id.* at 107, 576 S.E.2d at 194. The commission has the discretion as factfinder to weigh and consider all evidence, both lay and expert. *Tiller v. Nat'l Health Care Ctr. of Sumter,* 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999). South Carolina appellate courts have affirmed awards based solely on objective evidence and awards based solely on subjective evidence. *See Gattis,* 353 S.C. at 110, 576 S.E.2d at 196.

"The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to these findings." *Brayboy v. Clark Heating Co.*, 306 S.C. 56, 58-59, 409 S.E.2d 767, 768 (1991) (citing *Hill v. Jones*, 255 S.C. 219, 178 S.E.2d 142 (1970)). "Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact." *Id* at 59, 409 S.E.2d at 768 (citing *Aristizabal v. Woodside- Div. of Dan River,* 268 S.C. 366, 234 S.E.2d 21 (1977)). "The Worker's Compensation Act should be liberally construed in furtherance of the purposes for which it was designed. Any reasonable doubts as to construction should be resolved in favor of the claimant by including [her] within the coverage of the Act rather than excluding [her]." *Gattis* at 111, 576 S.E.2d at 197.

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 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).

The liberality afforded to workers, however, is not a free gift of grace. It is a result of negotiation and compromise known as "The Grand Bargain." *See* Ellen Relkin, *The Demise of the Grand Bargain*, 69 RUULR 881, 883 (2017). Claimants, by statute, give up their right to full compensation for wage loss, their right to non-economic damages, their right to compensation for disability longer than 500 weeks,[3] their right to trial by jury, their spouse's rights to loss of consortium claims, their right to direct their own medical care (and be later compensated for the expense of that care), their right to punitive damages, and others. S.C. Code Ann. § 42-1-540; *Cf.* James L. Ward, Jr. & Edward J. Westbrook, *South Carolina Damages* 4, 33-79 (2nd ed. 2009).

In return, they are entitled to two-thirds of their lost wages, up to the average salary of the state, for no more than 500 weeks; medical care directed by the employer/carrier; and limited compensation for permanent disability or disfigurement. In exchange for giving up their rights, workers are told they will receive swift compensation; compensation regardless of fault; limited

[3] With limited exception, i.e., quadriplegia.

death benefits; compensation during the life of the claim; medical care at their employer's expense; the right to reopen the claim within one year, if their condition worsens;[4] and a liberal application of the Act in favor of the claimant's receipt of benefits. *See generally* Ward & Westbrook, *supra*, at 669-83; S.C. Code Ann. § 42-17-90; *Allen*, 236 S.C. at 30, 112 S.E.2d at 725.

Russell brings this appeal because the commission misapplied the law to her case, made findings of fact that are unsupported by substantial evidence, and made arbitrary and capricious determinations of her credibility.

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 Russell's claim. (R. p. 68). 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 (as interpreted by the physicians). Objectively assessing the evidence, it must be organized in one of three ways[5]:

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

[4] The same right is afforded to the employer when an employee's condition changes for the better.

[5] Russell presents three options to present the evidence as fairly as possible. The 2016 court of appeals 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. *Russell III* (Appx. p. 377). The physicians contest the conclusiveness of the MRI results on the ultimate question, as explained, *infra*. (R. pp. 211-212; 237; 244).

Dr. Edwards' opinion is either evidence showing a change of condition, or it is of no consequence. In either case, the only evidence upon which the commission's order could have been based is its improper interpretation of the significance of the MRIs. An MRI is only a singular piece of clinical data physicians consider when diagnosing and treating; 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.

To reach its 2022 decision, the court relied upon *Robbins v. Walgreens & Broadspire Servs., Inc*. 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007). *Robbins* is fully distinguishable from the case *sub judice* and does not support an affirmation of the commission. In *Robins,* no physician testified a change occurred, and the claimant testified his condition was the same as when his claim was first adjudicated. He testified his pain never got better, but he told the employer otherwise. So, the claimant in *Robbins* 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 here. *Robbins* permits the commission weigh the testimony and give greater weight to portions of evidence. It does not permit the commission to use an objective evidence standard, nor does it permit the commission to 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 2022 court of appeals reached the opposite conclusion regarding Dr. Edwards' opinion than it did in 2016 and this court did in 2019. *Compare Russell II* (R. pp. 12-16) ("[t]he [commission] discounted the testimony and medical records of the two physicians.") *and Russell I* (R. pp. 66-68) ("the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition.") *with Russell III* (Appx. pp. 375-382) ("Dr. Edwards could not say there had been a physical change in Russell's condition." "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.'").

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 determined "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." (Appx. 381). The court either accepted the proposition that physical is synonymous with objective, or it failed to recognize Dr. Edwards' consternation with providing expert testimony based solely on radiographic evidence, without any consideration of clinical findings. (R. p. 223). Dr. Edwards explained why he did not rely solely on the MRI 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 2022 court, however, claims, "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*. When read in context, the quotes relied upon by the court confirm Dr. Edwards' testimony is a result of his being constrained to objective, radiographic evidence and being told the standard is objective or radiographic evidence. 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 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 suggestion Dr. Edwards cannot testify as to a change of condition is driven by Wal-Mart's insistence he do so with MRI evidence only. (R. pp. 223, 245, 247, 252).

Wal-Mart limited its questions to an objective evidence standard and required Dr. Edwards constrain his opinions to those supported only by objective evidence. (R. pp. 223, 245, 247, 252). Dr. Edwards' testimony he cannot say a change occurred without considering subjective evidence is not testimony there was no physical change. (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 did not question Russell's worsening condition, 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. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 539-40, 482 S.E.2d 577, 581-82 (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.").

The court of appeal's 2022 opinion has deviated from the unappealed rationale of the court in *Russell I.* Russell argues this deviation is unwarranted, as the deviation is unsupported by competent evidence and requests this Court reverse the order of the commission.

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 Russell's Symptoms.

In addition to imposing an objective evidence standard, the commission made arbitrary and capricious credibility findings. The court of appeals, however, declined to address the issues Russell raised regarding the commission's credibility findings. Those erroneous findings were integral to the commission's final determination of the matter and the court of appeals' affirmation of that order. The commission's credibility findings must be reversed.

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, Inc. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). Commissioner Roche found Russell's testimony credible after seeing her testify. (R. p. 86). The commission, however, describes Russell's testimony as "conclusory and self-serving." (R. p. 8). To support its reversal of Commissioner Roche, the commission claims Russell 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.

The commission's finding that Russell was incredible for not establishing when her complaints began is unfounded and perplexing. Russell testified her new symptoms began in September or October of 2011, well after she returned to work, and prior to her return to Dr. Merritt's office.[6] (R. p. 181). Russell's testimony as to when her symptoms began is consistent with her medical records and the evidence of this case.

Russell's accident occurred on November 3, 2009. (R. p. 94). In the months thereafter, she experienced pelvic pain and some numbness in her legs. (R. pp. 93, 236). She was three months pregnant when the accident occurred. (R. p. 93). Her radicular symptoms resolved prior to her first visit with Dr. Merritt on October 25, 2010. (R. pp. 91, 236). Commissioner Wilkerson adjudicated her claim on April 13, 2011. (R. p. 90). He noted in his unappealed order that Russell had been back at work "for quite some time." (R. p. 93). Commissioner Wilkerson issued his order on June 8, 2011, and stated Russell testified she still had back pain, but her pelvic and radicular symptoms had resolved. (R. p. 93). Russell treated with Dr. Merritt on September 16, 2011, and reported to him, "she was having new complaints of pain more down the legs." (R. p. 236). Before Commissioner Roche, who heard the change of condition claim, Russell testified her symptoms began in September or October of 2011. (R. p. 181). Dr. Merritt, the authorized treating physician for Russell in the latter half of 2010 and 2011, testified her radicular symptoms in September of 2011 were of a different nature than when pregnant in 2009 and early 2010. (R. p. 236).

The commission is either requiring Russell testify with unreasonable specificity, or it is making this finding based on her radicular symptoms in 2009 or early 2010, prior to the claim's

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

initial adjudication in April of 2011. 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. Similarly, the court of appeals erred in accepting and relying upon the commission's findings regarding her surgical candidacy. (Appx. p. 381; R. pp. 225-26).

When Commissioner Wilkerson heard this case in April of 2011, Russell was not a surgical candidate and only needed NSAIDs. The need for surgery did not arise until after her change of condition. Whether she could have been a surgical candidate while pregnant in 2009 and early 2010 is of no consequence. This is the same with her new complaints in September of 2011. Her leg symptomology, which was of a different type, in late 2009 and early 2010 while pregnant is of no consequence. The commission's conclusions are supported solely by Russell's prior reports of symptoms[7] and Dr. Edwards' speculation as to her surgical candidacy well prior to the last payment of compensation. This is insufficient to affirm the commission order because both are premised upon a misapplication of the law.

For this case, a change of condition after the last payment of compensation is functionally a change of condition after the case was adjudicated on April 13, 2011. *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). Symptoms Russell had prior to adjudication, but which had resolved, are of no consequence. *Mungo v. Rental Uniform Serv. of Florence, Inc.*, 383

[7] In 2011, the commission believed Russell's account of her symptoms and found her credible; in 2019, it inexplicably decided she lacked credibility. (R. pp. 8, 93).

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*, 325 S.C. at 540, 482 S.E.2d at 581 ("[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.").

Consideration of Russell's condition prior to the final payment of compensation is arbitrary. The pivotal moment is the April 2011 hearing. At that time, 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 change must be compared.

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. *Cf. Hamilton v. Martin*, 405 S.C. 478, 488, 748 S.E.2d 76, 81 (Ct. App. 2013) (affirming the credibility findings of the commission since "[t]he appellate panel was in the best position to gauge the credibility of a witness "*because they saw and talked to her*") (emphasis added). The commission's appellate panel is in no better position to reverse a finding that a claimant is credible than is this Court. The commissioners on the appellate panel never met, saw, or spoke to Russell, except for Commissioner Wilkerson. Commissioner Wilkerson heard Russell's case in 2011, and after he "judge[d] her credibility as a witness" did not question her credibility. (R. p. 92). Without specifying why, he years later signed an order finding her testimony conclusory and self-serving and entitled to little weight. (R. p. 7). Commissioner Roche, who heard Russell testify, stated, "I find [Russell]'s testimony, stating that she suffered a worsening of symptoms, to be credible." (R. 86). Commissioner Campbell, who issued an order vacated on procedural grounds, found Russell credible as well. (R. pp. 61, 166).

The credibility finding of the commission further conflicts with Wal-Mart's argument before the commission in 2014. Then, 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.[8] (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 order must specify why it reversed Commissioner Roche's creditability finding. 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. The commission's credibility findings are arbitrary, they are capricious, and they are unsupported by substantial evidence; the Court must reverse.

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

[8] In its return to Russell's petition for rehearing, Wal-Mart claimed it did not take this position stating, "[Russell] has a rather extensive history of falsely claiming that Wal-Mart hast taken a certain position in this case in order to fabricate support for her own arguments . . . ." (Appx. p. 406). The full quote from counsel's 2014 commission 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 Russell not credible. (R. p. 8).

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 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).	[9]	"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 Claimant's MRI scan[s]." (R. p. 79).
"[T]he evidence shows that Claimant's radiographic condition has not worsened." (R. p. 9).	Showing 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 both doctors concluded to a reasonable degree of medical certainty that Russell suffered a change." (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[s]." (R. p. 8).	Showing reliance on objective evidence only: "The commission found both doctors ultimately testified that there was no objective or significant radiographical difference to be noted in the MRI[s]." (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[s]." (R. p. 80).

[9] The court did not reach Russell's credibility argument because it ruled on other grounds. (R. p. 68).

2019 WCC	2016 COA	2014 WCC
"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).	[10]	"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. 162).	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. 146).

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, the commission is not reaching an outcome based upon the evidence. (*See, e.g.*, R. p. 149).

Instead of advocating for a proper review of the evidence, Wal-Mart argued to the court of appeals that this Court authorized the commission blindly insert buzz words into its order and claimed this Court found Wal-Mart never advocated for an objective evidence standard.[11] Specifically, when arguing in support of the commission order, Wal-Mart relied 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. (Appx. p. 352). Russell believes this was not Justice Hearn's intent.

Additionally, Wal-Mart relied upon statements from Justice Kittredge at oral arguments to support its argument Wal-Mart never argued for an objective evidence standard. (*See* Appx. 350-51; 406-07). Likewise, Wal-Mart utilizes the same statement from Justice Kittridge to argue it never conceded Russell was credible or had a subjective worsening. (Appx. pp. 406-07). The

[10] The 2022 court relied on this statement. The 2016 court of appeals did not find it persuasive.
[11] Russell 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.

Court reviewed this matter on procedural grounds and on a limited appendix in 2019; no record on appeal was generated. However, the record for the current appeal shows the court of appeals did not assign a straw-man argument to Wal-Mart. Wal-Mart consistently advocated for an objective evidence burden of proof prior to this case's initial appeal. (*See, e.g.,* R. p. 162).

To wit, when deposing Dr. Merritt, Wal-Mart's counsel asked, "Can you say . . . there has been a change in the objective status of [Russell's] low back condition?" and "can you say there's been an objective change . . . ?" (R. pp. 245-46). When placing its position on the record in 2013 before Commissioner Roche, counsel for Wal-Mart stated, "we would contend there needs to be objective physical evidence of a change of condition."[12] (R. p. 178). After Commissioner Roche found Russell suffered a change of condition, the sole argument made by Wal-Mart in its brief to the commission was "The Hearing Commissioner erred in finding [Russell] sustained a change of condition for the worse under Sec. 42-17-90 because [Russell] 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, Wal-Mart did not argue in 2013 that Dr. Edwards could not testify a change of condition occurred, instead, it argued "[Dr. Edwards] cannot state to a reasonable degree of medical certainty that [Russell] has sustained a change of condition for the worse based upon the objective radiographic studies." (R. p. 282). In front of the appellate panel in 2013, counsel for Wal-Mart 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 Wal-Mart engaged in the following dialog: "Commissioner

[12] As discussed, *supra*, pp. 9-10, counsel for Russell replied, "pursuant to 42-17-90 it's proof by a preponderance of the evidence. There's no phrase in the statute that requires an objective finding."

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). Wal-Mart advocated for an objective evidence burden until the court of appeal's 2016 opinion. In doing so, Wal-Mart corrupted the physician testimony. Considering that corruption, both Drs. Merritt and Edwards testified Russell suffered a change of condition for the worse. For those reasons, Russell respectfully requests the Court reverse the order of the commission.

Conclusion

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should reverse the order of the commission and remand with instructions to order causally related medical care and calculate back due temporary total disability benefits.

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January 11, 2024