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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.

Appendix

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Index

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

Wal-Mart Stores, Inc., Employer,

&

American Home Assurance, Carrier, Respondents.

Record on Appeal

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Index

Appellate Panel of the Workers' Compensation Commission

State of South Carolina

PAULA RUSSELL, RESPONDENT/ CLAIMANT

v.

WAL-MART STORES, INC., EMPLOYER

AND

AMERICAN HOME ASSURANCE, CARRIER, DEFENDANTS/ APPELLANTS

WCC File No. 0917785

On Remand from the South Carolina Supreme Court

Filed: July 18, 2019

PROCEDURAL HISTORY

Claimant who suffered work-related back injury filed claim alleging change of condition for worse requiring additional medical treatment, including surgery. The Workers' Compensation Commission denied claim, and claimant appealed. The Court of Appeals, Short, J., 415 S.C. 395, 782 S.E.2d 753, reversed and remanded. On remand, the Commission remanded claimant's change of condition claim to a single commissioner for what would have been a third ruling on the same claim. Claimant appealed. The Court of Appeals dismissed and remanded. Claimant petitioned for a writ of certiorari.

The Supreme Court held that:

1 the commission's unreasonable delay in making a final decision with regard to claimant's claim for an increase in benefits due to a change of condition left claimant without an adequate remedy on appeal, and thus, the appellate panel's second remand order to a third commissioner was immediately appealable, and

2 remand to any appellate panel was warranted for immediate and final review of the original commissioner's order in accordance the holding of the Court of Appeals.

On July 1st, 2019, the Commission received notice from the parties in accordance with S.C. Code Ann. Regs. 67-712(B) (Supp. 2018) that the matter was ripe for further action by the Commission.

Accordingly, this matter is now before the undersigned 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.

STATEMENT OF THE CASE

The parties were originally heard by Commissioner Andrea C. Roche on February 11, 2013, in Columbia, South Carolina. On August 5, 2013, Commissioner Roche issued the following Order:

> In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:
>
> 1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
>
> 2. Defendants shall provide temporary total disability benefits from December I, 2011 through the present date and continuing.
>
> AND IT IS SO ORDERED!

Within the statutory period, Defendants filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on December 16, 2013, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Hearing, Commissioner erred in the following:

It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact # 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 16, 17. and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C Code Ann. Sec. 42-17-90 as a result of her original November 3. 2009 accident at work, error being that the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since the back surgeon. Dr. Edwards. testified then he could not identify any objective difference between any of claimant's MR Is. and thus, he could not state to a reasonable degree medical certainty that claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. *McGuffin v. Schlumberger-Sangamo*. 307 S.C. 184,414 S.E.2d 162 (1992). In this case, the preponderance of evidence in the record, including the objective and subjective evidence, supports a reversal of the Hearing Commissioner's award and ruling that Claimant had sustained a compensable change of condition for the worse and was therefore entitled to additional benefits under the SC Workers' Compensation Act.

STATEMENT AND DISCUSSION OF EVIDENCE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The Defendants argue that the medical evidence and depositions of Dr. Edwards and Dr. Merrill do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

The law concerning change of condition claims in South Carolina is well established. Section 42-17-90 provides: "The Commission may review an award and on that review make an award ... 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." In *Galtis v. Murrells Inlet* VFW #10420. 576 S.F.2d 191 (S.C. Ct. App. 2003) (citing *Causby v. Rock Hill Printing & Finishing Co.*. 153 S.F.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant

experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. *Id.* (citing *Krell v. S.C. State Hwy. Dept..*, 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. *Id.* at 191 (citing *Lewis v. Craven Reg'l Med. Ctr.*, 468 S.E.2d 269. 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." *Id.*

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant's November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merrill testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merrill Deposition, page 7. lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merrill Deposition, page 13. line 21— page 14, line 1). At the visit in September 2011, however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7. line 24—page 8. lines 4-1 I). Although Dr. Merrill did not have the films from the MRIs to compare, he did not think there was a major change between the two. (Dr. Merritt Deposition, page 8. lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable."' (Dr. Merrill Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merrill could not say for sure whether there was an obvious objective change or not. (Dr. Merrill Deposition, page 17, lines 11-13). Dr. Merrill also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merrill Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines 16-17: page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies, they looked substantially the same to him, and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition. page 6. lines 5-7; page 7. lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12. lines 24-25; page 13. lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at E5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and her reflexes remain the same (Dr. Edwards Deposition, page 16. lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for disceetomy back in 2010 for

her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (Dr. Edwards Deposition, page 20. line 19—page 21. line 2).

After a lengthy review of all the evidence, both objective and subjective, including the medical records, deposition testimony of both doctors, and the Claimant's testimony at the hearing, we find that Claimant did not meet her burden of proving that she sustained a physical worsening of her condition subsequent to the original hearing on this claim per § 42-17-90, and that she is, therefore, not entitled to any additional benefits under the South Carolina Workers' Compensation Act.

In the case at hand, Claimant 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. We find the lack of objective evidence persuasive. However, even the Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award. Specifically, Claimant's treating provider Dr. Merrill testified that Claimant had complaints of pain going into her right leg before she saw him at her first visit. (Dr. Merrill Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt, and further conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010, all of which occurred prior to the original hearing. (Tr. at 18:21-25: 20:2-23). Nevertheless, Claimant testified that she believed the pain in her right leg was new and different than before, although she could not remember exactly when she "started receiving them" and whether those issues started before or after the original hearing. (Tr. at 9: 11-21.).

We give great weight to the fact the objective medical testimony and medical testing certainly does not support Claimant's assertion that she sustained a worsening of her physical condition after the original award. While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merrill testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merrill Deposition, page 8, lines 13-24). Dr. Edwards did review and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the E5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5. lines 16-17; page 6. lines 5-7; page 7, lines 8-10; page 16. lines 22-25; page 17. lines 1-3). We give great weight to this testimony. Dr. Edwards also opined Claimant's disc protrusion at L5-S1 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. (Dr. Edwards Deposition, page 16, lines 17-21; page 17. lines 9-12). Dr. Merrill deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing. We give greater weight to the opinion of Dr. Edwards on these issues because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment.

The preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery, (Tr. at 12:4–23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21. line 2).

In sum, Claimant's radiographic condition has not worsened; any alleged worsening in this case is solely based on Claimant'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 Claimant's condition is worse. While we have considered Claimant's testimony and given it due consideration, we give greater weight to the objective evidence. (Dr. Edwards Deposition, page 12. lines 24-25; page 13. lines 5-6; page 18. lines 5-8). The evidence, both lay and expert, both subjective and objective, simply does not meet the preponderance of the evidence standard as required by the Act and case law to establish a worsening of Claimant's physical condition occurring after the original award.

For these reasons, we find that the hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings.

FINDINGS OF FACT

Based upon the evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, based on both the subjective and objective evidence, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.

2. The Claimant worked for Wal-Mart Stores, Inc. and suffered an injury to her back arising out of and in the course and scope of her employment on November 3, 2009.

3. This claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issued on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merrill on March 29, 2011, as long as such medication is causally-related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

4. Subsequent to the original award, the Clamant filed an application for a change of condition per § 42-17-90.

5. Defendants mistakenly filed a Form 15 on this claim, and that issue was adjudicated by Order of Commissioner Melody James dated September 18, 2012. That Order specifically held all claims

of change of condition by Claimant and all defenses by Defendants in abeyance for future determination.

6. We have reviewed the submitted evidence, both subjective and objective, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders.

7. We give limited weight to the subjective testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, both subjective and objective, we find Claimant's lay testimony about her past and ongoing complaint's does not carry the burden of proving a worsening of condition after the original award. Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award. The lay testimony simply did not carry the burden of proving a compensable change of condition claim. That is not to say that lay testimony could not meet the burden of proof in *any* instance, but in this *particular* instance, the lay testimony did not outweigh the medical evidence.

8. We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts in this case. Among the medical experts, we give the greatest weight to Dr. Edwards' testimony and opinion because he is a spine surgeon, and because Dr. Merrill himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment. Dr. Edwards' testimony and opinion is more persuasive than Claimant's testimony.

9. The medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse. The preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan after the original award and the MRI scan before the original award. This is given greater weight than Claimant's subjective testimony.

10. We 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. However, when reviewing the evidence as a whole and giving weight to the various pieces of evidence, both subjective and objective, it is our view that the preponderance of the evidence does not establish that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

11. Both Dr. Merritt and Dr. Edwards ultimately testified that was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award. While this finding alone is not dispositive, as objective proof is not required to establish a change of condition, we assign it greater weight than Claimant's subjective complaints.

12. Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. We are not persuaded and the preponderance of the evidence, both subjective and objective, does not support Claimant's contention that her need for surgery is new or developed after the original award.

13. The preponderance of the evidence shows that Claimant's radiographic condition has not worsened.

14. As a result of our finding that Claimant has not proven a compensable change of condition per § 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (§ 42-9-10), additional permanent disability (§§ 42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (§ 42-15-60).

15. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merrill on March 29, 2011, as long as such medication is causally-related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

15. The Commission does not find that in this, or any other case, 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. Claimant has not proved it more likely than not that she suffered a change of condition for the worse. We readily acknowledge that there is *some* evidence the Claimant may have suffered a change of condition. However, in this particular case, we find the *preponderance* of the evidence, both subjective and objective, does not establish Claimant has a change of condition for the worse.

CONCLUSIONS OF LAW

In view of those findings of fact, and as provided in the South Carolina Code of Laws. WE. THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW;

1. Pursuant to S.C. Code Ann. § 42-17-90, Claimant failed to prove by a preponderance of the evidence that Claimant suffered a change of condition for the worse.

2. Pursuant to § 42-15-60, Claimant is not entitled to additional medical care.

3. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.

4. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (§ 42-9-10), additional permanent disability (§§ 42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (§ 42-15-60).

5. Notwithstanding #4 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally-related to her work accident and lends to lessen her period of disability as per the authorized treating physician.

6. These conclusions of law are based on the evidence as a whole, including both the subjective and objective evidence. We do not hold that in this, or any other case, objective evidence is a pre-requisite to establish a change of condition.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law:

IT IS, THEREFORE, ORDERED that, after considering the subjective and objective evidence, the Claimant failed to prove by a preponderance of the evidence in the record that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

IT IS FURTHER ORDERED that as a result of our finding that Claimant has not proven a compensable change of condition per § 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not. limited to temporary compensation (§ 42-9-10), additional permanent disability (§§ 42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (§ 42-15-60).

IT IS FURTHER ORDERED that notwithstanding the above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally-related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

IT IS FURTHER ORDERED that Claimant application for additional benefits under the South Carolina Workers' Compensation Act for a worsening of condition per § 42-17-90 is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED.

Aisha G. Taylor, Commissioner

Susan S. Barden, Commissioner

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie D. Deller on July 18, 2019

426 S.C. 281
Supreme Court of South Carolina.

Paula RUSSELL, Claimant, Petitioner,
v.
WAL-MART STORES, INC., Employer, and Illinois National Insurance Company, Carrier, Respondents.

Appellate Case No. 2018-000354
|
Opinion No. 27875
|
Heard February 21, 2019
|
Filed April 3, 2019

Synopsis

Background: Claimant who suffered work-related back injury filed claim alleging change of condition for worse requiring additional medical treatment, including surgery. The Workers' Compensation Commission denied claim, and claimant appealed. The Court of Appeals, Short, J., 415 S.C. 395, 782 S.E.2d 753, reversed and remanded. On remand, the Commission remanded claimant's change of condition claim to a single commissioner for what would have been a third ruling on the same claim. Claimant appealed. The Court of Appeals dismissed and remanded. Claimant petitioned for a writ of certiorari.

Holdings: The Supreme Court, Few, J., held that:

the commission's unreasonable delay in making a final decision with regard to claimant's claim for an increase in benefits due to a change of condition left claimant without an adequate remedy on appeal, and thus, the appellate panel's second remand order to a third commissioner was immediately appealable, and

remand to any appellate panel was warranted for immediate and final review of the original commissioner's order in accordance the holding of the Court of Appeals.

Reversed and remanded.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Workers' Compensation Commission

Attorneys and Law Firms

C. Daniel Vega, of Chappell Smith & Arden, P.A., of Columbia, for Petitioner.

Johnnie W. Baxley III, of Willson Jones Carter & Baxley, of Mount Pleasant, for Respondents.

Opinion

JUSTICE FEW:

*283 An appellate panel of the workers' compensation commission remanded Paula Russell's change of condition claim to a single commissioner for what would be a third ruling on the same claim. Russell appealed the remand order to the court of appeals, which dismissed the appeal on the ground the order was not a final decision, and thus not immediately appealable. We find the remand order is immediately appealable because the commission's unwarranted delay in making a final decision requires immediate review to avoid leaving Russell with no adequate remedy on an appeal from a final decision. We reverse the court of appeals' order dismissing the appeal, reverse the appellate panel's remand order, and remand to any appellate panel of the commission for an immediate and final review of the original commissioner's decision.

***284 I. Facts and Procedural History**

Russell injured her back in 2009 while working at a Wal-Mart store in Conway. The commission found Russell suffered a 7% permanent partial disability, and awarded her twenty-one weeks of temporary total disability compensation. In 2011, Russell requested review of her award, claiming there had been a "change of condition caused by the original injury" pursuant to subsection 42-17-90(A) of the South Carolina Code (2015).

A single commissioner conducted a full evidentiary hearing on the 2011 claim on February 11, 2013. In a detailed order dated August 5, 2013, the commissioner found Russell had proven a change of condition. The commissioner ordered Wal-Mart to pay temporary total disability benefits beyond the original twenty-one weeks "through the present date and continuing." The commissioner based the award on Russell's

testimony, and the testimony and medical records of two treating physicians. The commissioner explained in her order she relied on testimony of the two physicians who described a "physical, anatomical change" and an "increase in the size of the disc protrusion," demonstrated by an "objective" comparison of MRI images taken before and after the award.

An appellate panel reversed the commissioner. The panel dismissed Russell's testimony on the ground "it is conclusory and self-serving." The panel discounted the testimony and medical records of the two physicians, stating, "Both [physicians] ultimately testified there was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award." In an order dated January 30, 2014, the panel found Russell "failed to prove by a preponderance of the evidence ... [she] has sustained a change of condition."

Russell appealed to the court of appeals. The court of appeals found the appellate panel "erred in requiring a change of condition to be established by objective evidence." *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 398, 782 S.E.2d 753, 755 (Ct. App. 2016). The court of appeals reversed the panel and remanded "to the Commission," 415 S.C. at 401, 782 S.E.2d at 757, with no express remand instructions.

***285** The court of appeals remitted the case to the commission on May 3, 2016. On March 20, 2017, a second commissioner filed a detailed order finding Russell "met her burden of proving a change of condition." On September 15, 2017, however, a new appellate panel vacated the second commissioner's order and remanded for what would be a third commissioner to make a third ruling. The panel stated, "At the remand hearing, the Single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition is found to be compensable."

Russell appealed the September 15, 2017 order to the court of appeals. In an unpublished decision, the court of appeals found the appellate panel's remand order was not immediately appealable and dismissed the appeal. Russell filed a petition for a writ of certiorari with this Court. She argued the commission's repeated remands for new hearings created a "perpetual" [1] "cycle of orders and appeals such that [she] will be deprived of an adequate remedy." We granted the petition, and now reverse.

II. Analysis

One primary goal of the Workers' Compensation Act is to provide quick and efficient resolution of work-related injury claims so neither employers nor employees become bogged down in complicated and protracted litigation. *See Peay v. U.S. Silica Co.*, 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993) (recognizing "Workers' compensation laws were intended by the Legislature to ... provid[e] sure, swift recovery for workplace injuries regardless of fault"). This Court recently emphasized the goal, stating, "The Workers' Compensation Act was designed to supplant tort law by providing a no-fault system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson v. S.C. Dep't of Soc. Servs.*, 411 S.C. 381, 389, 769 S.E.2d 1, 5 (2015) (citing ***286** *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 115, 580 S.E.2d 100, 107 (2003)).[2] The court of appeals addressed this goal in another case in which the commission unreasonably delayed addressing the merits of claims, stating, "If the claimants were entitled to benefits, they were entitled to receive them many years ago. If the claimants were not entitled to benefits, [the employers] were entitled to have the claims denied many years ago." *Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. 501, 506, 768 S.E.2d 670, 673 (Ct. App. 2015).

The Administrative Procedures Act limits the role of the judicial branch of government in meeting the goal of quick decisions in limited litigation by restricting appeals to final decisions in most cases. *See* S.C. Code Ann. § 1-23-380 (Supp. 2018) ("A party ... who is aggrieved by a final decision ... is entitled to judicial review...."); *Spalt v. S.C. Dep't of Motor Vehicles*, 423 S.C. 576, 583, 816 S.E.2d 579, 583 (2018) (stating "the Administrative Procedures Act permits an appeal only from 'a *final* decision ...' " (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894 (2010))). Nevertheless, this Court has struggled to foster quick and efficient resolution of work-related injury claims by discouraging the commission from making repeated, unnecessary remands. In *Bone v. U.S. Food Service*, we cited "lingering confusion in this area [of immediate appealability] that has arisen after the passage of the Administrative Procedures Act" as a basis for granting certiorari to review the court of appeals' dismissal of an interlocutory appeal. 399 S.C. 566, 570, 733 S.E.2d 200, 202 (2012), *adhered to on reh'g*, 404 S.C. 67, 744 S.E.2d 552 (2013). Ultimately, we denied an immediate appeal and permitted a remand for a new hearing, 404 S.C. at 84, 744 S.E.2d at 562, but we highlighted

the prejudice employers and employees *287 may suffer from delaying appeal of interlocutory orders until after final judgment, 404 S.C. at 82-83, 744 S.E.2d at 561. The dissent in *Bone* addressed the problem even more directly. Justice Hearn wrote, "Moreover, the interests of judicial economy demand a rejection of the majority's view. Taken to its logical conclusion, the majority's position could have cases trapped in a cycle of remands for years." 404 S.C. at 92, 744 S.E.2d at 566 (Hearn, J., dissenting).

In *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 791 S.E.2d 719 (2016), we again faced the prejudice workers' compensation litigants may encounter when the commission orders repeated remands, and appeal must be delayed until a final decision. We stated, "Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy." 418 S.C. at 250, 791 S.E.2d at 722; *see* § 1-23-380 ("A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."). We foresaw in *Hilton* precisely what has happened in this case, that "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." 418 S.C. at 252, 791 S.E.2d at 723. In *Hilton*, we granted an immediate appeal despite the fact the commission's order was not a final decision. *Id.*; *see also* 418 S.C. at 253, 791 S.E.2d at 723 (Kittredge, J., concurring) (contending "the petitioners in *Bone* made the identical argument ..., that review of a final agency decision would not provide an adequate remedy").

If this Court's role in achieving this goal of the Workers' Compensation Act is limited, however, the commission's role is primary. *See James v. Anne's Inc.*, 390 S.C. 188, 201-02, 701 S.E.2d 730, 737 (2010) (stating the " 'workers' compensation commission ... is, in the first instance, responsible for effectuating the purposes of the workers' compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives.' " (quoting 100 C.J.S. *Workers' Compensation* § 706 (2000))). The Workers' Compensation Act sets forth the procedure the commission should follow to fulfill its purpose. Subsection 42-17-40(A) of the South Carolina *288 Code (2015) provides, "The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner." Section 42-17-50 of the South Carolina Code (2015) provides an "application for review" by an appellate panel must be made "within fourteen days," in which case an appellate panel may, "if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award."

In most instances, therefore, a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and "determine the dispute in a summary manner." § 42-17-40(A). If the commissioner's decision is appealed, an appellate panel must promptly hear the appeal, and "if proper, amend the award." § 42-17-50. In all but rare cases, the appellate panel should proceed promptly to make a final decision without the necessity of any remand. When the commission follows this procedure, it will have fulfilled the legislatively set goal to "provide[ ] a ... system focusing on quick recovery, relatively ascertainable awards, and limited litigation." *Nicholson*, 411 S.C. at 389, 769 S.E.2d at 5.

In this case, however, the commission's unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers' Compensation Act. As we will explain, each of the remands was unnecessary—particularly the remand order on appeal—and thus contributed to the commission's failure to make a final decision in a timely manner.

After the first appellate panel reversed the first commissioner, the court of appeals reversed. *Russell*, 415 S.C. at 397, 782 S.E.2d at 754. The focus of the court of appeals was the error of requiring that only objective evidence may support the claim. *See* 415 S.C. at 398, 782 S.E.2d at 755 ("Russell argues the Commission erred in requiring a change of condition to be established by objective evidence. We agree."). That was an error only in the appellate panel's review of the first commissioner's decision. In fact, as we previously explained, the first commissioner specifically relied on Russell's subjective *289 testimony, and on the subjective impressions of the two physicians, in addition to the objective MRI scans. While the court of appeals did not provide the commission with specific remand instructions, the commission should have been able to determine that its error was in the appellate panel's review of the commissioner —not in the work of the commissioner. It was completely unnecessary, therefore, for the commission to require the case be reheard by a second commissioner. Rather, given

the clear description of the error committed by the appellate panel in reversing the original commissioner, the only task for the commission after the court of appeals' decision was to complete a renewed review of the original commissioner's order under proper principles of law.

It was also completely unnecessary for the second appellate panel to remand to a third commissioner after the second commissioner reviewed the evidence and filed a second detailed order. The court of appeals' 2016 opinion required only a new review, not a new hearing. Even before the second commissioner ruled, counsel for Wal-Mart specifically argued there should be no new hearing. In an email to the commission shortly after the court of appeals remitted the case in May 2016—nine months before the second commissioner's March 2017 order—counsel for Wal-Mart wrote,

> Based upon the hearing notice that I have received, it appears as though this matter has been set for a de novo hearing before the single commissioner. I believe this to be in error based upon the remand from the ... court of appeals.... There is nothing in the remand ... which indicates that a new hearing should be held and that new evidence should be taken on the claim; instead, the commission is simply supposed to reconsider the existing evidence and issue new factual findings in accordance with the legal issues raised by the court of appeals. I believe that having a new hearing ... is improper from a legal and procedural perspective.

Counsel for Wal-Mart continued, specifically raising the concern we foresaw in *Hilton* and upon which we now reverse,

> I am surprised that this matter was not considered by the full commission and that new factual findings were not issued in accordance with the directives of the court of appeals. Any new factual findings coming from a single ***290** commissioner will simply necessitate more appeals and more litigation.... I certainly don't see any basis for a de novo hearing or consideration of new evidence; the remand from the court of appeals simply directs the commission to reconsider the existing evidence in light of [the court's] legal determination.

Nevertheless, despite the fact counsel for Wal-Mart specifically asked there not be a de novo hearing, despite the fact the issue of a de novo hearing was not raised by either side after the second commissioner's order, despite the fact almost six years had elapsed since Russell's claim for a change of condition was filed, despite the existence of two detailed single commissioner orders awarding Russell additional benefits, the appellate panel remanded to a third commissioner for a third hearing, specifically requiring the very thing the party appealing to it (Wal-Mart) had specifically asked not to have—a new hearing.

In summary, Russell filed her claim for an increase in benefits due to a change of condition in 2011. In 2013, a commissioner found she proved her condition had changed for the worse. As of the writing of this opinion—nearly eight years after Russell filed her claim—Russell has not received any additional benefits, despite two commissioners finding she was entitled to them. *Cf. Rose v. JJS Trucking, LLC*, 411 S.C. 366, 369, 768 S.E.2d 412, 413 (Ct. App. 2015) (finding an interlocutory order not immediately appealable under the "adequate remedy" provision when the only prejudice was "to delay the payment of money" between insurance providers). If Russell is entitled to additional benefits, she was entitled to receive them many years ago. If she is not entitled to additional benefits, Wal-Mart was entitled to have her claim denied many years ago. *S.C. Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. at 506, 768 S.E.2d at 673. The commission failed to fulfill its responsibility under the Workers' Compensation Act to promptly decide this case without protracted litigation.

III. Conclusion

We find the commission's unreasonable delay in making a final decision leaves Russell without an adequate remedy on appeal from a final decision under section 1-23-380.

Therefore, we find the appellate panel's remand order is immediately *291 appealable. We **REVERSE** the court of appeals' dismissal, **REVERSE** the order remanding to a single commissioner, and **REMAND** to any 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.

BEATTY, C.J., KITTREDGE, HEARN and JAMES, JJ., concur.

All Citations

426 S.C. 281, 826 S.E.2d 863

Footnotes

1 Russell did not use the word "perpetual" in her petition for a writ of certiorari. She did, however, use it in her petition for rehearing to the court of appeals. As we will explain, the term is appropriate.

2 *See also* 99 C.J.S. *Workers' Compensation* § 16 (2013) (stating "considerations leading to the enactment of the compensation legislation [include] a desire to provide a remedy or form of relief to, or settlement of the claims of, injured workers or their dependents that is prompt and speedy" (footnote omitted)); 82 Am. Jur.2d *Workers' Compensation* § 12 (2013) ("A state's workers' compensation act ... provid[es] injured employees with an efficient system of rights, remedies, and procedures with the goal of giving them prompt relief. Among the purposes of a workers' compensation act [is] ... providing prompt justice for injured workers and preventing the delays that might arise from protracted litigation." (footnotes omitted)).

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APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,	CLAIMANT/RESPONDENT,
vs.	
Wal-Mart Stores, Inc.,	EMPLOYER,
and	
Illinois National Insurance Company,	CARRIER, DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina, on June 19, 2017, per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed 9-15, 2017

APPEARANCES:

Respondent Paula Russell, Claimant represented by C. Daniel Vega, Esquire, of Chappell, Smith & Arden in Columbia, South Carolina.

Defendants/Appellants represented by Johnnie W. Baxley, III, Esquire of Willson Jones Carter & Baxley, P.A. in Mt. Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, and on March 20, 2017, he issued the following Order:

IT IS ORDERED that Defendants shall pay Claimant benefits pursuant to a change of condition for the worse, commencing on November 21, 2011, of the lumbar injury sustained November 3, 2009.

IT IS FURTHER ORDERED that Defendants shall provide and pay for Claimant's medical care and treatment related to the change of condition for the worse, commencing November 21, 2011 to the present and continuing of the further order of the Commission.

IT IS FURTHER ORDERED that Defendants shall pay for Claimant's reasonable costs and expenses incurred while obtaining medical care and treatment related to the change of condition for the worse, commencing November 21, 2011 to the present and continuing of the further order of the Commission.

IT IS FURTHER ORDERED that Defendants shall pay temporary total disability benefits in the amount of $681.36 per week, commencing December 1, 2011, to the present and continuing until further order of the Commission.

IT IS SO ORDERED!

Within the statutory period, Defendants filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on June 19, 2017, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Single Commissioner erred in finding as a fact and concluding as a matter of law in the following particulars listed below. Such errors are errors of fact and law:

1. Did the Single Commissioner err in Findings of Fact #1, in basing his decision on workers' compensation benefits in part on the prior factual findings of Commissioner Roche, which were set aside by the Full Commission and have no precedential value or weight, instead of reviewing the record de novo using the preponderance of the evidence standard as instructed by the Court of Appeals?

2. Did the Single Commissioner err in Findings of Fact #12 and #13, in stating conclusively that the Claimant did not have any prior work restrictions or leg or buttock pain based on Commissioner Wilkerson's June 8, 2011 order, even though Commissioner Wilkerson did not address these issues in his order?

3. Did the Single Commissioner err in Findings of Fact #18 and #19, in stating that the Claimant's "new" pain and symptoms began in her leg and buttock around September or October of 2011, such findings being based on surmise and conjecture, rather than medical evidence stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support this factual finding?

4. Did the Single Commissioner err in Findings of Fact #20, in concluding that Dr. Merritt opined that Claimant's condition had worsened contrary to the greater weight and substantial evidence of record, especially taking into consideration that Dr. Merritt did not state his opinion to reasonable degree of medical certainty on November 21, 2011? Does the preponderance of evidence in the record support this factual finding?

5. Did the Single Commissioner err in Findings of Fact #21 and 22, in indicating that Wal-Mart refused to accommodate the Claimant's restrictions and terminated her, even though the greater weight of the evidence proves that Wal-Mart was accommodating the Claimant's restrictions and that the Claimant voluntarily resigned from Wal-Mart? Does the preponderance of evidence in the record support these factual findings?

6. Did the Single Commissioner err in Findings of Fact #26, in stating that Dr. Edwards opined that Claimant did not have radicular symptoms after her 2009 injury, but now has pain centered in her lower back that radiates into her legs, even though Dr. Edwards did not offer an opinion as to this matter and the medical narrative simply reiterated the Claimant's subjective history? Does the preponderance of evidence in the record support this factual finding?

7. Did the Single Commissioner err in Findings of Fact #28, by stating that Dr. Edwards recommended surgery after a July 24, 2012 MRI, when he did not recommend surgery and only discussed surgery with the Claimant on her own request?

8. Did the Single Commissioner err in Findings of Fact #30, 31, and 32, in stating that Dr. Merritt testified that there was a slightly larger disc protrusion in the MRI that was touching the nerve root and that the Claimant had new radicular symptoms, when his testimony regarding these issues were speculative and not stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?

9. Did the Single Commissioner err in Findings of Fact #33, by stating to a reasonable degree of medical certainty that Claimant suffered a change in condition for the worse, even though Dr. Merritt's deposition, taken as a whole, is speculative and does not meet the standard of medical evidence to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?

10. Did the Single Commissioner err in Finding of Fact #34, by stating that Dr. Merritt recommended additional treatment, up to but not excluding surgery, even though his deposition testimony did not take an affirmative stance on the Claimant's future surgical needs?

11. Did the Single Commissioner err in Findings of Fact #36, 37, 38, 39, 40, 41, 42, and 43, by mischaracterizing or misstating Dr. Edwards testimony when:

a. Fact #36 only provided part of Dr. Edwards answer, and omitted Dr. Edwards' testimony that "radiographically, there's not a significant difference" in the MRI scan?

b. Fact #37 indicated that Dr. Edwards testified to a reasonable degree of medical certainty that there was change to the Claimant's nerve making it more painful, but Dr. Edwards did not provide this opinion to a reasonable degree of medical certainty as indicated on page 13 of his deposition transcript?

c. Fact #38 indicated that the Claimant's symptoms were worse and clinically different in 2012 than 2010, even though Dr. Edwards clarified that radiographically she was not worse?

d. Fact #39 indicates that Dr. Edwards stated the Claimant's radiculopathy was caused by a combination of mechanical direct compression and chemical irritation to the nerve, when he was unable to state this fact to a reasonable degree of medical certainty

and merely postulated that chemical leaking and mechanical compression could be causing the Claimant's subjective symptoms?

e. Fact #40 indicates that Dr. Edwards testified that the disc pathology was causing the Claimant's worsening, when he did not state that fact and merely indicated that the Claimant's disc pathology was causing her symptoms and that the disc pathology was fairly consistent before and after the alleged worsening?

f. Fact #42 omitted certain testimony from Dr. Edwards answer on page 18 of his deposition transcript?

g. Fact #43 incorrectly stated that Dr. Edward recommended surgery for the changed condition, when he never stated to a reasonable degree of medical certainty that the Claimant has suffered a worsening of her condition?

Are these findings supported by the preponderance of evidence in the record, or are they snippets of testimony cherry-picked to provide the basis for an award despite the weight of the evidence?

12. Did the Single Commissioner err in Findings of Fact #45 - #66, by stating as fact any findings by Commissioner Roche when her Order was expressly overturned by the Full Commission and therefore such findings are entitled to no weight or precedential value? Did the Single Commissioner incorrectly rely upon prior Single Commission findings that were expressly overturned by the Full Commission? Does the preponderance of evidence in the record support these findings?

13. Did the Single Commissioner err in Findings of Fact #68 - 72 by mischaracterizing and misinterpreting the basis for Defendants' appeal and arguments?

14. Did the Single Commissioner err in Findings of Fact #91-94 by mischaracterizing the "findings" of the Court of Appeals and basing his decision in part upon mischaracterized factual findings which were not made by the Court of Appeals?

15. Did the Single Commissioner err in Findings of Fact #95, when stating that the South Carolina Court of Appeals reversed and remanded the matter to the Commission to enter an order consistent with their findings, when the Court of Appeals merely reversed and remanded the matter to the Commission to evaluate this case and make its own findings under a preponderance of the evidence standard? Did this misunderstanding by the Single Commissioner of the directives

of the Court of Appeals lead to this erroneous decision and factual findings that are not supported by the preponderance of the evidence?

16. Did the Single Commissioner err in Findings of Fact #98, in stating that the Claimant suffered a change of condition for the worse as outlined in the overturned order of Commissioner Roche? Did the Single Commissioner fail to properly review the preponderance of the evidence and make factual findings, as opposed to relying upon old factual findings that had already been overturned by the Full Commission? Does the preponderance of the evidence in the record support this finding?

17. Did the Single Commissioner err in Finding of Fact #102, 103, and 104, in stating that Dr. Merritt testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though preponderance of the evidence states otherwise? Did the Single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?

18. Did the Single Commissioner err in Findings of Fact #105, 106, and 107, in stating that Dr. Edwards testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though substantial evidence states otherwise? Did the Single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?

19. Did the Single Commissioner err in Findings of Fact #108 and #109 in implying that objective evidence is not appropriate in a change of condition for the worse standard even though objective evidence is an integral part of the preponderance of evidence standard?

20. Did the Single Commissioner err in Findings of Fact #110 and #111, in finding the Claimant's testimony "admittedly credible" and that the Full Commission erred in finding the Claimant's testimony conclusory and self-serving, based on the fact that Defense counsel simply stated that she came across well?

21. Did the Single Commissioner err in Findings of Fact #112, 113, and 114, in stating that the Claimant was able to establish that she had new complaints that were not present at the time of the original award, that her present condition is different than the condition in existence when the first award was made, and that her condition had worsened, when such factual findings are based exclusively on the claimant's testimony and not based upon a preponderance of evidence in the record? Did the Single Commissioner err in basing these factual findings on only

certain evidence while ignoring other competent evidence as opposed to making factual findings based upon the preponderance of evidence in the record?

22. Did the Single Commissioner err in Findings of Fact #115 that the Claimant needs surgery and that her need is new and occurred after the original award, even though there is evidence to the contrary in this claim? Does the preponderance of evidence in the record support this factual finding?

23. Did the Single Commissioner err in Findings of Fact #116, in stating affirmatively that the Claimant had difficulty driving and working due to her symptoms, even though the preponderance of objective evidence shows that she was able to complete her job without issue?

24. Did the Single Commissioner err in Findings of Fact #117 and 118 finding that a preponderance of evidence supports a finding that Claimant suffered a change of condition for the worse, is eligible for further benefits under the Act?

25. Did the Single Commissioner err in Findings of Fact #119-124 by simply restating the award of Commissioner Roche which has no weight or precedential value since it was overturned by the Full Commission, and where such findings are not supported by the preponderance of evidence?

26. Did the Single Commissioner err in Findings of Fact #123, in stating that the Claimant was terminated on December 1, 2011, when the greater weight of the evidence indicates that the Claimant was being accommodated prior to December 1, 2011 and that she resigned her employment sometime after December 1, 2011 when Defendants would not move her to another location?

27. Did the Single Commissioner err in Findings of Fact #124, in reinstating Commissioner Roche's award of temporary total disability benefits from December 1, 2011, to the present and continuing? Procedurally, did the Single Commissioner err in awarding back temporary benefits without the taking of any new testimony or evidence regarding that issue and reinstating an award that was based upon testimony and evidence from February 2013? Does the preponderance of evidence in the record support such an award? Is the reinstatement of the original award from the Single Commissioner an error of law?

28. Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #2, based on Commissioner Roche's overturned Order that the Claimant was awarded a change of condition for the worse commencing on November 21, 2011, ongoing temporary total disability benefits commencing December 1, 2011, to the present and continuing, and causally related medical care and treatment for the change in condition along with reasonable reimbursement costs and expenses? Was it factual error for the Commissioner to simply reinstate the old findings of Commissioner Roche as opposed to making new findings based upon a preponderance of evidence in the record?

29. Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #8, that Claimant has met her burden of proving a change of condition for the worse commencing November 21, 2011?

30. Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #9 and #10, that the Claimant is awarded causally related medical care and treatment along with reasonable reimbursement costs for expenses incurred while obtaining care and temporary total disability benefits commencing December 1, 2011, to the present and continuing? Are these awards errors of law procedurally and factually?

31. Did the Single Commissioner err in failing to make factual findings regarding the weight given to the competing evidence in this matter?

32. Did the Single Commissioner err in failing to make factual findings regarding whether there has been proof by a preponderance of the evidence that there has been a change of condition caused by the original injury occurring after the last payment of compensation?

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Single Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, we find that the Single Commissioner should have had a full evidentiary hearing on the issue of benefits to be awarded if there is a finding of a change of condition for the worse. Due to the failure to conduct such a hearing on that issue and the Single Commissioner's improper reinstatement of a previous award of Commissioner Roche, we vacate the Order dated March 20, 2017, and remand the matter back to the Single Commissioner for a full evidentiary hearing.

PROCEDURAL HISTORY

On February 11, 2013, a hearing was held before Commissioner Andrea C. Roche to determine the issues raised in Claimant' s Form 50. After considering the evidence presented, Commissioner Roche found that Claimant suffered a change of condition for the worse and was entitled to additional medical care and attention as well as temporary total disability benefits. Defendants appealed this decision and a hearing was held before the Full Commission on December 16, 2013. The Full Commission issued its order on January 30, 2014, and found that no change in condition had occurred due to the fact that no objective evidence showed a change in condition and the greater weight of the evidence did not support a worsening of condition. Claimant appealed this decision to the South Carolina Court of Appeals arguing that the Full Commission erred by using an objective evidence standard. The South Carolina Court of Appeals heard the appeal on October 20, 2014, and issued its decision on January 20, 2016. The Court of Appeals found that the Full Commission erred in requiring the Claimant to establish her claim for a change of condition with objective evidence. The Court reiterated the standard that the Commission use a preponderance of evidence standard when deciding these claims.

The Court of Appeals remanded to the Commission to determine if the Claimant sustained a changed in condition based upon a preponderance of evidence. The Court of Appeals found that the Commission erred in requiring a change of condition to be established by objective evidence and they reversed and remanded on that issue alone. On remand and without a hearing, Commissioner Campbell concluded that the Claimant met her burden of proving a change of condition for the worse. Additionally, Commissioner Campbell reinstated the original award of Commissioner Roche which awarded causally related medical care and treatment commencing November 21, 2011, and temporary total disability benefits commencing December 1, 2011, to

the present and continuing. Commissioner Campbell's Decision and Order was filed on March 20, 2017, and Appellants subsequently and timely filed a Form 30 appealing this Decision and Order on March 31, 2017.

ISSUES PRESENTED

I. **Did the Single Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work when the preponderance of evidence in the record does not support such findings (Grounds for Appeal # 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 18, 21, 22, 23, 24, 26, 29, 30, 31, 32)?**

II. **Did the Single Commissioner err in failing to review the evidence de novo to determine whether the Claimant sustained a change of condition for the worse by a preponderance of the evidence and in awarding benefits (Grounds for Appeal # 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 27, 28, 29, 30, 31, 32)?**

DISCUSSION

The Appellate Panel first addresses Issue II, as our ruling on that issue necessitates our decision to vacate the order of Commissioner Campbell and remand the case. The Defendants argued that, even if there had been a compensable change of condition for the worse, the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of benefits. We agree.

Although we find that the Single Commissioner properly addressed benefits, such benefits should have only been awarded after a full evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits. It was improper and an error of law for the Single Commissioner to simply reinstate the prior award of benefits by Commissioner Roche dated August 5, 2013. Those previous findings and the award had already been overturned by the Full Commission, and as an operation of law, the findings, conclusions, and award of Commissioner Roche no longer existed and cannot be reinstated. Claimant argues Commissioner

Campbell properly reinstated Commissioner Roche's findings because Commissioner Roche's findings are the "law of the case." Claimant argues the Orders must necessarily have been consistent with one another because those issues had already been litigated, were unappealed, and could not be relitigated. However, the Full Commission unanimously reversed Commissioner Roche's findings, stating Claimant failed to meet her burden of proof that she sustained a change of condition for the worse and reversing her award of benefits. Thus, it is legal error to reinstitute Commissioner Roche's overturned findings.

Further, the award of benefits in this matter without allowing Defendants to have an evidentiary hearing, to present evidence, or to cross-examine the claimant, had the effect of denying the Defendants due process to present a defense to this claim for benefits. By reinstating the award of Commissioner Roche from 2013, which consisted of an award of ongoing temporary benefits and medical treatment, it deprived the Defendants of the opportunity to challenge the claimant's entitlement to any of those benefits or present evidence on those issues. Obviously, the Defendants had an opportunity to present evidence before Commissioner Roche's original award, but that occurred at an evidentiary hearing in February 2013. Since that time, the Defendants have had no opportunity to present any additional evidence regarding Claimant's entitlement to workers' compensation benefits. The Single Commissioner's decision to simply reinstate the award of Commissioner Roche denied the Defendants due process on the issue of benefits.

Finally, the Single Commissioner made an award of benefits that apply to the time period from November 21, 2011, through the present and continuing without any factual or evidentiary basis for such award. As indicated above, the last time either party submitted any testimony or evidence was at a hearing on February 11, 2013. The Single Commissioner made an award of ongoing temporary compensation and medical treatment even after that date despite a complete

lack of evidence and testimony as to whether the claimant's need for medical treatment has continued and temporary disability has continued. There is simply no evidence or factual basis for such an award since there was not a full evidentiary hearing.

It is improper and prejudicial to both parties in this claim to simply reinstate findings that are almost four years old. If benefits are to be awarded, there must be an evidentiary hearing so that accurate and up-to-date factual findings and awards can be made. We find that the Single Commissioner, on the issue of whether there had been a change of condition for the worse, correctly limited his review to the evidence and record that had been presented at the hearing on February 11, 2013. We find that the Single Commissioner erred in not having a full evidentiary hearing and accepting new testimony on the issue of benefits due if there has been a change of condition for the worse.

The Defendants also asserted that the Single Commissioner inadvertently misstated and mischaracterized a number of important and relevant facts. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

Additionally, the Defendants have asserted that the preponderance of evidence in the record including the medical records, the diagnostic testing, and the medical testimony, and the testimony of the Claimant do not support the finding of the Single Commissioner that Claimant sustained a physical worsening of condition after the original award. The Claimant has asserted that the preponderance of the evidence in the record supports that the Claimant has sustained a worsening of her condition. Again, the appellate panel does not need to address this issue. We have decided to vacate the order of Commissioner Campbell and remand the claim for a new hearing based upon

the award of benefits issue, and thus there is no need to address this additional ground.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.

2. The claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issued on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

3. Subsequent to the original award, the Claimant filed an application for a change of condition per section 42-17-90.

4. A hearing regarding the alleged change of condition was adjudicated before Commissioner Andrea Roche on January 16, 2013. Commissioner Roche found Claimant sustained a compensable change of condition claim, and awarded Claimant ongoing medical treatment.

5. Defendants/Appellants appealed to the Full Commission and received an Order in their favor dated January 30, 2014. The Full Commission unanimously reversed Commissioner Roche's findings, stating Claimant failed to meet her burden of proof that she sustained a change of condition for the worse.

6. The Claimant appealed to the South Carolina Court of Appeals, and it heard the case

on October 20, 2015. The South Carolina Court of Appeals issued its decision on January 20, 2016, reversing and remanding the Full Commission's January 30, 2014 Order. The South Carolina Court of Appeals found the Commission erred in requiring Claimant to establish her claim for a change of condition by objective evidence. See Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016). The Court of Appeals remanded this matter to the Commission.

7. Commissioner R. Michael Campbell adjudicated the case on remand without a hearing and issued an Order on March 20, 2017. The Single Commissioner reinstated Commissioner Roche's findings and benefits award.

8. Defendants/Appellants filed a Form 30 to appeal the Single Commissioner's Order, and the Full Commission heard the case on June 19, 2017.

9. We find that the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of benefits. Any award of benefits should have only been awarded after a full evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits.

10. The award of benefits in this matter without allowing Defendants to have an evidentiary hearing, to present evidence, or to cross-examine the claimant, had the effect of denying the Defendants due process to present a defense to this claim for benefits. By reinstating the award of Commissioner Roche from 2013, which consisted of an award of ongoing temporary benefits and medical treatment, the Single Commissioner deprived the Defendants of the opportunity to challenge the claimant's entitlement to any of those benefits or present evidence on those issues.

11. The Single Commissioner made an award of benefits that applied to the time period from November 21, 2011, through the present and continuing without any factual or evidentiary basis for such award. The last time either party submitted any testimony or evidence was at a hearing

on February 11, 2013. The Single Commissioner made an award of ongoing temporary compensation and medical treatment even after that date despite a complete lack of evidence and testimony as to whether the claimant's need for medical treatment has continued and temporary disability has continued.

12. The Defendants also asserted that the Single Commissioner inadvertently misstated and mischaracterized a number of important and relevant facts. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

13. The Defendants also asserted that the preponderance of evidence in the record including the medical records, the diagnostic testing, and the medical testimony, and the testimony of the Claimant do not support the finding of the Single Commissioner that Claimant sustained a physical worsening of condition after the original award. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to S.C. Code Ann. section 42-17-90, 42-9-10, 42-9-30 et seq., we find that the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of any award of benefits under the

Act.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Single Commissioner's March 20, 2017 Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing. The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof.

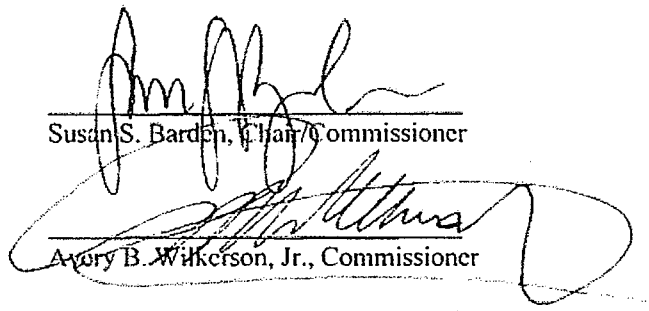
IT IS FURTHER ORDERED that at the remand hearing, the Single Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90. At the remand hearing, the Single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable.

AND IT IS SO ORDERED!

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

VACATED AND REMANDED

Aisha Taylor, Commissioner



Susan S. Barden, Chair/Commissioner

Avory B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on September 14, 2017

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0917785

Paula Russell,

Claimant,

vs.

Wal-Mart #0586,

Employer,

Illinois National Insurance Company,

Carrier/Defendants.

DECISION AND ORDER

Commissioner: The Honorable R. Michael Campbell, II.

Hearing: Judgment of the Commission based upon a review of the record.

Purpose: To determine issues remanded to the Commission from the South Carolina Court of Appeals.

Attorneys: Claimant represented by C. Daniel Vega, Esq., of Columbia, S.C.

Defendant Illinois National Insurance Company represented by Johnnie W. Baxley, III, Esq., of Mount Pleasant, S.C.

STATEMENT OF THE CASE

The present claim comes before the Commission pursuant to *remittiture* from the Court of Appeals with instructions to the Commission remanding and reversing its previous order denying benefits. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016).

This is a Workers' Compensation claim. Claimant, Paula Russell (hereinafter "Claimant") was first injured in an admitted work-related accident on November 3, 2009. Claimant's employer was Wal-Mart Stores, Inc. ("Employer"), and its carrier is American Home Assurance ("Carrier") (collectively, "Defendants"). A hearing was held on April 13, 2011. On June 8, 2011, the Commission ordered Claimant reached Maximum Medical Improvement ("MMI"), was entitled to a 7% disability to the back, and could work with moderate restrictions that did not prevent her from doing her management-level job.

Within a few months, Claimant began to experience increased symptoms. Claimant suffered increased pain in her back as well as new radicular pain in her legs and buttock. On December 9, 2011, after discussing these new symptoms with her doctors, Claimant filed a Form 50 alleging a change of condition. A hearing on this matter was held on February 11, 2013. In an order dated August 5, 2013, the Single Commissioner ruled Claimant experienced a change in condition, was entitled to ongoing causally related medical care and was also entitled to temporary total disability benefits from December 1, 2011 through the present and continuing.

This Order was appealed by the Defendants and a hearing was held on December 16, 2013. The Full Commission issued its order on January 30, 2014. The Full Commission found no change in condition occurred, based on the lack of difference between lower back

MRI's. The first MRI was performed in 2010, prior to the resolution of her initial claim. The next two MRIs, from 2011 and 2012, were performed after she began experiencing new and more severe symptoms. In making this ruling, the Commission applied an "objective difference" standard, requiring Claimant prove, via an 'objective' measure, that a change in condition had occurred. The Commission found the doctors' opinions that a change of condition had occurred, as well as Claimant's otherwise credible testimony her symptoms increased, was not enough to prove a change of condition without being able to show an anatomical change via an MRI. Finally, the Commission found Claimant's statements about her increased symptoms were unreliable because they were both "conclusory" and "self-serving."

Claimant served her Notice of Appeal to the South Carolina Court of Appeals on February 28, 2013, alleging three errors made by the Commission: (1) the use of an "objective" evidence standard to prove a change of condition is an error of law; (2) the substantial evidence of the case can lead to no other conclusion but that a change in condition has occurred; and (3) the Commission erred in finding that the Claimant was not a credible witness.

Claimant's appeal was heard by the South Carolina Court of Appeals on October 20, 2014, and its decision was filed January 20, 2016. The Court of Appeals reversed and remanded finding error in the Full Commission's Order. Specifically, the Court found the Commission erred in requiring Claimant establish her claim for a change of condition with objective evidence. Instead, the Court ruled the proper standard for proving a change of condition for the worse is a preponderance of evidence. The Court remanded to the Commission so it could make a factual determination as to whether Claimant proved her claim of change of condition for the worse by a preponderance of evidence.

APA SUBMISSIONS

The present claim comes before the Commission pursuant to a letter of *remittiture* from the Court of Appeals dated May 3, 2016. The letter contains a copy of the judgement of the Court of Appeals. The instructions do not require a hearing *de* novo and no new evidence is contained herein. The present order is issued based on a review of the records and proceedings preserved in the claim.

CLAIM

This case has a complicated history going back to 2009; therefore, a lengthy recitation of the facts is necessary. Claimant was first injured on November 3, 2009, while lifting at work. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). At this point, Claimant had been working at Wal-Mart for 13 years, the preceding 4 as an assistant store manager. (Order, Wilkerson, p. 3). Claimant started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (2-11-2013 H.T., p. 27-28). Wal-Mart recognized her skills and she moved to North Carolina for two years to work at a store that was having personnel problems. (2-11-2013 H.T., p. 28-29). Eventually, she moved back to South Carolina and was promoted to a Co-Manager or Shift Manager position, essentially one level below the store manager. (2-11-2013 H.T., p. 29, ll. 6-14). This position placed her in charge of forecasting, supervision of employees, merchandise, and store finances; during her shifts, she was responsible for the operation of the entire store. (2-11-2013 H.T., p. 29-30).

Claimant was 3 months pregnant at the time of her injury, and was treated very conservatively for the remainder of her pregnancy term. (Order, Wilkerson, p. 3-4). After she

delivered her child, her treating physician, Dr. James Merritt, opined, "no surgery was required," and treated her with medication, exercises, and an injection. (Order, Wilkerson, p. 4). Claimant admitted at the hearing she still suffered from some back pain and had a 30 pound lifting restriction, but was able to perform her job within these restrictions. (Order, Wilkerson, p. 4). She hoped to return to her job and eventually become a full store manager. (Order, Wilkerson, p. 4). While she experienced pelvic pain occasionally, that problem resolved by the time of the hearing, and her primary diagnosis was a "back strain." (Order, Wilkerson, p. 4).

There was no mention of any leg or buttock pain in the Order. (Order, Wilkerson, p. 1-8). Commissioner Wilkerson's two primary findings were: (1) Claimant was entitled to ongoing *Dodge* medicals, in the form of anti- inflammatory medication; and, (2) she suffered from a 7% permanent partial disability pursuant to § 42-9-30. (Order, Wilkerson, p. 5-6). This Order was not appealed

In September or October of 2011, Claimant began experiencing more intense back pain, as well as severe leg and buttock pain of a type she had never experienced before. She reported this at her next appointment with Dr. Merritt, and he referred Claimant for an MRI in October, where Claimant gave a history of "[p]ersistent pain radiating to right leg, worse with driving." (APA, p. 13). The radiologist's impression was "[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." (APA, p. 13). 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 this worsening pain. I do think this is medically necessary and could provide her with some relief.

(APA, p. 1) (emphasis added).

A December 5, 2011 report from Dr. Merritt indicates Claimant was "continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf." (APA, p. 2). He reviewed her 2011 MRI and concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (APA, p. 2). His assessment was a "[l]ow back strain with ruptured disc L5-S1 and continued symptoms in her right leg." (APA, p. 2). He recommended she stay out of work because Wal-Mart had no light duty for her. (APA, p. 2).

In the meantime, Claimant filed an accommodation request with Wal-Mart in early October 2011, which, if accepted, would have allowed her to move to a store location closer to her home. (2-11-2013 H.T., p. 13-14). Claimant thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (2-11- 2013 H.T., p. 13-14). Claimant continued to work until December 1, 2011, when she was told Wal-Mart could not accommodate her request, and that she must leave the premises immediately. (2-11-2013 H.T., p. 14). She had previously been told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (2-11-2013 H.T., p. 14-15). Claimant ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (12-9-2011 Form 50).

She was next seen by Dr. William Edwards of Pee Dee Orthopedics Associates for an IME. (APA, p. 4). In the history, Dr. Edwards stated that Claimant's 2009 pain involved central low back pain "without any radicular discomfort at that time." (APA, p. 4). He further 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." (APA, p. 4). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (APA, p. 4). He concluded:

> she appears to have worsening radicular symptoms predominantly on the right side, her MRI scan is unchanged and it is unlikely that the condition has worsened from an objective standpoint. I would agree with Dr. Merritt's assessment that there is an approximately 7% impairment of her spine based on this one level disc injury. Aggressive intervention from a surgical standpoint could be offered as a last resort and would most likely involve anterior lumbar interbody fusion at L5/S1 though a limited microdiscectomy at L5/S1 on the right side may be successful in alleviating some of her radicular symptoms.

(APA, p. 5).

By March of 2012, Dr. Merritt diagnosed her right leg radiculopathy as "chronic," and stated that if it worsened "within the year that would be something reasonable and we will need to have the Workers' Compensation's company get her back to Dr. Edwards to discuss it but from my standpoint there is not much else I can offer and her impairment and work restrictions are as previously dictated." (APA, p. 3). Another MRI was performed on July 24, 2012, and Dr. Edwards opined that there was no change in disc pathology despite an increase in symptoms. (APA, p. 7-9). Dr. Edwards clearly recommended surgery at this point, because it would serve to provide a "measure of improvement" in her radicular pain. (APA, p. 9).

Dr. Merritt was deposed on May 23, 2012. Dr. Merritt was asked to compare the 2011 MRI to the one taken in 2010, and he stated there is "a slightly increased sized protrusion on the second one." (Deposition of Dr. Merritt, p.8, ll. 18-24). 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 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 ...." (Deposition of Dr. Merritt,

p. 9, ll. 4-12). "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." (Deposition of Dr. Merritt, p. 15, II. 19-24). He further felt the "little bit" of disc protrusion constituted an anatomical difference in Claimant's condition. (Deposition of Dr. Merritt, p. 9, ll. 10-12). "If you're talking a couple millimeters, larger protrusion on the second one versus the first, that may be a little hard to discern. A small difference, you know." (Deposition of Dr. Merritt, p. 16).

Dr. Merritt did ultimately defer to Dr. Edwards, *but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI* (Deposition of Dr. Merritt, p. 18, II. 13-17). Dr. Merritt, however, did not defer to Dr. Edwards on any other issues and maintained his opinion as stated within a reasonable degree of medical certainty that Claimant's condition had worsened.

Dr. Merritt gave a very clear opinion that a change in Claimant's condition had occurred. When he saw Claimant in September of 2011, she had "new complaints of pain more down in the legs.... In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area." (Deposition of Dr. Merritt, p. 7, II. 9-10, 12-15). "The leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, II. 19-20). He felt this was a new anatomical distribution, and that "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." (Deposition of Dr. Merritt, p. 7, II. 18-21).

When asked directly about a change in Claimant's condition, he testified that "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." (Deposition of Dr. Merritt, p. 11). Dr. Merritt stated he was basing his opinion as to a change of condition "in part on her subjective complaints as far as the development of leg pain." (Deposition of Dr. Merritt, p.23, ll. 5-6).

He recommended additional medical care, possibly surgery, and indicated that any previous radicular pain she had experienced in her legs had been resolved at the time she reached MMI. (Deposition of Dr. Merritt, p. 13-14, 19, 21). Dr. Merritt did recommend conservative treatment as a pain control measure, and opined that epidural steroid injections could be revisited; this recommendation "is not really on the knew [sic] MRI as much as she's now having right leg radicular pain." (Deposition of Dr. Merritt, p. 19-2).

Dr. Edwards was deposed on September 13, 2012. (Deposition of Dr. Edwards, p. 1). When comparing the 2010 and 2012 MRIs, 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 LS-S1 on both studies. It looked substantially the same [as the 2012 MRI] to me.

(Deposition of Dr. Edwards, p. 6, ll. 2-7). When asked if there was a difference between the MRI's, 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.

(Deposition of Dr. Edwards, p. 7, II. 2-10). He stated that all three MRI's are fairly consistent, and they all appear to show a "nerve root compression." (Deposition of Dr. Edwards, p. 9).

He stated that Claimant's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (Deposition of Dr. Edwards, p. 4-5).

When asked about the cause of Claimant's symptoms, Dr. Edwards stated that as early as September of 2010" he believed there was a disc pathology that was compressing the nerve root, and that "compression" over an extended period of time, is most likely what's causing her worsening." (Deposition of Dr. Edwards, p. 8-9). Dr. Edwards even stated that Claimant's "fairly significant radiculopathy" could be caused "without having pressure on...that nerve." (Deposition of Dr. Edwards, p. 11, ll. 22-25). Instead, prolonged chemical irritation to the nerve is, most likely to a reasonable degree of medical certainty, the cause of the increase in symptoms. (Deposition of Dr. Edwards, p. 10, ll. 15-25).

Dr. Edwards stated "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." (Deposition of Dr. Edwards, p. 12, II. 11-16). Dr. Edwards did not doubt that the condition has worsened. (Deposition of Dr. Edwards, p. 13, ll. 5-14). Dr. Edwards said that in Claimant's "opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention." (Deposition of Dr. Edwards, p. 13, II. 21-24).

In perhaps the most important exchange in the depositions, on cross- examination, counsel for the Defendants asked Dr. Edwards a particularly leading question:

> 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 M.R.I.'s, 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?

(Deposition of Dr. Edwards, p. 17-18).

Dr. Edwards answered:

> 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.

(Deposition of Dr. Edwards, p. 18, II. 2-13) (emphasis added).

Dr. Edwards also opined Claimant 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." (Deposition of Dr. Edwards, p. 20-21). Dr. Edwards' recommended treatment going forward is surgery, and he stated he "would not have offered it if I 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." (Deposition of Dr. Edwards, p. 21, II. 7-11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (2-11-2013 H.T., p. 1). Defendants 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." (2-11-2013 H.T., p. 4, II. 15-19). Counsel for the Defendants argued first that the "case law of the Statute is pretty clear there has to be a physical change of condition," but then stated the standard actually requires "objective physical evidence of a change of condition." (2-11-2013 H.T., p. 6). No legal authority was cited for the use of this "objective" standard.

Claimant took the position the standard of proof for a change of condition is "preponderance of the evidence," and the law does not require "an objective finding per MRI or some other manner that does not require an opinion of a doctor." (2-11-2013 H.T., p. 5-6).

Claimant 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." (2-11-2013 H.T., p. 8, II. 22-24). She began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (2-11-2013 H.T., p. 9, II. 2-3, II. 13-16). She remembered beginning to experience these new symptoms in either September or October of 2011, and this is what led to her returning to Dr. Edward's care. (2-11-2013 H.T., p. 9, II. 19-21; p. 10, II. 19-22). When asked if her condition had changed since the initial disability determination, she said "Yes, it has." (2-11-2013 H.T., p. 15, I. 15). Her symptoms include "still having pain and I'm still having a stabbing pain down my leg and the left leg is still hurting." (2-11-2013, H.T., p. 16, II. 7-9).

When asked about the location of her pain prior to the 2011 hearing, she stated that the pain centered on her lower back and pelvic area, and that she did not experience major symptoms in her leg. (2-11-2013 H.T., p. 17, II. 6-9). To the extent she experienced any symptoms in her right leg prior to the 2011 hearing, she indicated feeling "numbness," but she now describes the pain as "a sharp - - the pain that I'm having now is like a - - a - - electrical - - electrical pain down my leg." (2-11-2013 H.T., p. 17-18). She testified that she is now having "pain into [her] left leg now as well." (2-11- 2013 H.T., p. 19, II. 13-14).

Any pain she had indicated previously was

> not - - once again, it 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.
>
> (2-11-2013 H.T., P: 20, II. 8-14).

Until October 2011, Claimant continued to work in her shift manager position. Because of her symptoms she put in a request for an accommodation. During this time her symptoms were making the job difficult and she wanted to work closer to home. Claimant was having symptoms because the long drive was difficult on her back. (2-11-2013 H.T., p. 21-23). Wal-Mart refused to honor the accommodation and placed her out of work in December 2011. Claimant has not worked for Wal-Mart since that time. (2-11-2013 H.T., p. 24). Claimant was ultimately forced to cash out her 401K with the company just to pay her bills. (2-11-2013 H.T., p. 31, ll. 1-6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (8-5-2013 D&O, p. 1-7). Commissioner Roche found that after the 2011 decision of the Commission, Claimant "experienced an increase in symptoms, which she testified worsened with work and activity. Claimant testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake." (8-5-2013 D&O, p. 3). 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." (8-5-2013 D&O, p. 3). She also found "Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible." (8-5-2013 D&O, p. 4). She further found that both Dr. Merritt and Dr. Edwards testified that the Claimant suffered a change of condition for the worse, and that this change was a physical, anatomical change. (8-5-2013 D&O, p. 5). Her findings of law included that Claimant "suffered a change of condition for the worse," that "[p]ursuant to 42-1-120, Claimant is 'disabled,'" and that "[p]ursuant to section 42-9-10, Claimant is entitled to temporary total disability benefits." (8-5-2013 D&O, p. 6).

The Defendants filed a timely appeal to the Full Commission. In their brief, Defendants relied heavily on the fact Dr. Merritt conceded Dr. Edwards was more of an expert on spine MRI's than him, and that, therefore, Dr. Edwards' opinion as to whether there was a change in MRI's from 2010 to 2011/2012 was probably correct. (10-17-2013 Brief, p. 2). Defendants also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (10-17-2013 Brief, p. 3). Finally, Defendants also relied on the fact that Dr. Edwards indicated that Claimant may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (10-17-2013 Brief, p. 3).

In the brief's argument section, the Defendants relied most heavily on the fact that "[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." (10-17-2013 Brief, p. 4). Defendants also contended that "any alleged worsening in this case is solely based on Claimant'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 Claimant's condition is worse." (10-17-2013 Brief, p. 6).

At the hearing before the Full Commission, counsel for the Defendants attempted to frame the issue in the following way: "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." (12-16-2013 H.T., p. 4, ll. 15-18). As to Dr. Merritt's opinion, Defendants' counsel contended that "when you look under the surface about what he bases [his change of condition opinion] on, frankly, I think that it doesn't meet the standard, the legal standard." (12-16-2013 H.T., p. 5, ll. 3-6). Defendants' counsel also contended that Dr. Edwards said "that he does not believe that there's been a change of condition for the worse," despite Dr. Edwards' clear opinion to the

contrary. (12-16-2013 H.T., p. 5, II. 7-9). Much of the argument centered around the fact that Dr. Merritt couldn't be certain about whether there was a difference between the 2010 and 2011 MRI's, but counsel also made the point that Claimant's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (12-16-2013 H.T., p. 5-6).

The most crucial exchange came on the issue of Claimant's credibility. The Commission pointed out that an important factor in the change of condition was the history given by Claimant, "which Commissioner Roche found was credible." (12- 16-2013 H.T., p. 7, II. 22-24). Counsel for the Defendants stated "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."* (12-16-2013 H.T., p. 8, II. 5-9) (emphasis added). He went on to say that "[n]ow, is she having some continued complaints, yeah. Have those complaints even gotten worse? Dr. Edwards actually testified in his deposition that, you know, frankly *the chronic nature of this is that she's going to have those continued complaints and they could even worsen over time."* (12-16-2013 H.T., p. 8, II. 12-19)(emphasis added). He went on to say that "in these sorts of cases the absolute most important factor is the doctor's testimony about the actual physical condition of the back," but was unable to cite any proposition of law supporting this point. (12-16-2013 H.T., p. 9-10).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (1-30-2014 D&O, p. 1). In the recitation of the facts, the Full Commission focused the vast majority of its attention on the lack of differences between the 2010 and 2011, 2012 MRI's, and made it painstakingly clear that it did not believe there was a difference between them. (1-30-2014 D&O, p. 4-5). When going through the deposition of Dr. Merritt, the order left out his 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." (1-30-2014 D&O, p. 5). The Commission similarly omitted Dr. Edwards' opinion, made to a reasonable degree of medical certainty, that a change of condition had occurred, and instead cited his statement that "there was no objective or significant radiographical difference to be noted in the scans." (1-30-2014 O&O, p. 5).

Crucially, the Commission next found that "[c]laimant 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." (1-30-2014 D&O, p. 6). Despite the Single Commissioner's finding that the Claimant was credible, as well as Claimants' stipulation that the Claimant was credible, the Commission found that she lacked credibility simply because she had reported right leg problems in 2010. (1-30-2014 D&O, p. 6}. The Commission found "[i]n sum, Claimant's radiographic condition has not worsened; any alleged worsening in this case is solely based on Claimant'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 Claimant's condition is worse." (1-30-2014 D&O, p. 7).

In its Findings of Fact, the Commission stated:

> [w]e give limited weight to the testimony of the Claimant as it is conclusory and self-serving . . . . Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award.

(1-30-2014 D&O, p. 9). The greatest weight was given to Dr. Edwards' testimony over Dr. Merritt "because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment." (1-30-2014 D&O, p. 9).

The Commission also found that the "preponderance of the evidence indicates that there was no *objective difference* between the Claimant's MRI scan after the original award and the MRI scan before the original award." (1-30-2014 D&O, p. 9) (emphasis added). The Commission also made the statement 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," but that the preponderance of the evidence did not indicate a change of condition had occurred. (1-30-2014 D&O, p. 9-10). The Commission ultimately ordered that the Claimant had failed to prove a change of condition and was not entitled to any additional benefits under the Workers' Compensation Act. (1-30-2014 D&O, p. 11-12). This Order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had actually occurred.

After receiving the Full Commission's order, Claimant appealed 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) ruling substantial evidence existed to deny a change of condition, and (3) finding Claimant'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). The Court restated the law of change of condition for the worse by quoting S.C. Code Ann. § 42-17-90(A) (2015) which states, a review of a previous award is proper "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." Moreover, the Court noted, "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," *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107–09, 576 S.E.2d 191, 1946 (Ct. App. 2003).

Regarding the first point of alleged error, the Court cited *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339–40, 513 S.E.2d 843, 846 (1999) which held both lay and expert testimony may be considered when determining causation. Additionally, the court cited *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23–24, 716 S.E.2d 123, 126–27 (Ct. App. 2011), which held the commission may disregard medical evidence and instead rely upon lay testimony if the record contains competent evidence, and held the court does not balance objective against subjective findings of medical witnesses. Upon the Court of Appeal's review of the record and the Full Commission's Order, it found the Commission exclusively relied upon the MRIs in finding Claimant failed to objectively prove her claim. *Russell* at 756. Further, 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." *Id.*

As a result, the Court of Appeals found "the Commission relied exclusively on objective evidence, the MRIs, in denying Russell's claim." *Id.* Correspondingly, the Court found 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." *Id.* Therefore, the court held a change of condition for the worse can be proven with subjective evidence. *Id.* The court of appeals reversed the Commission's requirement that Claimant prove her claim by a preponderance of the evidence, and remanded the remaining issues – whether Claimant suffered

a change of condition and whether the statements were self-serving and conclusory – to the Commission.

On remand, the undersigned Commissioner reviewed the record and issues this order without hearing additional testimony from the parties.

Findings of Fact

Based upon the above stated evidence as well as a review of the record in its entirety, the undersigned Commissioner makes the following Findings of Fact:

1. Based upon a review of the record, as outlined in the order of Commissioner Wilkerson, Commissioner Roche, the Full Commission, as well as a review of the order of the Court of Appeals, Claimant shall receive benefits.
2. Claimant worked for Wal-Mart Stores, Inc., and suffered an admitted injury to her back arising out of and in the course and scope of her employment November 3, 2009.
3. Prior to her injury, Claimant was an employee of Walmart for 13 years.
4. At the time of her injury, Claimant was working as an Assistant Store Manager.
5. Claimant received compensation and medical care for the November 3, 2009, accident, until the claim was adjudicated before Commissioner Avery Wilkerson, April 13, 2011.
6. Commissioner Wilkerson issued a signed decision and order June 8, 2011.
7. Pursuant to Commissioner Wilkerson's order Claimant reached maximum medical improvement February 2, 2011.
8. Pursuant to Commissioner Wilkerson's order Claimant was awarded seven (7) percent permanent partial disability to the back.

9. Pursuant to Commissioner Wilkerson's order Claimant was awarded ongoing anti-inflammatory medications, as long as such medication is causally related to her work accident and tends to lessen the period of her disability.

10. Pursuant to Commissioner Wilkerson's order Claimant became pregnant during her claim, because of her pregnancy Claimant was offered conservative medical care, after Claimant's pregnancy, Dr. Merritt opined surgery was not necessary.

11. Pursuant to Commissioner Wilkerson's order, Claimant had pelvic pain that resolved by the time of the hearing.

12. Commissioner Wilkerson's June 8, 2011 Order did not find Claimant had leg or buttock pain.

13. Commissioner Wilkerson's Order did not find Claimant had work restrictions.

14. Commissioner Wilkerson set Claimant's compensation rate at $681.36.

15. Commissioner Wilkerson's June 8, 2011 order was not appealed.

16. Subsequent to Commissioner Wilkerson's hearing Claimant continued working for Wal-Mart.

17. A review of the record demonstrates Claimant hoped to become a store manager for Wal-Mart.

18. A review of the record demonstrates Claimant began experiencing more intense back pain and new severe pain in her leg and buttock around September and October of 2011.

19. A review of the record demonstrates Claimant returned to Dr. Merritt for medical care related to her new symptoms.

20. On November 21, 2011, Dr. Merritt opined Claimant's condition worsened. Dr. Merritt also recommended an MRI of the lumbar spine and recommended Claimant only work light duty, or not work if light duty was not available.

21. Claimant requested Walmart accommodate her restrictions and transfer her to a store closer to home so she would spend less time making a painful commute.

22. On December 1, 2011, Walmart refused to accommodate Claimant's request and told her she must leave the premises immediately.

23. On December 5, 2011, Dr. Merritt stated Claimant had a disc protrusion at L5-S1 with contact on the nerve root.

24. Claimant subsequently filed an application for a change of condition pursuant to S.C. Code Ann. § 42-17-90 on December 9, 2011.

25. A review of the record demonstrates Defendants sent Claimant to Dr. Edwards for an IME February 16, 2012.

26. Dr. Edwards opined Claimant did not have radicular symptoms after her 2009 injury, but now has pain centered in her lower back that radiates into her legs.

27. Dr. Edwards stated surgery might successfully alleviate Claimant's radicular symptoms.

28. Dr. Edwards again recommended surgery after a July 24, 2012 MRI.

29. Dr. Merritt provided deposition testimony on May 23, 2012.

30. Dr. Merritt testified there was a slightly larger disc protrusion in the MRI that was touching the nerve root.

31. Dr. Merritt stated Claimant's leg symptoms were new radicular symptoms.

32. Dr. Merritt opined the disc protrusion was an anatomical difference, despite the disc protrusion being only slightly larger.

33. Dr. Merritt testified, to a reasonable degree of medical certainty, Claimant suffered a change in condition for the worse.

34. A review of his deposition demonstrates Dr. Merritt recommended Claimant receive additional treatment, up to but not excluding surgery.

35. Dr. Edwards provided deposition testimony on September 13, 2012.

36. In his deposition Dr. Edwards testified, "it's clear that [Claimant's] symptoms are now worse. I don't have any – I don't have any doubt about that . . . clinically."

37. Dr. Edwards, testified there was a change to Claimant's nerve making it more painful or more symptomatic, and that his opinion was held to a reasonable degree of medical certainty.

38. Dr. Edwards said Claimant's symptoms were worse, and clinically different in 2012 than in 2010.

39. Dr. Edwards stated Claimant's radiculopathy is caused by a combination of mechanical direct compression and chemical irritation to the nerve.

40. Dr. Edwards testified disc pathology was compressing the nerve root and the compression over an extended period of time was causing Claimant's worsening.

41. Dr. Edwards testified he had no reason to doubt Claimant's subjective accounts of her pain and symptoms.

42. Dr. Edwards testified that reliance upon physical examination and a demonstration of parasthesias into the nerve distribution is an objective analysis.

43. Dr. Edwards recommended surgery for the changed condition.

44. A hearing was held on the matter of Claimant's change of condition for the worse on February 11, 2013, before Commissioner Andrea C. Roche.

45. Commissioner Roche issued a Decision and Order on August 5, 2015.

46. At the hearing Defendants argued "objective evidence" is required to prove a change of condition.

47. Claimant testified her symptoms worsened and changed since the initial disability determination and award.

48. Claimant testified she began feeling sharp pains in her leg and increased pressure on her back in September or October of 2011.

49. Pursuant to Commissioner Roche's order Claimant testified credibly.

50. Pursuant to Commissioner Roche's order Defendants admitted Claimant is credible.

51. Commissioner Roche found Dr. Merritt testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.

52. Commissioner Roche found Dr. Merritt testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.

53. Commissioner Roche found Dr. Edwards testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.

54. Commissioner Roche found Dr. Edwards testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.

55. Commissioner Roche found Dr. Merritt's and Dr. Edwards' testimony consistent with the requirements of a change of condition for the worse.

56. Pursuant to Commissioner Roche's order Claimant suffered a change of condition for the worse.

57. Pursuant to Commissioner Roche's order Claimant attempted to comply with the restrictions placed on her by her physicians.

58. Pursuant to Commissioner Roche's order Walmart failed to provide Claimant work within the restrictions of the authorized treating physician.

59. Pursuant to Commissioner Roche's order Walmart required Claimant to turn in her keys and leave the premises.

60. Commissioner Roche found Claimant is in need of additional medical treatment.

61. Commissioner Roche found Claimant suffers ongoing temporary disability.

62. Commissioner Roche concluded as a matter of law Claimant suffered a change of condition for the worse.

63. Commissioner Roche concluded as a matter of law Claimant was disabled.

64. Commissioner Roche concluded as a matter of law Claimant was entitled to temporary total disability benefits.

65. Commissioner Roche ordered Defendants pay temporary total disability benefits from December 1, 2011 to the present and continuing.

66. Commissioner Roche ordered Defendants provide Claimant with causally related medical care and treatment for a change of condition.

67. Defendants appealed Commissioner Roche's Order to the Full Commission.

68. In the appeal Defendants argued Claimant did not present objective evidence to demonstrate her condition had changed.

69. Defendants argued Claimant's change of condition was subjective only.

70. Defendants argued radiographic evidence did not support a finding of change of condition.

71. Defendants argued Dr. Merritt's testimony did not meet the legal standard for a change of condition.

72. Defendants argued Dr. Edwards did not believe there was a change of condition for the worse.

73. Defendant's admitted before the Full Commission Claimant "comes across well" when addressing her credibility.

74. Claimant argued her symptoms, along with radiographic evidence, and the doctors' opinions stated to a reasonable degree of medical certainty support the award for change of condition.

75. The Full Commission reversed the order of the Single Commissioner.

76. The Full Commission found Claimant did not present objective evidence demonstrating a change of condition for the worse.

77. The Full Commission found Claimant's testimony was self-serving and conclusory.

78. The Full Commission found both Dr. Merritt and Dr. Edwards testified there was no objective radiographic evidence to be noted on the MRI's done before and after the original award.

79. The Full Commission found Claimant's radiographic condition had not changed.

80. The Full Commission found Claimant's need for surgery was not new and did not developed after the original award.

81. The Full Commission found the preponderance of the evidence did not indicate a change of condition had occurred.

82. The Full Commission found Claimant ineligible for further benefits under the Workers' Compensation Act.

83. Claimant appealed the decision of the Full Commission to the South Carolina Court of Appeals.

84. Claimant alleged in her appeal before the South Carolina Court of Appeals that the use of an objective evidence standard to prove a change of condition is an error of law.

85. Claimant alleged in her appeal the substantial evidence of the case can lead to no other conclusion but that a change of condition has occurred.

86. Claimant also alleged in her appeal the Commission erred in finding Claimant was not a credible witness.

87. The Court of Appeals reversed and remanded the decision of the Full Commission in an opinion filed January 20, 2016.

88. The Court of Appeals found the Commission relied exclusively on objective evidence, the MRIs, in denying a change of condition.

89. The Court of Appeals found the Commission erred as a matter of law by imposing a requirement to the statute mandating Claimant prove her change of condition by objective evidence.

90. The Court of Appeals found the Commission must base an award for a change of condition on proof by a preponderance of the evidence.

91. The Court of Appeals found Dr. Merritt testified there was a change based on his review of the MRI, in part, and Claimant's subjective complaints, in part, even if it was not an obvious, objective change.

92. The Court of Appeals found Dr. Edwards testified there was a chronic change in Claimant's nerve, making her condition more painful or more symptomatic.

93. The Court of Appeals found both doctors concluded, to a reasonable degree of medical certainty, Claimant suffered a change of condition.

94. The Court of Appeals found the Commission ignored that both doctors concluded, to a reasonable degree of medical certainty, Claimant suffered a change of condition.

95. The South Carolina Court of Appeals reversed the Appellate Panel's order and remanded the matter to the Commission to enter an order consistent with their findings.

96. Because the Court of Appeals found the Commission erred in requiring a change of condition be established by objective evidence, and reversed and remanded on that issue, it did not consider additional issues in the appeal.

97. Pursuant to the Order of the Court of Appeals the claim has been remanded to the jurisdictional Commissioner and the current order ensues.

98. I find, based upon a review of the record, Claimant suffered a change of condition for the worse as outlined in the order of Commissioner Roche.

99. Claimant testified she suffered increased symptoms, including new symptoms radiating down into her legs, causing her legs to shake.

100. Claimant testified she suffered new difficulties driving and working.

101. Claimant reasonably sought additional medical care and attention for her worsening symptoms.

102. Dr. Merritt testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.

103. Dr. Merritt testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.

104. Dr. Merritt's testimony is consistent with the requirements of a change of condition pursuant to the Act.

105. Dr. Edward testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.

106. Dr. Edward testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.

107. Dr. Edward's testimony is consistent with the requirements of a change of condition pursuant to the Act.

108. The appropriate standard of proof required for a change of condition for the worse is not objective evidence.

109. The appropriate standard of proof required for a change of condition for the worse is preponderance of evidence.

110. Claimant's testimony is admittedly credible.

111. The Full Commission erred in finding Claimant's testimony was conclusory and self-serving.

112. Claimant was able to establish she had new complaints that were not present at the time of the original award.

113. Claimant's present condition is different than the condition in existence when the first award was made.

114. Claimant established her condition worsened.

115. Claimant established her need for surgery is new and occurred after the original award.

116. Claimant established she has difficulty driving and working due to her symptoms.

117. The preponderance of evidence supports a finding Claimant suffered a change of condition for the worse.

118. Claimant is eligible for further benefits under the South Carolina Workers' Compensation Act.

119. Claimant is entitled to benefits as outlined by the Single Commissioner in her Order of August 5, 2013.

120. Claimant is entitled to further medical care and attention to be provided by Defendants.

121. Claimant is entitled to compensation for her out of pocket medical costs that are causally related to her change of condition for the worse.

122. Claimant attempted to comply with the restrictions placed on her by her physicians.

123. Claimant was terminated December 1, 2011.

124. Claimant is entitled to temporary total disability benefits from December 1, 2011 through the present and continuing.

CONCLUSIONS OF LAW

In accordance with S.C. Code Ann. § 42-17-40, the following are made as conclusions of law:

1. Pursuant to the Order of Commissioner Avery B. Wilkerson, Jr., issued June 8, 2011, Claimant suffered an admitted injury to the low back November 3, 2009; Claimant was found to be at maximum medical improvement February 2, 2011, and awarded future anti-inflammatory medication as may be reasonably necessary; and Claimant was awarded seven (7) percent permanent partial disability for loss of use of the low back.

2. Pursuant to the Order of Commissioner Andrea C. Roche issued August 5, 2013, Claimant was awarded a change of condition for the worse commencing November 21, 2011; Claimant was awarded ongoing temporary total disability benefits commencing December 1, 2011, to the present and continuing; Claimant was awarded causally related

medical care and treatment for the change of condition commencing November 21, 2011, along with reasonable reimbursement for costs and expenses incurred while obtaining care.

3. Pursuant to § 42-17-50, the Full Commission reversed the order of the Single Commissioner awarding benefits, by finding Claimant failed to prove she suffered a change of condition for the worse. It was the determination of the Full Commission Claimant was ineligible for benefits awarded pursuant to the previous change of condition award.

4. Pursuant to § 42-17-60, Claimant filed an appeal to the Court of Appeals contending the Commission erred in mandating Claimant prove she suffered a change of condition by objective evidence.

5. Pursuant to the opinion of the Court of Appeals in *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016), the order of the Commission denying Claimant suffered a change of condition for the worse because she lacked objective evidence is reversed and remanded with instructions to determine whether Claimant suffered a change of condition by proof of preponderance of the evidence.

6. Pursuant to a letter of *remittitur* signed by the Honorable V. Claire Allen, Deputy Clerk, South Carolina Court of Appeals, May 3, 2016, the claim is remitted to the Commission along with a copy of the judgment of the Court.

7. Pursuant to § 42-17-40, the below signed Commissioner R. Michael Campbell, II, was conferred jurisdiction to hear the issues in dispute in accordance with the judgment of the Court of Appeals.

8. Pursuant to § 42-17-90, Claimant has met her burden of proving a change of condition for the worse commencing November 21, 2011.

9. Pursuant to § 42-15-60, Claimant is awarded causally related medical care and treatment commencing November 21, 2011, along with reasonable reimbursement for costs and expenses incurred while obtaining care.

10. Pursuant to § 42-9-10, Claimant is awarded temporary total disability benefits commencing December 1, 2011, to the present and continuing.

11. Pursuant to § 42-1-40, Claimant's average weekly wage is $1,232.52.

12. Pursuant to § 42-9-10, Claimant's compensation rate is $681.36 per week.

ORDER

IT IS THEREFORE ORDERED the Findings of Fact and Conclusions of Law be incorporated herein as if set forth verbatim and:

1. DEFENDANTS SHALL pay Claimant benefits pursuant to a change of condition for the worse, commencing November 21, 2011, of the lumbar injury sustained November 3, 2009.

2. DEFENDANTS SHALL provide and pay for Claimant's medical care and treatment related to the change of condition for the worse, commencing November 21, 2011, to the present and continuing until further order of the Commission.

3. DEFENDANTS SHALL pay for Claimant's reasonable costs and expenses incurred while obtaining medical care and treatment related to the change of condition for the worse, commencing November 21, 2011, to the present and continuing until further order of the Commission.

4. DEFENDANTS SHALL pay Claimant temporary total disability benefits in the amount of $681.36 per week, commencing December 1, 2011, to the present and continuing until further order of the Commission.

AND IT IS SO ORDERED!

Mike Campbell

Commissioner Mike Campbell

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

March 20, 2017

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell

415 S.C. 395
Court of Appeals of South Carolina.

Paula RUSSELL, Appellant,
v.
WAL–MART STORES, INC., and
American Home Assurance, Respondents.

Appellate Case No. 2014–000454.
|
No. 5376.
|
Heard Oct. 20, 2015.
|
Decided Jan. 20, 2016.
|
Rehearing Denied March 24, 2016.

Synopsis

Background: Claimant who suffered work-related back injury filed claim alleging change of condition for worse requiring additional medical treatment, including surgery. The Workers' Compensation Commission denied claim, and claimant appealed.

The Court of Appeals, Short, J., held that claimant did not have to prove change of condition warranting review of original workers' compensation award with objective evidence.

Reversed and remanded.

Attorneys and Law Firms

**754 C. Daniel Vega, of Chappell Smith & Arden, of Columbia, and William Ashley Jordan, III, of Jordan Law Center, LLC, of Greenville, both for appellant.

Johnnie W. Baxley, III, of Willson Jones Carter & Baxley, P.A., of Mount Pleasant, for respondents.

REVERSED AND REMANDED

SHORT, J.

*396 In this workers' compensation action against Wal–Mart Stores, Inc. and American Home Assurance (Wal–Mart), Paula Russell appeals, arguing the South Carolina Workers' Compensation *397 Commission erred in (1) requiring a change of condition to be established by objective evidence; (2) ruling substantial evidence existed to deny a change of condition; and (3) finding Russell's statements were self-serving and conclusory. We reverse and remand.

BACKGROUND FACTS

In 2009, Russell was employed by Wal–Mart as an assistant store manager and had been an employee for more than ten years. On November 3, 2009, she was lifting something in the course of her employment and hurt her back and pelvis. Because she was pregnant at the time, her treatment did not include diagnostic testing and was very conservative. After her pregnancy, she had an MRI scan and was treated with medication, exercises, and an injection. At the time, her treating doctor, Dr. James O. Merritt, IV, determined no surgery was required.

Russell continued to work at Wal–Mart with a heavy-lifting (over thirty pounds) restriction. The medical records indicated Russell was diagnosed with back strain and had degenerative disc disease at L5–S1. By single commissioner order filed June 8, 2011, Russell was found to have reached maximum medical improvement (MMI) on February 2, 2011, and was awarded seven percent permanent partial disability. The award also provided for "ongoing anti-inflammatory medication ... as long as such medication is causally related to her work accident and tends to lessen her period of disability."

**755 On December 9, 2011, Russell filed a Form 50, alleging a change of condition for the worse to her back requiring additional medical treatment, including surgery. After a hearing on February 11, 2013, the single commissioner noted Russell testified she experienced new symptoms, including pain radiating down into her legs and shaking; she found her hour-long drive to and from work difficult; she requested to be transferred to a Wal–Mart closer to home; and in December 2011, Wal–Mart fired her rather than honoring her request. Finding Russell's testimony to be credible and relying on the testimony of Drs. Merritt and William S. Edwards, the commissioner found Russell suffered a change of condition and ordered Wal–Mart to provide medical care and temporary total disability benefits.

*398 After a hearing, the full commission (the Commission) reversed the single commissioner. The Commission gave

"limited weight to the testimony of [Russell] as it is conclusory and self-serving." The Commission found Russell was unable to establish (1) she suffered any new complaints; (2) when her condition worsened; and (3) that her need for surgery was new or occurred after the original award.

Although the Commission stated it gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts[,]" the Commission concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan after the original award and the MRI scan before the original award." Thus, the Commission denied Russell's claim for additional benefits. This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Commission. *Carolinas Recycling Grp. v. S.C. Second Injury Fund,* 398 S.C. 480, 482, 730 S.E.2d 324, 326 (Ct.App.2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *See* S.C.Code Ann. § 1–23–380(5)(e) (Supp.2015).

LAW/ANALYSIS

I. Objective Evidence

Russell argues the Commission erred in requiring a change of condition to be established by objective evidence. We agree.

Section 42–17–90(A) of the South Carolina Code permits the review of a previous compensation award "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." ***399** S.C.Code Ann. § 42–17–90(A) (2015). "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." *Gattis v. Murrells Inlet VFW* No. 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct.App.2003). "Generally, 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." *Id.* at 109, 576 S.E.2d at 195 (citation omitted). "The determination of whether a claimant experiences a change of condition is a question for the fact finder." *Id.* at 107, 576 S.E.2d at 194.

We recognize there is no requirement in the Workers' Compensation Act (the Act) that the evidence relied upon by the Commission be either subjective or objective. The appellate courts have affirmed awards based solely on objective evidence and awards based solely on subjective evidence. *See id.,* 353 S.C. at 110, 576 S.E.2d at 196 (affirming the Commission's finding, which was based in part on updated diagnostic tests); *Robbins v. Walgreens & Broadspire Servs., Inc.,* 375 S.C. 259, 265–66, 652 S.E.2d 90, 94 (Ct.App.2007) (affirming the Commission's denial of a claim for change of condition where medical tests performed both before and after the ****756** settlement of the claim showed the same condition despite claimant's continuing pain); *Potter v. Spartanburg Sch. Dist. 7,* 395 S.C. 17, 23–24, 716 S.E.2d 123, 126–27 (Ct.App.2011) (explaining the Commission may consider lay and medical evidence and disregard medical evidence if the record contains other competent evidence, and reiterating the appellate court does not balance objective against subjective findings of medical witnesses, or weigh the testimony of one witness against that of another, in reviewing the Commission's findings); *see also Tiller v. Nat'l Health Care Ctr. of Sumter,* 334 S.C. 333, 339–40, 513 S.E.2d 843, 846 (1999) (explaining the Commission has discretion to weigh and consider all evidence, both lay and expert, when determining causation); *Ballenger v. S. Worsted Corp.,* 209 S.C. 463, 467, 40 S.E.2d 681, 682–83 (1946) (finding despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award).

***400** We further recognize the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence. Rather, the order states the Commission "reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders." However, the hearing before the Commission and the Commission's order make it clear the Commission exclusively relied on the MRIs in finding Russell failed to objectively prove her claim. At the hearing, 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." (Emphasis added.). Although the order stated the Commission gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts" and they did "not support a physical change of condition for the worse[,]" the order also concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between" the MRIs. The Commission found both doctors "ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans [,]" and "[t]he preponderance of the evidence shows that [Russell's] radiographic condition has not worsened." However, the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. He based his opinion on the MRIs and "in part on her subjective complaints." Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic.

We find the Commission relied exclusively on objective evidence, the MRIs, in denying Russell's claim. Mindful of our standard of review of factual finding, we nevertheless conclude 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. *See Grant v. Grant Textiles*, 372 S.C. 196, 200–01, 641 S.E.2d 869, 871 (2007) (stating an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse where the decision is affected by an error of law or is unsupported by substantial ***401** evidence). The Act provides, "the [C]ommission may ... make an award ... on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury...." S.C.Code Ann. § 42–17–90(A) (2015). There is no requirement in the Act that a claimant prove the change of condition by objective evidence. Thus, we reverse and remand to the Commission.

II. Remaining Issues

Russell argues the Commission erred in finding she did not suffer a change of condition and in finding her statements were self-serving and conclusory. Because we find the Commission erred in requiring a change of condition to be established by objective evidence and reverse and remand on that issue, the court need not consider Stewart's remaining issues. *See Futch v. McAllister* ****757** *Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding it unnecessary to remaining issues when resolution of a prior issue was dispositive).

CONCLUSION

Accordingly, we find the Commission erred in requiring Russell to establish her claim for a change of condition by objective evidence and reverse and remand to the Commission.

REVERSED AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

All Citations

415 S.C. 395, 782 S.E.2d 753

End of Document

The South Carolina Court of Appeals

Paula Russell, Appellant,

v.

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

Appellate Case No. 2014-000454

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

FILED

March 24, 2016

cc:
C. Daniel Vega, Esquire
Johnnie W. Baxley, III, Esquire
William Ashley Jordan, III, Esquire
Amy Bracy

The South Carolina Court of Appeals

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May 03, 2016

The Honorable Amy Bracy
Worker's Compensation Commission
Post Office Box 1715
Columbia SC 29202

REMITTITUR

Re: Paula Russell v. Wal-Mart Stores
Lower Court Case No. 0917785
Appellate Case No. 2014-000454

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: C. Daniel Vega, Esquire
Johnnie W. Baxley, III, Esquire
William Ashley Jordan, III, Esquire

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,	RESPONDENT CLAIMANT,
vs.	
Wal-Mart Stores, Inc.,	EMPLOYER,
and	
American Home Assurance,	CARRIER, DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina, on December 16, 2013 per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed _____, 2014

APPEARANCES:

Respondent Paula Russell, Claimant, represented by Daniel C. Vega, Esquire of Chappell, Smith & Arden in Columbia, South Carolina.

Defendants/Appellants represented by Johnnie W. Baxley, III, Esquire of Willson Jones Carter & Baxley, P.A. in Mt. Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Andrea C. Roche, on February 11, 2013, in Columbia, South Carolina. On August 5, 2013, Commissioner Roche issued the following Order:

In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:

1. **Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.**

2. **Defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.**

AND IT IS SO ORDERED!

Within the statutory period, Defendants filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on December 16, 2013, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009 accident at work, error being that the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since the back surgeon, Dr. Edwards,

testified that he could not identify any objective difference between any of claimant's MRIs, and thus, he could not state to a reasonable degree medical certainty that claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, the preponderance of evidence in the record supports a reversal of the Hearing Commissioner's award and finding that Claimant had sustained a compensable change of condition for the worse and was therefore entitled to additional benefits under the SC Workers' Compensation Act.

STATEMENT AND DISCUSSION OF EVIDENCE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The Defendants argue that the medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

The law concerning change of condition claims in South Carolina is well established. Section. 42-17-90 provides, "the Commission may review an award and on that review make an

award . . . 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." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. *Id.* (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. *Id.* at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." *Id.*

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant's November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merritt testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21— page 14, line 1). At the visit in September 2011,

however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24—page 8, lines 4-11). Although Dr. Merritt didn't have the films from the MRIs to compare, he didn't think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" that he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines 16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and, her reflexes remain the same (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was

pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

After a lengthy review of the evidence, including the medical records, deposition testimony of both doctors, and the Claimant's testimony at the hearing, we find that Claimant did not meet her burden of proving that she sustained a physical worsening of her condition subsequent to the original hearing on this claim per 42-17-90, and that she is, therefore, not entitled to any additional benefits under the South Carolina Workers' Compensation Act.

In the case at hand, Claimant 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. However, even the Claimant's lay testimony about her past and ongoing complaints does not carry the burden or proving a worsening of condition after the original award. Specifically, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into her right leg before she saw him at her first visit. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010, all of which occurred prior to the original hearing. (Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg was new and different than before, although she could not remember exactly when she "started receiving them" and whether those issues started before or after the original hearing. (Tr. at 9: 11-21).

The objective medical testimony and medical testing certainly does not support Claimant's assertion that she sustained a worsening of her physical condition after the original award. While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Deposition, page 8, lines 13-24). Dr. Edwards did review

and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant's disc protrusion at L5-S1 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. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing. We give greater weight to the opinion of Dr. Edwards on these issues because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment. The preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2). In sum, Claimant's radiographic condition has not worsened; any alleged worsening in this case is solely based on Claimant'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 Claimant's condition is worse. (Dr. Edwards Deposition, page 12, lines 24-25; page

13, lines 5-6; page 18, lines 5-8). The evidence in this matter simply does not meet the preponderance of the evidence standard as required by the Act and case law to establish a worsening of Claimant's physical condition occurring after the original award.

For these reasons, we find that the hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.

2. The Claimant worked for Wal-Mart Stores, Inc. and suffered an injury to her back arising out of and in the course and scope of her employment on November 3, 2009.

3. This claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issues on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

4. Subsequent to the original award, the Clamant filed an application for a change of condition per 42-17-90.

5. Defendants mistakenly filed a Form 15 on this claim, and that issue was adjudicated by

Order of Commissioner Melody James dated September 18, 2012. That Order specifically held all claims of change of condition by Claimant and all defenses by Defendants in abeyance for future determination.

6. We have reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders.

7. We give limited weight to the testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, we find Claimant's lay testimony about her past and ongoing complaints does not carry the burden or proving a worsening of condition after the original award. Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award. The lay testimony simply did not carry the burden of proving a compensable change of condition claim.

8. We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts in this case. Among the medical experts, we give the greatest weight to Dr. Edwards' testimony and opinion because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment.

9. The medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse. The preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan after the original award and the MRI scan before the original award.

10. We 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. However, 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. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

11. Both Dr. Merritt and Dr. Edwards ultimately testified that was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award.

12. Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. The preponderance of the evidence does not support Claimant's contention that her need for surgery is new or developed after the original award.

13. The preponderance of the evidence shows that Claimant's radiographic condition has not worsened.

14. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

15. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to S.C. Code Ann. section 42-17-90, Claimant failed to prove by a

preponderance of the evidence that Claimant suffered a change of condition for the worse.

2. Pursuant to section 42-15-60, Claimant is not entitled to additional medical care.

3. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.

4. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

5. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Claimant failed to prove by a preponderance of the evidence in the record that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

IT IS FURTHER ORDERED that as a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Clamant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

IT IS FURTHER ORDERED that notwithstanding #14 above, per the previous Order

of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

IT IS FURTHER ORDERED that Claimant application for additional benefits under the South Carolina Workers' Compensation Act for a worsening of condition per 42-17-90 is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL REVERSAL
UNANIMOUS DECISION

Susan S. Barden, Commissioner

T. Scott Beck, Commissioner, concurring

Aisha Taylor, Commissioner, concurring

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on January 30, 2014

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Paula D Russell, Claimant, vs. WalMart #0586, Employer, American Home Assurance, Carrier/Defendants.	Decision and Order **WCC FILE NO: 0917785**

A hearing in this matter was scheduled before Commissioner Andrea C. Roche on February 11, 2013, in Columbia, SC, to determine issues set forth on Forms 50 and 51. Present at the hearing was C. Daniel Vega, attorney for the Claimant and Katie Veatch O'Neill, attorney for Defendants.

STIPULATIONS

The parties stipulated to the following issues at the call of the hearing:

1. The parties to these proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paula Russell as Employee-Claimant, Wal-Mart Stores, Inc. as Employer, and American Home Assurance Carrier, Defendant.
2. Notice of hearing was timely and properly served on all parties of interest.
3. Venue was proper in Horry County.

4. The purpose of the hearing is to determine issues as set forth in the Forms 50 and 51.

5. Claimant's average weekly wage is $1,232.52 and the compensation rate is $681.36.

6. Claimant sustained a compensable work related injury on November 3, 2009.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act the following were made a part of the record without objection:

Provider		Date of Service	Page Nos.
APA 1	James Merritt, M.D.	11/21/11-03/14/12	1-3
APA 2	W. S. Edwards, M.D.	02/16/12-07/31/12	4-15
	Deposition William S. Edwards, MD	09/13/2012	
	Deposition James O. Merritt, IV, MD	05/23/12	

STATEMENT OF THE CASE

Claimant contends that she suffered a change of condition for the worse. Claimant suffered a change to her low-back condition, requiring additional medical care and attention, including but not limited to a surgery recommendation by Dr. Edwards. Claimant also contends that because Defendants filed a Form 51, admitting the change of condition for the worse and in response to Claimant's first Form 50, served December 14, 2012, they are estopped from now denying that the claim should be admitted. Claimant seeks an order from the Commission ordering Defendants to pay for causally related medical care and treatment and temporary total disability benefits.

Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits. Defendants contend Claimant can not carry her burden of proving a change of condition for the worse as required under the Act. Defendants further contend that the

medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse because the complaints are subjective. Finally, Defendants contend that the Claimant did not timely file the second Form 50 and, therefore, the claim should be barred by the statute of limitations.

EVIDENCE OF THE CASE

Claimant worked at Wal-Mart for thirteen (13) years and has been a shift manager (assistant store supervisor) since 2007. Claimant testified that she continued working at Wal-Mart as the shift manager after the Hearing and Decision of the Commission dated April 13, 2011. Subsequently, Claimant experienced an increase in symptoms, which she testified worsened with work and activity. Claimant testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake. As a result of the increase in symptoms, Claimant found it more difficult to continue making the hour-long drive to and from work everyday and to continue working the same hours she had prior to her injury.

Claimant wanted to remain employed with Wal-Mart because she hoped to eventually become a store manager. In order to achieve this goal, Claimant put in a request for an accommodation that would allow her to work for a Wal-Mart closer to home. In December, 2011, rather than approving the requested accommodations, she was required to turn in her keys and asked to leave the store. Since December 1, 2011, Wal-Mart has failed to provide her with work that complied with her treating physicians' work restrictions.

Claimant reported to Dr. James O. Merritt after the Hearing and Decision of the Commission dated April 13, 2011. Dr. Merritt testified in his deposition that Ms. Russell reported to his office on September 16, 2011 with new complaints of pain down into her legs. When asked

whether he believed a change of condition existed, Dr. Merritt testified numerous times that he believed there was a change. Dr. Merritt testified that a comparison of the results of an MRI taken on August 16, 2010, to the MRI taken by his office on October 21, 2011, showed a slight increase in the size of the disc protrusion. He opined there was an anatomical difference between the two MRIs. Dr. Merritt also wrote a letter, dated November 21, 2011, asserting that Claimant's condition had changed for the worse.

Claimant also reported to Dr. William S. Edwards after the Hearing and Decision of the Commission dated April 13, 2011. Dr. Edwards testified in his deposition that the patient's symptoms were worse and further stated that he had no doubt the worsening symptoms were present. Dr. Edwards testified Claimant had development of numbness and discomfort in the distribution of the L5 nerve root that he had not noted in his previous exams. Dr. Edwards stated the worsening of Claimant's symptoms could anatomically be caused by the nerve making it more painful or symptomatic. He stated surgery may be an option in dealing with her symptoms. Dr. Edwards stated his opinion to within a degree of medical certainty, based on medical evidence he believed to be objective.

FINDINGS OF FACT

1. I find Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible.
2. I find Claimant reasonably and timely sought additional medical care and attention as a result of her worsening symptoms.
3. I find Claimant attempted to comply with the restrictions placed on her by her physicians.

4. Dr. Merritt testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
5. Dr. Merritt testified to within a degree of medical certainty Claimant's change of condition was a physical, anatomical change.
6. Dr. Merritt's letter dated November 21, 2011 supports both that Claimant underwent a change of condition for the worse and that future treatment, including but not limited to epidural injections, is medically necessary.
7. I find Dr. Merritt's testimony consistent with the requirements of a change of condition pursuant to the Act.
8. Dr. Edward's testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
9. Dr. Edward's testified to within a degree of medical certainty Claimant's change of condition was a physical-anatomical change.
10. I find Dr. Edward's testimony consistent with the requirements of a change of condition pursuant to the Act.
11. I find Claimant is in need of additional medical treatment.
12. The defendants shall provide medical care and attention pursuant to Claimant's change of condition.
13. I find the defendants required Claimant to turn in her keys December 1, 2011.
14. I find the defendants have not provided Claimant work hours since December 1, 2011.
15. I find Claimant was given work restrictions by Dr. Merritt prior to December 1, 2011. Those limitations continue to the present.

16. The defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.

17. The defendants admitted a change of condition in their initial Form 51, dated January 3, 2012, and did not amend or ask to amend their Form 51 until the date of the Hearing. Because I find a change of condition on the merits I do not issue a finding or order on Claimants estoppel contention.

18. The defendants failed to file a Form 51 in response to Claimant's second Form 50, served on September 20, 2012, and have therefore waived the statute of limitations defense.

FINDINGS OF LAW

1. Pursuant to S.C. Code Ann. section 42-17-90, Claimant suffered a change of condition for the worse.

2. Pursuant to S.C. Code Ann. Regs. 67-602(C), Claimant attached medical reports to the hearing request indicating a change in the claimant's condition.

3. Pursuant to section 42-15-60, Claimant is entitled to additional medical care and attention.

4. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.

5. Pursuant to 42-1-120, Claimant is "disabled."

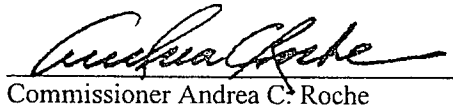
6. Pursuant to section 42-9-10, Claimant is entitled to temporary total disability benefits.

AWARD

In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:

1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
2. Defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.

AND IT IS SO ORDERED!



Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

August 5, 2013

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Roche

DECISION AND ORDER OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell, Employee, Claimant, vs. Wal-Mart Stores, Inc., Employer, and American Home Assurance, Carrier, Defendants.	)

HEARING: Held in Myrtle Beach, South Carolina on April 13, 2011.

APPEARANCES: Claimant represented by C. Daniel Vega, Esquire of Columbia , South Carolina.

Defendants represented by Johnnie W. Baxley, III, Esquire of Willson Jones Carter & Baxley, P.A., Mt. Pleasant, South Carolina.

PURPOSE OF HEARING: To determine the issues as set forth on the Form 21.

DECISION AND ORDER: **By Avery B. Wilkerson, Jr., Commissioner**

FILED: **June 8,** 2011.

I. APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

APA #1: Records of Dr. Maria Perez-Garcia, dated 11/25/09 – 8/23/10, consisting of pages 1-32.

APA #2: Records of Florence MRI, dated 8/16/10, consisting of pages 33-34.

APA #3: Records of Dr. Bill Edwards, dated 9/14/10, consisting of pages 35-37.

APA #4: Records of Dr. Ken Wenz, dated 11/22/10, consisting of pages 38-40.

APA #5: Reports of HealthSouth FCE, dated 1/25/11, consisting of pages 41-51.

APA #6: Records of Dr. James Merritt, dated 10/25/10 – 3/29/11, consisting of pages 52-59.

II. STIPULATIONS

Counsel for the respective parties stipulated at the time of the hearing to the following issues:

1. The purpose of the hearing is to determine the issues as set forth in the Form 21 and any other issues which may timely come before the Commission;

2. That the Claimant's accident occurred on November 3, 2009;

3. The Claimant's average weekly wage was $1232.52 with a corresponding compensation rate of $681.36 (maximum compensation rate for 2009);

4. Notices were timely and properly served upon all parties of interest;

5. Venue, set in Horry, is proper as agreed by all parties;

6. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved;

7. The issues for determination are the Claimant's entitlement to permanent partial disability compensation and future medical benefits and any other issues which may timely come before the Commission.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declaration or unstipulated medical reports.

III. STATEMENT OF THE CASE

This case was heard by the undersigned Commissioner in Myrtle Beach, South Carolina, on April 13, 2011. The Commission's file in this claim reflects that this is an admitted claim. It is Claimant's position in this matter that she has sustained permanent partial disability to the back per 42-9-30, and that she is entitled to future medical treatment consistent with the report from Dr. James Merritt. The Claimant indicated that she was paid salary continuance for all periods of time that she missed from work, and thus no temporary compensation is owed, and that all of her medical bills have been paid. The Defendants agreed that the only two issues for determination are extent of permanent disability and entitlement to future medical treatment.

The claimant testified at the hearing in this matter, and her testimony allowed this Commissioner to observe the Claimant, to ask questions to the Claimant and to judge her credibility as a witness.

IV. EVIDENCE OF THE CASE

The Claimant testified that she is 36 years old, not married and has three daughters (11 months old, 10 years old, and 13 years old). She graduated from high school, has taken some college classes, and served in both the National Guard and U.S. Army, where she received a bad conduct discharge for an issue with a gentleman. She has worked at Wal-Mart for 13 years, and has been a shirt manager (assistant store manager) since 2007. She is a salaried member of management at Wal-Mart.

On November 3, 2009, she was lifting and hurt her back and pelvis. The accident was timely reported and medical treatment was provided to her. At that time, Claimant was three months pregnant and thus treatment for the first several months did not include diagnostic testing

and was very conservative. After she successfully delivered her daughter and recovered from her caesarian section surgery, she had an MRI scan and began treating with Dr. Merritt. Dr. Merritt indicated that no surgery was required and treated Claimant with medications, exercises, and an injection. Claimant admitted that she had been released from medical care.

The Claimant indicated that she continues to have pain in her back, especially with prolonged standing and walking or any heavy lifting. She has been restricted to no lifting over 30 pounds, but she is able to do her job as a shift manager within those restrictions. The Claimant has been back at work for quite some time, and she plans to continue working and hopefully become a store manager. The Claimant testified that her pelvic pain last surfaced during her FCE, but those problems have essentially resolved.

The Claimant continues to take two medications prescribed by Dr. Merritt. She takes Flexeril (muscle relaxer) a couple times per week as needed, and she takes Naproxen (anti-inflammatory) twice per day every day. On the Form 14B, Dr. Merritt indicated that Claimant would need to continue the anti-inflammatories (Naproxen).

The medical records indicate that Claimant was diagnosed with a back strain and that she has degenerative disc disease at L5-S1. The records detail the medical treatment and her current abilities. The final medical report from Dr. Merritt indicates that Claimant has a 3% rating to the whole person as a result of her back injury, which converts to a 7% regional rating to the lumbar spine.

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

V. FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paula Russell as Employee-Claimant and Wal-Mart Stores, Inc. as Employer and American Home Assurance as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to November 3, 2009, on which date she did sustain an injury to the back arising out of and in the course of her employment, and proper notice was given to Employer. This was an accepted claim, and Claimant has received appropriate medical benefits and is not entitled to any temporary total compensation (she received salary continuance for all periods of time out of work).

3. That the average weekly wage of Employee at the time of the above-described accident was $1232.52, making a compensation rate of $681.36 (maximum compensation rate for 2009) applicable in this matter.

4. That Claimant reached maximum medical improvement on February 2, 2011, for the injuries resulting from the November 3, 2009, accident.

5. That Claimant has sustained 7% permanent partial disability to her back as a result of the accidental injury on November 3, 2009. This finding is based upon the Claimant's testimony and the medical records.

6. That Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

7. At this time, Claimant is not entitled to any other benefits or compensation under the South Carolina Workers' Compensation Act other than those benefits specifically awarded above.

VI. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Claimant did sustain an injury to her back by accident arising out of and in the course and scope of her employment on November 3, 2009.

3. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until February 2, 2011. Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

4. Under § 42-9-30, Claimant has sustained 7% permanent partial disability to the back.

VII. ORDER/AWARD

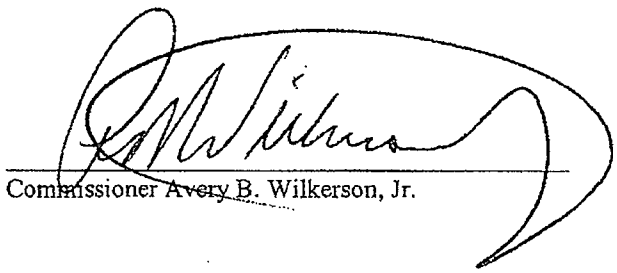
IT IS HEREBY ORDERED that as a result of Claimant's accidental injury occurring on November 3, 2009, she has sustained 7% permanent partial disability to the back, for which she is entitled to 21 weeks of compensation, at the compensation rate of $681.36 per week, for a total of $14,308.56.

IT IS FURTHER ORDERED Claimant reached maximum medical improvement on February 2, 2011, and Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 8, 2011

By: Elaine Boyd, Administrative Assistant to Commissioner Wilkerson

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov

#: 0917785
Carrier File #:
Carrier Code #:
Employer FEIN #:

Claimant's Name: Paula D Russell SSN: [redacted]
Address: 711 No. Williston Road
City: Florence State: SC Zip: 29506
Home Phone: (843) 260-9868 Work Phone: ( ) -

Employer's Name: WalMart #0586
Address: 2709-A Church Street
City: Conway State: SC Zip: 29526
Insurance Carrier: Illinois National Insurance Company

Preparer's Name: C. Daniel Vega Law Firm: Chappell, Smith & Arden Preparer's Phone #: 803-929-3600

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds: **Date of Injury or Illness:** 11/3/2009
☑ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to See 1b below on 11/3/2009 in Horry South Carolina
1b. Body part(s) affected are: abdomen and back
Briefly describe how the accident occurred. CSA-07-11/21 lifting pallet felt a pull in abdomen and middle of back
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 11/3/2009 in the following manner:
Notified Supervisor

☑ 6. Due to injury, the claimant is in need of (check one):
☐ (a) medical examination and treatment for: abdomen and back
☑ (b) additional medical examination and treatment for: abdomen and back

☑ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
to be determined

☑ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
☑ (1) General Disability: ☑ Total ☑ Partial ☑ (2) Specific Disability: ☑ Total ☑ Partial
☐ (3) Wage Loss

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of $ 0.00 and demands accounting of days worked and wages earned as provided by law.
10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
WalMart #0586
11a. Further grounds or unusual aspects of claim:
Claimant seeks to reopen case on a change of condition for the worse. See attached note from authorized treating physician.
11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Strand Orthopaedic
11c. To the best of your knowledge, did you have any prior permanent disability? None Known
If yes, describe:
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. **I am filing a claim. I am not requesting a hearing at this time.**
☑ 13b. **I am requesting a hearing. A $25 fee is required.**
14. Estimated time needed for hearing: 1 hour

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature | Attorney at Law (Title) | dvega@csa-law.com (Email) | 12/9/11 (Date)

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or Request for Hearing

[redacted]

SOUTH CAROLINA SUPREME COURT

CASE # 2018-000354

PAULA RUSSELL vs. WAL-MART STORES

TRANSCRIBED BY SALLY J. ROSSMANN, COURT REPORTER AND NOTARY PUBLIC, THIS 10TH DAY OF NOVEMBER 2019.

SOUTHEASTERN TRANSCRIPT, INC.

P.O. BOX 13478

CHARLESTON, SC 29422

INDEX

JUSTICE BEATTY: YOU MAY BE SEATED.

THE NEXT CASE FOR ORAL ARGUMENT THIS MORNING IS "RUSSELL VS. WAL-MART." COUNSEL ARE PREPARED TO GO FORWARD.

BY MR. VEGA:

MR. VEGA: MY NAME IS DANIEL VEGA AND I REPRESENT MS. PAULA RUSSELL, THE PETITIONER IN THIS CLAIM. MAY IT PLEASE THE COURT, IN ORDER TO PROPERLY STATE OUR GROUNDS FOR APPEAL, I WOULD LIKE TO GIVE A BRIEF DESCRIPTION OF THE PROCEDURAL HISTORY OF THE CLAIM.

MS. PAULA RUSSELL SUFFERED AN ADMITTED INJURY BY ACCIDENT IN THE COURSE AND SCOPE OF EMPLOYMENT WHILE WORKING FOR THE RESPONDENT, WAL-MART, ON NOVEMBER 3RD, 2009. APPELLANT UNDERWENT MEDICAL CARE AND ATTENTION UNTIL HER CLAIM CAME UNDER REVIEW IN 2011, AND IN 2011 THE COMMISSION FOUND CLAIMANT WAS AT MAXIMUM MEDICAL IMPROVEMENT, SUFFERED PERMANENT PARTIAL DISABILITY, AND WAS AWARDED ADDITIONAL MEDICAL CARE AND ATTENTION. THAT PARTICULAR ORDER WAS NOT APPEALED.

CLAIMANT SUBSEQUENTLY REQUESTED THE COMMISSION REVIEW HER AWARD FOR A CHANGE OF CONDITION. IN 2013 THE COMMISSION AWARDED THE

CLAIMANT A CHANGE OF CONDITION, AWARDED ADDITIONAL BENEFITS OF TEMPORARY DISABILITY, AND AWARDED ADDITIONAL MEDICAL CARE AND ATTENTION.

RESPONDENT WAL-MART APPEALED THE AWARD OF THE SINGLE COMMISSIONER TO THE APPELLATE PANEL, AND IN 2014 -

JUSTICE HEARN: AND WHAT WAS THE GROUNDS OF THAT APPEAL?

MR. VEGA: THE GROUNDS OF THE APPEAL WAS THAT THE CLAIMANT DID NOT SUFFER A CHANGE OF CONDITION BECAUSE OF A LACK OF OBJECTIVE MEDICAL EVIDENCE.

JUSTICE KITTREDGE: DID THEY TAKE THE POSITION THAT SUBJECTIVE EVIDENCE CANNOT EVEN BE CONSIDERED?

MR. VEGA: THEY TOOK THE POSITION THAT OBJECTIVE EVIDENCE DID NOT DEMONSTRATE THE CHANGE OF CONDITION IN THAT THE SUBJECTIVE EVIDENCE OF RECORD ALSO DID NOT SUPPORT IT.

JUSTICE BEATTY: IN FACT, THEY SAID IT WAS SUBSERVING, DIDN'T THEY?

MR. VEGA: YES, YOUR HONOR.

JUSTICE KITTREDGE: MY CONCERN IS THAT IT WAS SORT OF A STRAW-MAN ARGUMENT BY THE COURT OF APPEALS. IT SEEMS THEY ATTRIBUTED A POSITION

TO THE EMPLOYER THAT THE EMPLOYER NEVER TOOK, AND THAT WAS THE BASIS OF THE REMAND. AND THEY ATTRIBUTED A POSITION THAT SUBJECTIVE EVIDENCE, UNDER NO CIRCUMSTANCES, CAN BE CONSIDERED. AND I COULD NOT FIND THEM MAKING THAT PRECISE ARGUMENT.

MR. VEGA: AT THE COURT OF APPEALS, YOUR HONOR?

JUSTICE KITTREDGE: YEAH, AT THE FIRST, THE FIRST COURT OF APPEALS.

MR. VEGA: THE COURT OF APPEALS FOUND THAT IT WAS ERROR FOR WAL-MART TO REQUIRE THAT CLAIMANT DEMONSTRATE THE CHANGE OF CONDITION WITH OBJECTIVE MEDICAL EVIDENCE AND REMANDED TO THE COMMISSION -

JUSTICE KITTREDGE: I UNDERSTAND THAT. MY POINT IS: THEY NEVER MADE THAT ARGUMENT, AS I READ THE RECORD IN THEIR BRIEF. BUT WE'LL GET TO THAT AS YOU PROGRESS THROUGH YOUR ARGUMENT. THERE'S A POINT TO ALL THAT.

MR. VEGA: SO THE COURT OF APPEALS HEARD THE APPELLATE PANEL REVERSE THE SINGLE COMMISSIONER. MS. RUSSELL APPEALED TO THE COURT OF APPEALS.

JUSTICE BEATTY: THEY SENT IT BACK FOR A SECOND TIME.

MR. VEGA: CORRECT.

JUSTICE BEATTY: NOW THE ISSUE BEFORE US IS APPEALABILITY RIGHT NOW; WHETHER OR NOT IT'S IMMEDIATELY APPEALABLE; IS THAT CORRECT?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTCIE HEARN: CAN I ASK YOU SOMETHING ABOUT THAT FIRST OPINION FROM THE COURT OF APPEALS WHERE THEY SPECIFICALLY DIRECTED THAT IT GO BACK TO THE COMMISSION AND THAT THE COMMISSION APPLY THE RIGHT STANDARD, IF YOU WILL. AND THE ATTORNEY FOR WAL-MART EVEN WROTE AN E-MAIL MAKING IT CLEAR THAT IT SHOULD BE THE FULL COMMISSION THAT HEARD IT. BUT INSTEAD SOMEHOW - I'M NOT CLEAR HOW - BUT WE SEE FROM THIS RECORD THAT IT GOT SENT DOWN TO A SINGLE COMMISSIONER AGAIN. CAN YOU HELP ME? HOW DID THAT HAPPEN? WASN'T THAT AN ERROR BY THE COMMISSION?

MR. VEGA: I DON'T BELIEVE IT WAS AN ERROR, YOUR HONOR. THEY DELEGATED THE AUTHORITY OF THE COMMISSION TO THE SINGLE COMMISSIONER TO HEAR IT. WE BOTH - THE APPELLATE AND -

JUSTICE HEARN: BUT THAT'S NOT WHAT THE REMAND ORDER FROM THE COURT OF APPEALS SAID. THE COURT OF APPEALS SAID: WE REVERSE AND REMAND TO THE COMMISSION. THE COMMISSION SHOULD HAVE DONE SOMETHING THEN.

MR. VEGA: CORRECT, YOUR HONOR. HAD THE COMMISSION DECIDED THE THRESHOLD ISSUE OF COMPENSABILITY OF THE CHANGE OF CONDITION, WE MAY NOT BE IN THIS POSITION. SO YOUR HONOR IS CORRECT IN POINTING THAT FACT OUT.

JUSTICE HEARN: WELL, AND THEN AFTER THAT, COMMISSIONER CAMPBELL DID WHAT, IN MY VIEW AT LEAST, THE COMMISSION SHOULD HAVE DONE.

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE HEARN: HE DIDN'T HAVE A DE NOVO HEARING, BUT HE REVIEWED THE EVIDENCE UNDER THIS PROPOSED CORRECT STANDARD THAT THE COURT OF APPEALS HAD REQUESTED. AND THEN THERE'S ANOTHER APPEAL BY WAL-MART, AND IT GOES BACK TO THE FULL COMMISSION.

MR. VEGA: RIGHT.

JUSTICE HEARN: AND THIS TIME, DARNED IF THEY DON'T REVERSE AND REMAND FOR A DE NOVO HEARING. HOW DO WE GET ANOTHER BITE OF THE APPLE HERE? AND MEANWHILE, THIS LADY'S NEVER - YEARS PASS, AND SHE'S STUCK.

MR. VEGA: RIGHT, YOUR HONOR. MS. RUSSELL HAS NEVER RECEIVED MEDICAL CARE AND ATTENTION. SHE'S NEVER RECEIVED HER DISABILITY BENEFITS.

JUSTICE FEW: WELL, NOW, THAT'S NOT TRUE, IS IT? SHE RECEIVED HER INITIAL BENEFITS AND THAT BECAME A FINAL ORDER, AS YOU DESCRIBED TO US EARLIER, BECAUSE THE ORDER WAS NOT APPEALED.

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE FEW: THIS IS NOT LIKE HILTON WHERE THIS WAS A CLAIM FOR INITIAL BENEFITS. THIS IS A CLAIM FOR A CHANGE OF BENEFITS.

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE FEW: IT'S INCORRECT TO SAY THAT SHE NEVER HAS RECEIVED HER BENEFITS.

JUSTICE HEARN: SHE HASN'T RECEIVED THE BENEFITS YOU WERE REQUESTING IN THIS ACTION, HAS SHE?

MR. VEGA: CORRECT, YOUR HONOR. SHE HAS NOT RECEIVED BENEFITS PURSUANT TO A CHANGE OF CONDITION.

JUSTICE BEATTY: BEFOE YOUR TIME RUNS ON YOU, WILL YOU ADDRESS APPEALABILITY, THE QUESTION WE'RE ACTUALLY HERE TO HEAR.

MR. VEGA: YES, YES, YOUR HONOR. IT IS OUR CONTENTION THAT THIS CASE IS DISTINGUISHABLE FROM BONE [PH] IN THAT THE REMAND ORDER THAT IS ABSENT IN BONE IS PRESENT IN THIS CASE. THE SINGLE COMMISSIONER, AS

THE JUSTICE HAS POINTED OUT, FOLLOWED THE DIRECTIVES OF THE COURT OF APPEALS. THE COMMISSION NOW, WITHOUT EXPLANATION, IS VACATING THAT ORDER AND REVERSING FOR A HEARING DE NOVO, WHICH IS A SECOND BITE AT THE APPLE, WHICH THE RESPONDENTS DID NOT WISH TO HAVE TO BEGIN WITH; AND FOR THAT REASON, WE WOULD DISTINGUISH THIS FROM THE BONE CLAIM.

JUSTICE HEARN: AND YOU THINK THIS CASE IS MORE LIKE HILTON VERSUS FLAKEBOARD?

MR. VEGA: YES, YOUR HONOR.

JUSTICE HEARN: AND IN THAT CASE, FORMER CHIEF JUSTICE PLEICONES SAID THIS: IF UNDER THE CIRCUMSTANCES PRESENTED HERE, THE COMMISSION'S ORDER IS ALLOWED TO STAND, A PARTY COULD FACE THE POSSIBILITY OF REPEATED UNEXPLAINED DO-OVERS BEFORE A FINAL DECISION OF THE COMMISSION. AND I ASSUME YOUR ARGUMENT IS: THAT'S EXACTLY WHAT WE'VE GOT HERE.

MR. VEGA: YES, YOUR HONOR.

JUSTICE HEARN: THIS SITUATION THAT CHIEF JUSTICE PLEICONES - WELL, THE WHOLE COURT BECAUSE IT WAS A UNANIMOUS COURT.

MR. VEGA: CORRECT, YOUR HONOR. THE ORDER OF THE COURT OF APPEALS WAS UNANIMOUS.

JUSTICE HEARN: AND I'M TALKING ABOUT IN HILTON VERSUS FLAKEBOARD.

MR. VEGA: RIGHT.

JUSTICE HEARN: THAT WAS THE UNANIMOUS OPINION, EVEN THOUGH JUSTICE KITTREDGE WHO CURRED [SIC] IN RESULT AND WROTE SEPARATELY -

MR. VEGA: THAT'S CORRECT.

JUSTICE HEARN: - EVERYONE AGREED WITH THE RESULT IN THAT CASE, I.E., WHO TO ADDRESS APPEALABILITY AND FIND THAT THE MATTER WAS APPEALABLE BECAUSE OF THIS POTENTIAL OF REPEATED DO-OVERS.

MR. VEGA: RIGHT.

JUSTICE HEARN: SO MY QUESTION TO YOU: IS THAT WHAT YOUR ARGUMENT IS?

MR. VEGA: OUR ARGUMENT IS THAT MS. RUSSELL HAS BEEN LEFT WITHOUT AN ADEQUATE REMEDY, AND PURSUANT TO HILTON THIS SHOULD BE REVIEWED BY THE COURT.

JUSTICE HEARN: SO THAT'S HOW YOU GET AROUND BONE?

MR. VEGA: NO, YOUR HONOR. WE BELIEVE THAT BOBO V. MARSHANE DISTINGUISHES BONE FROM MS. RUSSELL. IN BONE, THERE WAS A DENIAL, A DENIAL AND A REMAND. IN THIS CASE, THE REMAND - IN BONE THE REMAND DID NOT OCCUR. THE OPINION CAME BEFORE THE COMMISSION ADDRESSED THE REMAND. IN THIS CASE, THE COMMISSION ADDRESSED THE REMAND. THE SINGLE COMMISSIONER DRAFTED THE ORDER. WE WOULD CONTEND FIRST, PURSUANT TO BONE [SIC] V. MARSHANE THAT THAT ORDER IS APPEALABLE IF IT IS INCONSISTENT WITH THE OPINION OF THE COURT OF APPEALS.

AND OUR SECOND ARGUMENT IS -

JUSTICE BEATTY: INCONSISTENT HOW; IN WHAT WAY?

MR. VEGA: IT EXCEEDS THE AUTHORITY THAT THE COMMISSION WAS GRANTED.

JUSTICE BEATTY: SO YOU'RE REVERTING BACK - I SHOULDN'T SAY "REVERTING" BACK BUT CIRCLING BACK TO JUSTICE HEARN'S ARGUMENT THAT: HOW DID IT GET THERE WHEN THEY DIDN'T FOLLOW THROUGH WITH THE RECORD FROM THE COURT OF APPEALS?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE JAMES: SO YOU'RE APPEALING BASICALLY THE PROCEDURAL IRREGULARITY THAT YOU PERCEIVE EXISTS?

MR. VEGA: CORRECT, YOUR HONOR. WE BELIEVE BOBO IS CONTROLLING. IT DISTINGUISHES THIS CLIENT FROM BONE.

JUSTICE JAMES: SO WE DON'T HAVE A TRUE FINAL RESULT ON THE MERITS YET, DO WE?

MR. VEGA: THE WAY THE COMMISSION DRAFTED ITS ORDER AT THE APPELLATE PANEL LEVEL, IT IS INTERLOCUTORY IN NATURE. AND SO IF THIS COURT BELIEVES THAT THE BOBO CASE IS NOT DIRECTLY ON POINT, WE WOULD ALSO RELY ON OUR HILTON ARGUMENT AND ASK THAT THAT -

JUSTICE FEW: LET ME ASK YOU A QUESTION ABOUT HILTON. IN HILTON, THERE WERE SOME UNIQUE CIRCUMSTANCES THAT CHIEF JUSTICE PLEICONES HIGHLIGHTED INCLUDING THE FACT THAT THE ISSUE - THE THREE ISSUES ON WHICH THE COMMISSION SENT THE CASE BACK TO THE SINGLE COMMISSIONER FOR A REHEARING WERE THREE ISSUES THAT COMPLETELY CHANGED THE LANDSCAPE OF THE APPEAL. THEY DESCRIBED IT AS NEITHER OF THE FOUR EXCEPTIONS OF COMPETENCE - NEITHER OF THE FOUR EXCEPTIONS THAT WERE RAISED TO THE COMMISSION ADDRESSED THE ISSUES OF COMPETENCY, THE APPOINTMENT OF THE GUARDIAN AD

LITEM OR ANY CLAIM THAT FLAKEBOARD HAS BEEN DENIED HIS RIGHT TO BE EVALUATED BY A PHYSICIAN OF HIS CHOICE. THE COURT LATER DESCRIBED THAT AS "UNIQUE CIRCUMSTANCES" AND THEN SAID: THESE EXTREME REMEDIES WERE ORDERED WITHOUT ANY EXPLANATION.

SO AS I READ HILTON, THE IMPORT OF IT WAS THAT THE REMAND ORDER COMPLETELY CHANGED THE LANDSCAPE OF THE HEARING. HOWEVER YOU READ IT, THE COURT SAYS THESE ARE UNIQUE CIRCUMSTANCES.

SO ARE THERE ANY UNIQUE CIRCUMSTANCES HERE THAT WOULD COMPARE TO THE UNIQUE CIRCUMSTANCES THAT THE COURT DESCRIBED IN HILTON?

MR. VEGA: CORRECT, YOUR HONOR. I BELIEVE THAT THE ISSUE PRESERVATION, THE MATTER OF ISSUE PRESERVATION, WHAT WAS APPEALED IN 2014 BY THE RESPONDENTS VERSUS WHAT WAS APPEALED IN 2017 COMPLETELY BRINGS THAT WITHIN THE PURVIEW OF HILTON.

ALSO, THE FACT THAT THE COMMISSION HAS NOT GIVEN PROPER GROUNDS OR A REASONABLE EXPLANATION FOR THEIR VACATING OF THE ORDER BRINGS THAT WITHIN THE PURVIEW OF HILTON.

JUSTICE KITTREDGE: AND BY THAT POINT YOU MEAN THAT WE SHOULD DISAGREE WITH THE GROUNDS THAT THEY DID GIVE?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE KITTREDGE: BECAUSE THEY DID GIVE GROUNDS.

MR. VEGA: WELL, I BELIEVE THOSE GROUNDS ARE NOT PROPER.

JUSTICE KITTREDGE: RIGHT. SO WE JUST SIMPLY DISAGREE WITH THEM. BUT YOU'RE NOT GOING TO COME IN HERE AND TELL US THAT HILTON - THAT HILTON IS A SPECIFIC INTERPRETATION OF 1-23-380'S PROVISION THAT IF YOU CAN'T GET AN ADEQUATE REMEDY ON EVENTUAL APPEAL FROM A PRIME DECISION, YOU CAN GET AN INTERLOCUTORY APPEAL? YOU'RE NOT GOING TO TELL US THAT THE SIMPLE FACT THAT ONE - THAT SOMEBODY IN THE JUDICIAL BRANCH MIGHT DISAGREE WITH WHAT THE COMMISSION SAID BRINGS THIS CASE UNDER HILTON?

MR. VEGA: I DON'T BELIEVE THAT'S MY ARGUMENT, YOUR HONOR.

JUSTICE KITTREDGE: SO YOU WERE IN THE PROCESS OF EXPLAINING THE UNIQUE FACTS THAT ARE PRESENT IN THIS CASE THAT WOULD COMPARE TO HILTON - AND YOU LISTED TWO. I CUT YOU OFF. DO YOU HAVE OTHERS?

MR. VEGA: YES, YOUR HONOR. THE THREE INADEQUATE REMEDIES ARE THAT THE COMMISSION FAILED TO FOLLOW THE INSTRUCTIONS OF THE COURT OF APPEALS, AS I MENTIONED, DISREGARDED THE PROCEDURAL HISTORY AND DONE SO WITHOUT AN ADEQUATE EXPLANATION, YOUR HONOR. THOSE ARE THE THREE GROUNDS.

JUSTICE KITTREDGE: DID THE EMPLOYER - NOW, THE COMMISSION REMANDED IT FOR DE NOVO HEARING. DID THE EMPLOYER ON ITS HEELS WITH THE FULL COMMISSION, DID THEY ASK FOR A REMAND FOR A DE NOVO HEARING?

MR. VEGA: YES, YOUR HONOR, THEY DID.

JUSTICE KITTREDGE: THEY DID?

MR. VEGA: EVEN THOUGH THE E-MAIL IS IN THE RECORD ON PAGE 113, IN WHICH THEY ARGUED THAT A SECOND BITE OF THE APPLE WAS NOT NECESSARY. THEY IN FACT ASKED FOR A SECOND BITE OF THE APPLE.

JUSTICE HEARN: BEFORE THAT E-MAIL THOUGH?

MR. VEGA: AFTER THE E-MAIL, YOUR HONOR.

JUSTICE HEARN: AFTER THE E-MAIL?

MR. VEGA: THE E-MAIL -

JUSTICE HEARN: WELL, WE'RE GOING TO HEAR WHAT HE SAYS BECAUSE HE'S SHAKING HIS HEAD "NO" SO -

MR. VEGA: THE E-MAIL WAS SENT TO THE COMMISSION PRIOR TO THE SINGLE COMMISSIONER'S HEARING.

JUSTICE KITTREDGE: I'VE GOT THEIR BRIEF THEY WROTE FROM THE SINGLE COMMISSIONER BACK TO THE FULL COMMISSION. IT APPEARS TO ME THEY'RE

BEGGING THE COMMISSION. A DE NOVO HEARING WAS NOT REQUIRED TO ADJUDICATE THE ISSUE ON REMAND. AND YET IT COMES TO THE FULL COMMISSION, THEY THINK THEY'RE THROWING THE EMPLOYER A BONE, AND THEY'RE GRANTING RELIEF ON SOMETHING THAT WASN'T EVEN ASKED FOR.

MR. VEGA: WELL, YOUR HONOR, I BELIEVE THEY'RE SORT OF PARSING THE DEFINITION OF "DE NOVO" HEARING. THEY ARE ASKING THE COMMISSION TO RECONSIDER A MATTER. AND I'LL ALLOW MY COLLEAGUE TO EXPLAIN. THEY IN FACT ASKED FOR ADDITIONAL AND NEW EVIDENCE WITH REGARDS TO THE PAYMENT OF BENEFITS, AND THAT WAS DONE EXPLICITELY.

JUSTICE JAMES: IS THERE ANOTHER E-MAIL OTHER THAN THE ONE ON PAGE 113, THE FEBRUARY 16 E-MAIL, WHERE MR. BAXLEY SAYS - THAT'S HIS E-MAIL, RIGHT?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE JAMES: HE SAYS THERE SHOULDN'T BE DE NOVO.

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE JAMES: I THOUGHT YOU JUST SAID NOW HE SAID IT SHOULD BE DE NOVO.

MR. VEGA: AT THE APPELLATE PANEL ARGUMENT.

JUSTICE JAMES: I SEE. BUT HE DOES SAY THERE'S NOTHING IN THE REMAND THAT INDICATES A NEW HEARING SHOULD BE HELD.

MR. VEGA: RIGHT. AND I BELIEVE THAT WHAT MR. BAXLEY TAKES EXCEPTION TO IS THE PAYMENT OF BENEFITS. NOW, WITH REGARDS TO THAT, HE WOULD, I PRESUME, ASSERT THAT HE'S ENTITLED TO NEW AND ADDITIONAL EVIDENCE WITH REGARDS TO THAT PARTICULAR MATTER.

JUSTICE BEATTY: IF YOU HAVE NOTHING FURTHER, WE WON'T PUNISH YOU FOR SAVING US A LITTLE TIME.

MR. VEGA: THANK YOU, YOUR HONOR.

JUSTICE BEATTY: MR. BAXLEY.

BY MR. BAXLEY:

MR. BAXLEY: MAY IT PLEASE THE COURT AND THANK YOU, YOUR HONOR.

MY NAME IS JOHNNIE BAXLEY. I'M HERE ON BEHALF OF WAL-MART DURING THIS APPEAL.

JUSTICE HEARN: AND I REALLY NEED TO ASK YOU, SIR -

MR. BAXLEY: SURE.

JUSTICE HEARN: THIS IS ONE OF THOSE CASES, ISN'T IT, THAT YOU REALLY HAVE TO BE CAREFUL WHAT YOU ASK FOR BECAUSE IT SEEMS TO ME, IF WE RULE WITH YOU TODAY AND DISMSIS THIS APPEAL, IT WILL BE MOST CERTAINLY A PYRRHIC VICTORY. IN OTHER WORDS, YOU WOULD WIN THE BATTLE TODAY. BUT I DON'T SEE HOW YOU COULD ULTIMATELY WIN THE WAR. BECAUSE WHAT THAT WOULD MEAN IF WE RULED FOR YOU TODAY IS: IT WOULD GO BACK FOR A DE NOVO HEARING, AND YOU HAVE ALREADY MADE IT VERY CLEAR IN YOUR E-MAIL - AND I THINK YOUR E-MAIL WAS CORRECT. I'M NOT TAKING YOU TO TASK FOR IT AT ALL. I THINK YOU WERE BEING VERY CANDID AND I APPLAUD YOU FOR THAT. BUT YOU HAVE ALREADY TAKEN THE POSITION THERE SHOULD NOT BE A DE NOVO HEARING IN THIS CASE.

SO WON'T THAT DE NOVO HEARING HAVE TO BE REVERSED WHEN IT COMES BACK UP TO US IF POOR MS. RUSSELL - WE'RE ALREADY 8 YEARS FROM WHEN SHE FILED THIS THING. SHE MIGHT BE DEAD BY THEN.

MR. BAXLEY: YES, YOUR HONOR. JUST TO ADDRESS THAT REALLY QUICKLY: I THINK WE'RE USING THE WORD "DE NOVO" HEARING ACROSS THE SPECTRUM WHEN THAT'S NOT REALLY WHAT THE FULL COMMISSION ORDERED. IF YOU LOOK AT PAGE 213 OF THE APPENDIX IN THIS CASE, WHAT THE FULL COMMISSION

ACTUALLY SAID IS THAT THE - IT'S GOING BACK TO A SINGLE COMMISSIONER: A SINGLE COMMISSIONER SHALL REVIEW THE EVIDENCE SUBMITTED AT THE HEARING ON FEBRUARY 11, 2013 - SO THE ORIGINAL HEARING, FINDING A CHANGE OF CONDITION FOR THE WORST - AND ISSUE FINDINGS AND FACTS AND CONCLUSIONS OF LAW CONCERNING THE ISSUE AS TO WHETHER THE CLAIMANT HAS HAD A CHANGE OF CONDITION, SPECIFICALLY UNDER THE GUIDANCE OF THE REMAND FROM THE COURT OF APPEALS.

THEN WHAT THE COURT SAYS IS THE SINGLE COMMISSIONER SHALL CONDUCT A FULL EVIDENTIARY HEARING, A DE NOVO HEARING SOLELY ON THE ISSUE OF BENEFITS; IN OTHER WORDS, THE REMAND ISSUE FROM THE COURT OF APPEALS.

JUSTICE KITTREDGE: THE LANGUAGE IS TO BE PRECISE.

MR. BAXLEY: YES, SIR.

JUSTICE KITTREDGE: THE REMAND HEARING SHALL BE DE NOVO, A DE NOVO HEARING AS TO THE ISSUES OF WHETHER THE CLAIMANT HAS SUSTAINED A COMPENSABLE CHANGE OF CONDITION AND WHETHER SHE IS ENTITLED TO ANY BENEFITS AS A RESULT THEREOF.

JUSTICE BEATTY: THAT SOUNDS LIKE A NEW HEARING TO ME.

JUSTICE KITTREDGE: AND I'D LIKE TO KNOW IN YOUR REQUEST FOR RELIEF: DID YOU EVER ASK FOR THAT?

MR. BAXLEY: NO, SIR.

JUSTICE KITTREDGE: NO, YOU DIDN'T.

MR. BAXLEY: YES, SIR.

JUSTICE KITTREDGE: SEE. AND I'M SORT OF - I LIKE TO ASK QUESTIONS UP HERE.

MR. BAXLEY: SURE.

JUSTICE KITTREDGE: THIS IS NOT REALLY A QUESTION. IT SEEMS TO ME YOU'RE TOAST. AND IT'S NOT YOUR FAULT. THE COURT OF APPEALS ATTRIBUTED AN ARGUMENT TO YOU YOU DIDN'T MAKE. YOU NEVER SAID THAT SUBJECTIVE EVIDENCE CANNOT EVER BE CONSIDERED.

MR. BAXLEY: I COULDN'T AGREE WITH YOU MORE, JUSTICE KITTREDGE.

JUSTICE KITTREDGE: YOU'RE SITTING THERE READING AN OPINION WHERE THEY ATTRIBUTE TO AN ARGUMENT YOU NEVER MADE. IT GETS SENT BACK. YOU TELL THEM EXACTLY WHAT THE LAW IS IN THIS CASE: REMAND ON THE RECORD. THEY DO JUST THE OPPOSITE. YOU FILE A BRIEF; YOU GO OVER THE FACT OF WHAT

YOU ARGUED THE COURT OF APPEALS AND HOW IT WAS MISTAKEN THAT YOU - YOU'VE NEVER ARGUED THAT SUBJECTIVE EVIDENCE CANNOT BE CONSIDERED. YOU AGREE THAT IT CAN BE CONSIDERED. AND IT'S JUST REPLETE WITH THIS.

YOU TELL THE APPELLATE PANEL: A DE NOVO HEARING IS NOT REQUIRED. AND I GUESS THEY THINK THEY'RE DOING YOU A FAVOR OR DOING THE EMPLOYER A FAVOR. AND ULTIMATELY ONE DAY IF IT'S INTERLOCUTORY AND IF WE DISMISS IT, IT'S COMING BACK AND IT'S AN ERROR OF LAW BECAUSE YOU'VE GOT SOMETHING YOU DIDN'T ASK FOR.

MR. BAXLEY: YES, SIR. AND, AND I WILL AGREE WITH YOU.

JUSTICE KITTREDGE: HOW DO WE HANDLE THAT?

MR. BAXLEY: WELL, I WOULD AGREE WITH YOU -

JUSTICE HEARN: BUT WHY ISN'T THIS AN EXTRAORDINARY SITUATION UNDER HILTON?

MR. BAXLEY: IT'S NOT ONLY BECAUSE THE SENATE JUDICIARY, JUSTICE KITTREDGE, DOES SAY "DE NOVO" HEARING. THE NEXT PARAGRAPH GOES INTO GREAT DETAIL DETAILING THAT IT'S NOT GOING TO BE A DE NOVO HEARING AS TO THE THRESHOLD ISSUE OF CHANGE OF CONDITION, ONLY A DE NOVO HEARING ON AN AWARD OF BENEFITS, IF IN FACT THERE IS A FINDING OF CHANGE OF

CONDITION. OBVIOUSLY IF THEY FIND THAT THERE HAS BEEN NO CHANGE OF CONDITION, YOU DON'T NEED TO GET THE BENEFITS.

JUSTICE KITTREDGE: I DON'T, YOU KNOW - I WISH IT SAID WHAT YOU SAID IT SAID. AT THE REMAND HEARING, THE SINGLE COMMISSIONER SHALL CONDUCT A FULL EVIDENTIARY HEARING ALLOWING BOTH PARTIES TO SUBMIT EVIDENCE, BLA, BLA, BLA. I MEAN, IT'S WIDE OPEN. I DON'T SEE THE LIMITATION YOU WANT US TO ASCRIBE TO IT.

MR. BAXLEY: WELL, AGAIN, THE ONLY LIMITATION IS THAT NEXT SENTENCE THAT SAYS: IT IS FURTHER ORDERED THAT AT THE REMAND HEARING, THE SINGLE COMMISSIONER SHALL REVIEW THE EVIDENCE SUBMITTED AT THE HEARING ON FEBRUARY 11, 2013 AND ISSUE FINDINGS AND FACTS AND CONCLUSIONS OF LAW CONCERNING THE ISSUES AS TO WHETHER THE CLAIMANT HAS HAD A CHANGE OF CONDITION OR THE WORST PER 42-17-90.

JUSTICE BEATTY: SO THE PROBLEM IS SOME OF THIS IS CONTRADICTORY.

MR. BAXLEY: WELL, NO, SIR, YOUR HONOR. THE FOLLOWING SENTENCE SAYS: IF YOU DETERMINE THAT THRESHOLD ISSUE -

JUSTICE BEATTY: IT DOES NOT SAY "IF" IN THERE ANYWHERE.

MR. BAXLEY: WELL, THAT'S TRUE. THAT SAYS THE SINGLE COMMISSIONER SHALL CONDUCT A FULL EVIDENTIARY HEARING ON THE ISSUE OF BENEFITS.

JUSTICE BEATTY: NOW, WHAT'S A FULL EVIDENTIARY HEARING?

MR. BAXLEY: ON THE ISSUE OF BENEFITS ONLY, YOUR HONOR. IT SPECIFICALLY SAYS: FOR THE AWARD OF BENEFITS UNDER THE ACT -

JUSTICE BEATTY: YOU'RE IN A HOLE YOU CAN'T DIG YOURSELF OUT OF.

JUSTICE KITTREDGE: AND WE DON'T MEAN TO GIVE YOU A HARD TIME. REALLY IT'S A HOLE SOMEBODY ELSE - THE COURT OF APPEALS DOCKET 40 AND THE WORKER'S COMPENSATION APPELLATE PANEL DUG IT FOR YOU.

MR. BAXLEY: I COULDN'T AGREE WITH YOU MORE, SIR.

JUSTICE HEARN: YOU ARE TO BE COMMENDED.

MR. BAXLEY: IF THEY WOULD LISTEN TO ME, YOUR HONOR.

JUSTICE JAMES: LET ME ASK YOU THIS QUESTION SO THAT I CAN GET IT IN MY SIMPLE MIND.

MR. BAXLEY: YES, SIR.

JUSTICE JAMES: IF YOU ALL WALKED BACK INTO THE COMMISSION HEARING ROOM AT WHATEVER TIME AND DIDN'T - NO APPEAL WAS FOR US, WHAT TYPE OF EVIDENCE WOULD YOU THINK YOU WOULD BE ENTITLED TO PRESENT, IF ANY, IN ADDITION TO WHAT WAS PRESENTED ORIGINALLY?

MR. BAXLEY: ON THE THRESHOLD ISSUE AS TO WHETHER OR NOT THERE HAD BEEN A CHANGE OF CONDITION FOR THE WORST?

JUSTICE JAMES: YES, SIR.

MR. BAXLEY: NONE.

JUSTICE JAMES: ALL RIGHT. HOW ABOUT THE OTHER ISSUE?

MR. BAXLEY: IF THERE HAS BEEN A CHANGE OF CONDITION FOR THE WORST, THEN I WOULD GET TO SUBMIT EVIDENCE POST-2013. THERE WAS A HEARING IN THIS CASE IN FEBRUARY 2013.

JUSTICE JAMES: DOES THE CLAIMANT'S SIDE AGREE WITH YOU ON THOSE TWO POINTS, AS TO THE SCOPE OF THE HEARING? AND I GUESS WE CAN ASK HIM THAT.

MR. BAXLEY: I THINK SO BUT I'M NOT SURE.

JUSTICE JAMES: SO WE MAY BE TALKING ABOUT NO HARM, NO FOUL?

MR. BAXLEY: WE MIGHT BE.

JUSTICE HEARN: IT SURE DOES LOOK LIKE A DO-OVER THOUGH, DOESN'T IT?

MR. BAXLEY: IT DOES LOOK LIKE A DO-OVER, REGARDLESS OF - WE ACTUALLY WERE DISCUSSING THIS BEFORE. NO MATTER WHAT HAPPENS HERE TODAY, THERE'S GOING TO BE A DO-OVER.

JUSTICE HEARN: I MEAN, I FEEL LIKE YOU'RE JUST AS TRAPPED IN THE CYCLE OF REMANDS AS MS. RUSSELL IS HERE.

MR. BAXLEY: I WOULD AGREE WITH YOU, YOUR HONOR, THAT THINGS COULD HAVE BEEN DONE PROCEDURALLY TO MAKE THIS A LITTLE BIT CLEANER.

JUSTICE BEATTY: JUST TO GET BACK TO YOUR POINT, IF YOU READ THE VERY LAST PART OF THE SENTENCE ON PAGE 213, IT SAYS: BOTH PARTIES TO SUBMIT TESTIMONY, MEDICAL RECORDS AND OTHER ADDITIONAL IMAGE [SIC] FOR CONSIDERATION AS TO THE ISSUE OF ANY AWARDED BENEFITS UNDER THE ACT, IF THE CHANGE OF CONDITION CLAIM IS FOUND TO BE COMPENSABLE. THAT'S THE QUALIFYING PART.

JUSTICE KITTREDGE: THAT WOULD ALWAYS BE THE CASE.

JUSTICE BEATTY: THAT WON'T HELP YOU.

JUSTICE HEARN: LET ME MAKE SURE I UNDERSTAND. THIS WOULD BE, PER MY COUNT, THE THIRD HEARING IN FRONT OF A SINGLE COMMISSIONER, RIGHT?

MR. BAXLEY: CORRECT, YOUR HONOR.

JUSTICE HEARN: WHY DO WE NEED SO MANY HEARINGS?

MR. BAXLEY: I'M NOT SURE THAT WE DO, YOUR HONOR. IN FACT, AND YOU POINTED OUT EARLIER, MY INITIAL E-MAIL SAID THAT THE FULL COMMISSION SHOULD HAVE TAKEN THE MATTER UP ON REMAND AND DECIDED THE THRESHOLD ISSUE AS TO WHETHER OR NOT THERE WAS A CHANGE OF CONDITION -

JUSTICE HEARN: SO I GUESS MY NEXT -

MR. BAXLEY: - CONSIDERING ALL OF THE EVIDENCE AS JUSTICE KITTREDGE POINTED OUT.

JUSTICE HEARN: MY NEXT QUESTION IS: WHY DON'T YOU WANT US TO FIND THIS APPEALABLE AND GO AHEAD AND RESOLVE THIS?

MR. BAXLEY: WELL, BECAUSE WE THEN START DOWN THE SLIPPERY SLOPE OF EVERYTHING QUALIFIES AS A HILTON EXCEPTION. I THINK THAT -

JUSTICE HEARN: OH, NO, WE WOULD ONLY HAVE TWO HEN'S TEETH. WHY ISN'T THIS THE SECOND HEN'S TOOTH?

MR. BAXLEY: LAWYERS TAKE TWO EXCEPTIONS AND TURN THOSE INTO A HUNDRED.

JUSTICE HEARN: WELL, I CAN'T HELP WHAT LAWYERS DO.

MR. BAXLEY: I THINK IN THIS CASE - I THINK THE HILTON CASE WAS VERY CLEAR. UNLESS THE COMMISSION IS GOING TO RAISE ISSUES, WHICH NO PARTY EVEN RAISED, AND DO SOMETHING SO EXTRAORDINARY, EXCEPT IN THOSE CIRCUMSTANCES -

JUSTICE HEARN: WHY ISN'T THE GRANTING THE DE NOVO HEARING THAT VERY THING? YOU TOLD THEM NOT TO DO THAT AND THEY STILL DID IT, AND YOU'RE BOUND BY THAT NOW. I DON'T SEE HOW YOU'RE GOING TO SURVIVE ON APPEAL ONCE IT DOES COME BACK UP HERE.

MR. BAXLEY: I THINK THE ONLY WAY THAT IT APPLIES, YOUR HONOR, IS IF YOU READ THE SECOND PARAGRAPH UNDER THE ORDER AND -

JUSTICE HEARN: BUT THEY DON'T ALWAYS READ THESE THINGS THE WAY YOU THINK THEY SHOULD BE READ, DO THEY? YOU THINK THEY'VE LEARNED THEIR LESSON?

MR. BAXLEY: YES, I WISH THEY WOULD, YOUR HONOR.

JUSTICE BEATTY: WHAT IS THE DIFFERENCE FROM THINKING THAT

WHAT'S GOING ON HERE IS THAT THE COMMISSIONERS KEEP SENDING IT BACK UNTIL THEY GET THE RESPONSE - THE DECISION THAT THEY WANT, MEANING FOR THE EMPLOYER. I MEAN, THREE TIMES?

MR BAXLEY: WELL, IN ALL FAIRNESS, YOUR HONOR, WE KEEP WINNING AT THE COMMISSION. IT'S ONLY THE COURT OF APPEALS WHO ASCRIBED AN ARGUMENT TO US THAT WE NEVER MADE (INAUDIBLE) -

JUSTICE BEATTY: OBVIOUSLY YOU WERE WRONG. IF WE SENT IT BACK, THE COURT OF APPEALS SENT IT BACK, SOMETHING IS WRONG.

MR. BAXLEY: I WOULD ASSERT TO YOU AS JUSTICE KITTREDGE POINTED OUT THAT -

JUSTICE BEATTY: THAT YOU DON'T THINK SO, RIGHT?

MR. BAXLEY: YES. THE COURT OF APPEALS DECISION I'M NOT SURE WAS PROPER AND THREW UP A STRAW-MAN ARGUMENT AND THEN RULED AGAINST THAT STRAW-MAN ARGUMENT, AN ARGUMENT, BY THE WAY, THAT THE COMMISSION NEVER TOOK. THE COMMISSION GAVE WEIGHT TO EVIDENCE, NOT IGNORED EVIDENCE.

JUSTICE HEARN: WHY ISN'T THAT THE LAW OF THE CASE NOW, THOUGH?

MR. BAXLEY: THE LAW OF THE CASE FROM THE COURT OF APPEALS?

JUSTICE HEARN: WELL, THE FACT THAT THEY MADE THAT DECISION; THEY SENT IT BACK FOR THE COMMISSION TO FIX IT. IT NEVER GOT FIXED. COMMISSIONER CAMPBELL RULED ESSENTIALLY THE SAME WAY AS THE FIRST COMMISSIONER DID IN FAVOR OF MS. RUSSELL. WHY AREN'T YOU STUCK WITH THAT, NOW?

MR. BAXLEY: BECAUSE WE'VE APPEALED IT PROPERLY AND ARE BACK IN FRONT OF THIS COURT TRYING TO FIGURE IT OUT AND GET BACK TO A COMMISSION HEARING.

JUSTICE HEARN: BUT THE COMMISSION'S RESPOSNE TO THAT SECOND THING WAS JUST: WE DON'T LIKE THAT DECISION AGAIN. SO WE'RE GOING TO SEND IT BACK AND THIS TIME IT'S DE NOVO.

MR. BAXLEY: I'M NOT SURE THEY WERE THAT CAVALIER ABOUT IT, YOUR HONOR. I THINK WHAT THEY DID WAS - I THINK WHAT THE COMMISSION WAS REALLY BOTHERED ABOUT IS THAT THE SINGLE COMMISSIONER THAT THIS WENT BACK TO AWARDED BENEFITS BASED UPON EVIDENCE THAT AT THE TIME HE AWARDED IT WAS FOUR-AND-A-HALF YEARS OLD. HE AWARDED ONGOING TEMPORARY COMPENSATION AND ONGOING MEDICAL BENEFITS.

JUSTCIE HEARN: SO YOU THINK THERE SHOULD HAVE BEEN - BUT HOW COULD HE NOT DO THAT? BECAUSE THAT WAS ALL HE HAD. HE HAD TO DEAL WITH THE RECORD. IT WASN'T DE NOVO.

MR. BAXLEY: CORRECT, YOUR HONOR.

JUSTICE HEARN: AND YOU SAID IT WASN'T DE NOVO.

MR. BAXLEY: BUT, AGAIN, I THINK THAT THAT'S WHERE THIS BIFURCATION COMES INTO EFFECT. WITH REGARD TO THE ISSUE ON REMAND FROM THE COURT OF APPEALS, THAT SHOULD NOT BE A DE NOVO HEARING. THEY SHOULD REVIEW THE EVIDENCE AS IT STANDS IN THE RECORD AND MAKE A DECISION. EITHER THERE'S BEEN A CHANGE OF CONDITION FOR THE WORST OR THERE HASN'T.

IF THEY DETERMINE THAT THERE HAS BEEN A CHANGE OF CONDITION FOR THE WORST, THERE HAS TO BE AN AWARD OF BENEFITS -

JUSTICE HEARN: BUT HASN'T THAT BEEN DETERMINED TWICE BY TWO COMMISSIONERS; THAT THERE HAS BEEN A CHANGE OF CONDITION?

MR. BAXLEY: IT HAS AND BEEN OVERTURNED BY THE FULL COMMISSION ON BOTH OCCASIONS.

JUSTICE JAMES: CAN I ASK YOU A QUESTION -

MR. BAXLEY: YES, SIR.

JUSTICE JAMES: GOING BACK TO THE - OBVIOUSLY THIS HAS NOTHING TO DO WITH THE APPEALABILITY ISSUE, BUT THE FULL COMMISSION'S RATIONALE WAS BASED CONTRARY TO WHAT'S IN THE BOWLING DYE [PH] CASE, I THINK THAT'S BALLENGER, AND THE TILLER CASE, RIGHT?

MR. BAXLEY: YES, SIR.

JUSTICE JAMES: SO THE EMPLOYEE SAID THOSE CASES WERE DISREGARDED BY THE COMMISSION. THAT'S HOW WE GOT HERE.

MR. BAXLEY: I MEAN, WE GOT HERE -

JUSTICE JAMES: THAT'S HOW YOU GOT TO THE FIRST ROUND OR TO THE COURT OF APPEALS.

MR. BAXLEY: TO THE COURT OF APPEALS IN THE FIRST PLACE, YES, SIR. I MEAN, WE GOT TO THE COURT OF APPEALS IN THE FIRST PLACE BECAUSE THE CLAIMANT WAS ESSENTIALLY ARGUING THAT THERE WAS ENOUGH EVIDENCE IN THE RECORD TO SUPPORT THAT THERE HAD BEEN A CHANGE OF CONDITION.

JUSTICE JAMES: BASED ON HER OWN TESTIMONY.

MR. BAXLEY: BASED UPON HER TESTIMONY AND, IN ALL FAIRNESS, TO A LITTLE BIT OF MEDICAL TESTIMONY.

JUSTICE JAMES: BUT A LOT MORE THAN THEY HAD IN TILLER AND BALLENGER?

MR. BAXLEY: I DON'T KNOW THAT THERE WAS A LOT MORE. THERE WAS CERTAINLY SOME EVIDENCE IN THE RECORD.

JUSTICE JAMES: I WAS AN ATTORNEY IN THE TILLER CASE AND I LOST. I STILL CAN'T FIGURE OUT WHY BUT - THAT WAS 20 YEARS AGO; PROBABLY ME.

MR. BAXLEY: WE SHARE THAT IN COMMON, YOUR HONOR. I STILL CAN'T FIGURE OUT HOW I LOST THIS CASE IN FRONT OF THE COURT OF APPEALS.

JUSTICE HEARN: LET ME GO BACK TO THAT LAW OF THE CASE BECAUSE MAYBE I WASN'T CLEAR. IT SEEMS TO ME THAT AFTER THE FIRST REMAND ORDER BY THE COURT OF APPEALS, THE COMMISSION WAS GIVEN THE OPPORTUNITY TO CORRECT THE PERCEIVED ERROR - YOU KNOW, WE CAN ARGUE ABOUT WHETHER THE COURT OF APPEALS WAS RIGHT ON THAT. ALL THEY HAD TO DO WAS ISSUE A NEW ORDER BASED ON THE RECORD AND MAKE FINDINGS OF FACT THAT SAYS THEY CONSIDERED THE SUBJECTIVE EVIDENCE TOO. THAT'S ALL THEY HAD TO DO. THEY'RE THE FACT-FINDER. AND THAT WOULD HAVE BEEN UPHELD ON APPEAL.

MR. BAXLEY: YES, MA'AM.

JUSTICE HEARN: THEY DIDN'T DO THAT.

MR. BAXLEY: I AGREE.

JUSTICE HEARN: SO I DON'T SEE HOW NOW AT THIS LATE DATE THAT CAN EVER BE RECTIFIED. I MEAN, IT SEEMS LIKE THAT'S SORT OF THE LAW OF THE CASE: WE GAVE YOU A SHOT, COMMISSION, TO FIX THIS ORDER; YOU DIDN'T DO IT, AND -

MR. BAXLEY: BUT AT THIS POINT, YOUR HONOR, THERE IS NO LAW OF THE CASE. ALL THE COURT OF APPEALS DID IS SAID: YOU DID THIS WRONG IN THE FIRST PLACE. REDO IT. AT THIS POINT WE DON'T HAVE AN ORDER THAT'S EVER BEEN IN WRITING.

JUSTICE HEARN: BUT THEY DIDN'T TAKE THAT OPPORTUNITY TO REDO IT.

MR. BAXLEY: AGREED. AND THEY'RE GOING TO, I SUSPECT, BE GIVEN ANOTHER OPPORTUNITY TO DO IT CORRECT THE NEXT TIME AROUND.

JUSTICE FEW: IF WE WERE TO DECIDE THAT THE COMMISSION COMMITTED A PROCEDURAL ERROR BY NOT FOLLOWING THE INSTRUCTION OF THE COURT OF APPEALS THAT SAID: REMAND TO THE COMMISSION - IF WHAT THAT MEANS - "IF" WHAT THAT MEANS, IS THAT THE APPELLATE PANEL MUST HEAR AND DECIDE THE

CASE AND NOT A SINGLE COMMISSIONER, THEN, YOU KNOW, THAT'S THE EXCEPTION. BUT IF NOT, I MEAN, WHAT PROVISION OF LAW INSIDE THE WORKER'S COMPENSATION ACT OR INSIDE THE RULES AND REGULATIONS THAT GOVERN THE PROCEDURAL ADMINISTRATION OF WORKER'S COMPENSATION CASES, WHAT PROCEDURE OF LAW, IF ANY, COULD WE LOOK TO THAT WOULD TELL US WHETHER OR NOT IT WAS PROPER OR IMPROPER FOR THE APPELLATE PANEL OR THE COMMISSION TO CHOOSE TO LET THE INITIAL REMAND HEARING BE CONDUCTED BY A SINGLE COMMISSIONER, AS OPPOSED TO AN APPELLATE PANEL?

MR. BAXLEY: YOUR HONOR, IF I MAY?

JUSTICE BEATTY: YES.

MR. BAXLEY: THANK YOU.

JUSTICE FEW, THERE IS NO LAW. THERE ARE NO REGULATIONS ON THAT EXACT ISSUE.

JUSTICE FEW: THAT'S A SUFFICIENT ANSWER IN MY VIEW.

MR. BAXLEY: AND FRANKLY THAT'S ONE OF THE ISSUES IS WE HAVE A REMAND FROM THE COURT OF APPEALS TO THE COMMISSION, BUT THERE'S NOTHING INTERNALLY WITHIN THE COMMISSION THAT I'M AWARE OF THAT DEFINES WHETHER OR

NOT THE APPELLATE PANEL IS GOING TO TAKE THAT UP OR WHETHER OR NOT IT GETS ASSIGNED OUT TO SOME -

JUSTICE FEW: IT'S NOT UNIMPORTANT HERE THAT THE WORKER'S COMPENSATION COMMISSION IS PART OF THE EXECUTIVE BRANCH OF GOVERNMENT, AND WE'RE PART OF THE JUDICIAL BRANCH OF GOVERNMENT. AND ORDINARILLY SOME FOLKS LOOK AT SITUATIONS LIKE THIS AND SAY: THE JUDICIAL BRANCH OF GOVERNMENT DOESN'T TELL THE EXECUTIVE BRANCH OF GOVERNMENT WHAT TO DO, EXCEPT ACCORDING TO LAW.

MR. BAXLEY: YES, SIR. I AGREE, YOUR HONOR.

JUSTICE FEW: JUST LIKE JUSTICE KITTREDGE A MINUTE AGO, THAT WAS A STATEMENT, NOT A QUESTION.

MR. BAXLEY: FAIR ENOUGH.

JUSTICE BEATTY: THANK YOU VERY MUCH.

MR. BAXLEY: THANK YOU.

JUSTICE BEATTY: MR. VEGA, IN REPLY.

BY MR. VEGA:

MR. VEGA: THANK YOU, YOUR HONOR.

WE BELIEVE THE BIFURCATION IS NOT PROPER. ANY NEW EVIDENCE TO BE INTRODUCED, WHETHER IT'S REGARDING THE THRESHOLD ISSUE OF COMPENSABILITY OR THE PAYMENT OF BENEFITS IS IMPROPER. THE PAYMENT OF BENEFITS, THE ARGUMENT IS THAT THERE'S A POTENTIAL WINDFALL. THAT'S THE FEAR.

JUSTICE FEW: STOP RIGHT THERE, IF YOU DON'T MIND. YOU JUST HEARD MY QUESTION TO YOUR OPPOSING COUNSEL. WHAT'S THE PROVISION OF LAW THAT SAYS - THAT SUPPORTS WHAT YOU HAVE SAID; THAT THIS BIFURCATION AND SO FORTH IS IMPROPER?

MR. VEGA: WELL, MY ARGUMENT IS THAT DE NOVO HEARING WITH REGARDS TO ANY ISSUE WITHIN THE ORDER IS IMPROPER BECAUSE IT IS ON REMAND AND IT EXCEEDS THE INSTRUCTIONS OF THE COURT OF APPEALS UPON REMAND.

JUSTICE FEW: SO THE WORDS AT THE END OF THE COURT OF APPEALS OPINION THAT SAYS: WE REMAND TO THE COMMISSION?

MR. VEGA: CORRECT.

JUSTICE FEW: THERE'S NO OTHER PROVISION OF LAW THAT YOU HAVE TO SUPPORT YOUR ARGUMENT THAT THE COMMISSION MUST, AS AN APPELLATE PANEL,

DECIDE THIS, FOR WHATEVER IT IS YOUR ARGUMENT IS, ABOUT THIS IMPROPRIETY, RIGHT, NO OTHER PROVISION OF LAW?

MR. VEGA: YOUR HONOR, I'M NOT AWARE OF IT. I'M CONTENDING THAT IT EXCEEDS THE AUTHORITY OF THE COURT OF APPEALS TO BOBO V. MARSHANE MAKES THAT ABUNDANTLY -

JUSTICE HEARN: YOU'RE TALKING ABOUT THE ORIGINAL COURT OF APPEALS REMAND ORDER -

MR. VEGA: RIGHT.

JUSTICE HEARN: - THAT REMANDED IT TO THE COMMISSION TO DO IT RIGHT?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE HEARN: OKAY.

MR. VEGA: AND OUR ARGUMENT IS THAT THE COMMISSION DELEGATED THAT AUTHORITY TO COMMISSIONER CAMPBELL WITHOUT OBJECTION FROM EITHER PARTY. COMMISSIONER CAMPBELL - AND THE ORDER IS 32 PAGES LONG AND CONTAINS 124 FINDINGS OF FACT. IT COVERS THE ENTIRE PROCEDURAL HISTORY AND ALL EVIDENTIARY MATTERS IN THE CLAIM AND IS PROPER. AND FOR THE

COMMISSION TO VACATE IT WITHOUT PROPER GROUNDS IS OUR CONTENTION THAT THE COMMISSION IS IN ERROR IN DOING SO.

JUSTICE KITTREDGE: ONE OF YOUR ANSWERS TO JUSTICE FEW'S QUESTION: YOU'RE NOT AWARE OF ANY SPECIFIC POINT OF LAW, BUT IT DOES SOMEWHAT EXCEED THE SCOPE OF MAYBE COMMON SENSE TO HAVE A FULL-BLOWN REHEARING?

MR. VEGA: CORRECT, YOUR HONOR.

JUSTICE JAMES: AND I WOULD JUST ASK HIM: WHAT PROVISION OF LAW ALLOWS THE JUDICIAL BRANCH TO PLACE THE TEMPLATE OF COMMON SENSE UPON THE EXECUTIVE BRANCH?

JUSTICE HEARN: HOW ABOUT THE FACT THAT WE HEAR APPEALS FROM THE COMMISSION?

MR. VEGA: CORRECT, YOUR HONOR. THE APPELLATE PANEL, ONCE AGAIN, BOBO V. MARSHANE, STANDS FOR THE PROPOSITION THAT THE COMMISSION MUST DO WHAT THE COURT OF APPEALS REQUIRES IT TO DO IF IT EXCEEDS THAT AUTHORITY. WHETHER IT'S PROCEDURAL OR NOT, THE COURT OF APPEALS RETAINS JURISDICTION. THAT'S ONE OF THE CONTENTIONS THAT WE HAVE IS THAT THIS

MATTER IS STILL BEFORE THE COURT OF APPEALS, UNTIL THE COMMISSION COMPLIES WITH THE ORDER OF THE COURT OF APPEALS.

JUSTICE HEARN: SO ARE YOU ASKING US IF WE AGREE WITH YOU TO SEND US BACK TO THE COURT OF APPEALS AND SAY IT IS APPEALABLE AND THEY SHOULD - BECAUSE IT WAS THEIR ORIGINAL ORDER. THEY CAN SAY - THEY MAY BE IN THE BEST POSITION TO SAY WHETHER IT WAS CORRECTLY DONE OR NOT.

MR. VEGA: WHAT WE'RE ASKING FOR IS FOR THIS COURT TO VACATE THE ORDER OF THE APPELLATE PANEL AND REMAND WITH INSTRUCTIONS TO THE APPELLATE PANEL THAT THEN REVIEW THE ORDER OF THE SINGLE COMMISSION, THE ORDER OF THE SINGLE COMMISSIONER, TO DETERMINE WHETHER IT COMPLIES WITH THE ORDER OF THE COURT OF APPEALS.

JUSTICE HEARN: WHY WOULDN'T WE REMAND IT TO THE COURT OF APPEALS? THEY DISMISSED THE APPEAL. I MEAN, THAT'S WHAT'S IN FRONT OF US, WHETHER THAT WAS CORRECT OR NOT; WHETHER THEIR DISMISSAL OF THE APPEAL WAS CORRECT.

MR. VEGA: RIGHT. AND PER BOBO V. MARSHANE, THEY SHOULD NOT HAVE DISMISSED THAT APPEAL. THEY RETAINED JURISDICTION. SO IT WOULD BE

PROPER FOR THIS COURT TO ORDER THE COURT OF APPEALS - TO ALSO ORDER THE COURT OF APPEALS TO GO AHEAD AND HEAR THE MATTER ON THE MERITS.

THERE IS A REMEDY FOR WAL-MART, THE RESPONDENTS. THE BENEFITS ARE PAID IN A CONTINUUM. IF AT SOME POINT THE RESPONDENTS BELIEVE THE BENEFITS SHOULD HAVE STOPPED, THERE ARE OTHER PROCEDURES BY WHICH THEY CAN ASK THE COMMISSION TO REVIEW THE BENEFITS, EVEN THOUGH THIS APPEAL IS PENDING.

JUSTICE FEW: YOUR CLIENT IS RECEIVING TEMPORARY BENEFITS RIGHT NOW?

MR. VEGA: NO, YOUR HONOR, SHE IS NOT.

JUSTICE HEARN: SHE HASN'T RECEIVED ANYTHING SINCE THIS ACTION WAS STARTED ON THE 11TH, HAS SHE?

MR. VEGA: CORRECT. WELL -

JUSTICE HEARN: DISPITE THE FACT THAT TWO COMMISSIONERS HAVE SAID SHE SHOULD?

MR. VEGA: CORRECT, YOUR HONOR.

THANK YOU.

JUSTICE BEATTY: THANK YOU. WE'LL BE IN RECESS. (ENDED)

REPORTER'S CERTIFICATE

I DO HEREBY CERTIFY THAT THE ATTACHED HEARING WAS TRANSCRIBED BY ME; THAT THE CONTENTS CONTAINED IN SAID HEARING WAS, BY ME, TRANSCRIBED ONTO A PAPER DOCUMENT WITH THE ORIGINAL BEING SEALED FOR THE COURT. SAID HEARING WAS TRANSCRIBED VERBATIM AND TO THE BEST OF MY ABILITY.

I DO FURTHER CERTIFY THAT I AM NOT CONNECTED BY BLOOD OR MARRIAGE WITH ANY OF THE PARTIES OR THEIR ATTORNEYS OR AGENTS, AND THAT I AM NOT AN EMPLOYEE OF EITHER OF THEM, NOR INTERESTED DIRECTLY OR INDIRECTLY IN THE MATTER OF CONTROVERSY EITHER AS COUNSEL, ATTORNEY, AGENT OR OTHERWISE.

SWORN TO AND SUBSCRIBED BEFORE ME THIS THE 11TH DAY OF NOVEMBER, 2019.

_____

SALLY J. ROSSMANN

COURT REPORTER AND NOTARY PUBLIC

COMMISSION EXPIRES: 3/01/20

Transcript of the Testimony of
RUSSELL V. WAL-MART

Date: June 19, 2017

CREEL COURT REPORTING, INC.
Condensed Transcript and Word Index

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STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No. 0917785

Paula D. Russell,	)
	)
Claimant,	)
	)
v.	)
	)
Wal-Mart,	)
	)
Employer,	)
	)
and	)
	)
Illinois National,	)
	)
Carrier/Defendants.	)
	)

FULL COMMISSION HEARING

****

Monday, June 19, 2017
1:54 p.m. - 2:10 p.m.

The Full Commission Hearing was heard before Commissioners Aisha Taylor, Avery B. Wilkerson, Jr., and Susan S. Barden, at the Workers' Compensation Commission, 1333 Main Street, Suite 500, Columbia, South Carolina, on the 19th day of June, 2017, before Sonia D. Wallace-Sanders, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES

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INDEX

EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Administrative Procedures Act and the South Carolina Rules of Civil Procedure.

CALL TO ORDER:

COURT REPORTER: Today is June 19th, 2017. This is South Carolina Workers' Compensation Case Number 0917785. This is the case of Paula D. Russell, Claimant, versus Wal-Mart, Employer, and Illinois National, Carrier. The Appellant is the Defendant, represented by Johnnie W. Baxley. The Respondent is represented by C. Daniel Vega. Each side is allowed 10 minutes for oral argument and the Appellant three minutes in reply. You are requested to argue the grounds of exception and stay within the record.

COMMISSIONER BARDEN: Well, all right. Mr. Baxley?

ARGUMENT BY MR. BAXLEY:

MR. BAXLEY: Thank you, Commissioner, may it please the Commission. Before I get started I just wanted to, I mean, obviously, you guys are aware of the case since this was a published decision, it's now on remand. I've got 32 grounds of appeal. I don't have enough time to go into 32 grounds of appeal. So, I'm going to try and summarize these as best I can and debate two basic arguments, one on compensability, one on benefits. I'm not

waiving any of those grounds, I just don't have time in 10 minutes to go through 32 grounds for appeal.

COMMISSIONER TAYLOR: And they're in your brief and that's part of the record.

MR. BAXLEY: Yeah, thank you very much. Let me start off by going through a little bit of procedure. Obviously, this case was remanded from the Court of Appeals. Court of Appeals said the Commission erred in relying only upon objective evidence or by requiring a showing by objective evidence of a change of condition. That was my argument then, it's still my argument now. And that's not what the Commission did in the first place. The Commission weighed evidence, but, nonetheless, that was the issue for remand. I believe that the Single Commissioner properly heard that case without a new evidentiary hearing, that was on remand. He considered the record that was on the appeal and I think that was proper on the issue of compensability, and that was really the issue for remand. And, so within that record, it's still my argument that the greater weight of the evidence when considering

objective evidence, subjective evidence, doctor testimony, everything, is that there is no change of condition. The Court of Appeals, in their decision, very clearly said there's things in the doctor's deposition that would support a change of condition. They're right. There are also things in the doctor's depositions that would support that there is no change of condition. The claimant's testimony would support a change of condition. It's this body's job to weigh all of that evidence. Not all of that evidence gets the same weight. I would assert to you that the greater weight of the evidence shows that there has been no change of condition. The reason that I say that is this, number one, we know for certain because Dr. Merritt testified to it and Dr. Edwards testified to it, that the MRI before the change of condition and the MRI after the change of condition are virtually identical. We also know that despite testimony to the contrary, this lady had radicular complaints before the award, radicular complaints after the award. That would not support a change in condition. What Edwards says, is that she

could have nerve damage, that the worsening of symptoms can represent a change of condition for the worse. But I challenge you to go into his deposition and find anywhere where he says, to a reasonable of degree of medical certainty, most probably or more likely than not, there's been a worsening of her physical condition because it's not in there. So, again ---

COMMISSIONER BARDEN: But we still have the word physical. That has not been changed. We still have physical ---

MR. BAXLEY: We do. We do. That has not been changed. And, so today, in her current case log ---

COMMISSIONER BARDEN: And I ---

MR. BAXLEY: --- that has not been changed.

COMMISSIONER BARDEN: I was laboring under it, as I've said earlier today, other than this apprehension for 13 years, that physical was synonymous with objective. So we've been told ---

MR. BAXLEY: So was I.

COMMISSIONER BARDEN: --- that's not the case.

MR. BAXLEY: I agree.

COMMISSIONER BARDEN: But are we to the -- are we to

the other extreme where a claimant merely has to say, I'm worse. And a doctor, who are all trained to take complaints at face value, which means you don't need the commit- -- convicting, doctor will be deciding whether or not it will be adjudicated. Whether there is a change of condition, if that's the new standard.

MR. BAXLEY: And again ---

COMMISSIONER BARDEN: And I don't know if that's the standard, but it completely takes it out of our hands.

MR. BAXLEY: Well, Commissioner, that's why I don't believe that's the new standard. Because if that's the new standard, then, yeah, the doctor decides compensability.

COMMISSIONER BARDEN: You'll need a Commissioner.

MR. BAXLEY: But you don't need a Commissioner if that's the standard. And frankly, the doctor is always bound to take the claimant's word at face value anyways. That's why I think the Commission's roll is still to weigh that evidence. And again, not just to look at the objective evidence, which I don't think is what the Commission did last time anyways. But, not just to look at objective evidence, look at it

as a total. Obviously, you've got to take into account firmer testimony. You got too consider what Meritt said, both subjectively and objectively.

COMMISSIONER WILERSON: Uh-huh.

MR. BAXLEY: You gotta look at what Edwards says. You gotta look at the medical records pre and post. You gotta look at her testimony. I believe that when you weigh all of that, just as the Full Commission did last time, the greater weight of the evidence is that there's not a finding of compensability. Before I run short on time, let me get to the award portion. I agree that the hearing Commissioner properly did not have a new evidentiary hearing, relied upon the evidence that was in the record to determine compensability. That's what had to be done, that was proper. But let's go a step forward, if you're going to find compensability, I understand that there's an argument on both sides as to whether or not you can then go ahead and address award. That wasn't subject to the -- of the remand from the Court of Appeals, but for the sake of judicial economy, I also get that it doesn't make any

sense to just find compensability and not also address entitlement to benefits. If, however, you're going to address entitlement to benefits, I think the Single Commissioner has to have a hearing on that issue. What the Single Commissioner did in this case was reinstate ---

COMMISSIONER WILKERSON: Uh-huh.

MR. BAXLEY: --- the award of the Single Commissioner Andrea Roche from 2013.

COMMISSIONER WILKERSON: Uh-huh.

MR. BAXLEY: Well the problem with reinstating that award is, that's four years old. We don't have any evidence in the record, but what if she's been working? What if she had an intervening accident? What if she's been out of work the whole time? What if she's had three surgeries? What if she hasn't had any surgery? What have -- there are a hundred things that can affect whether or not she should be entitled to back TTD, ongoing TTD, medical treatment, all those sorts of things.

COMMISSIONER TAYLOR: Interest.

MR. BAXLEY: I mean, anything. You can't just reinstate a four year old award without taking

some evidence and having some basis for that. So, even if this Commission finds that the greater weight of the evidence supports that there is a change of condition for the worse, at the very least, it has to be remanded for a factual determination and a actual hearing on the benefits and awards section. That being temporary benefits and medical treatment, I don't think that either side is arguing the permanency right. But, obviously, there is an ongoing issue with regard to temporary benefits and medical treatment. Those things would have to be adjudicated as opposed to simply reinstating a four year old award, not knowing what's happened in the past four years.

COMMISSIONER BARDEN: Uh-huh.

MR. BAXLEY: Unless there are any questions, that's the crux of my argument.

COMMISSIONER BARDEN: Well, you've got two minutes left and you weren't going to have enough time. You don't want to use your two minutes?

MR. BAXLEY: I like to keep it brief, Commissioner.

COMMISSIONER BARDEN: Okay.

MR. BAXLEY: I'm good.

COMMISSIONER BARDEN: All right.

MR. BAXLEY: Thank you very much.

COMMISSIONER BARDEN: Thank you. Mr. Vega?

ARGUMENT BY MR. VEGA:

MR. VEGA: Thank you. May it please the Commission. Claimant Paula Russell is the injured individual that has been waiting for surgery since 2011. Commissioner Roche issued her order in 2013. The Court of Appeals issued their order in 2016. The defendants have had multiple opportunities to litigate the issues, for which they're now complaining. And the individual that has been prejudiced the most is the claimant. And, what I would propose with regards to the defendant's first argument, the medical evidence, Dr. Edwards explained the reason that he felt that there was a change of condition. He felt that there was a chemical injury to the nerve that had progressed and had worsened. And that explanation is in the body of the deposition. And I asked him then, given that explanation, is that your opinion, I said to within a reasonable degree of medical certainty, and he said yes. The problem with the evidence is that there's not a competing opinion. There's not an opinion that says

there is no change of condition. And, so while the doctors may give some leeway to the defendant's arguments and may concede certain points, the end result is a statement to within a reasonable degree of medical certainty. And question was asked by the Court of Appeals. Do you have a separate competing opinion that says there is no change of condition and they could not answer that question in the positive. I believe the result, with regards to preponderance of the evidence, as outlined in the body of Commissioner Campbell's order, which is a substantial order that gives a lot of, of -- demonstrates that the record was reviewed in it's entirety, would support a finding and this Commission should uphold his order. With regards to addressing entitlement to benefits. When you litigate a claim before a Single Commissioner, and that then is appealed to the Full Commission, you have the opportunity to raise whatever issues you wish to raise and preserve for appeal. The defendants did not preserve arguments with regards to TTD, medical care and treatment, average weekly wage and compensation rate. If

you agree with the argument that Mr. Baxley is proposing, this body would have the ability to go back and change the average weekly wage and compensation rate. If that issue has not been preserved during the appeal, that issue is the law of the case and it should not be reviewed. If you look at the body of the order and how Commissioner Campbell composed it, he makes a detailed analysis of the evidence. He has his conclusions and his findings and he finds that those conclusions and findings are consistent with what Commissioner Roche did. In other words, I have no grounds to change her order, I believe her order was good on it's face value, given that it's been remanded to me with instructions to find, consistent with preponderance of the evidence, whether there has been a change of condition. The best thing to do is reinstate the order as it was originally written. But even if you take out those findings of fact, conclusions of the law from his order, he still as his own separate findings. He still says, this is what I believe and then says, and because this is what I believe and this is what I find I'm -- and

that's consistent with what Roche did, the only thing to do is reinstate the order. I would ask that the Commission allow Ms. Russell -- let me make one more point. At the time that Commissioner Campbell held his hearing, there was no other evidence than what was provided to Commissioner Campbell in the record. I believe the reason they said, they could have gone to Commissioner Campbell and made the argument, let's revisit the issue of TTD and all those things, they could have made that argument. But, from the moment that they got an order from the Full Commission, dismissing the change of condition or saying there was not a change of condition, they got what they wanted. All of the issues attached to a change of condition would no longer be at issue. If you reinstate the change of condition, all those issues come back in. But, even if you granted his request and said, okay, we're going to remand it to Commissioner Campbell and we're going to allow him to then go back through all these findings of fact and make the findings his own, which I don't believe is proper procedure given the history of the claim, they don't have any

evidence that would change. There's no facts that would change the outcome. And, so, for those three reasons, I would ask that the Commission uphold the decision of Commissioner Campbell, allow the claimant to have the medical care and treatment that she's been asking for for these several years. And allow the claim to proceed. There will be eventually a finding of maximum medical improvement, this Commission will bring this case to a close, but the time to do that is not now.

COMMISSIONER BARDEN: All right, thank you. Mr. Baxley?

REPLY BY MR. BAXLEY:

MR. BAXLEY: Thank you, Commissioner. With regard to the procedural issue, when we appealed this the first time, the first -- very first Form 30, we did assert that the temporary total award was wrong because there was no change of condition. In fact, the Full Commission ---

COMMISSIONER TAYLOR: This is the Roche appeal?

MR. BAXLEY: The Roche appeal.

COMMISSIONER TAYLOR: Okay.

MR. BAXLEY: This Commission specifically put in their Full Commission Order that they denied

any further benefits because there was no change of condition. So at that point, the decision from this Commission was no entitlement to temporary total, no entitlement to any benefits under the Act including medical treatment, so those things were adjudicated. Now, that this Commission has or the Single Commissioner has now said, there is entitlement ---.

COMMISSIONER BARDEN: The notes say.

MR. BAXLEY: --- we've properly filed a timely appeal addressing that tissue, just like we did last time. Our Form 30 from Commissioner Roche's appeal specifically addresses both temporary compensation and medical treatment and benefits under the Act. So I think that what we've done is proper. And, again, what we're asking for -- and Danny is right, there is no evidence right now in the record, but what I'm saying is there needs to be an evidentiary hearing on those issues. I don't think that allowing us to go back and re-depose the doctors on the change of condition issue would be proper, but I think that there has to be an evidentiary hearing and evidence

presented on the issues ---

COMMISSIONER BARDEN: The benefits?

MR. BAXLEY: --- of the benefits, yes. With regard -- and let me just read you real quick the testimony of Dr. Edwards. It's on page 13 of the transcript, which is in the record. On line 11, this is Dr. Edwards testifying. But the worsening of her symptoms anatomically, could be that there is now a chronic change in that nerve, which makes it more painful or more symptomatic. Would that be your opinion to -- within a reasonable degree of medical certainty? Yes. So, within that reasonable degree of medical certainty, it could be that there is now a chronic change in that nerve, which makes it more painful or symptomatic. Again -- and he's got it within a reasonable degree of medical certainty, it just doesn't say probable or likely, it's could be.

COMMISSIONER BARDEN: It's could be.

MR. BAXLEY: So I agree with Danny that he did say within a reasonable degree of medical certainty, it's just not probable or likely, it's could be. I would submit that there's lots of things that it could be, but that's not

the medical standard.

COMMISSIONER BARDEN: All right, thank you.

MR. BAXLEY: Thank you.

COMMISSIONER BARDEN: That concludes this matter and y'all have a good rest of the day.

COMMISSIONER WILKERSON: Thank y'all. Good to see you.

COMMISSIONER TAYLOR: Good to see you guys.

(There being nothing further, this hearing concluded at 2:10 p.m.)

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC No. 0917785

Paula D. Russell,	)
	)
Claimant/Appellant,	)
	)
v.	)
	)
Wal-Mart,	)
	)
Employer/Respondents,	)
	)
and	)
	)
Illinois National Insurance Company,	)
	)
Carrier/Respondents.	)
	)

COMMISSION HEARING

****

Monday, December 16, 2013
4:00 p.m. - 4:13 p.m.

The Commission Hearing before Commissioner Susan S. Barden; Commissioner Aisha Taylor; and Commissioner T. Scott Beck, Chair, was taken at 1333 Main Street, Suite 500, Columbia, South Carolina on the 16th day of December, 2013 before Jennifer Nottle, Court Reporter and Notary Public in and for the State of South Carolina.

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(803) 252-3445 / (800) 822-0896

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INDEX

COURT REPORTER: Today is Monday, December 16th, 2013. This is South Carolina Workers' Compensation case number 0917785. This is the case of Paula D. Russell, Claimant, versus Wal-Mart, Employer, and Illinois National Insurance Company, the Carrier. The Appellant is the Defendant, represented by Johnnie Baxley. The Respondent is represented by C. Daniel Vega. Each side is allowed 10 minutes for oral argument and the Appellant three minutes in reply. You're requested to argue the grounds of the exception and stay within the record.

COMMISSIONER BECK: Gentlemen, we don't have a transcript of this proceeding. Do y'all have an extra one?

MR. BAXLEY: Yes, sir.

COMMISSIONER BECK: That'd be great. Thank you.

MR. BAXLEY: Sure.

COMMISSIONER BARDEN: You know what, unless could it have been -- she does everything electronically.

COMMISSIONER BECK: Well, they're supposed to be -- they're supposed to be marked electronic on the front.

COMMISSIONER BARDEN: Oh, okay. All right.

COMMISSIONER BECK: Unless they just didn't do that. All right, Mr. Baxley.

ARGUMENT BY MR. BAXLEY:

MR. BAXLEY: Thank you, Commissioner. May it please the Commission. Change of condition claim. I'm going to make this short and sweet. Y'all have been here all day. Change in condition claim. There's really not all that much in the transcript that is really going to matter to this kind of an argument one way or the other. And clearly, Ms. Russell says that her condition has worsened, which is what you would expect to see in a change of condition claim. 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. We got two doctors that testified in this case. Both gave written reports and both were deposed. Dr. James Merrit, who was the original authorized treating physician, and Dr. Bill Edwards. Dr. Merrit at some point thought that she might be a surgical candidate and referred her over to Dr. Edwards for surgical consultation, that sort of thing. Both doctors

have testified in this case. Dr. Merrit's testimony, on it's face, says she's had a change of condition for the worse. But when you look under the surface about what he bases that on, frankly, I think that it doesn't meet the standard, the legal standard. Dr. Edwards, on the other hand, says that he does not believe that there's been a change of condition for the worse. Let me talk about Dr. Merrit's testimony first. Dr. Merrit testified in his deposition that he thought there had been a change primarily for two reasons. Number one, she had some new leg pain that had not been present before the first hearing and that that was a new finding in his opinion such that there had been a change of condition for the worse. He also said that when he looked at the report from the old MRI and the report from the new MRI that the bulging or herniation had worsened. Those -- so those were his two bases. However, in his deposition, we pointed out some things to him and he came back on his testimony a little bit. The first thing pointed out to him is, that this lady was complaining about leg problems even before the

first hearing. We actually pointed out to him APA page 50, where she had to do the little chart, where you have to mark where you're having problems and it marked low back and then pain all down the leg. He went back and looked at his own records and the records of Dr. Edwards, from before this accident, and concluded that okay, she did have some complaints about leg problems even before this accident. And so her complaints about leg problems after the hearing -- and I keep saying the accident, I mean the hearing. Before the hearing she had problems with the leg. After the hearing she had problems with the leg. So maybe that's really not a new finding. The other thing is that he looked at the MRI reports. Now, he admitted in his deposition, he didn't actually look at the films. He also said, and this is the most important thing, I defer to Dr. Edwards on that issue. Dr. Edwards is a spine surgeon. I'm just a general orthopaedist and he would know how to read the MRIs better than I. And he could testify as to that. We then went and deposed Edwards. Edwards' testimony on the issue of the MRI is

that there was pathology at L5-S1 on both studies, MRI before the hearing, MRI after the hearing. They looked substantially the same to him. There was no objective or significant radiographical difference to be noted in the scans. He said that Claimant's radiographical condition was not worsening and any worsening was predominantly subjective. He also went on to say that, in his opinion, looking at the MRI films, not reports from the radiologist but the films, that she had contact with the nerve root from L5-S1 even before the first hearing. And that in his opinion, she was likely a surgical candidate before the first hearing but said that she probably didn't have it because she was pregnant with a child at that time. But his testimony is from my looking at the MRIs, there's really no difference. She was probably a surgical candidate before the first hearing, she's a surgical candidate at this point. There's really no difference there.

COMMISSIONER BARDEN: Except as to subjective symptomatology, 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 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. That doesn't change the fact that the underlying condition, the physical condition, at least according to Dr. Edwards, is basically the same. Now, is she having some continued complaints, yeah. Have those complaints even gotten worse? Dr. Edwards actually testified in his deposition that, you know, frankly the chronic nature of this is that she's going to have those continued complaints and they could even worsen over time. But the underlying condition, in his opinion, was exactly the same from before the hearing to after the hearing. I think that Dr. Merrit's testimony, that there has been a change, was significantly undermined by some of the evidence in the case. Namely the evidence that, you know, clearly she was having leg

involvement and by the fact that Edwards really looks at the two MRIs and basically says -- in looking at the MRIs and not the radiologist report but the actual MRIs, we're looking at the same condition here. And if he really -- we actually asked Dr. Edwards to give us an opinion and his opinion is nicely stated on page 62 of the record. And it says, though she appears to have worsening symptoms predominantly on the right side, from a subjective standpoint, her MRI is unchanged and it is unlikely that the condition has worsened from an objective standpoint. And then he basically says that she does need surgery. Of course his testimony is she needed surgery before and basically agrees with the impairment rating that was previously given. And if she doesn't want to have surgery, goes through the steps in the process. But that's really the basis for our argument here is that, I understand that the Claimant's testimony is what it is and it's one factor to be considered. But in these sorts of cases the absolute most important factor is the doctor's testimony about the actual physical condition

of the back. And the most persuasive testimony on that -- and frankly, even Dr. Merrit agreed, I'm deferring to Dr. Edwards, he's -- he's the specialist. He's the one that really knows how to read those MRIs and knows what's going on. And Dr. Edwards' testimony is, they're substantially similar and really nothing has changed. Thank you.

COMMISSIONER BECK: Thank you. Mr. Vega?

ARGUMENT BY MR. VEGA:

MR. VEGA: Thank you. May it please the Commission. It sounds to me like the Defendants are asking the Commission to re-define condition. And condition involves all of the factors that a doctor would take into effect when making their determination, including subjective complaints. And I understand that a clear change on an MRI would make a better impression, but I disagree with Mr. Baxley's portrayal of what the doctors were stating. Dr. Merrit stated that there was a change of condition and he would also defer to Dr. Edwards. It's not that I don't have an opinion and I'm going to defer to Dr. Edwards. My opinion is that her condition changed but if you want to ask Dr. Edwards, that's fine, you

can go ask Dr. Edwards. And in his opinion he felt like the change -- given the pain and anatomical distribution and the slight increase in the disc bulge. That was Dr. Merrit's opinion. With regards to Dr. Edwards' opinion, my response to their questions and what I asked Dr. Edwards was, was the worsening of her symptoms anatomical, is it physical versus purely subjective. Now, he did state that there's a subjective component that doctors rely upon, but a patient doesn't walk into the doctor's office and sit down and the doctor only looks at the radiology to make a determination. They also take into account what the patient says with regards to the anatomic distribution. It's clear that there is a change in the component, the radicular component. It's becoming a radiculopathy due to the chronic pinching of the nerve. But I asked Doc Edwards, was the worsening of her system -- symptoms anatomical and would that be your opinion to within a degree of medical certainty and he said yes. So although he believes it's mostly related to the nerve, that the nerve is becoming more irritated, it's an

anatomical distribution as to the anatomical change. And I do believe that that falls within condition and is not limited to an MRI and a change on an MRI. And for that reason I would ask that the Commission support the decision of the single Commissioner. Thank you.

COMMISSIONER BECK: Mr. Baxley, anything?

REPLY BY MR. BAXLEY:

MR. BAXLEY: Just a couple things real quick. Instead of summarizing what the doctor said I was going to read it to you. Here's Dr. Merrit when he was talked -- when he was talking about the MRIs and whether or not they showed a change or didn't show a change. This is on page 18 of his deposition at line 13. It said, "I would agree that he" -- we're referring to Dr. Edwards now, "has more training in -- he probably has more experience in evaluating spine MRIs than me. And it's -- his opinion would probably be more expert. I guess he is more of an expert on spine MRIs than I am. I would agree that he probably is correct more likely than me on that. His area of specialty is spine. That's not my area of specialty.

I'm a general orthopaedic surgeon." The question that he was responding to is given the fact that Dr. Edwards is a spine surgeon and spine specialist, would you defer to his opinion as far as whether there's any change on the MRIs from 2010 to 2011. Dr. Edwards' deposition, and this is on page 16 starting at line 17, "So it's your testimony today that the disc protrusion at L5-S1 has been contacting the nerve root throughout the course of this claim causing that nerve root irritation?" Answer, "Yes". Question, "Okay. And I believe I understand your testimony is that you reviewed all three actual MRI scans that she's had as part of this claim?" Answer, "I have." Question, "Okay. In your opinion, there's no objective difference between those three scans?" Answer, "They all look about the same, yes." Question, "And I believe that your testimony earlier was that the majority of her complaints and problems had been subjective in nature. I believe you said predominantly it's a subjective worsening; is that correct?" Answer, "That's right." And it goes on to basically say that she doesn't have any

weakness in the muscles. The reflexes are the same. It's basically, predominantly a symptomatology and not the underlying condition.

COMMISSIONER BECK: Okay. Thank you, gentlemen. That will conclude this proceeding.

(There being nothing further, the hearing concluded at 4:13 p.m.)

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0917785

PAULA RUSSELL, CLAIMANT, v. WALMART ASSOCIATES, INCORPORATED, EMPLOYER, AND ILLINOIS NATIONAL INSURANCE COMPANY, CARRIER, DEFENDANTS.	HEARING BEFORE COMMISSIONER ANDREA C. ROCHE **TRANSCRIPT**

THE WORKERS' COMPENSATION HEARING, TAKEN BEFORE CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF 11:24 A.M., MONDAY, FEBRUARY 11, 2013, SOUTH STRAND GOVERNMENT COMPLEX, 9630 SCIPIO LANE, MYRTLE BEACH, SOUTH CAROLINA 29588.

CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
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INDEX

EXHIBITS
(No Exhibits Proffered)

THE COURT: Today's date is February the 11th, 2013. This is WCC File Number 0917785. This is the case of the Claimant, Paula D. Russell, represented by Attorney C. Daniel Vega, versus the Employer, Walmart Associates, Incorporated; its Carrier Illinois National Insurance Company; both Defendants represented by Attorney Katie O'Neill.

We have a date of accident of November the 3rd, 2009; an average weekly wage of $1232.52 with a resulting compensation rate of $681.36.

We're here today to determine the issues as set forth on the Form 50 and by operation of Regulation 67-603.

Y'all didn't file a 51 after that first 50 for the second 50. It's not in here, so.

MS. O'NEILL: Is it set on the 52?

MR. VEGA: It's not.

THE COURT: Yes. All right. Are there any objections to APAs, jurisdiction, venue or any other items?

MR. VEGA: No, Your Honor.

THE COURT: All right. Without objection the Commission's File becomes a part of the record with the exception of self-serving declarations and unstipulated medical reports.

Before going on the record we did have a pre-hearing conference.

It is the position of the Claimant that she has sustained a change of condition for the worse to her back. That she is in need of additional medical treatment to include surgery by Dr. Edwards. It's the position of the Claimant -- are you requesting TTD at this point?

MR. VEGA: Not at this point, Your Honor.

THE COURT: It's the position of the Claimant that the depositions support a finding of a change of condition of both Dr. Edwards and Dr. Merritt.

It's the position of the Defendants that the Claimant cannot carry her burden of proving a change of condition for the worse. It's the position of the Defendants that 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. Furthermore, it's the position of the Defendants that the Claimant did not timely file the second Form 50 and therefore it would be barred by the one year Statute of Limitations on a change of condition.

It's the position of the Claimant as far as the Statute of Limitations is concerned, obviously, that

they filed the Form 50 and it was timely filed at first and then they went off and did some discovery and all of that and so the 50 originating the change of condition was timely filed and that the 50 thereafter was just to get to a hearing; it wasn't to establish a claim. Furthermore, it's the position of the Claimant that the Defendants filed a Form 51 from the first Form 50 admitting the change of condition for the worse and it would be the Claimant's position that they are estopped from now denying that and that based on the pleadings that the change of condition is compensable.

It's the position of the Defendants that first they would make a Motion to amend that Form 51 at this point and it would also be their position that the second Form 50 was filed and they did not file a 51, therefore that acts as a general denial so they have, in fact, denied the change of condition for the worse.

Is there anything either of you would like to add?

MR. VEGA: Briefly, Your Honor, I'd like to add that 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.

THE COURT: Okay. Anything in addition? All right, Mr. Vega, --

MS. O'NEILL: Your Honor, excuse me, with regard to the -- the Form 51 and the -- the denial I would also assert that we've stated pretty clearly on both Form 58s before both hearings it's noted that we were denying the change of condition and as for the -- the actual requirement for change of condition I think the case law of the Statute is pretty clear there has to be a physical change of condition. So again, we would contend there needs to be objective physical evidence of a change of condition?

THE COURT: All right. Mr. Vega, I understand the Claimant is your first witness?

MR. VEGA: Yes, Your Honor.

THE COURT: All right. Ms. Russell, please raise your right hand. Do you swear to tell the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, ma'am.

THE COURT: Please state your full name for the record.

THE WITNESS: Paula Denitra Russell.

THE COURT: What's the middle name?

THE WITNESS: Denitra, D-E-N-I-T-R-A.

THE COURT: Okay. And speak up like you were doing just then because we're recording everything in here and madam court reporter has to hear everything that you're saying clearly. Okay?

THE WITNESS: Okay.

THE COURT: Mr. Vega, your witness.

MR. VEGA: Thank you.

Paula Denitra Russell,

Having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEGA:

Q Ms. Russell, you sustained an injury while working at Walmart; is that correct?

A Yes, sir.

Q And you received medical care and treatment from Walmart through workers' comp?

A Yes, sir.

Q All right. And what doctor was treating you prior to your resulting -- having a hearing on your claim?

A Dr. James Merritt.

Q And how long had Dr. Merritt treated you prior to the hearing that brought your claim to a close?

A I think it was December -- oh, I think it

was 2010.

Q Correct. So you -- you've seen him over a period of how long?

A From 2010 until 2012, I think about November 2012.

Q Okay. Now, the November 2012 visit, was that prior to or after your -- your initial hearing?

A It was after.

Q Right. Because you had a hearing looks to be in June of 2011?

A Yes, sir.

Q Okay. Now when you were going back to Dr. Merritt in 2012 who was providing treatment -- who was paying for that treatment?

A Walmart.

Q And so that was under workers' comp treatment, correct?

A Yes, sir.

Q All right. Now in November of 2012 what was going on that you -- you had to go back to Dr. Merritt at that time?

A My -- I started feeling sharp pains down my leg and pressure was more intense on my lower back throughout the consistency of working and driving. So it was more pressure on me.

Q Okay.

A And the leg -- especially the leg -- the tingling in my leg.

Q All right. Now let me get some clarification. After that hearing in June of 2011 you returned to Walmart to work, correct?

A Yes, sir, I was still working for Walmart.

Q Right. And so when you went in November you were also still working for Walmart?

A Yes, sir, I was still working.

Q All right. Now as those complaints, the symptoms going down your leg, were those additional symptoms, new symptoms, how long had you had those?

A They were new symptoms.

Q All right. How long --

A New symptoms.

Q -- how long -- about how long had you had them when you were complaining in November of 2012?

A I can't recall when I started receiving them -- some of the pain back in probably September, October. I can't remember exactly when.

Q Okay.

A But the pain would come and then it would go and then it would come where I was shaking -- my leg while I was driving.

Q All right. Now when you say you were driving, at that time were you driving a lot?

A Yes, sir. I was --

Q And --

A -- yes, sir.

Q -- why? Why were you driving so much?

A I was still staying in Florence, driving to Conway to work every day.

Q Okay. So even though you lived in Florence you had to drive to Conway?

A Yes, sir.

Q And you worked at the Conway Walmart over there off the highway?

A Yes, sir.

Q All right. Now after some time -- you said that pain would come and go. After some time did it persist more or did it -- is it something that still kind of comes and goes?

A No, it persists more. It still hurts me and it started hurting in the -- in the left leg and that's when I called Dr. Edwards again to see what they could do and the lady, Ms. Collins --

MS. O'NEILL: Objection to hearsay.

Q So you were stating that you went back to Dr. Edwards because of the symptoms?

A I did.

Q Did Dr. Merritt send you over to Dr. Edwards?

A Dr. Edwards was treating me during that time.

Q So you were receiving treatment from both Dr. Edwards and Merritt at that time, correct?

A Well, yes, Dr. Edwards, yes.

Q Okay. Now did the treatment that Dr. Merritt -- that he was prescribing for you, did he -- did it change after you had those complaints?

A Say that one more --

Q In -- in other words, Dr. Merritt -- prior to say September, October of 2012 what type of treatment was Dr. Merritt providing?

A The only thing that Dr. Merritt was providing is the medicine, but he referred me to Dr. Edwards.

Q Okay. Did Dr. Merritt's treatment change after you had these new complaints?

A He felt like he needed to send me to someone else.

Q Okay. Do you recall him recommending some epidural type injections?

A Yes, he did. He did.

Q Okay. Do you recall him getting some additional MRI imagining done?

A He did. We did more MRIs.

Q Now, how -- you've seen Dr. Edwards about three times, three or four times; is that correct?

A Yes, sir.

Q And what is Dr. Edwards recommending at this time?

A Dr. Edwards was recommending surgery.

Q Okay. And what type of surgery is he recommending?

A To relieve some of the pressure off of the lower back where a nerve is (inaudible) on the legs.

Q On the nerve?

A Yeah, on the nerve.

Q Okay.

A So it, you know, it will stop.

Q All right. Have you thought about that surgery?

A I have.

Q And is that something you would like to have done?

A Yes, sir, because we were trying to get back to where I need to be work-wise.

Q Okay. And what is going on with you now

work-wise?

A I'm not working because -- because I'm still -- I mean there's just so many hours that when I have the energy even with me trying to change my -- the career that I'm in --

Q Uh-huh.

A -- once you tell somebody about the back injury and where you're at I don't know if that's something that they're holding against me, but I haven't received a second phone call.

Q Okay. When did you stop working for Walmart?

A Well, they took my position away from me December 1 of 2012; they took the position away.

Q What do you mean by that?

A After I put in a request for a -- a -- a recommendation -- accommodation, it's accommodation --

Q Right.

A -- they denied accommodation.

Q What was -- what was that request?

A For me to move closer to home and with limitations that I had on my FCE, the functional capacity evaluation to move me closer to home for me to stay in my position, because of the open positions that I seen within the market and reading the policy

on me having the potential to move closer to home and keep my position and work more hours.

Q Right.

A And maybe that would have stopped the pain or at least the pain in my leg.

Q Okay now, when you say they denied you, I mean what does that mean? Did they terminate you at that time or what happened?

A I put in the request on October the 6th. The request was sent back on October the 17th, but they did not sit down with me until December the 1st and on December the 1st when my Human Resource Manager, Store Manager and Marketing Manager sat down with me they said that Walmart can no longer -- well, they could not accommodate me with those needs and I'd have to leave the building and I cannot stay in this position; they will find another position for me within 90 days to meet my accommodations, but they never found a position for me.

Q So what did you take that when they told you they would not accommodate you and you had to leave the building; how did you take that?

A I felt like I was fired, especially after they did not, you know, try to get back with me after the 90 days.

Q Okay.

A Well, after 90 days they sent me a request for my keys and my wall key.

Q And those limitations you had on December 1st, 2012 those were limitations the doctor had given you?

A Yes, sir.

MR. VEGA: Your Honor, I'd like to amend my pleadings to include TTD from December the 1st, 2012 to the present.

THE COURT: All right.

Q All right. Now, in -- in your own opinion you know your body, in your opinion have you -- has your condition changed?

A Yes, it has. Can I make a correction on that date?

Q Okay. Yes.

A It wasn't December 2012, they took my position away from me on December 2011 -- December 1st, 2011.

Q Okay.

A I'm sorry. That was my last day -- that's the day they took it away from me.

Q Okay.

A My position.

Q Okay. All right. I asked you a moment ago in your own opinion had your condition changed? You said?

A It has.

Q All right. And what has -- what has changed about your condition?

A It -- I'm still having pain and I'm still having a stabbing pain down my leg and the left leg is still hurting.

Q And when you say "still hurting" you're talking about --

A The sharp pains.

Q -- going back to November of 2011?

A Yes, sir.

Q All right.

MR. VEGA: Nothing further, Your Honor.

THE COURT: Okay. Ms. O'Neill.

MS. O'NEILL: Thank you, Commissioner.

CROSS EXAMINATION

BY MS. O'NEILL:

Q Ms. Russell, you testified earlier that the symptoms in your right leg, those were new symptoms; is that correct?

A They were.

Q Okay. But you've actually had symptoms in

your right leg before you had that hearing in April, 2011, correct?

A No, I did not.

Q Okay. Since you got hurt in November of 2009 you'd never had any symptoms into your right leg?

A Not that I can recall, no -- it's not -- no, not that I can recall it, no. My pain was always in my lower back and in the pelvic area; it wasn't in my leg.

Q Okay. Now, you were first seen by Dr. Edwards in September 2010 before you went to the initial hearing, correct?

A Yes.

MS. O'NEILL: Commissioner, I'm referring to page 50 of Defendants' APAs.

Q All right. This is a pain drawing that was done at Dr. Edwards' office. Do you recall filling out that pain diagram?

A That looks like my handwriting.

Q Okay. And do you recall putting that there were some symptoms into your right leg on that drawing?

A What is that? The pain -- it's numbness there, but the pain that I'm having was the sharp pain like a sharp pain down your leg.

Q Okay.

A It was a sharp -- the pain that I'm having now is like a -- a -- electrical -- electrical pain down my leg.

Q So you're saying that that was for numbness into your leg and now you're having pain into your leg?

A That's showing where it's numbness; I'm looking at what you're showing me, but the pain that I'm having now is when something is pinching and it's sharp and it's moving down your leg.

Q Okay. But it looks like there -- there's also some A's there which stands for "ache" or pain?

A It says "ache" and that's not sharpness of the pain that's going down your leg. So the pain that I felt versus what that's showing is a pain that I never had before.

Q Okay. But again, you were having some symptoms into your right leg before you had that hearing in April 2011 and after your initial injury?

A I thought it was showing -- it's showing aches in my leg and -- yeah, it was in 2010 right after I had my baby, so that could have been when we first started the treatment -- when we first started the treatment with Dr. Merritt.

Q Okay.

A Because I had the shots after that in the lower part -- in my lower back.

Q All right. Again, my question is you were having some symptoms into your right leg before you had that hearing in April 2011, correct?

A It wasn't the same symptoms that I had before from what I'm showing, but yes, it was not the same stiffness or the sharpness --

Q Okay.

A -- into my leg. Both legs, they're showing one leg, but it's both legs.

Q All right. And you said you're also having pain into your left leg now as well?

A Yes.

Q Okay. Did you ever have pain into your left leg?

A No, not that I recall or what I told the doctor.

Q All right. Do you recall seeing Dr. Wentz for injections back in 2010?

A Yes. That's the same doctor that referred me in Myrtle Beach.

Q Okay.

MS. O'NEILL: Commissioner, I'm referring to page

72 of Defendants' APA, number 5.

Q Dr. Wentz has a note in here that you have more pain radiating down into the right leg than the left. Do you recall telling Dr. Wentz that you had pain into your right and left legs back then?

A I don't know what kind of pain that was. It could have -- like I said it was when I first -- after I had the baby and when I was (inaudible), but it was not -- once again, it 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.

Q Okay. But again, you were having some symptoms and pain into your legs before you had that hearing in April 2011?

A I think it was -- if it was it wasn't the sharp -- same pain. It was more of the numbness and like I said it could have been from -- I don't know if it was from the pregnancy or -- I was out of work from -- when I had my baby and I was bed rest for that period of time, almost nine months, but this is not the same pain that you're -- that I was feeling with the driving and the sharpness down my leg; it was

absolutely not the same pain.

Q Okay. But again, my question is you did have some pain in your leg --

MR. VEGA: Objection.

Q -- before -

MR. VEGA: It's being argumentative. It's been asked and answered.

THE COURT: It's not argumentative, but it has been asked and answered. Sustained.

BY MS. O'NEILL:

Q All right. Now let's talk about what happened with your employment at Walmart. You said -- are you saying you were terminated in December 2011?

A No, ma'am, they denied my accommodation -- reasonable accommodation on December -- I put it in October the 6th, 2011. They sent back a response on October the 17th. My Human Resource Manager did not give me any information on it until December 1st. At that time they told me I had -- I could not be in my position, I had to leave the building and they would find a position -- a suitable position for me within the next 90 days.

Q Okay. So when you say you put in for an accommodation you were actually working up until that point; they had a job available for you?

A I was -- I was working in my same position, Shift Manager.

Q Okay. And I believe you talked about that at the last hearing, about your job duties with that which was more mental than physical; it wasn't really a strenuous job was it?

A It was physical, it was mental, I still had to do the routine in which they required of me. I had to walk out to the floor and we have a routine that consists of 14 hours. I wasn't working 13, 14 hours, but I was still doing my job duties.

Q Okay. So you were working from April 2011 when you had your hearing up until October 2011 when you put in for this request, correct?

A Yes, I was.

Q Okay. And you put in for the accommodation because you wanted to be able to work closer to home?

A I sent emails prior -- I sent emails ever since January of -- matter of fact, I sent emails right after I had my baby in May of 2010. I returned to work in June 2010 and I sent emails to try to move closer to home because of the back injury. I sent it from -- starting with my store manager all the way up to regional and once I spoke to my Human Resource Manager with regional she said, "Well, let's put it

through paper in which the regional accommodation states you do not have to put it on paper, you can actually ask someone verbally. So I -- I did ask. I went through a whole year and I followed the guidelines with accommodation.

Q And again my question is they still had a job available for you up until you put in for this accommodation, correct?

A I was still working in my shift manager position, yes.

Q Okay. And the reason for your accommodation is because you wanted to be able to work closer to home?

A I wanted them to honor my limitations that I currently had with the lifting and with the standing and I wanted to move closer to home to enable me to keep my position as a shift manager and move up in the company. That's what my accommodation said.

Q Okay. But they had been accommodating your restrictions up until that point, correct?

A Up until I put in for an accommodation --

Q Okay.

A -- by paper.

Q All right. And you weren't actually let go, you actually resigned from Walmart; is that correct?

A And they kept me out of work from December the 1st, 2012 -- 2011. I tried to reach out to my Human Resource Manager, Jan Walker, Human Resource Manager Shandra Hawkins and they did not return the call as trying to get me a position. I had no income coming in and it was June; no one was still speaking with me so I sent her an email asking her if they were going to find me a position and no one still contacted me. Jan said she was going to talk to Shandra. I put in the papers saying that I needed a way to pay my bills.

Q Okay. But again my question is you put in a resignation with Walmart, correct?

A I put in a paper with them to take me out of the system so I can access my 401 -- 401 but when they asked for my keys and my wall key, like the other attorney I had, when they asked for my keys and my wall key basically I felt like they terminated me then. But they gave me no kind of input after that so when they asked for my keys and my wall key and sent me that letter on February the 21st I'm wondering why did they ask for my keys and my wall key?

Q Okay. And hadn't you talked with Human Resources about some other possible job positions? They had talked to you about a Zone Merchandising

Supervisor position?

A No, I don't recall talking to her about that.

Q Okay. You don't recall talking about that at your deposition and possibly doing the Zone Merchandising Supervisor?

A What deposition?

Q The deposition you gave in June 2012 of last year.

A I don't know -- who -- who did I talk to? Who did they say I talked to -- spoke to?

Q Looks like you said that you spoke with Jan Walker and that she talked with you about --

A It wasn't a Zone Merchandising position, it was a Human Resource position open in Florence and I called and I left a message for her and I asked her about the position. She was supposed to call me back and give me the information. Once she didn't call me back when I went to turn in the keys and the wall key, per the request of my Store Manager, I saw her outside and she said, "Well, what happened with the position?" And I told her, "I was waiting on you." And the position was already filled.

Q Okay. So you're saying that you never spoke with Jan about a Zone Merchandising Supervisor

position?

A It was a Human Resource Manager position that I spoke to her about. I think I even have the -- the email -- not a email, a voice mail and I spoke to her right outside the door and it was already filled and the position was right there in Florence, like ten minutes from where I stay. And I had that conversation with Shandra Hawkins also.

Q All right. And again, I'm going to ask you this one more time. It's a yes or no answer. You did put in a resignation with Walmart, correct?

A I don't know if I could say yes or no because they asked for my keys and my wall key. I felt like I was fired after no communication was given after they asked for my keys and my wall key and I turned it in that day, and I had no income coming in. So they still had me in the system, I kept checking and basically I was getting ready to be homeless when I -- so I felt like Walmart terminated me when they sent me that letter for my keys and my wall key.

Q Okay. And all this occurred after you asked for an accommodation when they had been keeping your job as a shift manager since you went to that hearing in April 2011?

A All of it occurred when they took my

position away from me on December the 1st, 2011.

Q Okay. Well, up until you requested the accommodation your job was available, correct?

MR. VEGA: Objection, Your Honor, as being repetitive. I mean we've gone over this issue about three or four times.

THE COURT: Sustained.

MS. O'NEILL: All right, Commissioner, that's all the questions I have.

THE COURT: Mr. Vega.

MR. VEGA: Your Honor, I'd like to direct you to the deposition of Dr. Merritt, page 7.

THE COURT: I'm going to read all the depositions.

MR. VEGA: Well, I think it's important to the issue of her back pain that he explains in that deposition on page 7 how she had some initial symptoms.

THE COURT: And I'm going to read the deposition.

REDIRECT EXAMINATION

BY MR. VEGA:

Q Ms. Russell, you -- how long did you work for Walmart?

A 13 years.

Q And when you started at Walmart what was

your initial position?

A I worked in receiving, (inaudible) direct team.

Q And how long before you were promoted?

A I think it was three years.

Q And you were promoted to what position?

A Support Manager.

Q And after being a Support Manager what were you promoted to?

A I stayed Support Manager from October until January -- well, October of the previous year until January and they offered me an Assistant Manager position. So I only stayed Support Manager for three months then.

Q Okay. And so you were a Support Manager for three months and then you became an Assistant Manager?

A Assistant Manager, yes, sir, and then I trained in Lake City Walmart and then I went to Conway Walmart as an Assistant Manager. And they needed some good managers to help with the Wilson store in North Carolina because they had a lot of people issues and they had a new one coming in and so they asked me if I would like to volunteer to move to North Carolina. So I moved to North Carolina as an Assistant Manager. I stayed in that store for two years and then I became a

photo center manager, still a salaried member of management, but I was over the photo center and electronics. And then I was promoted after -- and they took that position away so I went back to an Assistant Manager and then I got promoted by Marie Deburles to Co-Manager and I ended up in Conway.

Q And you were a Co-Manager and what does that mean?

A Co-Manager -- they took the name away from Co-Manager to Shift Manager --

Q Right.

A -- but the position is you're one level beneath the Store Manager, but basically you're doing all the duties as the Store Manager, because the Store Manager is supposed to be out in the community and -- and basically -- he's -- he's a part of the community and I run the store. So I was doing forecasting, I was taking care of the associates, basically I was doing everything that he --

Q When you say the Store Manager, do you mean the entire store?

A Yes. He was the Store Manager, but as the Shift Manager --

Q Right. During the shift you run the entire store?

A Yes, sir, I was the only Shift Manager on duty with the rotation; you're the only one on duty. We had rotation, three days on, three days off.

Q And you were a Shift Manager for how long?

A I came back here in 2007. I got promoted in April the 14th of 2007 until they took the position away in December the 1st, 2011.

Q So during that time they -- Walmart trusted you with supervision of their employees, correct?

A Yes, sir, absolutely.

Q And they trusted you with supervision of their merchandise; is that correct?

A Absolutely.

Q And they trusted you with supervision of their finances?

A Absolutely.

Q All right. And the accommodations that you asked for were those accommodations based out of want or based out of your medical needs?

A It was based out of my medical needs and me wanting still to continue my career with Walmart to move on to being a Store Manager.

Q All right. Well when you say that you were about to be homeless, you -- you wanted to withdraw your 401K money; is that correct?

A Yes, sir, because my bills were not getting paid.

Q How much money did you have in 401K?

A 27. $27,000.

Q $27,000.00 dollars? Okay. And in order to get that money from the bank what did you have to do?

A When I called them I -- they told me that I could not get it, I could only get what I put into it in which I had -- I had exhausted that, and I was not allowed -- they told me I would have to leave the company.

Q In order to get that money?

A In order to get that money.

Q And since then what have you used that money for?

A Bills. I had to catch up on the bills and I had to try to stay on top with my bills.

MR. VEGA: Nothing further, Your Honor.

MS. O'NEILL: I don't have any further questions, Your Honor.

THE COURT: Any other witnesses for the Claimant?

MR. VEGA: None, Your Honor.

THE COURT: Any witnesses for the Defendants?

MS. O'NEILL: Possibly I have one witness. If I could step outside for one second.

(Off the record at 12:00 p.m.)

(On the record at 12:02 p.m.)

MS. O'NEILL: All right, Commissioner, no witnesses from the Defendants. If I could add one more argument with regard to the TTD though.

THE COURT: Okay.

MS. O'NEILL: I understand that they've got from December 1st of 2011 to the present. We would just contend that once the Form -- the original Form 50 was withdrawn and discovery pursued the next Form 50 wasn't filed until September of 2012, so based on that original Form 50 being withdrawn we would contend that if you do award TTD they wouldn't be entitled to TTD all the way back to the original Form 50 after it being withdrawn.

MR. VEGA: I would not dispute that, Your Honor.

THE COURT: All right. That concludes the hearing.

(The hearing concluded at 12:03 p.m.)

STATE OF SOUTH CAROLINA)
) CERTIFICATE
COUNTY OF LEXINGTON)

BE IT KNOWN THAT I TOOK THE FOREGOING WORKERS' COMPENSATION HEARING;

THAT I WAS THEN AND THERE A NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA-AT-LARGE;

THE FOREGOING TRANSCRIPT CONSISTING OF 32 TYPEWRITTEN PAGES REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPTION OF THE TESTIMONY SO GIVEN AT THE TIME AND PLACE AFORESAID TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

WITNESS MY HAND AND SEAL THIS 17TH DAY OF FEBRUARY, 2013.

_____
CORA ELLIS BRUTON
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES JANUARY 18, 2015

Before the South Carolina
Workers' Compensation Commission
WCC File # 0917785

Paula D. Russell,
Employee,
Claimant,

v.

Walmart Associates, Inc.,
Employer,
Selective Insurance Company,
Carrier,
Defendants.

ORIGINAL

Deposition of: William S. Edwards, M.D.

Location: 901 East Cheves Street

Florence, South Carolina

Date: Thursday, September 13, 2012

Time: 5:15 p.m. - 5:38 p.m.

Court Reporter: Roger R. Williamson

The deposition is taken pursuant to notice and/or agreement, in the above-entitled cause pending in the above-named court and pursuant to the South Carolina rules of civil procedure.

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A P P E A R A N C E S

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I N D E X

(No exhibits were proffered.)

** uh-huh = affirmative
huh-uh = negative

S T I P U L A T I O N S

It is stipulated between counsel that this deposition is being taken pursuant to the South Carolina rules of civil procedure and that all objections except as to the form of the question are reserved until the time of trial.

It is also stipulated between counsel for the respective parties and the deponent that the deponent will waive the right to read and sign this transcript.

Thereupon,

William S. Edwards, M.D.,

having been first duly sworn by the court reporter, testified as follows:

E X A M I N A T I O N

BY MR. VEGA:

Q Dr. Edwards, my name is Danny Vega. You and I have met before, and I've taken your deposition on several occasions. I'm here to talk to you about Ms. Paula Russell who appears to have visited with you on about four occasions. We went ahead prior to the deposition and noted the dates of her visits with you. But just, generally, if you could briefly tell us how she came to you initially, and what were your findings initially

with her?

A She had come, originally, to our office on September the 14th, 2010, at the request of Dr. Perez, who's one of the occupational medicine physicians here in town; to have us evaluate her back. She had had an injury in November of the preceding year. And the request was for an evaluation of the spinal problems related to that injury.

Q Okay. And after that she came to you -- it looks like she came to you in February of 2012, and it looks like an I.M.E. request; is that correct?

A Yes, sir.

Q And basically doctor, I'll go ahead and get sort of to the crux of the matter. Do you have copies of available of the -- you have copies of the M.R.I.'s dated 8/16/10 and October 21, '11, correct?

A Yes.

Q My concern, mainly, is that Ms. Russell has complained that her symptoms have progressively worsened. Is that consistent with what you've reviewed in your record, that her symptoms have increased or rather that her -- her

complaints have increased?

A Yes.

Q Okay. And in September of 2010, when you saw her, you reviewed this M.R.I. The M.R.I. that I have -- well, I'll just get to the point. When I reviewed the September 14, 2010, visit and I compared it to the February 16, 2012, there seems to be an opinion that though she appears to have worsening radicular symptoms, predominantly on the right side, the M.R.I. scan is unchanged. Did you have an opportunity to review the actual images, or did you base that on the reports that were provided to you?

A I always review the reports, but I would never give an opinion without having actually personally reviewed the studies, which I did in this case.

Q Okay. And when I compare the two, if I look at September 14, 2010, and February 16, I don't see a mention in September, I don't see a mention of an annular tear. Can you confirm whether there was in fact an annular tear in the August 16, 2010, M.R.I.?

A Well, the -- the description of the M.R.I. that I noted in my dictation from those two

dates suggested that there was disc pathology at L5-S1. I 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 to me.

Q Okay. There seems to have been also a new statement of contact with the nerve root in the February 16, 2012. Is that a new finding, or would you say that the previous M.R.I. also suggested contact with the nerve root? And I'll -- I'll be more specific. I'm sorry. Okay. In the October 21, 2011, M.R.I. report, annular tear and disc protrusion contacting the transiting S1 nerve root. Is that consistent with the previous M.R.I., or do you think that's a new finding?

A This is the radiologist's description of what he saw at the -- different radiologist, different M.R.I. scans and different backgrounds, professionally, can lead to a different description. It's still -- I mean, if you -- if what you're asking me is that those -- are those three scans substantially different, or is the

last or the second -- or is the third or the second scan worse than the first scan, the answer to that's no, unfortunately, for -- for what you're asking me. But, I mean, it's clear that the patient's symptoms are now worse. I don't have any -- I don't have any doubt about that --

Q Uh-huh.

A -- clinically. But, radiographically, there's not a significant difference to be noted in those three scans.

Q Okay. So -- all right. Now, her complaints in the September report, you noted that there was no dermatomal pattern. That refers to like a radicular pattern? Is that, typically, how you use that phrase?

A Yes. And in the distribution of where that nerves goes, is there any symptom of numbness, tingling, pain that would follow that particular --

Q Uh-huh.

A -- distribution of where that nerve goes.

Q Okay. Now, in the February report you did note that there was present of a right L5 distribution. Is that referring to an actual

dermatomal pattern?

A It -- it appeared that she had some development of paresthesia with dysesthesia. That is numbness or discomfort in the distribution of more predominately the L5 nerve root. Again, the anatomy books suggest there's some overlap between different dermatomes. But --

Q Uh-huh.

A -- that -- that was the most closely, approximately, the one that I noted, and I did not note that before on our earlier exam.

Q Okay. So if I understand what you're saying, there appears to have been a disc pathology in September that was affecting the L5 nerve root, S1 -- L5-S1 nerve root?

A And what -- what date did you refer to?

Q September. In September. When -- when you say that there was a disc pathology in September, degenerative -- your assessment is degenerative disc disease, L5-S1.

A Uh-huh.

Q And since you're stating that there's no change per the M.R.I. --

A Uh-huh.

Q -- would it be fair to say that as

early as September of 2010, there -- there was a disc pathology that was compressing the nerve root at that time?

A I thought that there was, yes.

Q Okay. So isn't it -- wouldn't it be a fair assessment to say that that compression, over an extended period of time, is most likely what's causing her worsening. Is that a fair assessment?

A Yes, I -- I do think that's a fair assessment. I don't have any doubt that her -- the radiographic abnormalities that you've been asking me about is what's causing her symptoms.

Q Right. Well, I think there's a lot of -- there's been a lot of attention placed on the actual M.R.I.'s. There's actually been three now.

A That's right.

Q And it looks like all three are fairly consistent.

A They look about the same, yes.

Q But they're all three, consistently, stating that there's a nerve root compression; is that correct?

A That's right. The -- the lower -- the -- the bottom disc in the back is protruding

out and -- and it is in a location where it could certainly be irritating the nerves that travel in that area. Yeah, there's no --

Q Okay.

A -- doubt about that.

Q And the nerve root irritation, is the compression, is that -- is the symptom--- symptomatology that she's complaining of, is that consistent with denervation? What we call a radicular denervation. Or how would you describe the radicular component?

A I -- I would just say that if there is irritation or compression or you can use those terms interchangeably of that nerve that sometimes with disc problems it can be chemical. It doesn't have to be mechanical direct compression. It can be chemical irritation to that nerve. Then you can get pain in the distribution of where that nerve goes. You may get weakness. You may just have pain. You may have numbness. It can be in any combination of -- of symptoms that the patient describes. In her case it was some of both.

Q Okay. I'm -- I'm not familiar with that term chemical. Could you describe that for me, please, in laymen's terms?

A Well, if you think about the way a nerve can be bothered in the spine, the most typical that we all think about is something compressing it like a disc bulge like she has directly putting pressure on that nerve and causing symptoms. But sometimes when the disc is injured --

Q Uh-huh.

A -- and you had mentioned earlier and annular tear, annular disruption, that is the outer lining of the disc. If that occurs, as it typically does when you have a disc protrusion, then there are some chemical irritants that reside inside the disc that can leak out and irritate the nerve. It's just like putting some acid on something that kind of --

Q Uh-huh.

A -- irritates it. Maybe that's not a great analogy but -- so it's not direct pressure on the nerve. It's just some -- some of the chemical substances that -- that live in the disc now or -- or in contact with that nerve. So you can have a fairly significant radiculopathy sometimes without having pressure on that -- on that nerve.

Q Okay. Okay. Could it -- would it be fair to say that at this point she -- her condition is chronic since it's lasted as long as it's lasted?

A Yes.

Q Okay. When we have a nerve that's been irritated as it -- as it -- the irritation continues over time, does that cause the nerve to worsen?

A It can.

Q Okay. And is it -- would it be your opinion in this case that the nerve has worsened?

A Well, I think clinically her symptoms are more significant now than they were when I first saw her. So you could -- you could make that conclusion.

Q Okay. Well, that's -- I guess that's what I'm asking you. I'm asking you if you could make that conclusion. I mean, she's had a long-standing nerve root irritation. Her symptoms have progressed. Her symptoms and -- and the objective evidence appear to be consistent. Is her condition worsening? Is it worse than it was?

A Well, radiographically it's not worsening. But in terms of how she feels in her

examination, it is worsening.

Q Okay. Is -- but is that an anatomical worsening, or is it simply a subjective worsening based on complaints?

A It's predominantly a subjective or symptomatic worsening. I mean, that -- that sometimes means that there is a worsening anatomic problem. In other words, the disc is bulged out more and putting more pressure on the nerves. And we've already established, radiographically, that that's not happened. But the worsening of her symptoms, anatomically, could be that there is now a chronic change in that nerve that makes it more painful or more symptomatic.

Q Would that be your opinion to within a degree of medical certainty?

A Yes.

Q Okay. At this time, what are you current recommendations for her?

A Well, because it's a chronic problem and it's not improved and in -- in her opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention.

Q Is that medically necessary, or is that

kind of more based on her -- I don't know how to ask it. How -- how important is it for her to have a surgical intervention at this time?

A Well -- well, surgery for this type of problem, regardless of who has a problem or what the circumstances are, the -- the great, great majority of the time it's not something that has to be done. It's something that we offer for patients when they fail other forms of conservative treatment in an effort to try to give them some relief for their pain.

Q Okay. And that would be the microlumbar discectomy that you reference in July, correct?

A Yes, sir.

Q At this time, do you know -- have you heard from her whether she would like to have that done or not or --

A Well, we discussed the surgical intervention with her when she was here back on July the 31st. And we specifically recommend patients to go and do some research and think about what we've talked about. And we don't encourage them to give us an answer at that time. And I -- I don't know whether she's called and

spoken with anybody else in the office. I have not had any contact with her since that day.

Q Okay. Now, would you place any restrictions on her with regards to work activities at this point?

A Yes.

Q And what would those be?

A The avoidance of repetitive bending and lifting and twisting and turning.

Q Any lifting restriction?

A Yes. I -- I don't recall specifically issuing any of those because when I saw her back in February, as an independent medical evaluation, I had reviewed some records from Dr. Merritt down at Myrtle Beach. And he had -- he had identified some work restrictions by way of a functional capacity evaluation --

Q Right.

A -- and as I recall looking at that, it seemed to be a valid reliable measure. And so I deferred then as I would probably now to whatever that study --

Q Okay.

A -- or whatever that test recommended.

Q So you would -- you would just continue

the limitations per the F.C.E.?

A Yes, sir.

Q All right.

MR. VEGA: All right. Thank you, sir.

THE DEPONENT: Yes, sir.

E X A M I N A T I O N

BY MS. O'NEILL:

Q All right. I just have a few questions in follow-up, Dr. Edwards. My name is Katie O'Neill, and I'm here on behalf of Walmart. We're probably going to go over a couple of the same issues you talked about. I want to make sure I understand your testimony. As we've discussed, we have three different M.R.I.'s. And I believe that Ms. Russell has had some involvement of her leg ongoing throughout the course of this claim. So is your testimony today that the disc protrusion at L5-S1 has been contacting the nerve root throughout the course of this claim causing that nerve root irritation?

A Yes.

Q Okay. And I believe I understand your testimony is that you've reviewed all three actual M.R.I. scans that she's had as part of this claim?

A I have.

Q Okay. And in your opinion, there's no objective difference between those three scans?

A They all look about the same, yes.

Q And I believe your testimony earlier was that the majority of her complaints and problems have been subjective in nature. I believe you said, predominantly, it's a sub--- subjective worsening; is that correct?

A That's right. She doesn't have any weakness in her muscles that are innervated by that particular nerve. The reflexes remain the same. But that's true for most patients that have disc herniations. It's a -- it's the symptoms of discomfort, predominantly, that can certainly worsen. Sometimes they improve.

Q And in this particular case the main issue is whether Ms. Russell has had a change of condition for the worse, and in South Caroline 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 M.R.I.'s, 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?

A 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. So it's difficult to answer the question with a simple yes or no.

Q All right. And you also testified regarding the chemicals inside the disc and the fact that those can also cause nerve root irritation if those that leaked out. In this particular -- in this particular case do you believe that the chemicals have, in fact, leaked out, or is there any evidence of that, or is -- is that speculation?

A Well, there's just no way to prove that one way or the other. But that's just a frequently postulated reason for some patients

having nerve symptoms when an M.R.I. scan, perhaps, doesn't show significant compression on the nerve by the disc.

Q In this particular case, is there significant compression of the disc, or is it not significant?

A It's not the worst I've ever seen, and it's not the least I've ever seen. It's somewhere in the middle.

Q And in this particular case can you state to a reasonable degree of medical certainty that she's had that chemical leaking affecting the nerve root?

A No.

Q Okay. And I understand that you're discussing the possibility to a microdiscectomy at L5-S1?

A Yes.

Q Okay. And I note that you would also discuss the possibility of a fusion. Is that still -- or are we just looking at the microdiscectomy?

A We talked about that being a part of the surgical alternative is to have a fusion. The -- the whole idea with that, of course, would

be to try and re-establish some of the structural integrity of that disc base. When we do a microdiscectomy, all we're doing is removing the part of the disc that's protruding out in an effort to try to help the buttock and the leg pain. If patients can be okay with improvement there, then that's all we would recommend doing. Sometimes patients have so much more mechanical back pain that it just -- a discectomy alone is unlikely to help, and that's when we talk about a fusion. I would be reluctant to recommend a fusion here.

Q Okay. So we're just talking about a discectomy at this point?

A Yes, ma'am.

Q Okay. And based upon the fact that it sounds like Ms. Russell's M.R.I.'s have consistently been the same since her initial in August of 2010, is it fair to say that with her lack of conservative treatment back in 2010 or 2011, she also could have been a candidate for -- a candidate for a discectomy at that point in time?

A Yes. I think, initially, it was probably not considered because she was pregnant

at the time. We certainly try not to operate on pregnant people if we can get by without it.

Q And in this particular case, the recommendation for surgery, do you believe that there's a greater than 50 percent chance that it would help alleviate her symptoms?

A Yes. I -- I would not have offered it if I 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.

Q Okay. I just -- the note looked like she was -- one of the notes that she was actually asking about having surgery, so I didn't know if there was a greater than 50 percent chance. But my understanding is that you believe that there is?

A I believe there is, yes.

Q And, Dr. Edwards, all of the questions I have asked today, have your opinions been given to a reasonable degree of medical certainty?

A Yes.

MS. O'NEILL: Thank you, sir. That's all the questions I have for you.

MR. VEGA: No follow-up. Thank you,

Doctor.

(Deponent excused.)

(Whereupon, at 5:38 p.m., the taking of the foregoing deposition was concluded.)

CERTIFICATE OF REPORTER

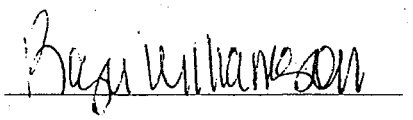
State of South Carolina

County of Florence

I, Roger R. Williamson, Court Reporter and notary public for the State of South Carolina, do hereby certify that the deponent in the foregoing deposition was, by me, first duly sworn to testify to the truth, the whole truth and nothing but the truth; that said deposition transcript was taken via stenomask with backup; that the foregoing transcript contains a true record of the deposition of said deponent.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this the 24th day of September, 2012.



Roger R. Williamson
MY COMMISSION EXPIRES:
March 1, 2022

In The Matter Of:

Paula D. Russell vs.

Wal-Mart #0586, et al

James O. Merritt, IV, M.D.

May 23, 2012

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

COPY

PAULA D. RUSSELL

Claimant,

vs.

WCC NO.: 0917785

WALMART #0586,

Employer,

and

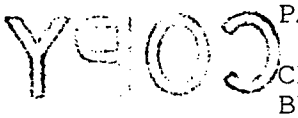
ILLINOIS NATIONAL INSURANCE COMPANY,

Carrier/Defendants.

DEPOSITION OF:	JAMES O. MERRITT, IV, MD
DATE:	May 23, 2012
TIME:	2:41 PM
LOCATION:	Strand Orthopaedic Consultants 210 Village Center Boulevard Suite 200 Myrtle Beach, SC
TAKEN BY:	Counsel for the Claimant
REPORTED BY:	LINDA A. MAHONEY, COURT REPORTER

APPEARANCES OF COUNSEL:

ATTORNEYS FOR EMPLOYEE
PAULA D. RUSSELL:



CHAPPELL, SMITH & ARDEN, PA
BY: C. DANIEL VEGA
(Via Telephone)
1510 Calhoun Street
Columbia, SC 29201
(803) 929-3600
dvega@csalaw.com

ATTORNEYS FOR EMPLOYER and INSURER
WALMART # 1586 and ILLINOIS NATIONAL
INSURANCE COMPANY:

WILLSON JONES CARTER & BAXLEY
BY: GEORGE T. MIARS, JR.
(Via Telephone)
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Mt. Pleasant, SC 29464
(843) 284-1084
gtmiars@wjlaw.net

(INDEX AT REAR OF TRANSCRIPT)

STIPULATIONS

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent waives reading and signing of this deposition.

* * * * * * * * * * *

JAMES O. MERRITT, IV, MD

being first duly sworn, testified as follows:

EXAMINATION

BY MR. VEGA:

Q. Dr. Merritt, my name is Danny Vega and I represent Ms. Paula Russell in a workers' compensation claim.

I have a few questions to ask you about the treatment that you've provided to her to date.

Have you been deposed in the past?

A. Yes, I have.

Q. Do you have any questions about deposition procedures or anything of that nature?

A. No. I'm pretty good.

Q. Give us a brief CV, if you will,

please.

A. Graduated from college in '95. Graduated from the Medical University of South Carolina in 2000. Finished my orthopedic residency in 2005 and started work here at the same point.

Became board certified, I believe, in 2008 or 2009. And I'm still board certified in orthopedic surgery.

Q. Okay. Thank you, Doctor. I'm going to refer to the notes from February 2, 2011 and after.

Do you have those notes?

A. Yes, I do.

Q. In February -- I'll lead you through some of this stuff so that we an get to the meat of the matter.

In February 2, 2011 it looks like she had treated with you for some time, Ms. Russell. And at that time you placed her at maximum medical improvement subsequent to a functional capacity evaluation, and you provided an impairment rating; is that correct?

A. Yes. I'm sorry. My notes are not in order. Hold on just a second. February 2011?

Q. Right.

A. I'm looking at my 2010 notes. Okay. I

got my February 2011 notes. Okay.

Q. All right. So she was treating with you for the low back strain and on that day she had treated with you for some time. You had performed or had requested a functional capacity evaluation be performed and you placed her at maximum medical improvement, correct?

A. That's correct.

Q. She had limitations. The limitations that you listed, the return to modified duty, no working more than five hours a day, no lifting greater than 30 pounds, were those permanent restrictions?

A. Yes. That's correct.

Q. And the impairment rating -- it's an obvious question -- three percent to the whole person, seven percent to the spine, correct?

A. That's what I dictated, but just looking at that, that looks like a three percent whole person. I think when you convert it to a lumbar spine impairment, it should be four percent, if I'm correct.

I'd have to look at the impairment guides. I'm a little worried that that conversion is not correct there.

Q. Okay. All right. Now, after that she came to you in April -- on April 27, 2011, and it looks like her complaints were increasing; is that correct?

A. Yes. She was still having back pain. I think it was getting a little worse, I believe. She says it's been the same, but still bothering her. And she was worried about it.

Q. Okay. Then at that time you placed her on a 20-pound limitation. But you did increase her hours to eight hours a day, correct?

A. Correct.

Q. Now, before we move on, what was the reasoning with limiting the number of hours worked per day? What was the reason behind that?

A. If I recall, she was driving a good ways and her back was getting stiff. If I'm correct, I think she was having to drive an hour to work and back, and it was just a long day. She was just having a lot of pain.

I felt by cutting her hours down it would just not put as much stress on her back. That was why I originally cut them.

Q. Sorry. Go ahead.

A. I believe that was why we originally

had the hours limited.

Q. All right. Now, the next note that I have is September 16, 2011.

Can you confirm that that's the next visit?

A. Correct.

Q. Okay. And tell us about that visit. What happened at that visit?

A. She was having new complaints of pain more down the legs. Although, when I initially saw her -- she said that she had some initially.

In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area.

Q. Did you feel at that time that was sort of a new kind of anatomical distribution?

A. Yes. She was -- 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.

That was the first time in the office she was having more discomfort down her legs.

Q. At that time you ordered an MRI; is that correct?

A. Correct.

Q. What was the result of the MRI, please?

A. The result of that MRI revealed an L5-S1 disk herniation. That was a central one that did contact the transiting nerve roots, particularly the right one.

Q. Prior to her MRI had she had another MRI done?

A. She had one before she saw me originally in August of 2010. It did have a disk protrusion.

I don't have the MRI itself, but I have the report. I'm not sure if I ever saw the actual films. It was not done at our facility. But I did have the report of that one.

Q. Okay. Were there anatomical changes on the MRI from the first time to the second MRI?

A. Again, I didn't have the films to compare. They were done on two different magnets and two different machines.

I don't think there was a major change. Certainly, not a very significant one. Maybe a slightly increased sized protrusion on the second one. Nothing I felt was extremely remarkable.

Q. Okay. When you say slightly increased,

could you be more specific and try to quantify that maybe?

A. Again, the first MRI I'm working with is a report -- they do not mention any contact of the transiting nerve roots. So my feeling is that it was probably not quite as big as 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.

Q. Even though it's a little bit, it's still an anatomical difference, correct?

A. Correct.

Q. Now, as a result of the MRI, what was your recommendation at that point?

A. Let me flip back to my notes. That was September 2011. I ordered it in September. The follow-up was --

Q. Before you answer the question, let me double-check. After September 16th, the next note that I have is October 5th, and then the next one is October 26th.

A. Yes. That was when we went over the MRI.

Q. On the 26th?

A. Yes.

Q. Okay. So as a result of the review of the MRI, what happened at that point?

A. I recommended that we revisit some epidural injections to see if it would help. And also gave her a corset brace.

Q. And the corset brace, that's basically a back brace?

A. Just to give her some support. Throughout this her back was still bothering her across the low back. That will sometimes take stress off the facet joints and muscles to give her some lumbar support.

Q. Now, subsequent to those visits, I sent a question to you and I have the response dictated, or at least transcribed, on November 21, 2011.

Do you have that available?

A. I don't know if I have that correspondence. Let me see. November 21st. I do have that.

Q. Okay. So if you'll take a moment to review your response.

A. That I recommended that we try epidural injections?

Q. Right.

A. Correct.

Q. Now, this is the kind of issue that we need to talk to you about.

Given kind of the pain, the anatomical distribution of the pain, the slight increase in the disk bulge, did you state your opinion that she suffered a change in condition to within a degree of medical certainty?

A. 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. And then the pain going down her leg, which I believe I documented in two or three visits.

Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort.

Q. Okay. You answered yes, it is within a degree of medical certainty?

A. Yes. I do think there was a change.

Q. Is it your still your opinion that she needs to have this treatment in order to lessen her disability or provide comfort or relief?

A. I certainly think it will be worth while to try and lessen her discomfort and pain.

Q. Okay. Now, if the epidural injection -- before I ask you that -- do you know if

she was able to get that epidural injection?

A. I don't think she did, because I'm looking at my next note and we didn't discuss it. Hold on.

Q. Right.

A. I'm pretty sure she didn't.

Q. You talked to her about maybe seeing another physician?

A. Yes. To get another opinion, correct.

Q. Okay. So you're talking about December 5, 2011?

A. I recommended -- hold on, let me check that note.

As far as I can tell from my notes, I am assuming that she didn't get the epidural. I recommended it in October/November.

I felt that since she was continuing to have pain that I felt was probably radicular, that if the injections were not possible, that we get an opinion from a spine surgeon as to whether he would recommend surgery or the epidurals.

Q. Okay. At this point being that we're three weeks into May, would you still have her follow that procedure?

Would you have her undergo the epidural

injection and see how that went and take it from there and have her see someone else?

How would you handle it now if she came to your office?

A. I would have her to do an epidural. If it gave her some relief, I may consider a second one.

If she did not get any relief, I would probably have her see a spine surgeon to discuss whether he thought surgically it would he help improve her pain.

MR. VEGA: Okay. Thank you, Doctor. Mr. Miars may have some questions for you.

EXAMINATION

BY MR. MIARS:

Q. My name is George Miars. I represent Walmart in this claim. I have a few follow-up questions for you.

Just to be clear, I think it was your testimony that you're aware -- even though she didn't complain to you, Ms. Russell did have some complaints of pain going into the leg before she saw you; is that correct?

A. According to my first note, she said that initially she had some radiating pain in her

legs, none recently.

Q. As far as the pain radiating into her legs, I guess it would be September of 2011, have you -- it's not noted in your report. The pain that she's having, is it following any type of dermatomal pattern or radicular pattern, or is it diffused leg pain?

A. It was going -- it wasn't a classic radicular pattern. It was down the back of right let, buttock, going down into the calf.

Typically, that's kind of the S1 nerve root distribution, which is where the disk was touching the nerve.

Typically, if you have a true S1 radiculopathy, it will go all the way down into the bottom of the foot. Some people will have it right down to their heel in the back of the calf.

It wasn't like it was just the whole leg, it was following the nerve root, nerve dermatomal pattern to some degree.

Q. As far as the MRI reports that you referred to, and this is referring to the original one back on August 16, 2010, again, you have not reviewed the actual film of that MRI, have you?

A. I don't recall whether I had those

films or not. I certainly don't have them now. When I look at my first note, I may have had them at that point in time.

Typically we don't retain films in our office. We don't have the ability to do that. Usually I'll dictate it.

Unless both MRIs are done here, it's often hard for me to compare both of them.

Q. In regards to the questions that Mr. Vega asked you earlier about any changes in the MRI from August 16, 2010 to the more recent MRI on October 21, 2011, you're basing that opinion on the radiologist's report, and not the actual film itself; is that correct?

A. Yes. I mean, and my notes. It looks like my notes from October 10th -- I did have my films. By the way I read my films, I would assume I had them. I don't remember that far back.

But 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.

Q. If you had the actual film itself,

would you be in a better position to give an opinion on that?

A. It would be a little easier if I had two films. Again, two different magnets, two different machines.

They are not going to look exactly the same to begin with. Certainly, if there's a major change, it would be easy to look at and see.

If you're talking a couple millimeters, larger protrusion on the second one versus the first, that may be a little hard to discern. A small difference, you know.

Certainly, if you were comparing two MRIs side by side and they were of reasonable quality, you could tell if there was a significant change.

Q. The fact is that your opinion was that if there was a change, it would be very small. And we don't have the actual film itself, just the radiologist's report now of the original MRI.

Can you say to a reasonable degree of medical certainty that there has been a change in the objective status of her low back condition?

A. I'm sorry. Repeat the question one more time.

Q. Based on the fact that you don't have the film in front of you, we're going off the radiologist's report, and your recollection from over a year ago, the fact that we're dealing with what you consider to be a very minor change in the extent of the disk protrusion, can you say there's been an objective change to a reasonable degree of medical certainty?

A. I would have -- in looking at the reports, I feel that there's been a change.

I mean, again, without looking at the films, I can't tell you for sure whether there's an obvious objective change.

But, I mean, from the information I have in front of me, I would say there's a change.

Q. Now, as far as your recommendations for Ms. Russell, you did recommend her for a surgical evaluation; is that correct?

A. Yes.

Q. Are you aware that she had been seen by Dr. Bill Edwards back on --

A. Yes.

Q. Since you made that recommendation?

A. Yes.

Q. Do you have a copy of Dr. Edward's

report?

A. Yes.

Q. Is it your understanding that Dr. Edwards, after reviewing the MRIs, has opined there is no objective change in the MRIs as far as the 2010 to the 2011 MRI?

A. Yes. I am aware that he felt that.

Q. Now, given that the fact that Dr. Edwards is a spine surgeon and spine specialist, would you defer to his opinion as far as whether there's any change in the MRIs from the 2010 to 2011 MRI?

A. I would agree that he has more training in -- he probably has more experience in evaluating spine MRIs than me. And it's -- his opinion would probably be more expert -- I guess he is more of an expert on spine MRIs than I am.

I would agree that he probably is correct, more likely than me, on that.

His area of specialty is spine. That's not my area of specialty. I'm a general orthopedic surgeon.

Q. Now, as far as surgery, I guess, he did not believe at this point she was a good candidate for surgery; is that correct?

A. He did not feel that it was -- she was a great candidate. It was something that could certainly be considered, I believe, in looking at his note.

MR. MIARS: That's all the questions I have. Thank you very much, Dr. Merit.

EXAMINATION

BY MR. VEGA:

Q. Is it your opinion that she continues to need ESI or conservative treatment given the fact that she's not a surgical candidate?

A. Yes. I think she is complaining of a right lumbar radiculopathy, which is what Dr. Edwards himself assessed. And I would probably recommend that the ESIs be revisited mostly for radicular pain.

If she was having lumbar ligamentous pain, I don't know that doing any injections would be beneficial. Given she's having some radicular pain, I would certainly try that.

Q. Okay. You've been asked a lot of questions about the MRI and the differences in them. That was just one component of your opinion?

A. Yes. The recommendation on the ESI is not really on the knew MRI as much as she's now

having right leg radicular pain.

I mean, part of that comes on the MRI. Again, if she wasn't having the pain, even with the subtle change if there is one, I wouldn't recommend an epidural. The epidural is more to treat her right leg symptoms to see if it helps with any nerve pain.

Q. And would this be her first series of ESIs or has she had some prior to this?

A. I think she had some injections before. Hold on. Let me see if I have that in my notes.

She had some injections when I initially saw her. She had already been through therapy and a good bit of conservative treatment prior to seeing me in October of 2010. I referred her to pain a specialist to try some injections.

I don't have the report in front of me as to whether he did epidural or facet injections. Hold on. I'm sorry.

She had some epidural injections in 2010 that helped a little bit. She had one on November 10th, she had one on November 22nd. And I believe she did get a little bit of temporary relief with those for her back pain.

Q. Given the fact that she had relief in

the prior injections, does that give you an indication as to whether she would have relief with this series or not, or is it separate all together?

A. It helped her back pain a little. I don't know that any further epidurals are going to help her back pain. My recommendation in trying the epidurals was given her changes, her right leg pain that she was getting.

Given the small disk protrusion and maybe some mild facet changes that she may have, if she's getting some nerve root irritation or irritation of the S1 nerve root, an epidural may calm down that nerve -- the nerve root or the transiting nerve roots, and would hopefully get rid of right leg pain.

I think epidurals are usually 50 percent effective in getting rid of back pain. They are usually 70, 80, maybe 90 percent effective in getting rid of referred leg pain.

Q. Okay. So you're recommendations at that point would be the same?

A. Yeah. I would try an epidural. If not, I don't know there's a whole lot. I agree with Dr. Edwards' assessment on surgery. Her main complaint is still back pain. And I'm not sure

surgery's extremely predictable in treating that, but it could be considered.

MR. VEGA: Okay. All right. Thank you, Dr. Merritt. I have no further questions.

EXAMINATION

BY MR. MIARS:

Q. Just one more brief question. As far at the back pain is concerned and Dr. Edwards' report -- I'm referring to his February 16, 2012 report -- he notes that as far as her symptoms are concerned, 80 percent of her symptoms are localized in the back as far as back pain, and then 20 percent in the leg.

Is that consistent with complaints she's made to you recently?

A. Yeah. I believe, as far as I can tell from my notes, she had always continued to have significant back discomfort.

The leg stuff was relatively new. It was never the main problem.

Q. As far as the back pain itself is concerned that she's had, has there been any significant change in that now as opposed to when you originally found her at maximum medical improvement?

A. No. I don't think there's any major changes, as far as I can tell.

Q. Again, as far as your opinion is concerned and her change of condition, you testified that you're basing that in part on her subjective complaints as far as the development of leg pain?

A. Yes.

MR. MIARS: That's all the questions I have.

MR. VEGA: I have no further questions. Thank you.

MR. MIARS: Thank you, Dr. Merritt.

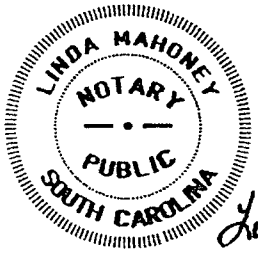
(The deposition was concluded at 3:08 PM)

CERTIFICATE OF REPORTER

I, Linda A. Mahoney, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 7th day of June, 2012 at Horry County, South Carolina.



Linda Mahoney

Linda A. Mahoney, Court Reporter
My Commission expires
October 12, 2017

I N D E X

REQUESTED INFORMATION INDEX

(No Information Requested)

E X H I B I T S

(None Proffered)

South Carolina Workers' Compensation Commission
1612 Marion St.
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739
www.wcc.sc.gov

PRE-HEARING BRIEF

WCC File No: 0917785

Claimant's Name:	Paula D. Russell	Employer's Name:	WalMart #0586
Address:	2210 West Jody Road	Address:	2709-A Church Street
City:	Florence State: SC Zip: 29501	City:	Conway State: SC Zip: 29526
Home Phone:	(843) 260-9868 Work Phone: ( ) -	Carrier:	Illinois National Insurance Company
Preparer's Name:	C. Daniel Vega	Preparer's Phone #:	803-509-5830

A claim for workers' compensation benefits is made based on the following grounds:
☑ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: $ 681.36 2. AWW: $ 1,232.52 **Date of Injury:** 11/3/2009
3. Type of injury and body part(s): abdomen and back
4. Facts in controversy:
   Claimant contends she suffered a change of condition for the worse pursuant to the medical opinions of Dr. Merritt and Dr. Edwards.
5. Legal issues involved:
   42-15-60; 42-9-10
6. Unusual aspects:
7. Witnesses (designate if expert):*
   Claimant, Dr. James Merritt*, Dr. W.S. Edwards* via deposition
8. Exhibits:
9. Medical evidence (indicate report pursuant to R.67-612; deposition or appearance):
   See APA
10. Name, address, and specialty, if any, of the treating physician:
    See APA
11. Impairment rating(s); body part(s); physician and date of opinion:
12. I am amending my Form 50/51 in the following manner:

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: Email: dvega@csa-law.com

Date of hearing: 2/11/2013 Time needed for hearing: 30 minutes

On behalf of ☑ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Paula D. Russell, Claimant, vs. WalMart #0586, Employer, Illinois National Insurance Company, Carrier/Defendants.	WCC FILE NO: 0917785 NOTICE OF WITNESSES AND WRITTEN MEDICAL REPORTS TO BE INTRODUCED AS DIRECT EVIDENCE ON BEHALF OF Paula D. Russell

TO: South Carolina Workers' Compensation Commission and Johnnie W. Baxley, III, attorney for the defendants

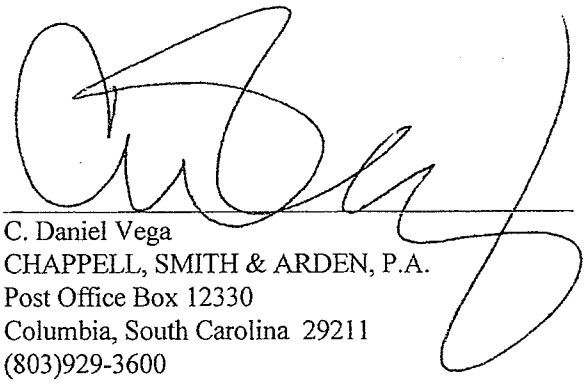
YOU ARE HEREBY NOTIFIED THAT THE Employee/Claimant, pursuant to the provisions of the SC Workers' Compensation Act and SC Code §1-23-330, (1976, as amended), herewith submits the following medical reports as direct evidence on behalf of the Claimant, to wit:

	Provider	*Date of Service*	*Page Nos.*
APA 1	**James Merritt, M.D.**	**11/21/11-3/14/12**	**1-3**
APA 2	**W. S. Edwards, M.D.**	**2/16/12-7/31/12**	**4-15**

YOU ARE FURTHER NOTIFIED that you have the right of cross-examination; and, should you desire to exercise said right, you are to forthwith schedule the depositions of any of the physicians, whose reports are submitted, for the purpose of cross-examination.

YOU ARE FURTHER NOTIFIED that the originals of the documents referred to herein, or photocopies received from said physicians/others, are being herewith forwarded to the South Carolina Workers' Compensation Commission, for insertion in the file of the South Carolina

Workers' Compensation Commission and inclusion into evidence on behalf of the employee-claimant.



C. Daniel Vega
CHAPPELL, SMITH & ARDEN, P.A.
Post Office Box 12330
Columbia, South Carolina 29211
(803)929-3600
Attorney for Employee/Claimant

Dated: January 28, 2013

STRAND ORTHOPAEDIC CONSULTANTS, L.L.C.

Joe N. Jarrett, Jr., M.D.
Total Joint Replacement
Orthopaedic Surgery
Knee Arthroscopy

Richard W. Ward, M.D.
Sports Medicine
Orthopaedic Surgery
Shoulder Surgery

Steven M. Callihan, M.D.
Orthopaedic Surgery
Total Joint Replacement
Sports Medicine

J. Clark Butler, M.D.
Sports Medicine
Orthopaedic Surgery
Total Joint Replacement

Wayne B. Bauerle, M.D.
Orthopaedic Spine Surgery

Robert S. Leak, M.D.
Hand & Upper Extremity Surgery
Orthopaedic Surgery

James O. Merritt, IV, M.D.
Total Joint Replacement
Orthopaedic Surgery
Knee Arthroscopy

Alexander J. Pappas, M.D.
Foot and Ankle Surgery
Orthopaedic Surgery

Thomas J. Chambers, M.D.
Sports Medicine
Orthopaedic Surgery
Total Joint Replacement

David G. Everman, M.D.
Hand & Upper Extremity Surgery
Orthopaedic Surgery

Kimberly A. Purgavie, D.O.
Physical Medicine
and Rehabilitation

November 21, 2011

Attorney

RE: Paula Russell
MR#: [redacted]

Dear Mr. Vega:

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

Sincerely,

James O. Merritt, IV, M.D.
JM/ft

210 Village Center Boulevard, Suite 200 • Myrtle Beach, SC 29579
843.236-3222

www.strandorthopaedic.com

STRAND ORTHOPAEDIC CONSULTANTS

Patient ID: [redacted]
Patient Name: PAULA D RUSSELL
Date of Birth: [redacted]

Date of Service: 12/05/2011
MYRTLE BEACH OFFICE

HISTORY: This is a pleasant lady who is in today for a followup of her leg. She is continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf. She has apparently been unable to work secondary to not being able to provide light duty for her.

PHYSICAL EXAMINATION: On physical exam, she still has some muscle guarding and tenderness in the low back. Alignment of the spine is normal. No focal or motor deficits but she does get some pain with a straight leg raise on the right.

STUDIES: I did again review her MRI and she does have a disc protrusion at L5-S1 and it does contact the right S1 nerve root.

ASSESSMENT: Low back strain with ruptured disc L5-S1 and continued symptoms in her right leg.

PLAN: I told her that from a nonoperative standpoint there is not much else I can do. I would recommend we probably have her see a spine surgeon either here in Florence and we will see if they can get the setup for and in the meantime, we will keep her out of work. I did recommend that she stay out of work since they have been unable to provide light duty for.

James O. Merritt, IV, M.D.
JM/ft

STRAND ORTHOPAEDIC CONSULTANTS

Patient ID: [redacted]
Patient Name: PAULA D RUSSELL
Date of Birth: [redacted]

Date of Service: 03/14/2012
MYRTLE BEACH OFFICE

HISTORY: This is a pleasant lady who is in today for a followup of her back and right leg. She is still getting pain in the back and down the right leg and really no major changes.

PHYSICAL EXAMINATION: On physical exam, she has really no focal deficits and normal alignment of the spine and some mild tenderness in the low back.

ASSESSMENT: Low back herniated disc with right leg chronic radiculopathy.

PLAN: I told her really there is not much else we can do from nonoperative standpoint. She has seen Dr. Edwards who also felt that really not much else can be done and surgery would be a last resort. Given that a lot of pain seems to be in her back, it would be the most predictable thing and this would be an option. I have to discuss this with her. At this point in time, she is not quite ready to go for a surgical procedure. I did tell her if it worsens within the year that would be something reasonable and we will need to have the Workers' Compensation's company get her back to Dr. Edwards to discuss it but from my standpoint there is not much else I can offer and her impairment and work restrictions are as previously dictated.

James O. Merritt, IV, M.D.
JM/ft

Electronically Signed by: James O. Merritt, IV., MD on Tuesday, September 04, 2012 10:32 am

Pee Dee Orthopaedic Associates, PA

Anthony W. Alexander, M.D., Rakesh P. Chokshi, M.D., Barry L. Clark, D.O., Patrick K. Denton, M.D., W.S. (Bill) Edwards, Jr., M.D., Robert E. Elvington, Jr., M.D., Dewey N. Ervin, M.D., Jason B. O'Dell, M.D., Chadley M. Runyan, M.D., Nigel A.R. Watt, M.D., Matthew D. Welsch, M.D.

901 E. CHEVES ST., SUITE 100 - FLORENCE, SC 29506-2769
(843) 662-5233 - FAX (843) 678-9003 - WWW.PDOA.COM

Lumbar IME Examination

PATIENT ID: [redacted]

Patient: Paula Russell
Address: 711 North Williston Road Lot 36
Florence, SC 29506
DOB: [redacted]
Employer: Wal-Mart

Date of Service: 02/16/12
Gender: female

Age: 37 years old
Occupation: Co-Manager

Referring Physician: Merritt, James, ;
Other Physicians:

Date of injury/onset:

Date:	Type:
10/03/2009	onset

Chief Complaint: Low back pain for Independent Medical Evaluation.

(X) Low back pain (X) Leg pain ( ) L (X) R ( ) Thoracic back pain
( ) Neck pain ( ) Arm pain ( ) L ( ) R

History of Present Illness: This 37 year old black female presents for independent medical evaluation related to a lifting injury that occurred while working at Walmart in November of 2009 down in Conway. She describes immediate onset of central low back pain without any radicular discomfort at that time. Minimal evaluation and treatment was recommended then due to being three months pregnant. She was treated conservatively in that manner and had her child in May of 2010. She was on light duty in the intervening months until December of this past year when Dr. Merritt down at Myrtle Beach took her out of work. She had physical therapy about one year ago and this helped a little. She denied any problems with her back prior to the industrial injury. Symptoms now are centered into the lower part of her back but radiate into the legs more on the right than the left side. Increased discomfort is noted with prolonged standing and walking though neurogenic claudication pain symptoms per se are not present. 80% of her symptoms are localized to the back and 20% to the legs. Sleep pattern is disturbed by her symptoms and her activity level is low because of her discomfort. She denies any neurogenic sounding bowel or bladder dysfunction.

Earlier examination in September 2010 was carried out in this facility and at that time MRI scan demonstrated a small central disc protrusion at L5/S1 and conservative treatment was advised. Since that visit and confirmed on records from Dr. Merritt's office confirmed more significant radicular symptoms in the right buttock and leg. Epidural steroid injection previously performed in November 2010 did not seem to be of much help. Previous opinion from Dr. Merritt in March of 2011 felt that she had a 7% impairment of her spine. The inquiry regarding this visit relates to whether there has been any worsening of the condition that was previously documented by our visit with her September 2010.

Medications: Flexeril () (Dosage:), Naproxen () (Dosage:)
Allergies: .No Known Drug Allergies
Surgical History: Cataract Extraction, Right; C-section
Medical History: .No Serious Illnesses; Hypertension

Family History: Arthritis; Diabetes; Parents: Father-Living; Parents: Mother-Living
Social History: Alcohol use: Seldom; Drug Use: Never; Employment: Full Time; Marital Status: Single; Tobacco: Never Smoked

REVIEW OF SYSTEMS:
Review of Systems: General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine systems are normal except what is noted below:

General: Fatigue, tiredness; Musculoskeletal: Joint swelling/stiffness; Musculoskeletal: Leg cramps; Musculoskeletal: Muscle aches; Musculoskeletal: Muscle weakness; Neurological: Dizziness

PHYSICAL EXAM:
Vitals: **HEIGHT: 5'7" WEIGHT: 160 lbs 0 oz BMI: 25.1**
Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

LUMBAR FOCUSED EXAM: Healthy appearing black female in no acute distress. She is very pleasant and gave an appropriate effort on examination and exhibited no non-organic physical signs. She rises easily from sitting to standing. Normal lumbar lordosis is noted. No localized tenderness or spasm. No step off of the spinous processes. Flexion is limited to 40 degrees and there is no reversal of lumbar lordosis with forward flexion. Returns to the erect posture with a muscular dysrhythmia. Lateral bending 20 degrees each way. Extension 30 degrees all of which cause some central low back pain. Straight leg raising is mildly positive on the right side but mostly with back pain. Paresthesias are present in the right L5 distribution. Motor strength is 5/5. Reflexes 2+ symmetric. No limitation of hip or knee motion. Gait is non-antalgic.

Xrays: Plain films with bending series show disc space narrowing at L5, S1 without evidence of instability.
MRI: MRI scan 10/21/11 was personally reviewed and demonstrates central disc protrusion at L5/S1. No significant change over previous MRI scan reviewed August 6th, 2010.

ASSESSMENT:
Diagnosis: -Central disc protrusion L5/S1 with chronic right lumbar radiculopathy.

PLAN:
Though she appears to have worsening radicular symptoms predominantly on the right side, her MRI scan is unchanged and it is unlikely that the condition has worsened from an objective standpoint. I would agree with Dr. Merritt's assessment that there is an approximately 7% impairment of her spine based on this one level disc injury. Aggressive intervention from a surgical standpoint could be offered as a last resort and would most likely involve anterior lumbar interbody fusion at L5/S1 though a limited microdiscectomy at L5/S1 on the right side may be successful in alleviating some of her radicular symptoms. Previous work restrictions identified by functional capacity evaluation and Dr. Merritt's note appear to be appropriate and would be considered unchanged at this point in time. I will be happy to follow her from a treatment standpoint if the involved parties desire.

W S Edwards MD

W. S. Edwards, M.D.
Spine Surgeon
Pee Dee Spine Center

This document was electronically signed on 02/16/12

Referral Reply Letter(s) , Dated 02/21/12

Merritt, James - SPECIALTY: .Unknown

Fax Created , Dated 2/24/2012 9:52:02 AM

w comp dept

[redacted]

[redacted]

[redacted]

Pee Dee Orthopaedic Associates, PA

Anthony W. Alexander, M.D., Rakesh P. Chokshi, M.D., Barry L. Clark, D.O., Patrick K. Denton, M.D., W.S. (Bill) Edwards, Jr., M.D., Robert E. Elvington, Jr., M.D., Dewey N. Ervin, M.D., Jason B. O'Dell, M.D., Chadley M. Runyan, M.D., Nigel A.R. Watt, M.D., Matthew D. Welsch, M.D.

901 E. CHEVES ST., SUITE 100 - FLORENCE, SC 29506-2769
(843) 662-5233 - FAX (843) 678-9003 - WWW.PDOA.COM

Follow Up Examination

PATIENT ID: [redacted]

PATIENT: Paula Russell
DOB: [redacted]
Employer: Wal-Mart

Date of Service: 06/28/12
Age: 37 years old
Occupation: Co-Manager

Referring Physician: Wade, Jonathan,
Other Physicians: David;

Date of injury/onset:

Date:	Type:
10/03/2009	onset

Chief Complaint: Back and worsening right leg pain; follow up after IME

History of Present Illness: Patient was seen in February and at that time was noted to have central and right sided disc protrusion at L5/S1 though she was being treated conservatively. Original injury was in November of 2009 and she is now back working in a lighter job but now with worsening symptoms.

Allergies: .No Known Drug Allergies
Current Meds: Flexeril () (Dosage:), Naproxen () (Dosage:)

PHYSICAL EXAM:

Vitals: **HEIGHT: 5'7" WEIGHT: 165 lbs 0 oz BMI: 25.8**
Appearance: No acute distress.
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:
Pleasant black female rising with mild discomfort from sitting to standing. Mild diffuse tenderness across the low back not well localized to any anatomic site. Flexion 60, extension beyond neutral 20. Straight leg raising is mildly positive right side. Paresthesias S1 distribution but no motor weakness or reflex asymmetry. Gait is normal.

X-ray: Plain films show disc space narrowing at L5/S1. No change from previous studies. MRI scan October of last year showed small disc protrusion at L5/S1.

ASSESSMENT:
Diagnosis: -Central disc protrusion L5/S1 with chronic right lumbar radiculopathy.

PLAN:
New MRI scan is indicated given the worsening of her radicular symptoms to determine if surgical treatment may be offered. Follow up after that study.

W. S. Edwards, M.D.
Spine Surgeon
Pee Dee Spine Center

This document was electronically signed on 06/28/12

Fax Created - Dated 7/10/2012 9:34:45 AM
Jonathan David Wade, M.D.

[redacted]

[redacted]

Pee Dee Orthopaedic Associates, PA

Anthony W. Alexander, M.D., Rakesh P. Chokshi, M.D., Barry L. Clark, D.O., Patrick K. Denton, M.D., W.S. (Bill) Edwards, Jr., M.D., Robert E. Elvington, Jr., M.D., Dewey N. Ervin, M.D., Jason B. O'Dell, M.D., Chadley M. Runyan, M.D., Nigel A.R. Watt, M.D., Matthew D. Welsch, M.D.

901 E. CHEVES ST., SUITE 100 - FLORENCE, SC 29506-2769
(843) 662-5233 - FAX (843) 678-9003 - WWW.PDOA.COM

MRI Review

PATIENT ID: [redacted]

PATIENT: Paula Russell
DOB: [redacted]
Employer: Wal-Mart

Date of Service: 07/31/12
Age: 38 years old
Occupation: Co-Manager

Referring Physician: Wade, Jonathan, David;
Other Physicians:

Allergies: .No Known Drug Allergies
Current Meds: Flexeril () (Dosage:), Naproxen () (Dosage:)

MRI Review:
MRI scan was personally reviewed and discussed with the patient in detail. This study demonstrates no change in disc pathology at L5/S1 with right sided protrusion compared with earlier scan in August of 2010.

Plan:
Patient has had long standing radicular right buttock and leg pain since his industrial injury back in 2009. Her MRI scan has failed to improve and she has asked that I discuss surgical intervention with her which would involve microlumbar discectomy at L5/S1 on the right side. All potential risks and complications were discussed with her including my inability to guarantee her complete relief of symptoms especially the mechanical component of her discomfort. She indicated that she would be thankful for even a small measure of improvement in her radicular pain hence surgery is offered.

Diagnosis: -Central disc protrusion L5/S1 with chronic right lumbar radiculopathy.

W. S. Edwards, M.D.
Spine Surgeon
Pee Dee Spine Center

This document was electronically signed on 07/31/12

Fax Created - Dated 8/7/2012 9:48:40 AM
Dr. Jonathan David Wade

Print this Page

Russell, Paula Denitra Sex: F DD: [redacted] MR#: [redacted] PT#: [redacted]
Clinic: Mrmc Visit Dt/Tm: 02/11/2008 10:13 Visit#: [redacted]

MRI CERV WO **Feb 11, 2008 11:55**

TRANSCRIBED D/T: Feb 11 2008 12:07PM
MRI CERVICAL WO / ORD #: 90002 Accession#: 3515243 CPT: 72141
ORDERED FOR: Feb 11 2008 11:05AM COMPLETED: Feb 11 2008 11:55AM
INDICATIONS/COMMENTS: PARES.

RESULT: MRI of the cervical spine was performed per our standard protocol. Normal cervical spine alignment is demonstrated. Vertebral bodies and discs have normal signal intensity. No spinal stenosis or disc herniations are present. No cerebellar tonsillar herniation is seen. No cervical rib is seen.

CONCLUSION: NORMAL CERVICAL SPINE

\E\
DICTATED BY: NOEL PHIPPS M.D.
DICTATION DATE: Feb 11 2008 12:07PM

Page created: Friday, February 29, 2008 11:17 AM Top of Page

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FLORENCE MRI & IMAGING
805 South Irby Street
Florence, SC 29501
(843) 292-0400 - fax (843) 292-0470

PATIENT: Russell, Paula
DOB:
MRN:
PHYSICIAN: Monica Ansani
DATE: 8/16/2010

EXAM: MR LUMBAR SPINE WITHOUT CONTRAST

HISTORY: Mid and low back pain, pelvic pain, right leg numbness.

COMPARISON STUDIES: None.

TECHNIQUE: Three plane localizer, sagittal T2 FSE, sagittal T1 FLAIR, axial T2 angled, axial 3D FRFSE, coronal T1 through hips.

CONTRAST: No intravenous contrast administered.

FINDINGS: The conus is normal. Bone marrow signal and alignment are normal. Coronal screening views of the hips are negative for avascular necrosis.

L1-2, L2-3, L3-4 and L4-5: No abnormality.

L5-S1: There is decreased signal intensity of the intervertebral disc and there is a focal central disc protrusion which extends slightly cephalad from the intervertebral disc space. It does not lateralize into the foramen or compress the nerve roots.

IMPRESSION: L5-S1, there is degenerative disc change and a moderate focal central disc protrusion.

Thank you for this consultation.

Margaret Lee, M.D.
ML / ab

DD: 8/16/2010
DT: 8/16/2010
Job: 11130518

This document has been electronically reviewed and signed.

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805 South Irby Street
Florence, SC 29501
(843) 292-0400 - fax (843) 292-0470

PATIENT: Russell, Paula
DOB: [redacted]
MRN: [redacted]
PHYSICIAN: Monica Ansani
DATE: 8/16/2010

EXAM: THORACIC SPINE MRI WITHOUT CONTRAST

HISTORY: Back pain, right leg numbness.

COMPARISON STUDIES: None.

TECHNIQUE: Sagittal T2, sagittal T1 FLAIR, axial T2 gradient echo.

CONTRAST: No intravenous contrast administered.

FINDINGS: The thoracic cord is normal. But the bone marrow signal is normal and no compression fractures. There is some mild degenerative disc change in the mid dorsal spine. No significant disc protrusions, spinal or foraminal stenosis.

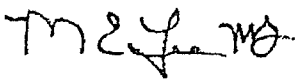
IMPRESSION: Some minimal degenerative disc change in the mid dorsal spine. No cord lesions, compression fractures, spinal or foraminal stenosis.

Thank you for this consultation.

Margaret Lee, M.D.
ML / ab

DD: 8/16/2010
DT: 8/16/2010
Job: 11130543

This document has been electronically reviewed and signed.



Mail Receive Date: 2011-11-04

D05UNDEF

Strand Orthopaedic Consultants
210 Village Center Boulevard
Myrtle Beach, South Carolina , 29572
(843) 236-3222 Office
(843) 903-7171 Fax

Professionally Interpreted by:
Carolina Radiology Associates, LLC

NAME: RUSSELL, PAULA
DOB: [redacted]
PHYSICIAN: James Merritt IV MD

EXAM DATE: 10/21/2011
PATIENT ID: [redacted]

Exam: MRI of the lumbar spine without contrast.

History: Work injury in 2009. Persistent pain radiating to right leg, worse with driving.

Comparison: None.

Technique: Routine MRI of the lumbar spine on a 1.5 Tesla MRI system.

Findings: Coronal overview imaging shows unremarkable appearance of the visible portion of the sacral plexus and kidneys. The conus terminates at L1-2. No abnormal signal is seen within the visualized spinal cord. Desiccation of the L5-S1 disc. No suspicious marrow signal abnormality is seen.

L2-3: Mild facet hypertrophy. No stenosis.

L3-4: Mild facet hypertrophy. No stenosis.

L4-5: Mild facet and ligamentum flavum hypertrophy. No significant stenosis.

L5-S1: High signal intensity centrally, consistent with annular tear. There is a small central disc protrusion superimposed on a diffuse disc bulge. Disc material extends approximately 8 mm beyond the normal vertebral border. This contacts the thecal sac and the transiting right S1 nerve root but does not cause impingement. Mild foraminal narrowing is seen but no nerve root impingement.

Impression:

1. Mild spondylosis most pronounced at L5-S1 where there is an annular tear centrally. The annular tear and disc protrusion contacts the transiting right S1 nerve root and if patient's symptoms correspond with a right S1 radiculopathy, this could be an etiology.

Pee Dee
Orthopaedic
Associates
Pee Dee Spine Center

Patient Name:	**RUSSELL PAULA**	**X-RAY #:**	259411
Physician:	**W.S. EDWARDS**	**AGE:**	037Y
Study Date :	**07/24/2012 10:42:28**	**DOB:**	[redacted](F)

---------- FINAL REPORT ----------

MRI OF THE LUMBAR SPINE WITHOUT CONTRAST:

HISTORY: Low back pain after a lifting injury. Bilateral leg pain.

TECHNIQUE: MRI examination of lumbosacral spine obtained using multiecho & multiplanar technique.

FINDINGS: Visualized osseous elements intact with no evidence of fracture. Marrow signals within normal limits. Normal lordotic curvature of lumbar spine. Conus medullaris & cauda equina normal. Incidental note of a 1 cm hemangioma at the L3 vertebral body.

T12-L1: Normal sagittal alignment & vertical disc height. Normal hydration of lumbar disc. Facet joints normal. No central nor foraminal stenosis.

L1-L2: Normal sagittal alignment & vertical disc height. Normal hydration of lumbar disc. Facet joints normal. No central nor foraminal stenosis.

L2-L3: Normal sagittal alignment & vertical disc height. Normal hydration of lumbar disc. Facet joints normal. No central nor foraminal stenosis.

L3-L4: Normal sagittal alignment & vertical disc height. Normal hydration of lumbar disc. Facet joints normal. No central nor foraminal stenosis.

L4-L5: Normal sagittal alignment & vertical disc height. Normal hydration of lumbar disc. Facet joints normal. No central nor foraminal stenosis.

L5-S1: Disc desiccation. Central disc herniation measuring 3 mm AP best visualized in series 5, image 15. T2 hyperintensity at the posterior margin of the disc at 6 o'clock. Central canal borderline narrowed to 10 mm AP. No significant neural foraminal narrowing. Facet joints are normal.

Dictated: Kapellen, Phyllis J. M.D. 07/24/2012 01:37 PM
Transcribed: Tokazowski, Amelia 07/24/2012 03:06 PM
Electronically signed: Kapellen, Phyllis J. M.D. 07/24/2012 04:06 PM LICENSE #

Pee Dee Orthopaedic Associates
Pee Dee Spine Center

Patient Name: RUSSELL PAULA
Physician: W.S. EDWARDS
Study Date : 07/24/2012 10:42:28

X-RAY #: 259411
AGE: 037Y
DOB: [redacted](F)

IMPRESSION:

1. L5-S1: CENTRAL DISC HERNIATION MEASURING 3 MM AP. T2 HYPERINTENSITY AT POSTERIOR MARGIN OF THE DISC AT 6 O'CLOCK. CENTRAL CANAL BORDERLINE NARROWED TO 10 MM AP.
2. INCIDENTAL NOTE OF A 1 CM HEMANGIOMA AT THE L3 VERTEBRAL BODY.

Dictated: Kapellen, Phyllis J. M.D. 07/24/2012 01:37 PM
Transcribed: Tokazowski, Amelia 07/24/2012 03:06 PM
Electronically signed: Kapellen, Phyllis J. M.D. 07/24/2012 04:06 PM LICENSE #

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 0917785

Paula D. Russell,

Claimant/Respondent,

vs.

WalMart #0586,

Employer,

Illinois National Insurance Company,

Defendants/Appellants.

REPLY BRIEF OF
CLAIMANT/RESPONDENT

STATEMENT OF THE CLAIM

Claimant filed a Form 50 request for a change of condition on December 14, 2012. Claimant contended she suffered a physical change of condition for the worse that requires surgery. Defendants initially filed a Form 51 admitting the change of condition, initially paid temporary total benefits, but failed to provide medical treatment pursuant to the change of condition request. At the call of the hearing on February 11, 2013, Defendants denied Claimant suffered a change of condition for the worse. The Single Commissioner issued an order finding Claimant sustained a change of condition for the worse and awarded benefits. From the decision Defendants appeal.

EVIDENCE

Claimant worked for Wal-Mart for 13 years. During that time she worked first in shipping and receiving, then as a support manager, assistant manager and shift manager. She began working as a shift manager in 2007. As a shift manager she had responsibility of the entire store, including:

forecasting merchandise, managing associates and managing finances. After her injury she returned to work and continued working until Wal-Mart would no longer accommodate her limitations and asked for her keys December 1, 2011.

After the initial award Claimant experienced a marked increase in symptoms and returned to the authorized treating physician for an opinion. James Merritt, MD, opined Claimant suffered a change of condition in a letter dated November 21, 2011. (APA 1 page 1). He also stated Claimant had an anatomical change of condition in his deposition. (Dr. Merritt Deposition, page 9, lines 3-12). William Edwards, MD, was also deposed and also testified claimant suffered an anatomical worsening of her condition. (Dr. Edwards Deposition, page 13, lines 11-170).

Issue

Did the Hearing Commissioner err in finding claimant sustained a change of condition for the worse pursuant to S. C. Code Ann. Sec. 42-17-90.

ARGUMENT

The Hearing Commissioner did not err in finding Claimant sustained a change of condition for the worse pursuant to section 42-17-90 when the greater weight and preponderance of the evidence demonstrates claimant in fact suffered a change of condition

Defendants assert claimant must provide proof by a preponderance of the evidence that there has been a change of "physical" condition as a result of the original injury in order to establish entitlement to 42-17-90 benefits. Defendants also assert "Claimant has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is 'different.'" A review of the evidence however demonstrates Defendants assertion is not entirely accurate.

After receiving permanent partial disability benefits pursuant to an order dated June 8, 2011, Claimant continued treating with the authorized treating physicians James Merritt, MD, and Bill Edwards, MD. Due to her complaints of increased symptoms and new dermatomal patterns of

symptoms Claimant sought an opinion from Dr. Merritt with regards to a change of condition for the worse. Dr. Merritt wrote a letter in which he stated "I do feel that since she is getting increased pain that the condition has worsened." (APA 1, page 1). In his deposition Dr. Merritt testified Claimant's annular bulge is "probably a little bigger than it was before." (Deposition, page 9, lines 6-9). He then agreed that even though it is only a little bit bigger there was an anatomical difference. (Id. lines 10-12). When asked whether he was stating a change in condition to within a degree of medical certainty, he stated, "I would say there was a change." (Deposition, page 11, lines 3-15).

Claimant was authorized to be evaluated by Dr. Edwards, who likewise stated in deposition Claimant suffered a change of condition for the worse. Dr. Edwards stated to within a degree of medical certainty that the worsening being experienced by the Claimant is an anatomic change in the nerve. (Deposition, page 13, lines 2-17).

It is also noted that Dr. Edwards refused to characterize the medical findings as purely subjective. He acknowledged both an objective and subjective component but did not change his opinion and continued to opine Claimant suffered a change of condition. (Deposition, page 18, lines 8-14).

Given the above referenced medical evidence the Single Commissioner issued a finding Claimant indeed suffered a change of condition for the worse in accordance with section 42-17-90.

CONCLUSION

Claimant contends the record supports only a finding in favor of Claimant's change of condition for the worse. Claimant respectfully requests the Full Commission affirm the order of the Single Commissioner.

Respectfully submitted,

C. Daniel Vega
P.O Box 12330
1510 Calhoun Street
Columbia, South Carolina 29211
(803) 929-3600

November 1, 2013

BEFORE THE SOUTH CAROLINA

WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell, Employee, Claimant/Respondent, vs. Wal-Mart Stores, Inc., Employer, and American Home Assurance, Carrier, Defendants/Appellants.	)	BRIEF OF DEFENDANTS/APPELLANTS

STATEMENT OF THE CASE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

On February 11, 2013, a hearing was held before Commissioner Andrea C. Roche to determine the issues raised in Claimant's Form 50. After considering the evidence presented, the Commissioner found that Claimant suffered a change of condition for the worse and is entitled to additional medical care and attention as well as temporary total disability benefits. The Decision and Order from the hearing was filed on August 5, 2013, and Appellants subsequently timely filed a Form 30 appealing this Decision and Order on August 9, 2013.

EVIDENCE OF THE CASE:

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant's November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merritt testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21— page 14, line 1). At the visit in September 2011, however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24—page 8, lines 4-11). Although Dr. Merritt didn't have the films from the MRIs to compare, he didn't think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" that he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines

16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and, her reflexes remain the same (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

ISSUE PRESENTED

I. **Did the Hearing Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work when the preponderance of evidence in the record does not support such findings?**

ARGUMENTS/DISCUSSION

II. **The Hearing Commissioner erred in finding Claimant/Respondent sustained a change of condition for the worse under Sec. 42-17-90 because Claimant failed to meet her burden of proof demonstrating to a reasonable degree of medical certainty that there were any objective changes in her physical condition.**

At the hearing before the single Commissioner, Claimant's medical records from Dr. Merritt and Dr. Edwards were made part of the record (APA 1, pages 1-3; APA 2, pages 4-15) as well as the deposition transcripts of Dr. Edwards taken on September 13, 2012, and Dr. James Merritt taken on May 23, 2012. Claimant's attorney used these submissions along with the testimony of Claimant in support of his argument that Claimant sustained a change of condition for the worse and is entitled to further medical care and treatment and other benefits under the

Act. Based on the evidence presented, however, Appellants assert Claimant did not meet the burden of proof as required by Sec. 42-17-90.

Sec. 42-17-90 provides, "the Commission may review an award and on that review make an award . . . 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." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions *different* from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id.

In the case at hand, Claimant/Respondent 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. Specifically, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into the leg before she saw him at her first visit. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg

associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she "started receiving them". (Tr. at 9: 11-21).

While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Deposition, page 8, lines 13-24). Dr. Edwards did review and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant's disc protrusion at L5-S1 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. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI csan before and after the first hearing. Based on this testimony, Appellants argue the preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards

20, line 19—page 21, line 2). In sum, Claimant's radiographic condition has

not worsened; any alleged worsening in this case is solely based on Claimant'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 Claimant's condition is worse. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6; page 18, lines 5-8). Appellants assert this does not meet the preponderance of the evidence standard as required by the Act and case law.

CONCLUSION

For all of these reasons, Appellants argue the Hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since Claimant's treating spine specialist testified that he could not identify any objective difference between any of Claimant's MRIs, and thus, he can not state to a reasonable degree medical certainty that Claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

Respectfully submitted,

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Date: October 17, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2014-000454

PAULA RUSSELL.....APPELLANT,

v.

WAL-MART STORES, INC.
AND AMERICAN HOME ASSURANCE.....RESPONDENTS.

PETITION FOR REHEARING

Respondents, Wal-Mart Stores, Inc. and American Home Assurance, by their undersigned attorney, respectfully Petition for Rehearing of the Court's Opinion No. 5376 filed on January 20, 2016, pursuant to Rule 221 (a), SCACR. The Court of Appeals held that the South Carolina Workers' Compensation Commission erred in relying exclusively on objective evidence, in excluding subjective evidence, and in requiring that a change of condition be established by objective evidence. The Respondents respectfully assert that the Court of Appeals overlooked, disregarded, and misapprehended the order of the South Carolina Workers' Compensation Commission in arriving at this holding.

ARGUMENTS

In South Carolina workers' compensation cases, "the Full Commission is the ultimate fact finder." *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). Additionally, "[t]he

final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). Finally, "[i]t is not the task of [an appellate court] to weigh the evidence as found by the Full Commission." *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981).

In this case, the Court held that the Workers' Compensation Commission exclusively relied on objective evidence, excluded subjective evidence, and required that Claimant establish her claim for a change of condition by objective evidence only. However, a reading of the plain language of the Workers' Compensation Commission's Decision and Order indicates that the Court of Appeals misapprehended and disregarded the burden applied by the Commission and the evidence considered.

First, the Court of Appeals overlooked and disregarded the plain language of the Commission's Order where it is plainly stated that both objective and subjective evidence was considered. On page 4 of the Order, in the general discussion of the evidence, the Commission noted Claimant's subjective testimony. On page 6 of the Order, the Commission stated that they conducted a lengthy review of the evidence, including the medical records, deposition testimony of both doctors, and the Claimant's testimony at the hearing. Finding of Fact #6 specifically states that the Commission reviewed and considered the Claimant's testimony. (R. p. 231). Specifically regarding Appellant's subjective complaints, the Full Commission stated in Finding of Fact #7, "[w]e give limited weight to the testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, we find Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award." (R. p. 231). Further, the "Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the

original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery . . . occurred after the original award." (R. p. 231). The Commission did not rely exclusively on objective evidence; the Commission's Order plainly states that both objective and subjective evidence were considered. The Court of Appeals disregarded and overlooked this plain language in the Commission's Order in reaching their decision on this claim.

Second, the Court of Appeals misapprehended the Commission's burden of proof; there is no indication in the Commission's Order that it required proof of a change of condition exclusively by objective evidence. The burden of proof was plainly set forth by the Commission in its Order:

> The law concerning change of condition claims in South Carolina is well established. Section. 42-17-90 provides, "the Commission may review an award and on that review make an award . . . 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." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id.

There is no indication anywhere in the Commission's Order that it was requiring proof exclusively by objective evidence on this change of condition claim. The holding by the Court of Appeals disregards and overlooks the plain language in the Commission's Order and misapprehends the actual burden stated by the Commission.

In this matter, the Commission did not exclude subjective evidence or rely exclusively on objective evidence. Instead, the Commission considered all of the evidence but gave more weight to certain evidence and less weight to other evidence. That is exactly what the Workers' Compensation Commission, as fact finder, is authorized and empowered to do on these claims. The Court of Appeals seems to have mistaken and confused weighing of the evidence (which is a proper role of the Commission) with exclusion and failure to consider evidence (which would not be a proper role of the Commission). Based on the plain language of the Commission's Order, the Commission considered both subjective and objective evidence, and simply gave more weight to the objective evidence than it did to the subjective evidence in making its Findings of Fact and Conclusions of Law. That is the proper role of the Commission as fact finder, and the Respondents assert that the Court of Appeals was mistaken and misapprehended the role and actions of the Commission in this matter.

For the foregoing reasons, Respondents would respectfully request an opportunity for this case to be reheard by this honorable Court.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

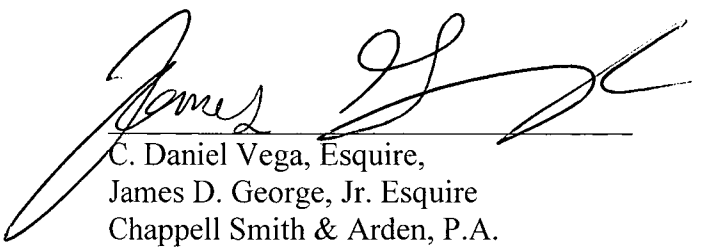
Aisha G Taylor, Commissioner
Susan S. Barden, Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2019-001380

Paula Russell,	Claimant, Appellant,
v.	
Wal-Mart Stores, Inc.,	Employer,
&	
American Home Assurance,	Carrier, Respondents.

Certificate of Counsel

The undersigned hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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January 3, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Aisha G Taylor, Commissioner
Susan S. Barden, Commissioner
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Aisha G. Taylor, Commissioner
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Paula Russell, Claimant, Appellant,

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&

American Home Assurance, Carrier, Respondents.

Final Brief of Appellant

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Table of Contents

Table of Authorities

South Carolina Cases

Statutes

Other Authorities

Statement of Issues on Appeal

I. Whether the Appellate Panel of the South Carolina Workers' Compensation Commission Erred as a Matter of Law in Finding Appellant Failed to Establish a Change of Condition Because No "Objective" Evidence Supports a Finding of a Change of Condition.

II. Whether the Appellate Panel of the South Carolina Workers' Compensation Commission Erred in again Requiring Appellant Prove She Suffered a Change of Condition for the Worse with Objective Evidence in Contravention of the 2016 Opinion of this Court and the 2019 Opinion of the Supreme Court.

III. Whether the Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding Appellant Failed to Establish a Change of Condition Because Her Testimony Concerning Her Symptoms were "Conclusory" and "Self-serving."

IV. Whether the Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding as Fact that Appellant Did Not Suffer a Change of Condition for the Worse.

Statement of the Case

The present appeal comes before the Court of Appeals from a lengthy procedural history, beginning with Appellant Paula Russell's (hereinafter "Appellant") admitted work-related accident. On November 3, 2009, Appellant injured her back while working as an assistant manager for Wal-Mart ("Employer") at a Wal-Mart store. Employer's carrier is American Home Assurance ("Carrier") (collectively, "Respondents"). Following an April 13, 2011 hearing, Commissioner Wilkerson submitted an Order dated June 8, 2011, which ordered Appellant reached Maximum Medical Improvement ("MMI") and was entitled to compensation for a 7% back impairment disability rating, and was entitled to ongoing pain medication.

However, within a few months Appellant started experiencing new and increased symptoms from her existing injury. Appellant reported to her doctors she was experiencing increased pain in her back as well as new radicular pain in her legs and buttocks. Appellant then filed a Form 50 on December 9, 2011, alleging a change of condition for the worse and requesting a review of her previous benefits award pursuant to S.C. Code Ann. § 42-17-90. A hearing was held on this matter on February 11, 2013. In an Order dated August 5, 2013, Commissioner Andrea Roche ruled Appellant suffered a change of condition for the worse, ruled Appellant was credible, ruled Appellant was disabled, and ruled Appellant was thus entitled to ongoing causally related medical care in addition to temporary total disability benefits from December 11, 2011, through the present and continuing.

Respondents appealed this Order to the Appellate Panel of the Workers' Compensation Commission (hereinafter "Commission") with a Form 30 submitted on August 9, 2013. The Form 30 alleged twenty points of error. A hearing was held on December 16, 2013, to determine whether Commissioner Roche erred in awarding a change of condition when the objective evidence of

record did not purportedly reflect a change of condition. The Appellate Panel overturned Commissioner Roche's Order and found in an Order dated January 30, 2014, that Appellant had not satisfied her burden of proof with objective evidence demonstrating she had suffered a compensable change of condition for the worse. Appellant responded with a proper and timely appeal to the Court of Appeals alleging the Appellate Panel should not have used an objective evidence standard over the proper preponderance of the evidence standard in making its determination on her claim. After oral arguments in front of the Court of Appeals on October 20, 2015, the Court of Appeals issued a January 20, 2016, decision, finding that the Appellate Panel erred as a matter of law by using an objective evidence standard. The Court remanded the case to the Commission with instructions to issue an Order to determine whether Appellant suffered a change of condition as demonstrated by the preponderance of the evidence.

The case was then assigned on remand to single Commissioner Michael R. Campbell, who reviewed the entire record, found Appellant suffered a compensable change of condition for the worse, and accordingly awarded benefits. Respondent submitted a Form 30 notice of appeal in response. The case was heard by another Appellate Panel of the Commission. In an Order dated September 15, 2017, the panel reversed Commissioner Campbell's Order in its entirety, which vacated the evidence of the record and remanded the case for a hearing de novo.

Appellant again responded with a timely appeal to the South Carolina Court of Appeals, and Respondent promptly responded with a Motion to Dismiss, alleging the appeal was interlocutory pursuant to the Administrative Procedures Act. Appellant opposed that motion arguing the appeal was a permissible interlocutory appeal. The Court of Appeals dismissed her appeal in an Order dated December 8, 2017. Appellant subsequently submitted a petition for a Writ of Certiorari on March 1, 2018, seeking a determination as to the appealability of the

Commission's Order. The South Carolina Supreme Court granted certiorari in an Order issued May 25, 2018. The parties appeared before the Supreme Court on February 21, 2019. In an opinion filed April 3, 2019, the Court reversed the Court of Appeals' dismissal, reversed the Commission's Order remanding the case to a single commissioner, and remanded the case to any appellate panel for immediate and final review of the original commissioner's August 5, 2013, Order in accordance with the Court of Appeals' 2016 holding. In an Order dated July 18, 2019, the Appellate Panel found the Appellant did not suffer a change of condition for the worse and found the Appellant's lay testimony to be "conclusory and self-serving." Appellant now appeals the Appellate Panel's July 18, 2019, Order.

Statement of Facts

This case has a complicated history going back to 2009; therefore, a lengthy recitation of the facts is necessary. Appellant was first injured on November 3, 2009, while lifting at work. (R. p. 92, line 18). At this point, Appellant had been working at Wal-Mart for thirteen years, the preceding four as an assistant store manager. (R. p. 92, lines 15 – 16). Appellant started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (R. pp. 200 – 01, lines 2 – 25; 1 – 19). Wal-Mart recognized her skills, and she moved to North Carolina for two years to work at a store that was having personnel problems. (R. pp. 200 – 01, lines 19 – 25; 1 – 5). Eventually, she moved back to South Carolina and was promoted to a Co-Manager or Shift Manager position, working one level below the store manager. (R. p. 201, lines 6 – 14). This position placed her in charge of forecasting, supervision of employees, merchandise, and store finances. During her shifts, she was responsible for the operation of the entire store. (R. pp. 201 – 02, lines 24 – 25; 1 – 2).

Appellant was three months pregnant at the time of her injury and was treated conservatively for the remainder of her pregnancy term. (R. p. 92 – 93). Months after she delivered her child, her treating physician, Dr. James Merritt, opined, "no surgery was required," and treated her with medication, exercises, and an injection. (R. p. 93). Appellant stated at the hearing she still suffered from some back pain and had a 30 pound lifting restriction but was able to perform her job within these restrictions. (R. p. 93). She hoped to return to her job and eventually become a full store manager. (R. p. 93). While she experienced pelvic pain occasionally immediately after the accident, that problem had resolved by the time of the hearing, and her primary diagnosis was a "back strain." (R. p. 93).

There was no mention of any leg or buttock pain in the Order. (R. pp. 90 – 97). Commissioner Wilkerson's two primary findings were: (1) Appellant was entitled to ongoing *Dodge* medicals in the form of anti-inflammatory medication; and, (2) she suffered from a 7% permanent partial disability pursuant to section 42-9-30. (R. pp. 94 – 95). This Order was not appealed.

In September or October of 2011, Appellant began experiencing more intense back pain, as well as severe leg and buttock pain of a type she had never experienced before. She reported this at her next appointment with Dr. Merritt, and he referred Appellant for an MRI in October. At that MRI appointment, Appellant gave a history of "[p]ersistent pain radiating to right leg, worse with driving." (R. p. 270). The radiologist's impression was "[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 this worsening pain. I do think this is medically necessary and could provide her with some relief.

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

A December 5, 2011, report from Dr. Merritt indicates Appellant was "continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf." (R. p. 259). He reviewed her 2011 MRI and concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (R. p. 259). His assessment was a "[l]ow back strain with ruptured disc L5-S1 and

continued symptoms in her right leg." (R. p. 259). He ordered she stay out of work if Wal-Mart had no light duty for her. (R. p. 259).

In the meantime, Appellant filed an accommodation request with Wal-Mart in early October 2011, which, if accepted, would have allowed her to move to a store location closer to her home. (R. pp. 185 – 86). Appellant thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (R. pp. 185 – 86). Appellant continued to work until December 1, 2011, when she was told Wal-Mart could not accommodate her request, and that she must leave the premises immediately. (R. p. 186). She had previously been told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (R. pp. 186 – 87). Appellant ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (R. p. 98).

She was next seen by Dr. William Edwards of Pee Dee Orthopedics Associates for an IME. (R. p. 261). In the history, Dr. Edwards stated that Appellant's previous pain involved central low back pain "without any radicular discomfort at that time." (R. p. 261). He further 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). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (R. p. 261). He concluded:

> she appears to have worsening radicular symptoms predominantly on the right side, her MRI scan is unchanged and it is unlikely that the condition has worsened from an objective standpoint. I would agree with Dr. Merritt's assessment that there is an approximately 7% impairment of her spine based on this one level disc injury. Aggressive intervention from a surgical standpoint could be offered as a last resort and would most likely involve anterior lumbar interbody fusion at L5/S1 though a

> limited microdiscectomy at L5/S1 on the right side may be successful in alleviating some of her radicular symptoms.

(R. p. 262).

By March of 2012, Dr. Merritt diagnosed her right leg 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 but from my standpoint there is not much else I can offer and her impairment and work restrictions are as previously dictated." (R. p. 260). Another MRI was performed on July 24, 2012, and Dr. Edwards opined that there was no change in disc pathology despite an increase in symptoms. (R. pp. 264 – 66). Dr. Edwards recommended surgery at this point, because it would serve to provide a "measure of improvement" in her radicular pain. (R. p. 266).

Dr. Merritt was deposed on May 23, 2012, and he was 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, lines 18 – 24). 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 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, lines 4 – 12). "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, lines 19 – 24). He further felt the "little bit" of disc protrusion constituted an anatomical difference in Appellant's condition. (R. p. 238, lines 10 – 12). "If you're talking a couple millimeters, larger protrusion on the second one versus the first, that may be a little hard to discern. A small difference, you know." (R. p. 245, lines 9 – 12).

Dr. Merritt did ultimately defer to Dr. Edwards, but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI. (R. p. 247, lines 13 – 17). Dr. Merritt, however, did not defer to Dr. Edwards on any other issues and maintained his opinion as stated within a reasonable degree of medical certainty that Appellant's condition had worsened.

When Dr. Merritt saw Appellant in September of 2011, she had "new complaints of pain more down in the legs . . . . In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area." (R. p. 236, lines 9 –10; 12 – 15). "The leg stuff was relatively new. It was never the main problem." (R. p. 251, lines 19 – 20). He felt this was a new anatomical distribution, and stated, "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, lines 18 – 21).

When asked directly about a change in Appellant's condition, he testified that "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, lines 8 –10; 13 – 15). Dr. Merritt stated he was basing 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, lines 5 – 6).

He recommended additional medical care, possibly surgery, and indicated that any previous radicular pain she had experienced in her legs had been resolved at the time she reached MMI. (R. p. 242 – 43, 248, 250). Dr. Merritt did recommend conservative treatment as a pain control measure, and opined that epidural steroid injections could be revisited; he stated his recommendation "is not really on the knew [sic] MRI as much as she's now having right leg radicular pain." (R. p. 248 – 49).

Dr. Edwards was deposed on September 13, 2012. (R. p. 206). When comparing 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, lines 2 – 7). 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, lines 2 – 10). He stated that all three MRI's are fairly consistent, and they all appear to show a "nerve root compression." (R. p. 214, lines 21 – 24).

He stated that Appellant's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (R. pp. 209 – 210). When asked about the cause of Appellant's symptoms, Dr. Edwards stated that as early as September of 2010 he believed there was a disc pathology that was compressing the nerve root, and that 'compression' over an extended period of time, is most likely what's causing her worsening. (R. pp. 213 – 214). Dr. Edwards even stated that Appellant's "fairly significant radiculopathy" could be caused "without having pressure on…that nerve." (R. p 216, lines 22 – 25). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (R. p. 215, lines 15 – 25).

Dr. Edwards further stated, "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, lines 11 – 16). Dr. Edwards did not doubt that the condition has worsened, stating that in Appellant's "opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention." (R. p. 218, lines 5 – 24).

In perhaps the most important exchange in the depositions, on cross- examination, counsel for the Appellants asked Dr. Edwards a question:

> 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 M.R.I.s, 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, lines 16 – 25; 1).

Dr. Edwards answered:

> 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, lines 2 – 13).

Dr. Edwards also opined Appellant 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, lines 25; 1 – 2). Dr. Edwards's recommended treatment going forward is 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, lines 7 – 11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (R. p. 173). Respondents 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, lines 15 – 19). Counsel for the Respondents argued first that the "case law of the Statute is pretty clear there has to be a physical

change of condition," but then stated the standard actually requires "objective physical evidence of a change of condition." (R. p. 178, lines 10 – 11; 12 – 13). No legal authority was cited for the use of this "objective" standard.

Appellant took the position the standard of proof for a change of condition is "preponderance of the evidence," and the law does not require "an objective finding per MRI or some other manner that does not require an opinion of a doctor." (R. p. 177 – 78).

Appellant 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, lines 22–24). She began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (R. p. 181, lines 2–3; 13–16). She remembered beginning to experience these new symptoms in either September or October of 2011, and this is what led to her returning to Dr. Edwards's care. (R. pp. 181 – 82, lines 19–21; 19–22). When asked if her condition had changed since the initial disability determination, she said, "Yes, it has." (R. p. 187, line 15). Her symptoms included "[that she was] still having pain, and [she was] still having a stabbing pain down [her] leg and the left leg [was] still hurting." (R. p. 188, lines 7–9).

When asked about the location of her pain prior to the 2011 hearing, she stated that the pain centered on her lower back and pelvic area, and that she did not experience major symptoms in her leg. (R. p. 189, lines 6 – 9). To the extent she experienced any symptoms in her right leg prior to the 2011 hearing, she indicated feeling "numbness," but she now describes the 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 that she is having "pain into [her] left leg now as well." (R. p. 191, lines 13–14). Any pain she had indicated previously was,

> not - - once again, it 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, lines 8–14).

Until October 2011, Appellant continued to work in her shift manager position. Because of her symptoms, she put in a request for an accommodation. During this time her symptoms were making the job difficult and she wanted to work closer to home. Appellant was having symptoms because the long drive was difficult on her back. (R. p. 193 – 95). Wal-Mart refused to honor the accommodation and placed her out of work in December 2011. Appellant has not worked for Wal-Mart since that time. (R. p. 196). Appellant was ultimately forced to cash out her 401K with the company just to pay her bills. (R. p. 203, lines 1 – 6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (R. pp. 83 – 96). Commissioner Roche found that after the 2011 decision of the Commission, Appellant "experienced an increase in symptoms, which she testified worsened with work and activity. Appellant 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 "Appellant's testimony, stating that she suffered a worsening of symptoms, to be credible." (R. p. 86). She further found that both Dr. Merritt and Dr. Edwards testified that the Appellant suffered a change of condition for the worse, and that this change was a physical, anatomical change. (R. p. 87). Her findings of law included that Appellant "suffered a change of condition for the worse," that "[p]ursuant to 42–

1–120, Appellant is 'disabled,'" and that "[p]ursuant to section 42–9–10, Appellant is entitled to temporary total disability benefits." (R. p. 88).

Respondents filed a timely appeal to the Full Commission. In their brief, Respondents relied heavily on the fact Dr. Merritt conceded Dr. Edwards was more of an expert on spine MRIs than him, and that, therefore, Dr. Edwards's opinion as to whether there was a change in MRIs from 2010 to 2011/2012 was probably correct. (R. p. 278). Respondents also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (R. p. 279). Finally, Respondents also relied on the fact that Dr. Edwards indicated that Appellant may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (R. p. 279).

In the brief's argument section, the Respondents relied most heavily on the fact that "[Appellant] 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). Respondents also contended that "any alleged worsening in this case is solely based on [appellant'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 [Appellant's] condition is worse." (R. p. 282).

At the hearing before the Full Commission, counsel for the Respondents attempted to frame the issue in the following way: "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, lines 15–18). As to Dr. Merritt's opinion, Respondents' counsel contended that "when you look under the surface about what he bases [his change of condition opinion] on, frankly, I think that it doesn't meet the standard, the legal standard." (R. p. 163, lines 3 – 6). Respondents' counsel also

contended that Dr. Edwards said "that he does not believe that there's been a change of condition for the worse," despite Dr. Edwards's clear opinion to the contrary. (R. p. 163, lines 7–9). Much of the argument centered around the fact that Dr. Merritt could not be certain about whether there was a difference between the 2010 and 2011 MRIs, but counsel also made the point that Appellant's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (R. pp. 163 – 64).

The most crucial exchange came on the issue of Appellant's credibility. The Commission pointed out that an important factor in the change of condition was the history given by Appellant, "which Commissioner Roche found was credible." (R. p. 165, lines 22 – 24). Counsel for the Respondents stated, "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. p. 166, lines 5 – 9 (emphasis added)). He went on to say that "[n]ow, is she having some continued complaints, yeah. Have those complaints even gotten worse? Dr. Edwards actually testified in his deposition that, you know, frankly *the chronic nature of this is that she's going to have those continued complaints and they could even worsen over time.*" (R. p. 166, lines 12 – 19 (emphasis added)). Further, he stated, "in these sorts of cases the absolute most important factor is the doctor's testimony about the actual physical condition of the back." (R. pp. 167 – 68).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (R. p. 71). In the recitation of the facts, the Full Commission focused the vast majority of its attention on the lack of differences between the 2010 and 2011, 2012 MRIs, and made it clear that it did not believe there was a difference between them. (R. pp. 74 – 75). When going through the deposition of Dr. Merritt, the Order left out his 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 had occurred, and instead cited his statement that "there was no objective or significant radiographical difference to be noted in the scans." (R. p. 75).

Crucially, the Commission next found that "[Appellant] 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 the Single Commissioner's finding that Appellant was credible, as well as Respondents' stipulation that the Appellant was credible, the Commission found that she lacked credibility simply because she had reported different right leg problems in 2010. (R. p. 76). The Commission found "[i]n sum, [Appellant']s radiographic condition has not worsened; any alleged worsening in this case is solely based on Appellant'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 Appellant's condition is worse." (R. p. 77).

In its Findings of Fact, the Commission stated:

> [w]e give limited weight to the testimony of the [Appellant] as it is conclusory and self-serving . . . . [Appellant] was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award.

(R. p. 79). The greatest weight was given to Dr. Edwards's testimony over Dr. Merritt "because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment." (R. p. 79).

The Commission also found, the "preponderance of the evidence indicates that there was no *objective difference* between the Appellant's MRI scan after the original award and the MRI scan before the original award." (R. p. 79 (emphasis added)). The Commission also made the statement 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," but that the preponderance of the evidence did not indicate a change of condition had occurred. (R. pp. 79 – 80). The Commission ultimately ordered that the Appellant had failed to prove a change of condition and was not entitled to any additional benefits under the Workers' Compensation Act. (R. pp. 81 – 82). This Order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had actually occurred.

After receiving the Full Commission's Order, Appellant appealed 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) ruling substantial evidence existed to deny a change of condition, and (3) finding Appellant'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). The Court restated the law of change of condition for the worse by quoting S.C. Code Ann. § 42–17–90(A) (2015) which states, a review of a previous award is proper "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." Moreover, the Court noted, "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." *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107–09, 576 S.E.2d 191, 196 (Ct. App. 2003).

Regarding the first point of alleged error, the Court cited *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339–40, 513 S.E.2d 843, 846 (1999), which held both lay and expert testimony may be considered when determining causation. Additionally, the Court cited *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23–24, 716 S.E.2d 123, 126–27 (Ct. App. 2011), which held the Commission may disregard medical evidence and instead rely upon lay testimony if the record contains competent evidence, and held the Court does not balance objective against subjective findings of medical witnesses. Upon the Court of Appeal's review of the record and the Full Commission's Order, it found the Commission exclusively relied upon the MRIs in finding Appellant failed to objectively prove her claim. *Russell* at 400, 782 S.E.2d at 756. Further, the Court of Appeals noted the Commission's order "ignores that both doctors concluded, to a reasonable degree of medical certainty, that [Appellant] suffered a change of condition." *Id.*

As a result, the Court of Appeals found "the Commission relied exclusively on objective evidence, the MRIs, in denying [Appellant's] claim." *Id.* Correspondingly, the Court found 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." *Id.* Therefore, the Court held a change of condition for the worse can be proven with subjective evidence. *Id.* The Court of Appeals reversed the Commission's requirement that Appellant prove her claim by a preponderance of the evidence, and remanded the remaining issues—whether Appellant suffered a change of condition and whether the statements were self-serving and conclusory—to the Commission. *Id.*

On remand from the Court of Appeals, the Commission assigned this matter to Single Commissioner Michael R. Campbell who reviewed the record in its entirety and issued his Order without hearing additional testimony from the parties. Commissioner Campbell found as fact the preponderance of the evidence supports a finding Appellant suffered a change of condition for the worse. (R. p. 61). He further found Appellant was terminated from her employment with Wal-Mart on December 1, 2011, and that she has a present need for surgery. (R. p. 61). Therefore, Commissioner Campbell Ordered Respondents pay for causally related medical treatment and pay back owed temporary total disability benefits from December 1, 2011, to the present and continuing. (R. p. 62).

That Decision and Order was subsequently appealed to an appellate panel of the Commission, which reversed the entire Order of Commissioner Campbell and remanded for a hearing de novo. That Order was ultimately appealed to the Supreme Court as an appealable interlocutory Order.

The South Carolina Supreme Court heard oral arguments on this matter on February 21, 2019 and a decision was issued on April 3, 2019. In its decision, the Supreme Court held the Commission's unreasonable delay, caused by a series of remands, left Appellant without an adequate remedy. *Russell v. Wal-Mart*, 426 S.C. 281, 826 S.E.2d 863 (2019). Therefore, the court reversed the Order of the Commission remanding to a single commissioner and remanded to the an appellate panel for immediate and final review of Commissioner Roches' August 5, 2013, Order in accordance with the 2016 holdings of this Court. After remand from the Supreme Court, the same appellate panel of the Commission issued a new Order denying Appellant 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 second decision and order of the Commission nearly mirrors the first with few alterations. Appellant believes the Commission again erred, for the reasons set forth below, and thus instituted this appeal.

Standard of Review

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions made by the Workers' Compensation Commission ("the Commission"). *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The substantial evidence standard of review permits this Court to reverse the Commission's findings when those findings are unsupported by substantial evidence. S.C. Code Ann. § 1–23–380(A)(5)(e). The Appellate Panel of the Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). While 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).

Review of a prior compensation award 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(A) (2015). 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. A claimant is not required under the Act to prove a change of condition by objective evidence. *Russell v. Wal-Mart Stores, Inc.,* 415 S.C. 395, 401, 782 S.E.2d 753, 756 (Ct. App. 2016). 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 v. Murrells Inlet VFW No. 10420,* 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." *Brayboy* at 59, 409 S.E.2d at 768 (citing *Aristizabal v. Woodside- Division 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

I. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred as a Matter of Law in Finding Appellant Failed to Establish a Change of Condition Because No "Objective" Evidence Supports a Finding of a Change of Condition.

The Commission erred as a matter of law in finding Appellant failed to establish a change of condition because no "objective" evidence supports a finding of a change of condition. The South Carolina Workers' Compensation Act ("the Act") allows an injured employee to submit her claim to the Commission for further review if her condition worsens within one year from the last date compensation was paid. S.C. Code Ann. § 42-17-90 ("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."). A change of condition is "a change in the claimant's physical condition as a result of the original injury, occurring after the first award." *Causby v. Rock Hill Printing and Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967).

"Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award, while review for a change of condition is concerned with conditions that have arisen thereafter." *Mungo v. Rental Uniform Services of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 830 (Ct. App. 2009) (citing *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (Ct. App. 2003)). "When the original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate for the Appellate Panel to then consider any subsequent events or diagnoses made after that when making a determination about an alleged change of condition." *Id.* The *Mungo* Court further stated,

> "[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 such an occurrence is one of the reasons the Commission may review awards through change of condition hearings.
> *Id.* at 282, 678 S.E.2d at 831 (quoting *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997)).

"To justify a modification of an award based on a change of condition, the claimant must show the change of condition and its causal connection to the original compensable accident." *Gattis*, at 109, 576 S.E2d at 195. Generally, if a condition is not causally related to the original compensable accident or it is a separate claim that was not required to be brought and was in fact not brought as part of the original claim, then the claimant has not suffered a change of condition for purposes of the Act. *Estridge*, at 537-38, 482 S.E.2d 580. However, if the condition is "causally connected and is a newly manifested symptom of the [the claimant's] original injury which has caused a worsening of his condition, then it is properly considered. To be causally related to the original physical injury, the condition need only be induced by said physical injury. *Id.* at 538, 482 S.E.2d at 580. Where a condition is "a new symptom manifesting from the same harm to the body . . . it may properly be compensated in a change of condition proceeding as a part of the original injury." *Id.* at 539, 482 S.E.2d at 581.

The change of condition claim at hand was denied for a single reason: The MRIs of Appellant's lower back performed before and after the adjudication of the claim before Commissioner Wilkerson show no objective, significant differences. While there were minor differences in these studies, Dr. Edwards, ultimately concluded that he could not identify significant changes between them. This left the Appellant without objective evidence according to the Commission. (R. p. 8, ¶11). The Commission is therefore requiring the Appellant to prove

her case with more than the opinion of the medical providers, who were selected by Respondents, and her own testimony.

The Appellant does have the burden of proving a change of condition, and this burden is clearly spelled out in S.C. Code Ann. § 42-17-90 and by this Court. The Appellant must only show that it is more likely than not that her original injury was the cause of her change of condition. She has met that burden. The only reservations Dr. Merritt and Dr. Edwards had about concluding that Appellant suffered a change of condition were around the confusing "objective" standard put before them by counsel for Respondents. Even then, both that a change in her condition had occurred. Appellant submits there is only one reason that the Commission discounted the opinions in her doctors' testimony: The Commission wants radiographical evidence to support a change of condition claim.

For example, the Commission stated in its 2019 Order "[Appellant] has not presented any objective testimony other than self-serving subjective complaints" and further stated "We find the lack of objective evidence persuasive." (R. p. 6). Moreover, the Commission stated "we give great weight to the fact the objective medical testimony and medical testing certainly does not support [Appellant's] assertion." (R. p. 6). Once again, the Commission stated "Appellant's *radiographic* condition has not worsened; . . . Dr. Edwards admits there is nothing he could look at that does not have a subjective component to it to show Appellant's condition is worse." (R. p. 7 (emphasis added)). The Commission made a specific finding of fact that "the preponderance of the evidence indicates that there was no *objective* difference between the Appellant's [MRIs]." (R. p. 8, ¶9). The Commission further found as fact "Both Dr. Merritt and Dr. Edwards ultimately testified that [sic] was no objective or significant radiographical difference to be noted in the MRI

scans." (R. p. 8, ¶ 11). Additionally, the Commission found as fact "the preponderance of the evidence shows [Appellant's] radiographic condition has not worsened. (R. p. 9, ¶13).

Therefore, Appellant respectfully asks this Court reverse the Order and Decision of the Commission on the basis that it applied an incorrect legal standard; and, rule that Appellant experienced a change of condition for the worse, is entitled to causally related medical care, and is entitled to temporary total disability benefits as outlined in Commissioner Roche's 2013 Order.

II. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in again Requiring Appellant Prove She Suffered a Change of Condition for the Worse with Objective Evidence in Contravention of the 2016 Opinion of this Court and the 2019 Opinion of the Supreme Court.

The Commission erred in again requiring Appellant prove she suffered a change of condition for the worse with objective evidence in contravention of the 2016 Opinion of this Court and 2019 Opinion of the Supreme Court. The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2019 Order. This Court has stated "where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen's Compensation* § 790 at 37 (1958)). Further, this Court opined, "[i]n such a case, the order limits the authority of the commission." *Id.*

In 2016, this Court addressed the same issue Appellant asks this Court to consider today: The Commission's repeated insertion of a requirement into the Act that Appellant prove her change of condition for the worse with objective evidence. When this Court reviewed this matter in 2016, it stated,

> We find the Commission relied exclusively on objective evidence, MRIs, in denying [Appellant's] claim. Mindful of our standard of review of factual finding,

> we nevertheless conclude 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.

Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016). Consequently, this Court further stated, "there is no requirement in the Act that a claimant prove the change of condition by objective evidence," and therefore, the court "reverse[d] and remand[ed] to the Commission."

This Court was cognizant of both what the Commission actually considered and what it claimed it considered in deciding Appellant's case, stating,

> We further recognize the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence. Rather, the order states the Commission "reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders." However, the hearing before the Commission and the Commission's order make it clear the Commission exclusively relied on the MRIs in finding [Appellant] failed to objectively prove her claim.

Id. Here, the Commission decided this case without briefing or oral argument, but the Commission's Order once again makes clear it relied exclusively on the MRIs and refused Appellant's claim for benefits based upon a lack of objective evidence.

After the Commission first reviewed this claim, this Court took issue with the fact the opinions of the physicians were not considered by the Commission because they included subjective evidence in their medical conclusion, stating,

> the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. He based his opinion on the MRIs and "in part on her subjective complaints." Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic.

Russell, at 400, 782 S.E.2d at 756. The Commission in its 2019 Order, however, made no findings tending to show it actually contemplated the opinions of the physicians as directed by the Court. Instead, it once again made findings as to what the "objective" differences were in the MRIs and again only found there "was no objective or significant radiographical difference to be noted in the MRI scans." (R. p. 8). This is patently erroneous and shows the Commission failed to follow the instruction of this Court.

In support of its Decision in 2016, this Court stated,

> We further recognize the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence. Rather, the order states the Commission "reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders." However, the . . . Commission's order make[s] it clear the Commission exclusively relied on the MRIs in finding Russell failed to objectively prove her claim. . . . Although the order stated the Commission gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts" and they did "not support a physical change of condition for the worse," the order also concluded, "the preponderance of the evidence indicates that there was no objective difference between" the MRIs. The Commission found both doctors "ultimately testified that there was no objective or significant radiographical difference to be noted in the MRI scans," and "the preponderance of the evidence shows that Russell's radiographic condition has not worsened." However, the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. He based his opinion on the MRIs and "in part on her subjective complaints." Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic.

Russell, at 400, 782 S.E.2d at 756. This Court could easily insert that same paragraph into its Decision on the current appeal, and the statements asserted therein would be equally true as to the 2019 Order of the Commission. The Commission again claims it considered all the evidence of record and expressly claims it considered the subjective evidence of record. However it is still evident the Commission exclusively relied upon the MRIs in finding Russell failed to prove her

claim. The Commission again stated it gave more weight to the medical evidence, found that evidence does not support a change of condition finding, and found by preponderance that there is no objective difference in the MRIs. (R. p. 8). The Commission in 2019 again found both doctors testified there is no objective difference in the MRIs and found there was no radiographical difference in the MRIs. (R. p. 8). The Commission again ignored that both doctors stated to a reasonable degree of medical certainty that a change occurred. (R. p. 8). Therefore the Commission failed to comply with instructions of this Court, for the same issues are present in the 2019 Order that this Court found in the 2014 Order.

The Commission was instructed to consider all the evidence presented in this case, but it failed to make any additional, substantive findings of fact with regard to the subjective evidence it considered. It failed to make any new findings of fact with regard to the lay testimony. It further, and imperatively, failed to make any findings of fact with regard to the findings of the physicians that included subjective components. Instead, it choose to only claim the statements of the physicians could be "cherry-picked" to support either position. Dr. Merritt testified unequivocally Appellant suffered a change of condition and Dr. Edwards reached the same conclusion despite being presented with an erroneous standard. (See argument IV, infra).

The Commission, instead of following the instructions of this Court, simply added to its findings that "the lay testimony simply did not carry the burden of proving a compensable change of condition claim. That is not say that lay testimony could not meet the burden of proof in any instance, but in this particular instance, lay testimony did not outweigh the medical evidence." (R. p. 8). This finding is factually wrong as discussed below but also shows the Commission did not follow the instructions of this Court. It further added a finding of fact that a negative MRI is not dispositive, but its order on the whole, taken in conjunction with its factual errors, shows the

Commission only added those words to the Order and failed to actually revisit the evidence of this case in light of this Court's decision. Furthermore, the Commission added a finding of fact that objective evidence is not required to prove a change of condition case, but again, its order makes clear it did not alter its reasoning; the Commission only added sentences saying it finds objective evidence defeats Appellant's subjective complaints. Just as the Commission's statement that it considered all evidence in its 2014 Order was insufficient to convince this Court it actually did so, its statements that it weighed the subjective evidence is also disingenuous in light of its findings.

The Commission, despite its statements to the contrary, again required Appellant to prove her change of condition with objective evidence or radiographical studies. Neither is a requirement under the Act. A plain reading of the Order of the Commission evidences the fact the Commission did not follow the instructions of this Court or the Supreme Court. The findings of the Commission and the discussion section of the Order show the Commission's analysis has not changed from its analyses in 2014. The Commission, instead, inserted the words "objective" and "subjective" into the order, added to certain findings of fact, and added one additional finding of fact. This, when read in conjunction with the remainder of the Order, shows the Commission once again required proof of a change of condition be demonstrated with objective evidence in contravention of the instructions of this Court.

Therefore, Appellant respectfully requests this Court reverse the Order of the Commission for its failure to follow the instructions of this Court's 2016 Decision.

III. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding Appellant Failed to Establish a Change of Condition Because Her Testimony Concerning Her Symptoms were "Conclusory" and "Self-serving."

The Commission erred as a matter of law and as a matter of fact in finding Appellant failed to establish a change of condition because her testimony concerning her symptoms was "conclusory" and "self-serving." Appellant spent many years devoted to her career at Wal-Mart. She worked hard, and she was rewarded for her diligence in the form of promotions, pay raises, and the trust Wal-Mart placed in her as a manager at multiple stores. Wal-Mart recognized she was talented and trustworthy and utilized her there for thirteen years, promoting her from an entry level position to a management post with major responsibilities. (R. pp. 92; 199-200). She handled multiple roles, and Wal-Mart trusted her to supervise employees, to control merchandise, and to control the money that moved through a fully-operational Wal-Mart store. (R. pp. 200 – 202). Had her employer questioned her trustworthiness and credibility, she certainly would not have had control over and responsibility for the cash and operations of a Wal-Mart store.

Now that Appellant's health is at issue, it appears her credibility is called into question. The Commission stated that Appellant "has not presented any objective testimony other than her self-serving subjective complaints to demonstrate her condition is 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 6). The Commission also gave "limited weight to the testimony of the [Appellant] as it is conclusory and self-serving." (R. p. 8, ¶ 7).

The Commission's findings as to what are essentially credibility are confusing. Initially, the findings of the Commission with regard to Appellant's credibility must be sufficiently detailed to allow for review by an appellate court. *Able Communications, Inc. v. SCPSC,* 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). In support of its conclusion that the Appellant was not credible,

or only presented "conclusory" and "self-serving" testimony, the Commission only cites its perception that she "was unable to establish that she had any new complaints," was unable "to establish when her conditioned worsened," and was "unable to establish that her need for surgery was new or occurred after the original award." (R. p. 8, ¶7).

There is no requirement, either in the change of condition statute or the case law interpreting that statute that requires a claimant pin down precisely when she began to experience a change of condition. The only requirements are that the change in condition occurs after the time she receives last payment of compensation and within one year from that date. S.C. Code Ann. § 42-17-90. Here, Appellant stated her increased and new symptoms began in either September or October of 2011, prior to her return to Dr. Merritt's office.[1] (R. p. 181, lines 17 – 21). Therefore, not only is there no requirement that Russell precisely state when her new symptoms appeared, she also was able to provide a fairly specific range as to when her new symptoms developed. (R. p. 181, lines 17 – 21). Moreover, this testimony is supported by her medical records.

Furthermore, the way in which the Commission found she was not credible, stating her testimony was "conclusory" and "self-serving" is also confusing. First, this does not give a reviewing court any clear indication as to why the Commission decided Appellant's testimony should be mistrusted. The Supreme Court has held,

> 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 those findings. Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact. No particular format is required. However, a recital of conflicting testimony followed by a

[1] While Appellant refers to the 2012 in this portion of the transcript, the medical records indicate it actually occurred in 2011. Appellant also corrected the year later in her testimony. (R. p. 187, lines 18 – 20).

> general conclusion is patently insufficient to enable a reviewing court to address the issues.

Able Communications, Inc. v. SCPSC, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (internal citations omitted). The Commission's order offers no clarity as to why it found Appellant's testimony was incredible other than that it was "self-serving" and "conclusory." The Commission only states, erroneously in Appellant's opinion, that Appellant was unable to establish she had new complaints, unable to establish when those new complaints began, and was unable to establish her need for surgery was new. (R. p. 8, ¶7). But even if true, these opinions of the Commission do not in any way affect Appellant's credibility and do not aid this Court or any reviewing court in its evaluation of how the Commission reached the conclusion that Appellant was incredible based upon her "conclusory" and "self-serving" testimony.

Appellant further asserts it is legal error to base, to any degree, its denial of Appellant's claim based upon the fact that her testimony is "conclusory" and "self-serving." First, Appellant answered the questions asked of her; she did not stand before Commissioner Roche and answer every question with a legal conclusion. Appellant certainly concludes ultimately that she suffered a change of condition for the worse, for otherwise she would not have brought the claim. However, that fact in no way discredits her or means that she cannot be believed. Second, it is a foregone conclusion that her testimony is self-serving. If not, she would not have testified in her case-in-chief, and she would not have brought this claim. If the Commission found Appellant lied for her own benefit, then it could make a valid finding that she presented false, self-serving testimony. However, absent a finding that Appellant is not truthful, the fact that her testimony is self-serving is of no relevance. Therefore, Appellant asserts the findings of the Commission are based upon legal error, surmise and conjecture, are arbitrary and capricious, and are made upon unlawful procedure.

Lastly, Appellant asserts the Commission erred in finding as fact that she was not credible, for such a finding is clearly erroneous in the view of the reliable, probative, substantial evidence on the whole record. As discussed above, Appellant did testify as to when her new symptoms began. Further, the testimony is clear that Dr. Merritt opined well after Appellant's pregnancy that she was not a surgical candidate before her condition worsened. (R. p. 38). Dr. Edwards stated he had no reason to doubt Russell's statements that her condition was worsening. (R. p. 218, lines 21 – 24). Dr. Edwards further stated that the physical examination he performed led him to his finding that Appellant's condition had worsened. (R. p. 223, lines 2 – 13). The evidence of record shows Appellant is credible.

In sum, Appellant's employer trusted her to run a store and to handle the store's money, merchandise, and personnel, and her doctors never doubted her veracity or questioned her as a historian as to her pain. Her initial injury was fully admitted and that she sustained an injury was not contested. Furthermore, counsel for the Respondents at the 2014 hearing before the Commission stated "I would agree with Commissioner Roche that [Appellant] comes across really well." (R. p. 166). In essence, the Respondents have agreed, both with their conduct and their stipulation, that Appellant is credible and can be trusted to relay her symptoms. Therefore, there is not substantial evidence to support the Commission's finding that Appellant's testimony was only "conclusory" and "self-serving."

This Court should overturn the Commission's decision on the basis that there is not substantial evidence of record to conclude Appellant's testimony was only conclusory and self-serving. Moreover, the Commission's finding as to Appellant's credibility is unexplained and impossible to review on appeal due to a lack of factual findings to support that decision. Finally, the Commission's finding should be reversed, for its finding that her testimony was "self-serving"

and "conclusory" amounts to an error of law. For each of these reasons, Appellant requests this Court reverse the findings of the Commission, rule that she is credible and suffered a change of condition for the worse, award benefits for medical care causally related to this change of condition, and award temporary total disability benefits.

IV. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding as Fact that Appellant Did Not Suffer a Change of Condition for the Worse.

The Appellate Panel of the Commission erred in finding as fact that Appellant did not suffer a change of condition for the worse. While the Commission is the fact-finder in workers' compensation cases, its findings are still subject to review by the appellate courts and may be overturned if the findings are not supported by substantial evidence. S.C. Code Ann. § 1-23-380; *Fishburne v. ATI Systems Intern.*, 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009); *Hamilton v. Martin Color-fi, Inc.*, 405 S.C. 478, 483, 748 S.E.2d 76, 79 (Ct. App. 2013).

The evidence of record with regard to this issue is simple, which is why two single commissioners have found Appellant sustained a change of condition on two separate occasions. Appellant testified she began experiencing radicular symptoms in September or October of 2011. (R. pp. 181, 187). Appellant's permanent disability was adjudicated prior to that date. The physicians testified in accord.

The Commission's 2019 Order contains factual errors. First, the Commission found Appellant had no new symptoms. Appellant testified her symptoms were new as of September or October of 2011, as verified by her medical records. Appellant specified that the nature of her radicular symptoms changed from those she initially experienced in 2009 to those she began experiencing in 2011, stating the symptom she experienced in 2009 was numbness and that after the final adjudication of her claim, she began experiencing a "pinching," "sharp," "electrical" pain

in her leg. (R. p. 190). However, the symptoms she experienced in 2009 are of no relevance for they had resolved far before the time she was deemed to have reached maximum medical improvement, before the time of the hearing before Commissioner Wilkerson, and before the time of Commissioner Wilkerson's Order. During that entire span, Appellant suffered no radicular symptoms.

To wit, Dr. Edwards found that Appellant had reached maximum medical improvement and listed her only body part affected as her lumbar spine. Likewise, Commissioner Wilkerson's 2011 Order made no mention of radicular symptoms and only made a finding of an injury to her lumbar spine. (R. pp. 90 – 97). If Appellant was suffering from radicular symptoms, that would have been mentioned when she was released by Dr. Merritt in 2011 and in Commissioner Wilkerson's 2011 Order. The fact that Commissioner Wilkerson did not find or mention radicular symptoms, of any type, is telling. Moreover, Appellant testified her radicular type symptoms began in September or October of 2011. Correspondingly, she treated with Dr. Merritt in October of 2011, and noted she was beginning to experience pain down her left leg.

The above is the evidence related to when Appellant's condition worsened and whether or not she experienced new symptoms. The Commission's conclusion that her condition did not worsen and she did not experience new symptoms is not supported by substantial evidence. Specifically, the Commission found "[Appellant] was unable to establish that she had any new symptoms that were not present at the time of the original award." (R. p. 8, ¶7). The simple truth here is Appellant had no radicular symptoms when she was found to have reached maximum medical improvement and had no radicular symptoms at the time of Commissioner Wilkerson's original award. *See generally, Mungo v. Rental Unif. Serv. of Florence*, 383 S.C. 270, 687 S.E.2d 825 (2009); *Clark v. Aiken County Gov't*, 366 S.C. 102, 620 S.E.2d 99 (2005); *Gattis v. Murrells*

Inlet VFW No. 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003). Later in 2011, Appellant developed radicular symptoms. Russell's testimony is that any symptoms she reported were likely related to her pregnancy. (R. p. 192). Both doctors further agree those symptoms had resolved by the time she reached maximum medical improvement, and both agree she never had major complaints of leg or buttock pain until late in 2011. They were aware of the minor complaints she had while pregnant, but both were still of the opinion that her condition had changed. The Commission's finding is not supported by substantial evidence and must be reversed.

Furthermore, the Commission erred in finding Appellant could not establish that her need for surgery was new or occurred after her original award. The facts here are simple. On the date of Appellant's accident, November 3, 2009, she was three months pregnant. No radiographical studies were performed during the course of her pregnancy and she was treated conservatively. After she carried her child to term, an MRI was performed. Dr. Merritt did not think surgery was indicated at that time. Later in 2011 Dr. Merritt again did not think surgery was indicated. After this claim was initially adjudicated, Dr. Merritt decided Appellant's condition and symptoms may warrant surgical intervention. (R. p. 259). Most importantly, for purposes here, Dr. Edwards who found Appellant at maximum medical improvement and stated her probable future medical care, only provided for ongoing NSAIDs with no mention of surgery before the hearing with Commissioner Wilkerson. Thus, Appellant did not need surgery at the time Commissioner Wilkerson adjudicated this claim in 2011, but surgery was soon thereafter recommended once her new symptoms presented.

Nevertheless, the Commission found Appellant was unable to establish that her need for surgery was new or occurred after the original award. (R. p. 8, ¶7). In support of this finding, the Commission stated "it is clear that Dr. Edwards opined [Appellant] could have been a candidate

for discectomy back in 2010 for her November 2009 accident, but was probably not considered at that time because she was pregnant." (R. p. 7). This finding is arbitrary and relies upon surmise and conjecture, in addition to being factually incorrect. Dr. Edwards did not treat Appellant regularly until after the issuance of Commissioner Wilkerson's 2011 Order. His testimony itself shows that he is speculating, as he stated "I think, initially, it was *probably*, not considered because she was pregnant at the time. We certainly try not to operate on pregnant people if we can get by with it." (R. pp. 225 – 26). The Commission, therefore, based its finding on the speculations of a physician who was not treating the Appellant during the time in question.

Had Appellant reached maximum medical improvement while she was pregnant, and received an opinion from her treating physician on surgery at that time, this could be a different analysis. However, the reality is Appellant's pregnancy had only a minor impact on the treatment she received, and had zero impact on the opinion of Dr. Merritt as to maximum medical improvement, future medical care, and the need for surgery because she was not pregnant at the time he gave his opinion. This issue is a complete red herring and should not affect the outcome of this case. It is clear from the record that Appellant was not a surgical candidate at the time she reached maximum medical improvement in 2011, and therefore had no chance to seek that medical treatment through the workers' compensation system prior to the assertion of a change of condition. The opinion of the Commission with regard to when Appellant developed a need for surgery is not supported by substantial evidence and is an arbitrary and speculative finding that must be reversed.

The Commission further erred in its findings with regard to the physician testimony. This Court stated in its 2016 opinion that "both doctors concluded, to a reasonable degree of medical certainty, that [Appellant] suffered a change of condition." *Russell v. Wal-Mart Stores, Inc.*, 415

S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016). Indeed, Dr. Merritt testified "there was a change . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort." (R. p. 240). Dr. Merritt immediately thereafter confirmed that opinion was within a reasonable degree of medical certainty. (R. p. 240). Likewise, Dr. Edwards testified to within a degree of reasonable certainty that Appellant's condition had worsened stating "I think clinically her symptoms are more significant now than they were when I first saw her. So you could – you make that conclusion"; "its predominantly a subjective or symptomatic worsening"; "but the worsening of her symptoms, anatomically, could be that there is a chronic change in that nerve." (R. pp. 217 – 18). The Commission nevertheless, found that testimony from both doctors could be "cherry picked" to support either position, and decided the preponderance of the evidence does not support a finding of change of condition.

Furthermore, to the extent that Commission could "cherry-pick" statements from both doctors in support of its own conclusions, the testimony garnered at the time was tainted by the erroneous "objective evidence" standard nullified by this Court. For example, counsel for Respondents asked Dr. Merritt, "can you say to reasonable degree of medical certainty that there has been a change in the *objective* status of her low back condition"? (R. p. 245) (emphasis added). He later asked "[i]s it your understanding that Dr. Edwards . . . has opined there is no *objective* change in the MRIs." (R. p. 247). At the end of the deposition, he finally asked Dr. Merritt "as far as your opinion is concerned and her change of condition, you testified that you're basing that in part on her subjective complaints as far as the development of leg pain"? (R. p. 252). Likewise, in Dr. Edward's deposition, he was asked "And in your opinion, there's no objective difference between those three scans"? (R. p. 222).

Dr. Edwards, however, was astutely aware of the framing of the questions asked by counsel for respondents. In response to an ultimate change of condition question, Dr. Edwards stated,

> So it would imply [sic] 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 is, no. But if you—if you rely on the physical examination and the demonstration of these paresthesias that we're describing into the 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). Dr. Edwards, who the Respondents have contended is the primary expert in this case, even found a change when the incorrect standard for a change of condition was asserted.[2] Nevertheless, the claim was denied.

The essence of the Appellant's argument here is that the questions presented by counsel for Respondents were posed in order to assert a standard this Court deemed inappropriate and the doctor testimony the Commission relies upon is tainted by that standard. However, despite the erroneous standard, both doctors still ultimately testified Appellant suffered a change of condition.

Of note, both doctors were authorized treating physicians selected by the Respondents to treat Appellant's injuries. Dr. Merritt, an orthopedic surgeon, provided the majority of Appellant's care prior the adjudication of this claim before Commissioner Wilkerson and for several months after. After Dr. Merritt opined Appellant sustained a change of condition for the worse, Respondents sent Appellant to Dr. Edwards, a spine surgeon, for a second opinion, and he ultimately testified she experienced a change, despite the incorrect standard posed to him. The

[2] Dr. Merritt is an orthopedic surgeon, selected by Respondents to provide treatment for Appellant. The deference granted to Dr. Edwards was with regard to his reading of spine MRIs. The issue of the objective findings in this case has been adjudicated as not controlling by this Court. Thus, his opinions with regard to anything except the differences in the MRIs is equally as valid as Dr. Edwards, for the Commission cited no reason to dispute his expertise.

only thing stopping the full Commission from adopting these opinions is the lack of change in MRIs.

The Commission in 2016 ignored the opinions of the physician's because they included subjective evidence in reaching their conclusions. *Russell,* at 400, 782 S.E.2d 753 ("the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that [Appellant] suffered a change of condition."). The Commission continues to ignore those findings now. The Commission made no new findings with regard to the physician's testimony, instead opting to only once again find their statements can be "cherry picked" to support either position. This is clear factual error and the lack of findings with regard to the physician testimony evidences how the Commission reaches the opinion that the medical testimony and opinions do not support Appellant's claim.

Curiously, the Commission also states "Dr. Edwards' testimony and opinion is more persuasive than [Appellant's] testimony." (R. p. 8). Appellant, as explained above, disputes that her testimony was only conclusory and self-serving; however, even if it was, this finding is odd. Appellant's testimony and Dr. Edwards' testimony are congruent; she suffered a change of condition for the worse and developed significant radicular symptoms that were not present at the initial adjudication of this claim. Dr. Edwards testified "its clear that the patient's symptoms are now worse. I don't have any—doubt about that . . . clinically. (R. p. 212). To find Dr. Edward's testimony does not support Appellant's claim, is factually erroneous and is not supported by substantial evidence sufficient to sustain the findings of the Commission.

On the whole, the Commission presents this as a case of Appellant's testimony versus all the other evidence of the record. (R. p. 8). This structuring and, as explained above, the findings related to it are erroneous. First, it was error for the Commission to find Appellant's testimony

was only conclusory and self-serving, and it should have given adequate weight to her testimony. However, the most problematic finding is finding of fact number nine that "the medical records, diagnostic test, and medical opinions do not support a physical change of condition for the worse. The preponderance of the evidence indicates that there was no objective difference between the Appellant's MRI scan[s]." (R. p. 8). This finding shows the Commission again did not consider the subjective portions of the physician's findings, but also is factually incorrect, for the medical records and medical opinions do, by a preponderance, support a finding of a change of condition for the worse. This case has evidence from three sources: the Appellant, Dr. Merritt, and Dr. Edwards. Appellant testified her symptoms worsened from the time the claim was originally adjudicated, Dr. Merritt testified clearly she experienced a change, and Dr. Edwards ultimately testified to the same as well, despite the incorrect standard presented to him as law. The Commission misaligns the facts in its weighing of the evidence and its opinion that the evidence does not support a finding of a change of condition is not supported by substantial evidence.

Furthermore, Respondents attempt to disprove Appellant's claim with a negative. Upon the standard proposed in 2013, requiring objective evidence, the lack of objective evidence could have arguably been persuasive if the Commission agreed with Respondents' interpretation of the doctors' testimony. Now, with clarity from this Court, the evidence the Respondents now must rely upon is of little consequence. The negative finding on the MRIs cannot alone be used to find by a preponderance of the evidence that there is no change of condition and does not amount to substantial evidence sufficient for this Court to sustain the Commission's finding of no change of condition for the worse. Furthermore, as explained in Argument I, above, sustaining the Commission's finding based upon a negative MRI finding,[3] in the face of the other credible

[3] Appellant's MRIs were not negative in that there was no abnormality. She undisputedly has a herniated disc.

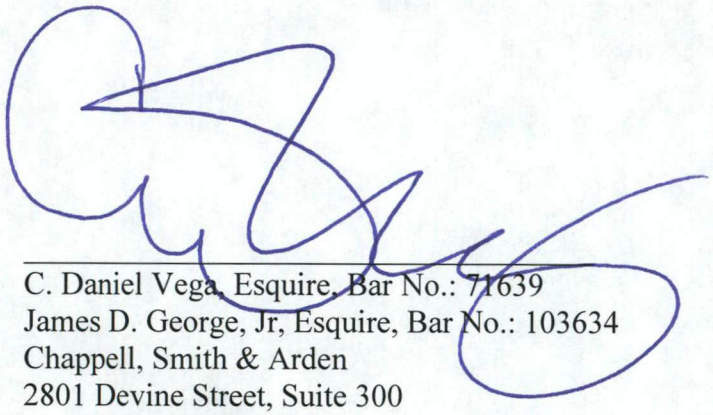
evidence of the case, allows the Commission to continue asserting its erroneous objective evidence standard. If the Commission can deny a change of condition claim when all other and substantial evidence of the record supports a finding of a change of condition except the radiographical studies, the Commission is ruling as a matter of law that radiographical evidence is required.

Therefore, the Commission made multiple errors in its findings of fact including its ultimate factual conclusions. There is not substantial evidence to support the Commission's finding by a preponderance that Appellant did not prove her symptoms were present at the time of the original award. There is not substantial evidence to support its finding that her need for surgery was not new. The Commission's findings regarding the physicians' testimonies are not supported by substantial evidence. And, the Commission's ultimate findings of fact as to whether Appellant experienced a change of condition for the worse, which are predicated upon the above errors, is further error and cannot be sustained. For these reasons, Appellant respectfully requests this Court reverse the findings of fact of the Commission and find Appellant suffered a change of condition for the worse and is entitled to the benefits attenuate to that finding.

Conclusion

For these reasons, Appellant respectfully requests this Court hold (1) the Commission committed reversible error in its failure to follow the 2016 instructions of this Court; (2) the Commission committed reversible error of law in requiring Appellant prove her change of condition with objective evidence; (3) the Commission committed reversible error in finding as fact a change of condition for the worse did not occur, and (4) that Commission committed reversible error in finding the Appellant was not a credible witness, where the other evidence of record, conduct of the employer, and the stipulation by counsel for Respondents indicates otherwise.

Further, Appellant respectfully requests this Court issue an Order finding that Appellant experienced a change of condition for the worse pursuant to S.C. Code Ann. § 42-17-90, that Appellant is entitled to ongoing causally related medical care, and that Russell is entitled to temporary total disability benefits from December 1, 2011, through the present date and continuing.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

Wal-Mart Stores, Inc., Employer,

&

American Home Assurance, Carrier, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant and Reply Brief comply with Rule 211(b), SCACR

January 28, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law

Statutes and Regulations

STATEMENT OF ISSUES ON APPEAL

1. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPLY THE CORRECT LEGAL STANDARD AND CORRECTLY DETERMINE THE APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD?

2. DOES SUBSTANTIAL EVIDENCE SUPPORT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE?

STATEMENT OF THE CASE

On November 3, 2009, Appellant sustained an admitted injury to her back arising out of and in the course of her employment with Wal-Mart. At hearings held on April 13, 2011, and on June 8, 2011, the Commission ordered that Appellant reached maximum medical improvement for her work-related injury on February 2, 2011, and she was entitled to a 7% permanent partial disability to the back and ongoing pain medication.

On December 9, 2011, Appellant filed a Form 50 claiming she was experiencing a change of condition for the worse with allegations of new and increased symptoms including radicular pain in her legs. 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 Appellant suffered a change of condition for the worse and ordered Respondents to provide Appellant 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 Appellant 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. Appellant 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 Appellant experienced a change of condition by a preponderance of the evidence in the record.

The case was remanded to Commissioner Michael R. Campbell, and he found that Appellant 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. Appellant 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. Appellant 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 Appellant did not suffer a change of condition for the worse based on the record as a whole, considering both the subjective and objective evidence. Appellant subsequently served a Notice of Appeal to this Court on August 15, 2019.

STATEMENT OF THE FACTS

Appellant sustained an admitted injury on November 3, 2009, and received appropriate medical treatment until she was released at maximum medical improvement. Commissioner Wilkerson awarded 7% permanent partial disability on June 8, 2011. After receiving her award, Appellant alleged that she suffered a change of condition for the worse under S.C. Code Ann. § 42-17-90. The issue was originally adjudicated before Commissioner Roche on February 11, 2013.

At the hearing, Appellant alleged she experienced new and increased symptoms including radiating pain into her legs that would require additional medical treatment to include surgery by Dr. Edwards. (R. p. 176, lines 3-6). Specifically, Appellant reported new complaints of pain down her legs to Dr. James O. Merritt. (R. p. 236, lines 9-10). However, at Dr. Merritt's deposition, he admitted he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (R. p. 242, line 19 – p. 243, line 1). In September of 2011, Dr. Merritt ordered an MRI to compare to Appellant's prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (R. p. 236, line 24 – p. 237, line 11). Although Dr. Merritt did not have the films from the MRIs to compare, he did not think there was a major change between the two. (R. p. 237, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (R. p. 237, lines 12-15 & lines 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (R. p. 246, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert

on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (R. p. 247, lines 3-19).

Dr. Merritt sent Appellant for further evaluation with Dr. William S. Edwards, a spine surgeon, who did review the actual MRI studies at issue in this case. (R. p. lines 14-17; R. p. 221, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies, that they looked substantially the same to him, and that there was no objective or significant radiographical difference to be noted in the scans. (R. p. 211, lines 5-7; R. p. 212, lines 8-10; R. p. 222, lines 1-3). Further, he opined Appellant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (R. p. 217, lines 24-25; R. p. 218, lines 5-6). In fact, Dr. Edwards explained that Appellant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root, that Appellant does not have any weakness in her muscles innervated by that particular nerve, and that Appellant's reflexes remain the same. (R. p. 221, lines 17-21; R. p. 222, lines 9-12). Dr. Edwards also opined that Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (R. p. 225, line 16 – p. 226, line 2).

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the

reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 398 S.C. 418, 421, 730 S.E.2d 296, 297 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, "[i]n workers' compensation cases, the Appellate Panel is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 4381 442 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). 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.

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPLIED THE APPROPRIATE LEGAL STANDARD AND CORRECTLY DETERMINED APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD.

The record and the July 18, 2019 Decision and Order show that the Commission considered the record *as a whole* and reached a reasonable conclusion based on all of the evidence submitted by both parties. Contrary to the arguments of Appellant, the Commission did not apply the wrong legal standard or fail to consider any evidence in this matter.

S.C. Code Ann. § 42-17-90 provides, "the Commission may review an award and on that review make an award . . . 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). In Gattis v. Murrells Inlet VFW #10420, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 255, 153 S.E.2d 697 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 237 S.C. 584, 118 S.E.2d 322, 323

(S.C. 1961)). 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 Full 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, 353 S.C. at 107, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (S.C. Ct. App. 1992)). Further, 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, 398 S.C. at 41, 730 S.E.2d at 298 (citing S.C. Code Ann. § 1-23-380(5)).

a. The South Carolina Workers' Compensation Commission correctly reviewed the record as a whole and in its discretion determined Claimant did not meet her burden of proving a change of condition by the preponderance of the evidence.

As indicated by the extensive case law cited above, the Claimant must prove by a preponderance of the evidence that there has been a change in the physical condition caused by the original injury after the last payment of compensation. It is the duty and obligation of the Commission, in its role as fact finder, to consider all of the evidence presented and, in reviewing the record as a whole, to use its discretion as to the weight given to the evidence submitted in forming findings and conclusions based on that evidence. This is precisely what the Commission did in this matter.

The Commission correctly applied the preponderance of the evidence standard and properly weighed the various evidence presented, as supported by various Findings of Fact in the July 18, 2019 Commission Order. 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 notes that it did not rely on objective evidence alone, as that is not the correct standard. In Finding of Fact #11, the Commission finds "...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, objective evidence is required to establish a change of condition." (R. p. 8 – p. 9). 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). It is disingenuous for the Appellant to argue that the Commission relied solely on objective evidence when the Commission itself explicitly says otherwise.

Appellant further argues that it was an error of law and fact to find Appellant failed to establish a change of condition because her testimony was "conclusory" and "self-serving." However, it has long been held by our courts that the Commission is empowered to adjudicate credibility of witnesses and weight of evidence, and the courts will not disturb those judgments. "It is not for this court to balance objective against subjective findings of medical witnesses, or to weigh the testimony of one witness against that of another. That function belongs to the Appellate Panel alone." Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) (quoting Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957)).

The Commission expressly detailed the flaws it found in Appellant's testimony. In Finding of Fact #7, the Commission states, "Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award." (R. p. 8).

Overall, the Commission indicated that Appellant's testimony simply did not meet the burden of proving a change of condition. Id. The Commission's July 18, 2019 Order also describes how the Commission weighed the Appellant's testimony, the medical records, and all other evidence in the record to make a determination. For example, in Finding of Fact # 7, the Commission says "[w]e give limited weight to the subjective testimony of the Claimant," in Finding of Fact 8, "Dr. Edwards' testimony and opinion is more persuasive than Claimant's testimony," and in Finding of Fact #11, "[b]oth Dr. Merritt and Dr. Edwards ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans... we assign it greater weight than Claimant's subjective complaints." (R. p. 8).

It is the function of the Commission to determine the weight of the evidence, and, in reading the Commission's Order, it is clear that the Commission fulfilled its obligation to consider and weigh all of the presented evidence in order to reach a determination as to whether the Claimant's legal burden, the preponderance of the evidence, had been met. The clear language of the Order indicates that all evidence was considered and which evidence was given more or less weight and the reasons therefore.

b. The South Carolina Workers' Compensation Commission correctly followed the Directives given by the Court of Appeals in the Court's 2016 Opinion.

The Commission expressly followed the specific instructions given by this Court in its 2016 Opinion. Appellant argues that the Commission denied Appellant's change of condition due to relying solely on objective evidence: Appellant's MRIs of her lower back. However, actual reading of the Commission's July 18, 2019 Order makes it clear that this allegation is both factually and legally false. Appellant has created this illusion in order to

form an argument against it. It is evident that Appellant is engaging in a straw-man's argument,[1] a logical fallacy. In reality, Appellant is substituting the Commission's actual findings with a distorted and exaggerated version of what the Commission found and then arguing a case against it.

Respondents never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard. Respondents' argument has always been about the weight given to the evidence–that the objective evidence in the record should be given more weight than the subjective. Almost every single case that comes before the Commission contains conflicting and competing evidence. For that reason, it is the Commission's job, as fact finder, to weigh the evidence, both subjective and objective, as it deems appropriate.

Appellant has used this straw-man argument for quite some time on this case, and it was adopted by the Court of Appeals. At Oral Arguments before the South Carolina Supreme Court, Case No. 2018-000354,[2] Justice John W. Kittredge points out, "[m]y concern is that it was sort of a straw-man argument by the Court of Appeals. It seems they attributed a position to the Employer that the Employer never took, and that was the basis of the remand." (R. p. 102, line 17 – p. 103, line 4). In speaking to Respondents' counsel, Justice Kittredge again observes:

> The Court of Appeals attributed an argument to you you didn't make. You never said that subjective evidence cannot ever be considered .... You're sitting there reading an opinion where they attribute to an argument you never made. It gets sent back. You tell them exactly what the law is in this case: remand on the record. They do just the opposite. You file a brief; you

[1] According to Black's Law Dictionary, a straw man is defined as "[a] tenuous and exaggerated counter-argument that an advocate makes for the sole purpose of disproving it. – Also termed straw-man argument." *Straw man*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[2] Respondents cite to these Oral Arguments not for precedential value, but to show this Court the observations made by the South Carolina Supreme Court.

> go over the fact of what you argued at the Court of Appeals and how it was mistaken that you – you've never argued that subjective evidence cannot be considered. You agree that it can be considered. And it's just replete with this.

(R. p. 118, lines 10-12; R. p. 118, line 15 – p. 119, line 3). Respondents did not make this argument, and the Commission explicitly states it did not use this standard: "[t]he Commission does not find that in this, or any other case, 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." (Finding of Fact #16; R. p. 9) (emphasis added).

Appellant argues that the Commission did not contemplate the opinions of the physicians as directed by this Court. 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 the Claimant. (Findings of Fact #8, #9, and #11; R. p. 8). 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.

Appellant has further argued that Claimant's testimony and complaints were ignored, but that is simply not the case. The Appellate Panel considered and weighed that evidence, and they found that the Claimant's lay testimony about her past and ongoing complaints did not carry the burden of proving a worsening of condition and that greater weight is given to the medical records, the diagnostic tests, and the testimony of the medical experts. (Findings of Fact #7, #8, and #9; R. p. 8). The Commission did not prohibit or disallow lay testimony by the Claimant; instead, the Commission reviewed and considered

Claimant's testimony but gave her statements less weight than the expert testimony of the medical providers. Id.

The Commission clearly followed the Directives of this Court in its 2016 Opinion and considered all of the evidence, not just the objective as Appellant claims. Even more telling, the Commission admittedly points out that there is *some* evidence that Claimant may have suffered a change of condition, but the proper standard is the *preponderance* of the evidence, and Claimant failed to meet this standard. (Finding of Fact #16; R. p. 9) (emphasis added). At oral arguments, Justice Kay Hearn[3] aptly points out:

> Let me go back to that law of the case, because maybe I wasn't clear. It seems to me that after the first remand order by the Court of Appeals, the Commission was given the opportunity to correct the perceived error–you know, we can argue about whether the Court of Appeals was right on that. All they [the Commission] had to do was issue a new order based on the record and make findings of fact that says they [the Commission] considered the subjective evidence too. That's all they had to do. They're the factfinder. And that would have been upheld on appeal.

(R. p. 130, lines 10-17). As fact finder, it is within the discretion of the Commission to make this determination.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE.

This Court should uphold the decision of the Commission because substantial evidence supports the Commission's finding that Appellant did not sustain a physical change of condition for the worse. In Gattis, 353 S.C. at 109, 576 S.E.2d at 196 (citing Causby, 249 S.C. at 227, 153 S.E.2d at 698), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original

[3] Again, Respondents are not citing to statements made at Oral Arguments for precedential value.

injury and occurring after the first award. (emphasis added). To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell, 237 S.C. at 588, 118 S.E.2d at 323). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id. Further, where one relies upon expert medical testimony to show a causal connection between an injury and a subsequent condition, the testimony must meet the "most probably" rule and it is not sufficient under our case law to establish the condition in question "possibly," "could have," or "might have" resulted from the injury. Gambrell v. Burleson, 252 S.C. 98, 101, 165 S.E.2d 622, 623 (S.C. 1969) (citing Cross v. Concrete Materials, 236 S.C. 440, 114 S.E.2d 828 (S.C. 1960)). 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 Full Commission's finding. Clark, 366 S.C. at 103, 620 S.E.2d at 111 (citing Gattis, 353 S.C. at 107, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 307 S.C. at 520, 415 S.E.2d at 843).

In the case at hand, Appellant contends that she began to experience new complaints of pain in her legs after the June 8, 2011 Order issued by the single Commissioner that placed her at maximum medical improvement and assigned a seven percent impairment rating to her back. However, the medical evidence in the record indicates otherwise. On May 23, 2012, Claimant's treating provider, Dr. Merritt, testified

that Claimant had some complaints of pain going into the leg before she returned to see him in September of 2011. (R. p. 242, line 21 – p. 243, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (R. p. 190, lines 21-25; R. p. 192, lines 2-23). Nevertheless, she testified that she believed the pain in her right leg associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she "started receiving them." (R. p. 181, lines 11-21).

While a new MRI was ordered by Claimant's treating provider due to her supposedly new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case and testified that he didn't think there was a major change . . . "[n]othing I felt was extremely remarkable." (R. p. 237, lines 13-24). He then testified on cross examination that he would defer to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans from 2010 to 2011, agreed that Dr. Edwards probably has more experience in evaluating spine MRIs and would be more of an expert on spine MRIs than he was, and ultimately agreed with Dr. Edwards' opinion there was no change in the MRI scan before and after the first hearing. (R. p. 247, lines 3-19).

As indicated above, Dr. Edwards did review and compare the MRI studies from 2010 and 2011 after which he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (R. p. 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). Dr. Edwards

also opined Claimant's disc protrusion at L5-S1 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).

As fact finder, the Commission weighed the testimony of both Dr. Merritt and Dr. Edwards in determining that there was no physical change in condition. In Finding of Fact #10, the Commission states "[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). Appellant argues that this "cherry-picking" is factual error. However, the South Carolina Supreme Court has 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).

The substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, support the Commission's finding that Appellant did not sustain a physical change of condition after the original award. The expert testimony of both Dr. Merritt and Dr. Edwards, the medical records, and the diagnostic tests constitute substantial evidence to support the finding that Appellant did not sustain a change of

condition for the worse.

Appellant also alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (R. p. 184, lines 4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Appellant could have been a candidate for 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). Specifically, he testified, "[w]e certainly try not to operate on pregnant people if we can get by without it." (R. p. 226, lines 1-2). He also opined that surgery for this type of problem is not something that "has" to be done the majority of the time; rather, it's something that is offered to patients in an effort to try to give them some relief for their pain. (R. p. 219, lines 4-11). 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.

Dr. Edwards further testified, "the worsening of [Appellant's] symptoms, anatomically, could be that there is now a chronic change in that nerve that makes it more painful or symptomatic." (R. p. 218, lines 11-14). When questioned on whether irritation of a nerve that continues over time would cause the nerve to worsen, Dr. Edwards testified, "[i]t can." (R. p. 217, lines 6-10). He then testified that radiographically Claimant's condition was not worsening and that her alleged "worsening" was predominantly a subjective or symptomatic worsening. (R. p. 217, line 24 – p. 218, line 6). While Dr. Edwards also opined that chemicals inside a disc can also cause nerve root irritation if those leak out, he could not state to a reasonable degree of medical certainty that Appellant has had chemical leaking affecting the nerve root and even stated that "there's just no way to

prove that one way or the other." (R. p. 223, line 15 – R. p. 224, line 14). In its Order, the Commission declined to base its decision on evidence from a doctor that something "could" be a cause especially where the doctor conceded that he could not offer his opinion to a reasonable degree of medical certainty.

In looking at the medical reports, deposition testimony of the doctors, and the Appellant's testimony, the substantial evidence in the record, both subjective and objective, supports the Commission's finding that there was physical change of condition for the worse.

CONCLUSION

Based on the foregoing, this Court should affirm the Full Commission Decision and Order.

Respectfully submitted,

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Date: January 27, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

Wal-Mart Stores, Inc., Employer,

&

American Home Assurance, Carrier, Respondents.

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Table of Contents

Table of Authorities

South Carolina Cases

Statutes

Other Authorities

Argument

This appeal concerns essentially three matters: Whether the Workers' Compensation Commission ("the Commission") applied the wrong standard to a change of condition claim after receiving guidance from the appellate courts, whether the Commission erred in finding as fact Appellant, Paula Russell's, testimony was conclusory and self-serving, and whether the Commissioned erred in determining as a matter of fact that Appellant did not sustain a change of condition for the worse. Appellant, Paula Russell, argues the answers to these questions are "yes" for the reasons set out herein and set out in the brief of the Appellant.

I. The Order of the Commission indicates it again applied an incorrect legal standard to the facts of this case.

Appellant Paula Russell argued after the Commission's 2014 Order that the Commission applied the wrong legal standard to the facts of this case. This Court agreed. The Court determined from the record presented before it, that despite the fact "the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence [and stated it] 'reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior orders'" the Commission had actually "exclusively relied on the MRIs in finding Russell failed to objectively prove her claim." *Russell v. Wal-Mart Stores, Inc.* 415 S.C. 395, 401, 782 S.E.2d 753, 756 (Ct. App. 2016). Respondents now make two arguments on this point: First, they attempt to argue against the law of the case and argue the Court of Appeals erred in its 2016 decision, and second, they attempt to show that the Commission's 2019 analysis is sufficiently different from its 2014 analysis.

As a threshold matter, it is improper for Respondents to state "[they] never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard." The law of this case, as stated by the Court in 2016, is that "the Commission relied exclusively on

objective evidence." Russell, at 401, 782 S.E.2d at 756. Respondents petitioned for rehearing at that time, arguing the Court overlooked evidence demonstrating the Commission considered all the evidence and weighed it properly. (R. pp. 283 – 286). The Court of Appeals disagreed, ordering there was no basis for granting a rehearing. (R. p. 69). Respondents did not petition for a writ of certiorari, thus the case was remanded. (R. p. 70).

Once an issue is decided, the law of the case becomes the law of the case for all subsequent proceedings in the same matter. The doctrine of the law of the case is the law of the case in which it was made. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999) (law of the case doctrine "applies . . . to subsequent proceedings in the same litigation following an appellate decision"); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015) (law of case doctrine prohibits matters decided on appeal from being relitigated in the trial court in the same case). *See also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("[T]he phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."); Wright & Miller, Fed. Prac. & Proc. § 4478 (2d. ed.) (law of the case rules "do not apply between separate actions"). While the doctrine has been referenced as discretionary, it is recognized that principles "of authority . . . do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." Wright & Miller, Fed. Prac. & Proc. § 4478 (2d. ed.). Thus, it is legally incorrect for Respondents to seek to relitigate the issues adjudicated by this Court in 2016.

Furthermore, Respondents now inexplicably argue that Appellant and this Court somehow created the argument that is assigned to them and the Commission, contending: "Respondents

never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard." (Respondents' Brief p. 3). In support of this argument, Respondents quote Justice Kittredge's comments from the oral arguments of this matter when it was before the Supreme Court. Justice Kittredge, however, only reviewed the appendix as it appeared before him, and he could not have seen the arguments made by Respondents, for not every document that was a part of the record on appeal for the 2016 dispute was a part of the appendix when this matter was pending before the Supreme Court. *See* Rule 209 (b), SCACR ("a party shall not include any matter in his Designation which is not relevant to the appeal"); Rule 210 (h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal"). The matter taken before the Supreme Court was a procedural one, thus certain evidence, relevant to this appeal and relevant to the appeal decided by this Court in 2016, was excluded.

As a result, Justice Kittredge was concerned the Court attributed arguments to Respondents that they did not make and counsel for Respondents affirmed that belief during the oral arguments. (R. pp. 118 – 119). The facts, however, as reflected in the record on appeal show Respondents actively argued for an objective evidence requirement. In 2012, Counsel for Respondents asked Dr. James Merritt, "Can you say to a reasonable degree of medical certainty that there has been a change in the objective status of her low back condition"? (R. p. 245). Counsel for Respondents asked Dr. Edwards "in your opinion, there's no objective difference between those three scans"? (R. p. 222). Imperatively, before this case was tried before Commissioner Roche in 2013, Counsel for Respondents reiterated their position to Commissioner Roche stating, "we would contend there needs to be objective physical evidence of a change of condition." (R. p. 178). In Respondents' 2013 brief to the Commission on appeal, their only argument was "The Hearing Commissioner erred in finding [Appellant] sustained a change of condition for the worse under sec. 42-17-90

because Claimant failed to meet her burden of proof demonstrating to a reasonable degree of medical certainty that there were any *objective* changes to her physical condition." (R. p. 279) (emphasis added). Likewise, before the appellate panel of the Commission in 2013, counsel for Respondents stated, "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). After this Court issued its 2016 opinion, the Commission reaffirmed it was under the impression that "physical was synonymous with objective," to which counsel for Respondents replied "So was I." (R. p. 146).

The observations made by Justice Kitteridge were a result of his having, and being restricted to, a limited version of the record from this case. Appellant has not created a "strawman's argument," Appellant is not substituting the Commission's actual findings, and this Court did not incorrectly attribute a position to Respondents. Respondents argued for an objective evidence requirement, that standard was accepted by the Commission, and this Court correctly rejected that standard.

While Respondents argue the Commission did not err in its 2014 Order, they also seek to show that the 2019 Order of the Commission complies with the remand instructions of this Court. Those arguments are inextricably intertwined and show the Commission did not sufficiently review the evidence presented before it in light of the correct legal standard. In 2016, this Court stated the following to show the Commission applied the incorrect legal standard:

> Although the order stated the Commission gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts" and they did "not support a physical change of condition for the worse[,]" the order also concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between" the MRIs. The Commission found both doctors "ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans [,]" and "[t]he preponderance of the evidence shows that [Russell's] radiographic condition has not worsened." However, the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. Dr. Merritt testified

> to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. He based his opinion on the MRIs and "in part on her subjective complaints." Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic.

Russell, at 400, 782 S.E.2d at 756 (alterations in original).

In the 2019 Order, the Commission again stated that it gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts" and they did "not support a physical change of condition for the worse." (R. p. 8). The 2019 Order again concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between" the MRIs. (R. p. 8). The Commission found both doctors "ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans [,]" and "[t]he preponderance of the evidence shows that [Russell's] radiographic condition has not worsened." (R. p. 8). Respondents here believe the Commission's analysis is sufficient to support its order denying a change of condition. However, the 2019 Order again also ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. (R. pp. 2 – 11). Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. (R. pp. 237 – 38). He based his opinion on the MRIs and "in part on her subjective complaints." (R. p. 252). Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic. (R. pp. 216 – 18). Each quote the Court cited from the 2014 Order to support its decision is also present in the 2019 Order.

Respondents additionally appear to assert that the Commission did not need to actually review the evidence but instead only claim to have reviewed the subjective evidence by quoting

Justice Hearn's comments at oral arguments.[1] The suggestion that a Justice would expect a lower court to correct an erroneous order on its face without making a legitimate review of the evidence in light of the proper legal standard should not be persuasive to this Court. Regardless of the language in the order, it is evident the Commission did not follow its remand instructions.

Furthermore, the Commission continues to place undue or improper emphasis on the word "physical," which has an admittedly unclear pattern of adoption. *See Cromer v. Newberry Cotton Mills*, 201 S.C. 349, ___, 23 S.E.2d 19, 23 (1942) (stating "it is clear that a change in condition means a change in the physical condition of the claimant as a result of the original injury."); (*Keeter v. Clifton Mfg. Co.*, 255 S.C. 389, 393, 82 S.E.2d 520, 522 (1954) (stating twelve years later "Whether the phrase 'change in condition' therein mentioned contemplates only a change in physical condition need not now be decided. There is a conflict in the authorities on this question."). The Court, however, did clarify in 2016 that "physical" did not mean "objective," which was contrary to the opinion of the Commission. (R. p. 146 ("physical was synonymous with objective")). Nevertheless, the Commission still fixated on the word physical. (R. p. 146) ("[but] we still have the word physical. That has not been changed. We still have physical."). Correspondingly, the Commission's 2019 Order overemphasized that "a change in condition occurs when a claimant experiences a change in 'physical condition.'" (R. p. 5 (emphasis in original)). However, the facts here are clear that Appellant's claim is based on a changed of her physical condition. Dr. Edwards stated plainly, "I don't have any doubt that her – the radiographic abnormalities . . . is what's causing her symptoms." (R. p. 214). He further stated, "That's part of an objective physical finding, though it does have a subjective component to it." (R. p. 223).

[1] Justice Hearn, like Justice Kittredge, was also restricted to the limited record that was before the Supreme Court when it decided a procedural issue.

For these reasons, Appellant asserts the Commission failed to apply the correct standard of law in contravention of the guidance provided by this Court and inserted an objective evidence standard into the statute. Appellant therefore requests the Court reverse the order of the Commission for this reason and provide the Commission with specific instructions for remand.

II. The Commission erred in its factual determinations it uses to discredit the Appellant's testimony.

While it is certainly true the Commission is the fact finder and is empowered to determine witness credibility, its determinations are not immune from appellate review. *See e.g., Able Communications, Inv. V. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). Simply detailing the "flaws" the Commission found in Appellant's testimony does not amount to substantial evidence to support the Commission's credibility findings, if the underlying factual determinations are erroneous. Here, the Commission cites three reasons why it stated it did not give more weight to her testimony, claiming she was unable to establish she had new complaints that were not present at the time of the original award; she was unable to establish when she thought her condition worsened; she was unable to establish that her need for surgery was new. As a result of those findings, the Commission concluded Appellant's testimony was conclusory and self-serving. Appellant disputes the legitimacy of these findings from a legal perspective as noted in her brief, but would reiterate today that the specific findings used to support the Commission's ultimate conclusions are factually erroneous and not supported by substantial evidence.

First, the Order claims she was unable to establish she had new complaints that were not present at the time of the original award. (R. p. 8). The evidence here is simple. Appellant did not allege any additional pain other than back and abdomen pain. (R. p. 98). Commissioner Wilkerson did not make any findings of any additional conditions affecting Appellant at that time. (R. pp. 90 – 97). The conditions that plagued Claimant at the time of the original award are those

found in Commissioner Wilkerson's Order. Then, after the claim was first adjudicated, Appellant began to suffer from radicular symptoms. The Commission in its Order correctly compares her symptoms to those at the time of the original award, but reaches the inexplicable conclusion that her radicular symptoms were present at that time. (R. p. 8). The facts here are simple and clear. Appellant had no radicular symptoms at the time of the original award but did within a few months of that award. When Respondents argue the Commission reached the correct conclusion on this point, they cannot and do not cite to records from the time of the hearing or the award. Instead, they cite to old medical records.[2] There is not substantial evidence to support the Commission's findings on this point and those findings must be overturned for that reason.

Second, the Commission found Appellant was unable to establish when she thought her condition worsened. This is again an erroneous finding, and there is not substantial evidence to support this finding or to support the Commission's using this finding to discredit Appellant. Appellant was asked before Commissioner Roche "how long—about how long had you had [radicular symptoms] when you were complaining in November . . . ."? She replied, "Probably September, October." (R. p. 181). This statement is corroborated by physician testimony. (R. p. 236). The Commission offered no details as to why it found her statement was not sufficient to prove when she thought her condition worsened. Respondent therefore presumes that either the Commission did not find her answer sufficiently specific, or took issue with the confusion regarding the year during which the symptoms manifested themselves.[3] Neither of those reasons

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[2] Appellant also testified as to how the nature of the discomfort was different during her pregnancy and after the original award. Appellant's discomfort during her pregnancy resolved with giving birth.

[3] The question posed to Appellant incorrectly presupposed that the symptoms began in 2012. This mistake was present in several questions. Appellant herself corrected that mistake later in the deposition, asserting that the pertinent events of her treatment, symptoms, and termination had taken place in 2011, not 2012.

are sufficient to find she could not state when her symptoms began and do not amount to substantial evidence sufficient to support the Commission's finding.

Finally, the Commission found Appellant's testimony was conclusory and self-serving because she could not establish that her need for surgery was new. This, similar to the prior points, is a simple matter. In 2011, Commissioner Wilkerson did not award surgery, he only awarded ongoing NSAIDs, Appellant did not ask for surgery, and the treating physician did not offer or recommend surgery. (R. pp. 92 – 95). Thus, her need for surgery was not present at the time of the prior award and developed after that award. Respondents argue she could have been a candidate for surgery while she was pregnant.[4] This argument, as posited in Appellant's brief, is speculative and an improper basis for refusing to give weight to her testimony. Moreover, the proper comparison for a change of condition is the condition as it existed after the initial award compared to how it existed at the time of that award. Even if she was truly a candidate for surgery immediately after the accident, which she disputes, she was not a candidate when her claim was first decided. For these reasons, Appellant asserts the Commission's findings regarding the credibility are unsupported by substantial evidence and must be overturned.

III. The Commission's findings of fact that Appellant did not suffer change of condition for the worse is not supported by substantial evidence.

There is not substantial evidence in the record to support the order of the Commission. The Commission paints this case as one of lay evidence versus medical evidence. That is not the case. Appellant testified with specificity how her condition worsened and the Respondent-selected physicians stated her condition had worsened. The Commission's Order therefore, relies only on the fact that there were not significant, objective differences in the MRIs.

[4] Appellant was three months pregnant when she was injured.

Substantial evidence must be substantial. Prior to the passage of the Administrative Procedures Act ("APA"), the rule governing appellate review of the factual determinations of boards and commissions was "any evidence." *Lark v. Bi-lo, Inc.*, 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). The APA, however, establishes the substantial evidence rule, which "is a grant of greater appellate authority to the courts." *Id.* Substantial evidence, as defined by the United States Supreme Court and quoted by the supreme court of this state, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

Here, the evidence relied upon by the Commission and by Respondents in support of the Commission's findings is only the MRIs. That evidence itself is even disputed. Dr. Merritt, a board certified orthopedic surgeon selected by the Respondents to treat and examine Appellant was asked on cross examination "can you say there's been an objective change to a reasonable degree of medial certainty"? (R. p. 246). Dr. Merritt replied "I would say there's been a change." Dr. Edwards also brought up an interesting point regarding the comparison of MRIs when evaluating changes, noting "unless both MRIs are done [with the same magnet and machine] it's often hard for me to compare both of them." (R. pp. 244; 237). Dr. Edwards admittedly reached the opposite conclusion, only regarding his interpretation of the MRIs, stating "radiographically, there's not a significant difference to be noted in those scans." (R. p. 212). Of note, Dr. Edwards clarified after stating he saw no differences in MRIs that "it's clear that the patient's symptoms are now worse. I don't have any – I don't have any doubt about that."

Once again, the evidence here is simply Appellant's testimony that her condition changed, Dr. Merritt's testimony that her condition changed, Dr. Merritt's testimony that the MRIs reflect a

change, and Dr. Edwards testimony that her condition changed versus Dr. Edwards opinion that the change is not shown on the MRIs.

Respondents essentially point to two things in the record they believe provide substantial evidence to support the Commission's award: That Appellant had complaints of leg pain while pregnant and Dr. Edwards's opinion that there was no "objective or significant radiographical difference" in the MRIs. The prior complaints of leg pain cannot be used to support the order. While pregnant, Appellant had some leg symptoms. Those symptoms were of a different nature and were not present for many months leading up to the adjudication of this claim. (R. p. 237). There is no requirement in the Act that a claimant alleging a change of condition for the worse have never experienced a symptom before. It is simply that her condition changed after the last payment of compensation and that the change is causally related to the original accident. S.C. Code Ann. § 42-17-90.

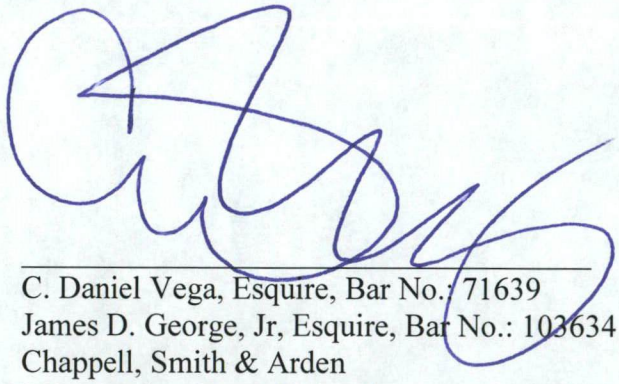
Likewise, the opinion of Dr. Edwards regarding what is shown on the MRIs is not sufficient evidence to justify the decision of the Commission, because that opinion is disputed by Dr. Merritt, the MRIs were not performed on the same machine, and Dr. Edwards did not find the lack of objective differences in the MRI conclusive of whether Appellant suffered a change of condition. In fact, based on his clinical findings, Dr. Edwards still believed she sustained a change of condition, notwithstanding the fact he did not identify objective changes in the MRIs, stating she had a chronic, long-standing condition, and his physical examination demonstrated the change of condition, even if his examination contained a subjective component. (R. p. 223 ("So it's difficult to answer the question with a simple yes or no.")).

This is the essence of the evidence in this case. The Commission repeats Dr. Edwards's opinions regarding the lack of objective changes he saw in the MRIs in an effort to make it appear

that significant evidence supports their conclusion. Instead, it is simply a reiteration of his statement that he does not see objective changes and his further attempts to state his opinions in a manner that was consistent with the "objective evidence" requirement that was erroneously proposed as law. Thus, there is not substantial evidence to support the finding of the Commission that Appellant did not sustain a change of condition for the worse and the Order of the Commission must be reversed for that reason.

Conclusion

Based upon the foregoing, Appellant asserts the Order of the Commission must be reversed. The Commission continued to apply an objective evidence standard and erred in its fact finding regarding credibility and the ultimate change of condition question. Therefore, the Appellant respectfully asks this Court reverse the Order of the Commission and award benefits for a change of condition.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

Wal-Mart Stores, Inc., Employer,

&

American Home Assurance, Carrier, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant and Reply Brief comply with Rule 211(b), SCACR

January 28, 2020

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THE STATE OF SOUTH CAROLINA
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Paula Russell, Claimant, Appellant,

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

Appellate Case No. 2019-001380

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2022-UP-422
Heard June 9, 2022 – Filed November 23, 2022

AFFIRMED

C. Daniel Vega and James David George, Jr., both of Chappell Smith & Arden, P.A., of Columbia, for Appellant.

Johnnie W. Baxley, III, of Willson Jones Carter & Baxley, P.A., of Mount Pleasant, for Respondents.

PER CURIAM: Paula Russell appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Commission) finding she failed to prove a change of condition under section 42-17-90 of the South Carolina Code (2015). We affirm.

FACTS/PROCEDURAL HISTORY

This case has an extensive procedural history, beginning with Russell's work-related back injury at Wal-Mart in 2009. A single commissioner issued the original order in June 2011, stating Russell had reached maximum medical improvement (MMI) and was entitled to compensation for a seven-percent back impairment disability rating. The single commissioner also found Russell was entitled to ongoing pain medication. That order was not appealed. Russell timely filed a Form 50, requesting the Commission review her award for a change of condition for the worse, and a single commissioner heard the case in 2013. Since 2013, this case has been reviewed by multiple single commissioners and several times by the Commission. Our supreme court and this court have also considered aspects of this case.[1] Finally, in a July 2019 order, the Commission found Russell did not prove a compensable change of condition under section 42-17-90.[2] That order is the subject of this appeal.

In 2013, Russell testified she had experienced new symptoms since reaching MMI, including shaking and pain radiating down into her legs. Russell stated she had pain in her legs before MMI but it was not "the same stiffness or the sharpness."

The record contains a letter from Dr. James Merritt, an orthopedist who treated Russell before referring her to Dr. William Edwards, a spine surgeon. In November 2011, Dr. Merritt stated, "I do feel that since [Russell] is getting increasing pain that the condition has worsened." Russell's medical records from February 2012 show that Dr. Edwards agreed with Dr. Merritt's assessment of the original seven-percent impairment rating of Russell's back. Dr. Edwards wrote, "Though she appears to have worsen[ed] radicular symptoms predominantly on the right side, her MRI scan is unchanged and it is unlikely that the condition has worsened from an objective standpoint." In March 2012, Dr. Merritt wrote:

> [T]here is not much else we can do from [a] nonoperative standpoint. She has seen Dr. Edwards who also felt that

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[1] *See Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 290–91, 826 S.E.2d 863, 863 (2019) (holding the order of the single commissioner was immediately appealable); *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 401, 782 S.E.2d 753, 756–57 (Ct. App. 2016) (holding the Commission erred in using an objective evidence standard instead of the preponderance of the evidence standard).

[2] The Commission found Russell was entitled to ongoing anti-inflammatory medication.

> really not much else can be done and surgery would be a last resort. . . . [A] lot of pain seems to be in her back. At this point . . . she is not quite ready . . . for a surgical procedure.

In July 2012, Dr. Edwards wrote:

> [Russell] has had long standing radicular right buttock and leg pain since 2009. . . . All potential risks were discussed with her including my inability to guarantee her complete relief of symptoms especially the mechanical component of her discomfort. She indicated that she would be thankful for even a small measure of improvement in her radicular pain hence surgery is offered.

In his deposition, Dr. Merritt stated Russell's post-MMI MRI showed a slightly worsened condition but acknowledged he did not see the actual films and he would defer to Dr. Edwards, who was "more of an expert on spine MRIs." Dr. Merritt stated Russell had pain in her legs before MMI but when he saw her in September 2011, it was a new kind of anatomical distribution.

In his deposition, Dr. Edwards stated Russell's pre-MMI and post-MMI radiological scans were "substantially the same." Dr. Edwards stated Russell's complaints had increased but her symptoms were "radiographically not worsening." He stated the worsening of her symptoms was "predominantly a subjective or symptomatic worsening," although it could have been a "chronic change in that nerve that [made] it more painful or more symptomatic."

Dr. Edwards believed it was reasonable to offer Russell surgical intervention because she had a chronic problem that had not improved, which she believed to be worsening and Dr. Edwards had "no reason to doubt that." He said Russell would have been a candidate for surgery at the time of the initial injury but because she was pregnant it was probably not considered. 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." He affirmed there was a disc pathology that was compressing the nerve root as early as September 2010. He stated, "[S]he doesn't have any weakness in her

muscles that are innervated by that particular nerve. . . . [I]t's the symptoms of discomfort, predominantly, that can certainly worsen." Dr. Edwards could not state to a reasonable degree of medical certainty that there was a "chemical leaking affecting the nerve root."

In the order before us, the Commission noted it reviewed all "subjective and objective" evidence and stated it was "cognizant of the fact that testimony from both doctors and statements out of medical reports can be cherry-picked to support either position." The Commission stated it did not find that "in this, or any other case, objective evidence is required to establish a change of condition." Rather, based on a review of all of the evidence, it assigned "more weight to the objective medical evidence including the MRI scans and testimony and opinion of Dr. Edwards than to [Russell's] subjective complaints." It found that although there was "*some*" evidence Russell may have suffered a change of condition for the worse, "the *preponderance* of the evidence, both subjective and objective," did not establish such a change. The Commission found:

> [Russell was] unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened and she was unable to establish that her need for surgery was new or occurred after the original award.

The Commission stated it gave more weight to Dr. Edwards's testimony than Dr. Merritt's because Dr. Merritt himself deferred to Dr. Edwards's judgment. The Commission found both doctors ultimately testified the pre-MMI and post-MMI MRIs were the same. It also noted that Dr. Edwards testified Russell's disc protrusion had been contacting the nerve in the same way throughout the course of her claim. The Commission examined whether Russell's claim of leg pain was present at the time of the original injury and noted that she indeed complained of leg pain at that time. Further, the Commission found there was no support for Russell's contention that her need for surgery was new or developed after the original award. This appeal followed.

ISSUE ON APPEAL

Did the Commission err in finding Russell failed to prove a change of condition for the worse?

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the Appellate Panel of the Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134–35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the [] Commission is the ultimate fact finder." *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Commission is "specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence." *Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 264, 652 S.E.2d 90, 93 (Ct. App. 2007).

Thus, this court "will not substitute its judgment for that of the [C]ommission as to the weight of the evidence on questions of fact." *Therrell v. Jerry's Inc.*, 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). "[Appellate courts] may reverse or modify the [C]ommission's decision if [a p]etitioner has suffered the appropriate degree of prejudice and the [C]ommission's decision is [a]ffected by an error of law or is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.* at 25, 633 S.E.2d at 894–95 (quoting S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2022)). "It is not within our province to reverse findings of the Commission which are supported by substantial evidence." *Broughton v. South of the Border*, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999). "Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the [Commission] reached." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 519, 466 S.E.2d 357, 359 (1996). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent [the Commission's] finding from being supported by substantial evidence." *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995) (quoting *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)).

LAW/ANALYSIS

Russell argues the Commission once again required her to prove a change of condition for the worse using an "objective evidence" standard instead of the preponderance of the evidence. We disagree.

A claimant may seek to reopen an award under the Workers' Compensation Act if there has been a change in condition. S.C. Code Ann. § 42-17-90 (2015) (providing that upon the motion of any party based upon a change of condition,

any award may be reviewed and thereafter diminished or increased). "The purpose of this section is to enable the [Commission] to change the amount of compensation, including increasing compensation when circumstances indicate a change of condition for the worse." *Clark v. Aiken Cnty. Gov't*, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005). "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." *Gattis v. Murrells Inlet VFW # 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003). Thus, "[t]he issue before the Commission is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." *Id.* (quoting *Krell v. S.C. State Highway. Dep't*, 237 S.C. 584, 588–89, 118 S.E.2d 322, 324 (1961)).

The determination of whether a claimant experiences a change of condition is a question for the fact finder. *Krell*, 237 S.C. at 588, 118 S.E.2d at 323–24.

> [I]t is not the province of [appellate courts] to determine whether the greater weight of the evidence supported the finding that a change had taken place in the condition of the claimant such as would warrant an extension or enlargement of the award, or whether the greater weight of the evidence supported the finding that such change resulted from the injury. . . .

Id. (quoting *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 371, 23 S.E.2d 19, 28 (1942)).

The order before us specifically sets forth that the Commission did not require Russell to provide objective evidence to establish a change of condition. The Commission went to great lengths to emphasize that it considered all of the evidence, objective and subjective. The Commission found the preponderance of the evidence supported the conclusion that Russell did not suffer a change of condition for the worse. The order clearly sets forth the Commission's findings of fact and conclusions of law. The order shows that the Commission used the proper standard when making its determination, and it did not commit an error of law. *See Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 87, 681 S.E.2d 595, 600 (Ct. App. 2009) (noting the Commission is given discretion to weigh and consider all the evidence, including both lay and expert testimony).

Russell additionally argues the Commission's factual finding that she did not suffer a change of condition for the worse is not supported by substantial evidence. We disagree.

> "Substantial evidence" is not a mere scintilla of evidence nor the 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 that the administrative agency reached or must have reached in order to justify its action.

Gattis, 353 S.C. at 108, 576 S.E.2d at 195 (quoting *Lark*, 276 S.C. at 135, 276 S.E.2d at 306). "When there is a conflict in the evidence, either by different witnesses or in the testimony of the same witness, the findings of fact of the Commission are conclusive." *Anderson v. Baptist Med. Ctr.*, 343 S.C. 487, 492–93, 541 S.E.2d 526, 528 (2001).

As the Commission stated, some evidence shows that Russell suffered a physical change of condition for the worse based on her subjective complaints. Both doctors agreed that Russell's complaints of pain had increased since reaching MMI. Russell stated the pain in her legs was worse than before she reached MMI, and Dr. Edwards said he had no reason to doubt her complaints. Dr. Merritt wrote that because Russell's complaints had worsened, her condition had worsened. However, it is solely within the province of the Commission to weigh the evidence and make the determination of whether the preponderance of the evidence supports a physical change of condition. Dr. Edwards could not say there had been a physical change in Russell's condition. He opined that she would have been a candidate for surgery at the time of the initial injury. He affirmed there was a disc pathology that was compressing the nerve root as early as September 2010. The Commission weighed all of the evidence and decided that the preponderance of the evidence did not support Russell's claim of a change of condition for the worse. Because reasonable minds could reach the same conclusion as the Commission based on the preponderance of the evidence, we find the Commission's determination was supported by substantial evidence. *See Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999) ("Expert medical testimony is designed to aid the Commission in coming to the correct conclusion; therefore, the Commission determines the weight and credit to be given to the expert testimony."); *see also Robbins*, 375 S.C. at 263, 652 S.E.2d at 93 (holding there was no change of condition for the worse when the claimant

testified his back pain was "much worse" than before and evidence before and after the settlement of his claim showed the same condition).

CONCLUSION

Accordingly, the Commission's order is

AFFIRMED.

WILLIAMS, C.J., and KONDUROS and VINSON, JJ., concur.

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Dec 08 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

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

PETITION FOR REHEARING &
SUGGESTION FOR REHEARING *EN BANC*

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

*

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

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

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

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

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

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

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

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

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

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

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

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

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

**

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

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

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

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

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

***

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

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

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

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

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

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

****

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

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

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

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

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

*****

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

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

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

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

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

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

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

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

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

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

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

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

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

******

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

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

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell, Appellant,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

CERTIFICATE OF SERVICE

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

Johnnie W. Baxley, III
jwbaxley@wjcblaw.com

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

Respectfully Submitted,

s/ James D. George, Jr.
James D. George, Jr.
Chappell, Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 509-5837
jgeorge@csa-law.com

December 8, 2022

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

JG

Johnnie,

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

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

Best,

JDG

Petition for Rehear….22.pdf

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December 8, 2022

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

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

Dear Ms. Kitchings:

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

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

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

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

Thank you for your assistance in this matter.

Very Truly Yours

Very Truly Yours,

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

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

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December 8, 2022

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

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

Dear Ms. Kitchings:

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

Thank you for your assistance in this matter.

Very Truly Yours,

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

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

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December 8, 2022

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

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

Dear Ms. Kitchings:

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

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

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

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

Thank you for your assistance in this matter.

Very Truly Yours,

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

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

RECEIVED
Dec 19 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

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

RETURN TO PETITION FOR REHEARING

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Attorney for Appellant

Wal-Mart Stores, Inc., and American Home Insurance (hereinafter "Respondents"), by and through their undersigned attorney, respectfully submit this Return to Appellant's Petition for Rehearing. Respondents assert that the Court of Appeals properly affirmed the decision of the Appellate Panel of the Workers' Compensation Commission (hereinafter "the Commission") by Opinion dated November 23, 2022. Consequently, Respondents respectfully request that Appellant's Petition for Rehearing be denied.

I. Appellant's Petition for Rehearing should be denied, as the Court properly affirmed the Commission's finding that Claimant did not meet her burden of proving a change of condition.

"In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640, 643 (2011) (citing *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, *Appellate Practice in South Carolina* 309 (1999))).

A. The Court correctly found that the Commission properly reviewed and weighed the record as a whole and applied the correct standard, by a preponderance of the evidence, in accordance with the Directives given by the Court in the Court's 2016 Order.

Appellant contends that "[t]he Court ostensibly overlooked the [Commission's] failure to correct its errors as required by *Russell I*." (Petition for Rehearing, p. 7). Appellant argues that ". . . the [Commission's] order indicates that the [C]omission only stated the correct standard, without correcting the errors raised by the Court in 2016 or reviewing the evidence appropriately." *Id.* Specifically, Appellant alleges that the Court misapprehended or

overlooked the Commission's reliance on an objective standard." (Petition for Rehearing, p. 2). 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.

Appellant further argues that the Commission did not contemplate the opinions of the physicians as directed by this Court, 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 Appellant. (Findings of Fact #8, #9, and #11, R. p. 8). In her Petition for Rehearing, Appellant 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 Rehearing, p. 2). 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 Appellant'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.

Similarly, Appellant 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 Rehearing, p. 2-3). This is an argument as to weight. Appellant 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 this Court, 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 Appellant'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 Appellant does not mean that

the evidence was not duly considered and properly weighed by the Commission.

Appellant's argument in her Petition 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. If the Order of the Commission is taken at face value, 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 by the Court of Appeals, and the Commission properly gave more weight to certain evidence. This is what the Court of Appeals found in its most recent decision. To accept Appellant'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 Appellant, this Court must find that 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. Appellant'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.

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

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 (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.*

Appellant alleges that the Court must have misapprehended or overlooked aspects of the evidence and Appellant's argument in affirming the Commission's decision, as there is no other way to reach the Court's ultimate conclusion. (Petition for Rehearing, p. 4, 8). Respondents respectfully disagree. As noted by this Court, there is evidence on both sides and the Court properly found that substantial evidence exists to support the Commission's decision after giving due consideration to the facts, law, and positions of the parties.

Appellant also contends that the Court "misapprehended the unimportance of [her] prior complaints." (Petition for Hearing, p. 5). She further 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). Of course, this is incorrect. As argued at length in Respondents' Final Brief submitted to this Court, the medical evidence and Appellant's own testimony indicate that Appellant 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 Appellant 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 Appellant'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 Appellant had a physical change in her condition. As properly noted by the Court of Appeals, this constitutes substantial evidence to support the factual findings of the Commission.

Appellant 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 Appellant 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 this Court, 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, Claimant argues that "[t]he Court ostensibly overlooked the [C]ommission's errors in its credibility determinations, as the Court did not address that portion of Russell's argument." (Petition for Rehearing, p. 8). Appellant contends that, "[t]o justify its *sole* reliance on the objective evidence and disregard for the subjective evidence in this case, the [C]omission made nonsensical credibility findings." (Petition for Rehearing, p. 8-9). Appellant asserts that the credibility determinations made by the Commission are not immune from appellate review. *Id.* (citing *Able Communications, Inc. v. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151 (1886)). However, is clear that Appellant 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 Appellant's testimony. (*See e.g.*, Finding of Fact #7, R. p. 8). The Commission's Order also describes how it weighed the Appellant'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 Court's supposed oversight, Appellant alleges that Respondents agree that Appellant's symptoms have worsened. (Petition for Rehearing, p. 11). 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 Appellant has sustained a change of condition. Appellant 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 the South

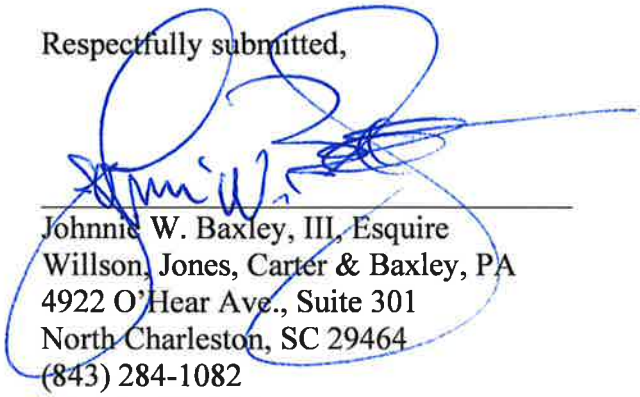
Carolina Supreme Court. (See R. p. 102, line 17 – p. 103, line 4; R. p. 118, lines 10-12; R. p. 118, line 15; R. p. 119, line 3; *see also* Respondents' Final Brief, p. 10-11).

Appellant argues that there is evidence in the record that suggests she has a change of condition; therefore, the Court must have misapprehended or overlooked the arguments in affirming the Commission's decision. The Commission readily acknowledges in its Order that "there is *some* evidence that Appellant may have suffered a change of condition;" however, in its discretion, the Commission ultimately concludes that Appellant failed to prove a change of condition by a preponderance of the evidence. (Finding of Fact #15, R. p. 9). The South Carolina Supreme Court has 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: Appellant failed to prove a physical change of condition after the original award based on a preponderance of the evidence. As such, the Court did not misapprehend or overlook the evidence or arguments in this case and correctly affirmed the decision of the Commission.

For the foregoing reasons, Respondents respectfully request that Appellant's Petition for Rehearing be denied by This Honorable Court.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,



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December 19, 2022

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2019-001380

Paula Russell, Claimant, Appellant,

v.

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

CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, Attorney for the Respondents with **WILLSON JONES CARTER & BAXLEY, P.A.** in North Charleston, South Carolina, and that on **December 19, 2022**, I electronically served the foregoing **RETURN TO PETITION FOR REHEARING** to the following via e-mail pursuant to the Order of the South Carolina Supreme Court dated August 25, 2021:

Via E-Mail Only
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December 19, 2022

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December 19, 2022

Via E-mail Only
The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Paula Russell vs. Walmart Inc.
Appellate Case No. 2019-001380

Dear Ms. Kitchings:

In response to the correspondence received from your office, dated December 9, 2022, please find enclosed the following documents for filing in regards to the above-referenced case:

1. Respondents' Return to Appellant's Petition for Rehearing; and
2. Certificate of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB/mth

cc (w/ encl.): C. Daniel Vega, Counsel for Appellant (via e-mail)
James D. George, Jr., Counsel for Appellant (via e-mail)

The South Carolina Court of Appeals

Paula Russell, Claimant, Appellant,

v.

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

Appellate Case No. 2019-001380

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED
Feb 10 2023

cc:
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Johnnie W. Baxley, III, Esquire
James David George, Jr., Esquire
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