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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

Unpublished Opinion No. 2022-UP-422 (S.C. Ct. App. filed Nov. 23, 2022)
Appellate Case No. 2023-000403

Paula Russell, Claimant, Petitioner,

v.

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

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Secondary Sources

STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE APPELLANT PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S FINDING THAT PETITIONER FAILED TO SATISFY HER BURDEN OF PROVING A CHANGE OF CONDITION?

STATEMENT OF THE CASE

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

On December 9, 2011, Petitioner filed a Form 50 claiming she was experiencing a change of condition for the worse. A hearing on the change of condition claim was held on February 11, 2013, before Commissioner Andrea Roche. On August 5, 2013, Commissioner Roche found that Petitioner suffered a change of condition for the worse and ordered Respondents to provide Petitioner with medical care and attention for the change of condition and temporary total disability benefits starting on December 1, 2011, to the present.

The August 5, 2013, Order was timely appealed by Respondents and a hearing was held before the Appellate Panel of the South Carolina Workers' Compensation Commission ("Full Commission") on December 16, 2013. The Full Commission issued its Order on January 30, 2014, reversing Commissioner Roche and finding Petitioner failed to prove by a preponderance of the evidence in the record that she sustained a change of condition for the worse. In making this ruling, the Full Commission considered all of the

evidence as a whole but gave greater weight to the medical records, the diagnostic tests, and the testimony of the medical experts in reaching a decision. Petitioner appealed the Decision of the Full Commission to the Court of Appeals, and oral arguments were held on October 20, 2015. On January 20, 2016, the Court of Appeals issued a decision remanding the case back to the Full Commission with directives to determine whether the Petitioner experienced a change of condition by a preponderance of the evidence in the record.

The case was remanded to Commissioner Michael R. Campbell, who found that Petitioner had suffered a change of condition for the worse. Respondents appealed that decision, and on September 15, 2017, the Full Commission ordered a complete reversal of the Single Commissioner's Order and remanded the case for a hearing *de novo*. Petitioner appealed this ruling to the South Carolina Court of Appeals, and Respondents filed a Motion to Dismiss, arguing that the appeal was interlocutory. The Motion to Dismiss was subsequently granted on December 8, 2017. Petitioner filed a Petition for a Writ of Certiorari to the South Carolina Supreme Court regarding the appealability of the Commission's Order. The Supreme Court filed an opinion dated April 3, 2019, finding that the Commission's Order was immediately appealable. The Supreme Court reversed the Court of Appeals' dismissal, reversed the order remanding the case to a single commissioner, and remanded the case to the Full Commission for a review of Commissioner Roche's August 5, 2013 Order based on the 2016 holding of the Court of Appeals.

In line with the 2016 holding of the Court of Appeals, the Full Commission issued an Order on July 18, 2019, finding that Petitioner did not suffer a change of condition for

the worse based on the record as a whole, considering both the subjective and objective evidence. Petitioner appealed to the Court of Appeals, which affirmed the Full Commission's decision in full by Opinion filed November 23, 2022. Thereafter, Petitioner filed a Petition for Rehearing with the Court of Appeals, which was denied. Petitioner subsequently filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on March 10, 2023, which was granted on December 12, 2023.

STATEMENT OF THE FACTS

Petitioner sustained an admitted injury on November 3, 2009, and received appropriate medical treatment until she was released at maximum medical improvement. Commissioner Wilkerson awarded seven percent (7%) permanent partial disability on June 8, 2011. After receiving her award, Petitioner 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, Petitioner 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, Petitioner reported new complaints of pain down her legs to Dr. James O. Merritt, an orthopedist. (R. p. 236, lines 9-10). However, at Dr. Merritt's deposition, he admitted he had some notes in his file showing Petitioner 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 Petitioner'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 Petitioner 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 both studies were "substantially the same", 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, Dr. Edwards opined Petitioner'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 Petitioner'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 Petitioner does not have any weakness in her muscles innervated by that particular nerve; and that Petitioner's reflexes remain the same. (R. p. 221, lines 17-21; R. p. 222, lines 9-12). Further, in July 2012, Dr. Edwards noted that "[Petitioner] has had longstanding radicular buttock and leg pain since 2009. . .". Dr. Edwards also opined that Petitioner 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 Petitioner 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 (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

Wal-Mart Stores, Inc., and American Home Insurance (hereinafter "Respondents"), by and through their undersigned attorney, respectfully submit this Brief of Respondents. Respondents assert that certiorari was improperly granted in this matter, and that the Court of Appeals properly affirmed the decision of the Appellate Panel of the Workers' Compensation Commission (hereinafter "the Commission"). Consequently, Respondents respectfully request that This Honorable Court affirm the decision rendered by the Court of Appeals in its Opinion dated November 23, 2022.

I. A WRIT OF CERTIORARI WAS IMPROPERLY GRANTED IN THIS MATTER, AS PETITIONER FAILED TO SET FORTH SUFFICIENT "SPECIAL AND IMPORTANT REASONS" UPON WHICH A WRIT OF CERTIORARI MAY BE GRANTED.

The South Carolina Appellate Court Rules state that a writ of certiorari "will be granted only where there are "special and important reasons." SCACR Rule 242. Rule 242 sets forth five main reasons that the Supreme Court will grant a writ of certiorari: (1) Where

there are novel questions of law, (2) where there is a dissent in the decision of the Court of Appeals, (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court, (4) where substantial constitutional issues are directly involved, and (5) where there is a federal question. None of these reasons apply to the instant case.[1]

First, Petitioner contends that the (2022) decision of the Court of Appeals conflicts with a prior decision of This Court. However, as Petitioner has repeatedly pointed out throughout this appeal, "[this] Court reviewed this matter on procedural grounds and on a limited appendix in 2019 (hereinafter Russell II); no record on appeal was generated." (See e.g., Petition for Writ of Certiorari, p. 19). Moreover, this Court made no holdings with regard to the merits of the case and remanded the case back to the appellate panel for "immediate and final review of the original commissioner's August 5, 2013 order in accordance with the 2016 holding of the court of appeals". See Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 291, 826 S.E.2d 863, 868 (2019). Likewise, the 2016 decision of the Court of Appeals (hereinafter "Russell I") specifically declined to consider the merits of Petitioner's change of condition claim and remanded the case to the Commission for determination. Russell v. Wal-Mart Stores, Inc., 782 S.E.2d 753 (Ct.App. 2016). As such, there is no conflict between the 2022 decision of the Court of Appeals and any previous appellate decisions.

Moreover, Petitioner has raised no novel questions of law. It is well-settled what a workers' compensation claimant must establish in order to prove a change of condition for the worse. The law (and the 2019 Order of this Court) is equally clear that objective

[1] While Petitioner has stated no grounds upon which a writ of certiorari should have been properly be granted, it is specifically unquestionable that no dissent, constitutional issue, or federal question is involved in this case.

evidence is not required to prove a change of condition for the worse by a preponderance of the evidence, which is explicitly acknowledged and applied by the Commission in its Order. (Conclusion of Law #6, R. p. 10). Nearly the entirety of Petitioner's Final Brief submitted to the Court of Appeals, Petition for Rehearing, Petition for Writ of Certiorari, and Brief submitted to this Court discusses issues of fact, not law. Petitioner wishes to create unclarity and novelty where none exists. An unfavorable factual determination does not inherently make for a "special or important reason" upon which certiorari should have been granted. Appellate courts exist to review legal issues, not factual issues. The issue in the instant appeal is purely factual – whether there is substantial evidence in the record to support the Commission's finding that Petitioner failed to prove a change of condition per section 42-17-90 of the South Carolina Code. Consequently, Respondents contend that a writ of certiorari should not have been granted in this matter; Respondents request that this Court find that certiorari was improvidently granted and dismiss this ongoing appeal of factual disputes.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE FULL COMMISSION'S FINDING THAT PETITIONER FAILED TO SATISFY HER BURDEN OF PROVING A CHANGE OF CONDITION.

The record and the Commission's 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 Petitioner, 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, 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. 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 255, 153 S.E.2d 697 (1967)). 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 (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 (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 (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 Court of Appeals correctly found that the Commission properly reviewed and weighed the record as a whole and applied the correct standard in accordance with the Directives given by the Court in the Court of Appeals' 2016 Order.

Petitioner alleges that "[t]he court of appeals fails to require the [C]ommission correct the error found in Russell I." (Brief of Petitioner, p. 26). Just as she did before the Court of Appeals, Petitioner continues to argue that "... the order of the [C]ommission shows it only reiterated the appropriate standard, without correcting the errors raised by the [C]ourt of [A]ppeals in 2016 and without reviewing the evidence properly." (Brief of

Petitioner, pp. 26-7). Specifically, Petitioner alleges that the Commission's order indicates a continued reliance on an objective standard; the words 'objective' and 'subjective' are used throughout." (Brief of Petitioner, p. 27). However, a plain reading of the Commission's Order proves this argument to be incorrect.

In finding that Petitioner 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 and explicitly recognizes the correct legal standard and duly considers and weighs all of the evidence as instructed by Russell I.

The Commission expressly followed the specific instructions given by the Court of Appeals in its 2016 Opinion. Petitioner argues that the Commission denied Petitioner's

change of condition due to relying solely on objective evidence: Petitioner's MRIs of her lower back. However, an actual reading of the Commission's July 18, 2019, Order makes it clear that this allegation is both factually and legally false. Petitioner has created this illusion in order to form an argument against it. It is evident that Petitioner is engaging in a straw-man's argument,[2] a logical fallacy. In reality, Petitioner 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 Petitioner 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.

Petitioner has used this straw-man argument for quite some time on this case, which was adopted by the Court of Appeals in its 2016 decision. At Oral Arguments before the South Carolina Supreme Court, Case No. 2018-000354,[3] 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

[2] 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).

[3] Respondents cite to these Oral Arguments not for precedential value, but to show this Court the observations made by the South Carolina Supreme Court.

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 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 in its Order that 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).

The Commission clearly followed the Directives of the Court of Appeals in its 2016 Opinion and considered all of the evidence, not just the objective as Petitioner claims. Even more telling, the Commission admittedly points out that there is *some* evidence that Petitioner 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[4] aptly points out:

[4] Again, Respondents are not citing to statements made at Oral Arguments for precedential value.

> 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.

Petitioner further argues that the Commission did not contemplate the opinions of the physicians as directed by the Court of Appeals in its 2016 decision, resulting in the requirement of objective evidence. However, the Commission clearly indicates it considered the medical reports, the diagnostic tests, the testimony of Dr. Merritt, the testimony of Dr. Edwards, and the testimony of Petitioner. (Findings of Fact #8, #9, and #11, R. p. 8). In her Brief to This Court, Petitioner attempts to manufacture a reliance on an objective standard by improperly categorizing the medical evidence in this case into three conclusive categories: No change [of condition], neutral, and change [of condition]. (Brief of Petitioner, p. 18). This is a great oversimplification and mischaracterization of this evidence. The medical evidence in this case is complicated and often times contradictory. Such evidence must be considered in conjunction with the medical records, expert testimony, diagnostic imaging, and Petitioner's testimony from both before and after the original hearing. More importantly, it is within the sole discretion of the Commission to adjudicate and weigh this evidence. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) (the final determination of witness credibility and the weight to be accorded to evidence is reserved to the Appellate Panel of the Workers' Compensation Commission).

Petitioner acknowledges this well-settled principle in addressing the Court of Appeal's citation to its decision in Robbins v. Walgreens & Broadspire Servs., Inc. 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007); (Brief of Petitioner, p. 20 ("Robbins permits the commission weigh the testimony and give greater weight to portions of the evidence")).

Similarly, Petitioner contends that "the significance the [C]ommission placed on the MRIs is improper" and incorrectly states that "the only evidence upon which the Commission's [O]rder could have been based is its interpretation of the significance of the MRIs." (Brief of Petitioner, p. 19). This is an argument as to weight of evidence. Petitioner is mischaracterizing the Commission giving weight to certain evidence as conclusive proof that no other evidence was considered. As discussed in Respondents' Final Brief submitted to the Court of Appeals, the Commission did not solely or inappropriately rely on the MRI scans in making its decision. In fact, the Commission expressly states in its Order that it gave more weight to the medical records, the diagnostic tests, *and* the testimony of the medical experts, "which they found to be more persuasive than Petitioner's testimony when considering the record as a whole." (R. p. 11). Attributing more weight to an objective piece of evidence under the specific set of facts in this case does not equate to a requirement by the Commission that a change of condition claim be proven with objective evidence. The Commission did not prohibit, ignore, or disallow evidence that was not objective evidence. In fact, the plain language of the Commission's Order makes it extremely clear that the Commission considered and weighed *all* of the evidence, both objective and subjective. Simply because a piece of evidence was ultimately weighed unfavorably to Petitioner does not mean that the evidence was not duly considered or properly weighed by the Commission. "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)).

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

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

The South Carolina Administrative Procedures Act ("APA") establishes the "substantial evidence" standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); S.C. Code Ann. § 1-23-380 (Supp. 2007). In workers' compensation cases, the Commission is the ultimate finder of fact. Hunter v. Patrick Const. Co., 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986); Ross v. American Red Cross, 298 S.C. 490, 492, 381 S.E.2d 728, 730 (1989). The determination of whether a claimant experiences a change of condition is a question for the fact finder and must be affirmed if substantial evidence supports the Commission's finding. Clark v. Aiken County Gov't, 366 S.C. 102, 111, 620 S.E.2d 99, 103 (Ct. App. 2005) (citing Gattis v. Murrell's Inlet VFW #10420, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (Ct.App. 2003); Solomon v. W.B. Easton, Inc., 307 S.C. 518, 415 S.E.2d 841 (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.

Petitioner alleges that the Court of Appeals must have not reviewed or considered aspects of the evidence and Petitioner's argument in affirming the Commission's decision, as there is no other way to reach the Court's ultimate conclusion. (See Petition for Rehearing, Appx. 383-98; Brief of Petitioner). Respondents respectfully disagree. As noted by the Court of Appeals in its 2022 decision, there is evidence on both sides of this case, and the Court properly found that substantial evidence exists to support the Commission's decision after giving due consideration to the facts, law, evidence, and positions of the parties.

Petitioner also contends that the Court of Appeals erred in failing to find that Petitioner's prior complaints and surgical candidacy are of no consequence when determining whether she sustained a change of condition for the worse. In her Petition for Rehearing filed with the Court of Appeals, Petitioner contends that having the same or similar "symptoms or surgical candidacy prior to the final adjudication is not evidence that her condition has not worsened." (Petition for Rehearing, Appx. p. 388). She maintains this position in her Brief to this Court. Of course, this argument is incorrect. As argued at length in Respondents' Final Brief submitted to the Court of Appeals, the medical evidence and Petitioner's own testimony indicate that Petitioner had long-standing radicular buttock and leg pain since 2009. (R. p. 190, lines 21-25; R. p. 192, lines 2-23; 242, lines 19-25; R. p. 243, line 1).

Petitioner 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,

Petitioner's treating provider, Dr. Merritt, testified that Petitioner 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, Petitioner 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 is 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 Petitioner's treating provider due to her supposedly new complaints of pain, Dr. Merritt testified that he didn't think there was a major change. (R. p. 237, lines 13-24). However, he deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans. Dr. Edwards 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 from before and after the original hearing. (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 Petitioner'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). Dr. Edwards further testified, "the worsening of [Petitioner'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 Petitioner'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 Petitioner 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.

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

Ultimately, Dr. Edwards was unable to say whether Petitioner had a physical change in her condition. The Commission explained in its Order that it attributed more weight to Dr. Edwards's testimony than Dr. Merritt's because Dr. Merritt himself deferred to Dr. Edwards's expertise and judgement. (R. p. 8). Neither the testimony of Dr. Edwards

nor any other witness was "corrupted" by Respondents' questioning as Petitioner claims. (Brief of Petitioner, p. 30). All witnesses were subject to cross-examination by Petitioner. As properly noted by the Court of Appeals, this constitutes substantial evidence to support the factual findings of the Commission. 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 weigh 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).

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

Moreover, Petitioner argues that the Court of Appeals failed to review the Commission's credibility findings. (Brief of Petitioner, p. 22). Petitioner continues to contend 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, Appx. p. 390). Again, this is a purposeful misinterpretation and misstatement of what the Commission actually did; Petitioner is making this straw-man argument in an attempt to manufacture grounds for appeal.

Petitioner asserts that the credibility determinations made by the Commission are not immune from appellate review. Id. (citing Crane v. Raber's Discount Tire Rack, 429 S.C. 636, 842 S.E.2d 349 (2020); Able Communications, Inc. v. SCPSC, 290 S.C. 409, 411, 351 S.E.2d 151 (1986). While this is correct in essence, it is clear that Petitioner misapprehends the Court's decision in Able Communications, Inc. v. SCPSC, which requires that an administrative body make findings of fact that are sufficiently detailed to allow for appellate review – it does not empower an appellate court to substitute its judgement for that of the Commission on issues of credibility. 290 S.C. at 409, 351 S.E.2d at 151.

The Commission's Order in this case expressly details the bases for its findings, including the flaws it found in Petitioner's testimony. 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). Specifically, Petitioner testified at the hearing that she first began experiencing leg pain after the hearing in June of 2011, which she testified were "new symptoms." (R. p. 181, lines 11-20). Petitioner was unable to recall when she first "started receiving" her newly-acquired leg pain but guessed that it began in September or October of 2012. (R. p. 181, lines 17-20). On cross-examination, Petitioner doubled down on her testimony that she had never had any pain in

either of her legs since she was injured in November 2009, and that these were "new" symptoms, despite the medical evidence showing a well-documented history of symptoms in both her legs throughout the duration of the entire claim. (R. p. 188, lines 21-24; R. p. 189, lines 4-9; R. p. 191, lines 16-19). The Commission's finding regarding credibility are certainly justified given Petitioner's uncertainty regarding when her "new symptoms" began, coupled with her blatantly false testimony that she had never had never experienced these symptoms before.

Overall, the Commission indicated that Petitioner's lay testimony did not meet the burden of proving a change of condition. Id. The Commission's Order details how it weighed the Petitioner's testimony against and in conjunction with 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 . . . [and] [w]hile this finding alone is not dispositive . . . we assign it greater weight than Claimant's subjective complaints." (R. p. 8).

In an attempt to demonstrate the Commission's supposed error, Petitioner alleges that Respondents agree that Petitioner's symptoms have worsened. (Brief of Petitioner, p. 26). This is categorically false. It has always been the position of Respondents that a preponderance of the evidence as a whole – both subjective and objective – does not support a finding that Petitioner has sustained a change of condition. Petitioner has a rather extensive history of falsely claiming that Respondents have taken a certain position in this

case in order to fabricate support for her own argument, which has not gone unnoticed by the Justices of this Court. (See R. p. 102, line 17 – p. 103, line 4; R. p. 118, lines 10-12; R. p. 118, line 15; R. p. 119, line 3; see also Respondents' Final Brief to the Court of Appeals, Appx. p. 350-360). In fact, the majority of Petitioner's Brief to This Court is spent discussing prior positions allegedly taken by Respondents and rehashing prior opinions from the Commission and the appellate courts that are not on appeal and/or subject to review.

Petitioner argues that there is evidence in the record that suggests she has a change of condition; therefore, the Court of Appeals must have erred in in affirming the Commission's decision. The Commission readily acknowledges in its Order that "there is *some* evidence that Petitioner may have suffered a change of condition;" however, in its discretion, the Commission ultimately concludes that Petitioner failed to prove a change of condition by a preponderance of the evidence in the record as a whole. (Finding of Fact #15, R. p. 9). This Court has long held, "…the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto All., Inc. v. S.C. Pub. Serv. Com., 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Further, when there is a conflict in the evidence, the Appellate Panel's findings of facts are conclusive. Steed v. Mount Pleasant Seafood Co., 236 S.C. 253, 256, 113 S.E.2d 827, 828 (1960); see also Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001).

It has long been stated by all the appellate courts in South Carolina that it is the charge and duty of the Commission to be the fact finder and to weigh evidence; those factual determinations will withstand review so long as there is substantial evidence in the

record to support them. “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)). In this case, there is ample evidence to support the factual findings of the Commission and This Court should not disturb those findings.

There is substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, to allow a reasonable person to come to the same conclusion as the Commission: Petitioner failed to prove a physical change of condition after the original award by a preponderance of the evidence. Therefore, the Court of Appeals properly affirmed the Commission’s decision.

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CONCLUSION

Based on the foregoing, Respondents respectfully request This Honorable Court affirm the Court of Appeals' Order.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

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BY: _____

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