

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

Mar 15 2024

S.C. 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.

REPLY

James D. George, Jr., Bar No.: 103634
C. Daniel Vega, Bar. No.: 71639
Smith, Born, Leventis, Taylor & Vega, LLC
2801 Devine St., Ste. 300
Columbia, SC 29205
(803) 929-3600 (p)
(803) 929-3604 (f)
jgeorge@sbltv.law
dvega@sbltv.law
Attorneys for Petitioner

Index

Table of Authorities.....	ii
Arguments.....	17
I. The Court is not Bound by the Workers’ Compensation Commission’s Findings of Fact or Credibility Findings	1
II. The Commission’s Fact Finding is Unsupported by Reliable, Substantial Evidence.....	3
a. The MRIs.....	3
b. Symptomology.....	6
c. Medical testimony.....	6
d. Prior symptomology and prior treatment possibilities.....	8
III. The Commission’s Credibility Findings are Unsupported by Substantial Evidence, are Arbitrary, and do not Rationally Support the Commission’s Ultimate Findings of Fact	11
a. When Russell’s worsening occurred.....	13
b. Whether Russell’s symptoms worsened.....	15
c. Whether Russell’s need for surgery was new.....	17
Conclusion.....	18

Table of Authorities

Cases

<i>Brayboy v. Clark Heating Co.</i> , 306 S.C. 56, 409 S.E.2d 767 (1991).....	2
<i>Clark v. Philips Electronics</i> , 433 S.C. 186, 857 S.E.2d 378 (Ct. App. 2021).....	<i>Passim</i>
<i>Crane v. Raber’s Disc. Tire Rack</i> , 429 S.C. 636, 842 S.E.2d 349 (2020).....	<i>Passim</i>
<i>Estridge v. Joslyn Clark Controls, Inc.</i> , 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997).....	9 - 11
<i>Gattis v. Murrells Inlet VFW No. 10420</i> , 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003).....	12
<i>Grant v. Grant Textiles</i> , 372 S.C. 196, 641 S.E.2d 869 (2007).....	1
<i>Herndon v. Morgan Mills, Inc.</i> , 246 S.C. 201, 143 S.E.2d 376 (1965).....	4
<i>Hutson v. S.C. State Ports Auth.</i> , 399 S.C. 381, 732 S.E.2d 500 (2012).....	2
<i>Nicholson v. S.C. Dep’t of Social Serv’s</i> , 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013).....	1
<i>Owenby v. Owens Corning Fiberglass</i> , 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993).....	9
<i>Sparks v. Palmetto Hardwood, Inc.</i> , 406 S.C. 124, 750 S.E.2d 61 (2023).....	5
<i>Tiller v. Nat’l Health Care Center of Sumter</i> , 334 S.C. 333, 513 S.E.2d 843 (1999)...	4

Statutes

S.C. Code Ann. § 1-23-380.....	1
S.C. Code Ann. § 42-15-60 (B)(2).....	18
S.C. Code Ann. § 42-17-90.....	8

Secondary Sources

Georg F. Bachmann et. al., <i>Diagnosis of Rotator Cuff Lesions</i> , 7 <i>European Radiology</i> 192–197 (1997).....	5
---	---

Argument

I. The Court is not Bound by the Workers' Compensation Commission's Findings of Fact or Credibility Findings.

The Court is not bound by the Workers' Compensation Commission's (hereinafter "the commission") findings of fact or credibility. The Court may reverse the commission "if its findings are clearly erroneous in view of the reliable, probative and substantial evidence." *Clark v. Philips Electronics*, 433 S.C. 186, 192, 857 S.E.2d 378, 380 (Ct. App. 2021). The Administrative Procedures Act provides:

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

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

S.C. Code Ann. § 1-23-380 (emphasis added). Although courts may not substitute their judgment as to the weight of the evidence, they may reverse where a decision is unsupported by reliable, substantial evidence. *Grant v. Grant Textiles*, 372 S.C. 196, 200-01, 641 S.E.2d 869, 871 (2007). Substantial is not synonymous with a mere scintilla; substantial evidence is evidence which would allow reasonable minds to reach the agency's conclusion. *Nicholson v. S.C. Dep't of Social Serv's*, 405 S.C. 537, 452-53, 748 S.E.2d 256, 259 (Ct. App. 2013).

The commission's credibility findings and resulting fact finding are not immune from review and reversal by this Court. "A credibility finding has no force independent of context—deciding a party is not credible does not make all of the party's other evidence incredible." *Clark*, 433 S.C. at 192, 857 S.E.2d at 381. When the commission makes a decision on credibility grounds,

it “must explain how the credibility determination is important to making the particular factual finding.” *Crane v. Raber’s Disc. Tire Rack*, 429 S.C. 636, 647, 842 S.E.2d 349, 354 (2020). “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.” *Brayboy v. Clark Heating Co.*, 306 S.C. 56, 58-59, 409 S.E.2d 767, 768 (1991). “Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact.” *Id* at 59, 409 S.E.2d at 768. The commission “may not base a factual finding on a credibility determination without explaining both the basis of the credibility determination and how the determination rationally affects the disputed fact.” *Clark*, 433 S.C. at 192, 857 S.E.2d 381.

Likewise, the commission may not give artificial importance to a credibility determination when credibility is not a reasonable and meaningful basis on which to ignore medical evidence. *Crane*, 429 S.C. at 639, 842 S.E.2d 350. “When the commission’s factual finding is not ‘founded on evidence of sufficient substance to afford a reasonable basis for the finding, [the supreme court] will not uphold it.’” *Crane*, 429 S.C. at 645, 842, S.E.2d at 353 (citing *Hutson v. S.C. State Ports Auth.*, 399 S.C. 381, 387, 732 S.E.2d 500, 502 (2012)). “In cases where credibility is not a substantial issue, however, even a valid credibility finding is not a proper basis for deciding a question of fact.” *Id.* at 646, 842 S.E.2d at 354. “The appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding and must be able to understand the reasons credibility supports the commission's decision.” *Id.* at 646-47, 842 S.E.2d at 354.

In the case at bar, the commission erred in its application of the law; its fact finding is unsupported by reliable, substantial evidence; its fact finding is clearly erroneous; its credibility findings are not a reasonable basis for deciding facts; and its credibility findings are unsupported.

The commission denied Russell’s claim because it “gives more weight to the medical records, the diagnostic tests, and the testimony of the medical experts” and “Dr. Edwards’ testimony and opinion is more persuasive than [Russell’s] testimony.” R. p. 8. These findings are fundamentally improper as a basis for deciding whether a change of condition occurred, because Russell’s testimony is consistent with medical records and doctor testimony. *See e.g.*, R. pp. 5, 68. Moreover, as this Court explained in *Crane*, a credibility determination is not inherently determinative of the issues before the commission. Therefore, Russell respectfully requests the Court reverse the commission’s erroneous factual and credibility determinations.

II. The Commission’s Fact Finding is Unsupported by Reliable, Substantial Evidence.

The commission’s order is unsupported by reliable, substantial evidence. The commission concludes the medical evidence—including the records, doctor testimony, and MRIs—does not show a change of condition. Its conclusion has no support in the record, making the commission’s conclusions as to the testimony and records of Drs. Edwards and Merritt unsupported by substantial evidence. The commission erroneously found “the preponderance of the evidence shows [Russell’s] physical symptomology did not change.” (R. p. 6). Similarly, the commission concluded “[t]he medical records, diagnostic tests, and medical opinions did not support a physical change of condition for the worse” despite that finding having no support in the record. (R. p. 8). These conclusions cannot withstand appellate review.

a. The MRIs

While Wal-Mart and the commission strain various pieces evidence to show the commission’s order is viable, it is functionally and primarily premised upon the doctors stating the MRIs do not show significant, objective differences. (*See e.g.*, pp. 6, 8 (“Both Dr. Merritt and Dr. Edwards ultimately testified that [sic] was no objective or significant radiographical difference to

be noted in the MRI scans.”)). Such a conclusion is contrary to the expert medical opinions of the physicians and is contrary to the other medical evidence in the case. Most importantly, the MRI interpretations do not amount to substantial evidence, and they are unreliable. The fact the physicians rejected the MRIs as conclusive regarding a change of condition is direct and meaningful evidence of the MRIs’ unreliability in determining if a change of condition occurred.

Importantly, this is not *Tiller v. Nat’l Health Care Center of Sumter*. 334 S.C. 333, 513 S.E.2d 843 (1999). Wal-Mart relies upon *Tiller* in support of its argument that the commission may properly weigh and discredit expert testimony. This general premise is accurate, but it is not applicable to the case at bar. In *Tiller*, the Court affirmed the commission’s decision finding a causal link between an accident and a medical condition the physicians could not link to within a reasonable degree of medical certainty. *Id.* The *Tiller* Court held claimants can establish causation in medically complex cases without medical testimony stated to a reasonable degree of medical certainty “if there is other competent evidence in the record.” *Id.* The *Tiller* Court, however, did not hold the commission may disregard competent medical testimony in the absence of competing competent, reliable, and substantial evidence. *Id.*

Here, the only evidence upon which the commission could justify its order is the doctors’ testimony as to the slight or no difference in Russell’s MRIs post-accident and after her symptoms worsened. Of note, the MRIs are not included in the record. The commission did not review the MRIs. It only interpreted the doctors’ impressions of the MRIs and attributed significance to them the physicians did not likewise attribute. See *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.”).

The MRIs are not diagnoses and are not the only diagnostic tool used by doctors in conducting their overall evaluation.

The significance of the commission's undue reliance upon the MRIs may be understood with an analogous hypothetical: A claimant injures his shoulder in a work accident. His physician performs an MRI. The MRI shows no damage. The physician, based on her physical exam and the claimant's subjective reports of symptoms, believes her patient suffered a partial thickness rotator cuff tear and testifies to that effect. She recommends her patient undergo surgery. No other evidence is presented except the claimant's self-serving testimony of his pain. May the commission properly find the claimant is not entitled to surgery because the MRI does not reveal a tear?

No, because the MRI alone is not reliable, substantial evidence. *E.g.*, Georg F. Bachmann et. al., *Diagnosis of Rotator Cuff Lesions*, 7 *European Radiology* 192–197 (1997) (examining cadaver shoulders with MRI and pathologically and finding MRI only identified 3 of 6 partial rotator cuff tears); *Sparks v. Palmetto Hardwood, Inc.*, 406 S.C. 124, 130, 750 S.E.2d 61, 64 (2023) (acknowledging “indisputable” conditions may not be detected by “diagnostic instruments” because those instruments “can detect only relatively gross physical abnormalities”). Physicians know the limitations of their diagnostic tools. While those tools may be objective, and lay persons may assume they are conclusive, they cannot be reliable, substantial evidence when the physician experts reject their conclusiveness. (R. p. 211 (Dr. Edwards explaining “different radiologist, different M.R.I. scans and different backgrounds can lead to different descriptions” of MRI films)); (R. p. 237, 245 (Dr. Merritt explaining the difficulty comparing MRIs performed with “two different magnets and two different machines,” noting the films “are not going to look exactly the same to begin with,” and smaller differences “may be a little hard to discern”)).

b. Symptomology

In addition to undue reliance upon the MRIs, the commission concludes “[t]he preponderance of the evidence shows [Russell’s] physical symptomology did not change . . . after the original [d]ecision and [o]rder from the [c]ommission filed in June 2011” despite no evidence supporting that conclusion. (R. p. 6). Russell testified her symptoms worsened. (R. pp. 180-81). Dr. Edwards testified Russell’s symptoms progressively worsened. stating, “it’s clear that [Russell’s] symptoms are now worse. I don’t have any doubt about that clinically.” (R. p. 209-212). Dr. Edwards’ records state Russell experienced a “worsening of radicular symptoms.” (R. p. 264). Dr. Merritt testified “certainly there appears to be a change of more radicular-type discomfort, nerve related discomfort.” (R. p. 240).

No one testified Russell’s symptoms did not worsen. Counsel for Wal-Mart acknowledged before the commission in 2014, “I would agree with Commissioner Roche that there was certainly change in the subjective complaints.” (R. p. 166). Despite the above and a patent absence of evidence showing Russell’s symptoms did not worsen, the commission concludes her symptoms did not worsen. Even under an any evidence standard of review, that finding cannot stand.

c. Medical testimony

Although, the commission found the medical testimony proves Russell did not suffer a change of condition, the opposite is true. The court of appeals concluded, “both doctors concluded to a reasonable degree of medical certainty there was a change even if it was not an obvious objective change.” (R. p. 68). Dr. Merritt testified to a reasonable degree of medical certainty, “I do think there was a change.” (R. p. 240). Dr. Edwards likewise testified, “compression, over an extended period of time, is most likely what’s causing [Russell’s] worsening.” (R. p. 214). Moreover, when permitted to consider his “physical examination” and the “paresthesias” into the

“nerve distribution” Dr. Edwards stated that a physical change of condition for the worse occurred. (R. p. 223). Dr. Edwards’s difficulty stating his opinion of a change of condition only arose when restricted to radiographic evidence. (R. p. 223).

The commission and Wal-Mart rely upon a statement from Dr. Edwards that Russell’s reflexes remained the same and she did not have weakness in the muscles innervated near the injured disc. However, both fail to note Dr. Edwards went on to state, unprompted, “But that’s true for most patients with disc herniations. It’s a – it’s the symptoms of discomfort, predominantly that can certainly worsen.” (R. p. 222). Similarly, Wal-Mart’s reliance on Dr. Edwards’ statement that he was not certain to a reasonable degree of medical certainty chemical leaking was a cause of Russell’s symptoms is flawed. (Respondents’ Brief pp. 18-19). That testimony is not Dr. Edwards stating he cannot say there was a physical change of condition. It was but one possible cause of her symptomology. He testified “compression over time is the most likely cause of [Russell’s] worsening.” (R. p. 214). Chemical leaking was a less likely alternative he suggested. Dr. Edwards explained “irritation” and “compression” are used interchangeably, both mean there is a problem with a disc, and the cause of “irritation” or “compression” can be either mechanical compression, chemical irritation, or both. (R. p. 215).

The 2016 court of appeals recognized Dr. Edwards concluded a change of condition occurred and faulted the commission for not conceding that fact. (R. p. 68). That opinion was not appealed and is the law of the case, but the commission still refuses to acknowledge this fact. The court wrote, “Dr. Edwards testified to a reasonable degree of medical certainty there was chronic change in Russell’s nerve, making it more symptomatic.” (R. p. 68). In doing so, the court referenced Dr. Edward’s testimony that “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.”

(R. p. 218). The court recognized that while Dr. Edwards stated, “could be” initially, when he was asked if he held that opinion to a reasonable degree of medical certainty, Dr. Edwards confirmed he did with an unambiguous “yes.” (R. p. 218).

d. Prior symptomology and prior treatment possibilities

The commission and Wal-Mart mistakenly assert Russell being a possible surgical candidate in 2009 and her reports of radicular symptoms around the same period prove her condition did not change. Dr. Edwards was not treating Russell prior to the change of condition claim and never recommended surgery for her prior to the change. (R. p. 209). His testimony as to her surgical candidacy is speculative. However, even if that opinion was not speculative, it is immaterial because a pre-maximum medical improvement (MMI) medical opinion cannot be the basis for denying a change of condition. The operative time to which a condition must be compared is the date of the last payment of compensation or here, the hearing date in April 2011.

The time to which new symptoms must be compared is set statutorily: “[t]he commission may review an award and, on that review, 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.*” S.C. Code Ann. § 42-17-90 (emphasis added). In a workers’ compensation case, a claimant receives medical treatment and temporary benefits until she reaches MMI. Then, she is compensated for any permanent impairment and is awarded future medical care as needed. Her medical needs, impairment, or disability prior to reaching MMI are not a basis for awarding future medical care or permanent disability benefits. If those conditions prior to MMI are not considered at a permanency hearing, then when the condition changes and those symptoms reappear, their prior existence cannot be the basis for denying the claim.

The court of appeals recognized this principle in *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997). There, a claimant sustained work related injuries to his upper extremities, neck, and back. *Id.* at 534-35, 482 S.E.2d at 578. After a hearing, a commissioner awarded permanent disability awards of 28% to the back and 5% to the right arm. *Id.* At the hearing, the claimant presented evidence of causally related depression and anxiety, but the commissioner awarded no disability for those symptoms. *Id.* at 534-35, 482 S.E.2d at 578-79. The claimant appealed the order, arguing the commissioner erred in not awarding medical treatment and arguing the psychological problems rendered him unable to work. *Id.* at 535, 482 S.E.2d at 579. The commission rejected his arguments and affirmed the commissioner order.

Thereafter, the claimant filed for change of condition benefits, alleging his psychological condition had worsened. *Id.* The commission and circuit court rejected his claim for change of condition benefits on various procedural and causal grounds. *Id.* at 535-36, 482 S.E.2d at 579. In denying the claim, the commission and circuit court relied upon *Owenby v. Owens Corning Fiberglass*. *Id.* at 539, 482 S.E.2d at 581. The *Estridge* court, however, distinguished *Owensby*, as causation was not the basis for the original denial. *Id.* at 540 482 S.E.2d at 581. That specific distinction is not of importance to this case, but the implications from *Estridge* are meaningful.

The court took no issue with the fact *Estridge* reported psychological symptoms and made an unsuccessful claim for psychological benefits at the original hearing and on appeal. *Id.* at 535, 482 S.E.2d at 579. Instead, the court reasoned that while he had symptoms, the commission could have found they did not impact his condition. *Id.* at 540, 482 S.E.2d at 581. Despite having already manifested prior to adjudication, the court concluded “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.” *Id.*

The application of *Estridge* to the case *sub judice* is simple. There, a claimant had unresolved symptoms at the time of the original award, but the commission found they did not impact his condition. Here, Russell's symptoms had fully resolved at the time of the original award, and the commission found they did not impact her condition. In *Estridge*, the symptoms later manifested themselves and impacted his disability and medical needs. For Russell, her symptoms returned impacting her disability and medical needs. If the presence of the symptoms at the time of the award in *Estridge* did not preclude his change of condition claim based upon those *same* symptoms, then Russell's symptoms, which had resolved by the original hearing, cannot preclude change of condition benefits when those symptoms are of a different nature. Wal-Mart rejects this argument, stating "of course, [Russell's] argument is incorrect." (Respondent's Brief p. 17). It provides no citation in support of its summary conclusion.

While the commission compares Russell's condition to the wrong periods, Wal-Mart and the commission also mischaracterize her radicular symptoms and surgical candidacy as continuing throughout the claim, including initial adjudication, like in *Estridge*. Wal-Mart claims Russell had a "history of symptoms in both her legs throughout the duration of the entire claim," but the evidence indicates only that she had some pelvic or lower extremity symptoms early in the claim and those symptoms resolved. There is no evidence, substantial or otherwise, showing she suffered from radicular symptoms "throughout" the claim or at the time of the hearing.

In April of 2011, before Commissioner Wilkerson, Russell testified her pelvic pain had resolved and she was released from medical care. (R. p. 93). Commissioner Wilkerson agreed, finding Russell had residual back pain and her radicular symptoms had resolved. (R. p. 93). Likewise, Commissioner Wilkerson found Russell did not need surgery and only needed NSAIDs. (R. p. 93). Commissioner Wilkerson found no disability to Russell's lower extremities. (R. p. 94).

Dr. Merritt's testimony substantiated Russell's testimony, as he confirmed Russell did not have radicular symptoms when he first treated her on October 25, 2010. (R. p. 236). He acknowledged she had some reports of pelvic pain and radicular symptoms shortly after the accident, while pregnant, but testified September of 2011, five months after adjudication, was the first time she had discomfort in her legs while in his care. (R. p. 236). Likewise, Dr. Edwards testified that Russell did not have any radicular symptoms when he performed an IME in September of 2010¹ (R. pp. 212-213). Based on the record, there is no evidence tending to show Russell suffered from any radicular symptoms at the time of the April 2011 hearing. Even if the record did show Russell had radicular symptoms at the time of the original award, pursuant to *Estridge*, the claim may still be compensable. However, that is not the case. Russell's claim for change of condition benefits is thus stronger; her report of symptoms, of a different nature and intensity, well before initial adjudication, is not substantial evidence to support the commission's finding that Russell did not have a symptomatic or physical worsening.

Therefore, whether Russell did or did not have radicular symptoms, the commission's fact finding is unsupported by reliable, substantial evidence and its order may be overturned on that basis alone. Russell respectfully requests the Court do so.

III. The Commission's Credibility Findings are Unsupported by Substantial Evidence, are Arbitrary, and do not Rationally Support the Commission's Ultimate Findings of Fact.

The commission's credibility findings are unsupported by substantial evidence, are arbitrary, and do not rationally support the commission's ultimate findings of fact. The

¹ Dr. Edwards evaluated Russell in September of 2010, prior to the claim's initial adjudication. (See R. p. 209). Russell was not suffering from radicular pain at that time, and she was not a surgical candidate. He only speculated during his 2012 deposition as to her surgical candidacy while pregnant in 2009 and early 2010. (R. p. 209).

commission concludes Russell's testimony is "subjective," "conclusory," "self-serving," and entitled to limited weight. (R. p. 8). In support of that findings—or as a consequence of ²—the commission concludes Russell was unable to establish she had new complaints that were not present at the time of the original award, was unable to establish when she thought her condition worsened and was unable to establish her need for surgery was new. (R. p. 8). Those conclusions, and the commission's credibility determinations, are unsupported by substantial evidence.

As a threshold matter, Russell questions her being found incredible for providing "subjective," "conclusory," and "self-serving" testimony. The characterization of her testimony as "subjective" appears a remnant from the commission's prior belief that objective evidence was required to prove a change of condition claim. Subjective testimony is not inherently incredible. *See e.g., Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003). Moreover, the commission offers no explanation for why Russell's testimony is "conclusory." She describes her symptoms. (e.g., R. p. 188). Wal-Mart's physicians describe her symptoms, they describe the dermatomal patterns and explain how they correspond with her radicular pain and her admitted spinal injury, and those physician descriptions are consistent with Russell's testimony. (R. pp. 213). The commission does not justify concluding her testimony is "conclusory."

Correspondingly, Russell questions the importance placed on her testimony being "self-serving." Testimony benefiting oneself does not make it false. *See Clark*, 433 S.C. at 194, 857 S.E.2d at 381 ("What people say when seeking medical help is *usually* self-serving and *sometimes* unreliable." (emphasis added)). Whether testimony is self-serving could matter if uncorroborated

² The order does not clearly indicate whether it found Russell was incredible because it found she could not establish she had new complaints, a new need for surgery, and when her condition worsened, or whether it found Russell was incredible and she was therefore unable to establish those things. Russell addresses those findings as if they were justifications, but the order does not clearly state whether those findings are causes or results of the credibility finding.

by other evidence, but Russell’s testimony is corroborated by and is consistent with the testimony of Wal-Mart’s doctors. If the commission dismisses the physician opinions that are predicated to any extent upon Russell’s reports to them, doing so is inappropriate. (R. p. 7) (“Dr. Edwards admits there is nothing he could look at the does not have a subjective component to it to show [Russell’s] condition is worse.”); *Clark*, 433 S.C. at 194, 857 S.E.2d at 381 (“Doctors are trained to detect [unreliable complaints from patients], and we are confident that if the doctors believed they were duped into their opinions they would have said so.”). Regardless, the commission’s credibility findings are arbitrary and are unsupported by substantial evidence.

a. When Russell’s worsening occurred

The commission claims Russell was unable to establish when she thought her condition worsened. (R. p. 8). Wal-Mart argues similarly that Russell was unable recall when the radicular symptoms began and “guessed that it began in September or October of 2012.” (Respondents’ Brief p. 21). Such findings and arguments might be meaningful, if they contradicted other evidence in the record, but that is not the case. Russell was asked at the hearing, “how long had you had [the radicular symptoms] when you were complaining of them in November of 2012.”³ (R. p. 181). Russell responded “I can’t recall when I started receiving them – some of the pain back in probably September, October. I can’t remember exactly when.” (R. p. 181). The reference to November 2012 in the question posed was to Dr. Merritt’s November 21, 2011, note opining Russell’s condition had worsened. (R. p. 258). Russell’s testimony her radicular symptoms began

³ During this line of questioning and others immediately following, counsel for Russell mistakenly referred to dates as 2012 when intending 2011. When discussing her 2011 termination from Wal-Mart, discussing Dr. Merritt’s December 1, 2011, work restrictions, both counsel and Russell continued to say 2012. (R. pp. 183-88). Russell, however, recognized the error on her own, clarifying “[i]t wasn’t December 2012, they took my position away from me December 2011.” (R. p. 187).

in September or October can only be interpreted as to mean September or October of 2011. Significantly, that testimony is correct. Dr. Merritt confirmed Russell first reported her “increasing pain down her legs and into the buttock area” to him on September 16, 2011. (R. p. 236).

The commission does not explain why it finds Russell could not establish when her radicular symptoms began. If the commission wanted greater specificity than a two-month range, it is unreasonable in doing so. If the commission bases its finding on the confusion as to the year, it is unreasonable in doing so. If the commission bases its finding upon Russell’s equivocation of “I can’t remember exactly when,” it is unreasonable in doing so. She testified her symptoms began in September or October of 2011. Her testimony is accurate and is corroborated by Dr. Merritt. Finding her incredible for stating accurately, but with a degree of imprecision, when her symptoms started, is unreasonable. Inexplicably, the commission asserted Russell could not even testify “whether [her new symptoms] started before or after the original hearing.” (R. p. 6). Russell didn’t offer testimony to the day as to when her symptoms began, but there is no evidence in the record to support the conclusion that she could not testify as to whether they began before or after the hearing. The commission’s finding is unsupported by substantial evidence and is capricious.

Most importantly, however, the commission’s finding is unexplained. Russell can postulate as to what the commission means when it says she could not establish when her symptoms began, but without explanation, the Court can only guess as to the reasoning. “To make a proper review of a factual determination by the commission based on credibility, the appellate court must not only understand that the commission relied on the credibility finding; the court must also be able to understand the reasons the evidence supports the credibility finding and must be able to understand the reasons credibility supports the commission's decision.” *Crane*, 429 S.C. at 646-47, 842, S.E.2d at 354. None of the conceivable reasons for concluding Russell could not

state when her symptoms began amount to substantial evidence to support that conclusion. But the commission failed to explain its conclusion at all. Therefore, the commission's finding is unsupported by substantial evidence, is capricious, and cannot stand.

b. Whether Russell's symptoms worsened

Likewise, the commission fails to explain how it concludes, "[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." (R. p. 8). Logically, the commission is stating either Russell failed to prove she had any radicular complaints in February of 2013 when Commissioner Roche heard her change of condition claim, or it is stating she failed to prove that she did not have radicular complaints at the time of the original award in 2011. There is not substantial evidence to support either.

There is no evidence in the record that even tends to suggest Russell did not have radicular complaints in 2013. She testified she was suffering from radicular pain. Dr. Merritt testified she suffered from radicular pain. Dr. Edwards testified she suffered from radicular pain and specified he had no reason to doubt her. No contrary evidence was offered. Therefore, there is no evidence, let alone substantial evidence, to support a conclusion that Russell did not have radicular symptoms in 2013. Likewise, there is no evidence suggesting Russell did had radicular symptoms in April of 2011. In April of 2011, Commissioner Wilkerson specifically found she did not. Russell testified her radicular symptoms had resolved when testifying in April of 2011. Both doctors testified her radicular symptoms resolved prior to their initial evaluations of her in 2010. The order must be reversed for the commission's failure to explain its finding, but logically, it cannot explain its conclusion, as there is no evidence in the record suggesting Russell did not have radicular pain in 2013 or suggesting she did have radicular pain in April of 2011.

Wal-Mart argues Russell using the phrase “new symptoms” justifies the commission order. This argument is flawed for two reasons: First, it imports conclusions from Russell’s reports to physicians early in the claim that the physicians themselves do not draw. Second, it is irrelevant, as the commission did not discredit Russell’s testimony on that basis. Russell’s testimony, and the doctors’ as well, show her symptoms were new vis-à-vis the original hearing date. Russell also testified her symptoms after the original award were different than any symptoms she had while pregnant or in the months following the accident, making a characterization of her symptoms as “new,” correct.

The physicians testified in accord as to the insignificance of Russell’s reports of symptoms into her pelvis or legs early in the claim. Dr. Merritt testified they resolved before he began treating her. Dr. Edwards testified she had no dermatomal or radicular pattern when he first treated her. (R. p. 212). Early in the claim, Russell had complaints of back pain and pelvic pain, as indicated in Commissioner Wilkerson’s order. While her pelvis is technically part of the lower extremities, Russell and both doctors explain the distinction and the newness of the radicular symptoms. (R. pp. 191, 212-13, 236).

While Russell disputes her testimony regarding her radicular symptoms materially conflicted with her medical records, such analysis is unneeded and is purely speculative. Wal-Mart argues Russell’s testimony her symptoms were new supports the commission finding her incredible, but the commission did not make that argument and did not find Russell incredible on that basis. The commission supported its order only by finding 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.*” (R. p. 8 (emphasis added)).

No evidence in the record indicates, to any degree, Russell had radicular symptoms at the time of the original award. Therefore, while Wal-Mart postulates reasons the commission could find Russell incredible, it did not do so for the reasons Wal-Mart suggests. The commission must make specific, express findings of fact, it must explain its findings, and it must explain the reasons the evidence supports its findings. *See Crane*, 429 S.C. 636, 842 S.E.2d 349. The commission failed to do so.

c. Whether Russell's need for surgery was new

In a similar manner, the commission found Russell “was unable to establish that her need for surgery was new or occurred after the original award.” (R. p. 8). Again, this finding has no support in the record. Wal-Mart argues Dr. Edwards’ September 2012 testimony, “I think, initially [surgery] was probably not considered because [Russell] was pregnant at the time” is sufficient evidence. (R. pp. 225-226). First, this testimony is conjecture. Dr. Edwards did not treat or examine Russell while she was pregnant in 2009 and early 2010. She did not have an MRI until August 16, 2010. (R. p. 91). Second, it is testimony as to surgical candidacy well before the claim was adjudicated. Nevertheless, the commission claims this shows she was a surgical candidate at the time of the original award. (R. p. 8).

The evidence in the record shows Russell was not a surgical candidate when the claim was originally adjudicated in April of 2011. There is no evidence suggesting otherwise. Dr. Edwards examined Russell for an IME on September 14, 2010, ten and a half months after her accident, and did not recommend surgery. (R. p. 91). When the claim was initially adjudicated, Russell testified she had been released from medical treatment. (R. p. 93). Commissioner Wilkerson included within his order “Dr. Merritt indicated that no surgery was required” and “on the Form 14B, Dr. Merritt indicated that [Russell] would need to continue the anti-inflammatories (Naproxen).” (R.

p. 93). Commissioner Wilkerson specifically found “[Russell] is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011.” (R. p. 94); *See* S.C. Code Ann. § 42-15-60 (B)(2) (“Each award of permanency . . . must contain a finding as to whether or not further medical treatment or modalities must be provided to the employee.”).

They only evidence in the record suggesting Russell was a surgical candidate at any time prior to her worsening is Dr. Edwards’ conjecture as to her candidacy while pregnant. There is no evidence suggesting Russell was a surgical candidate at the time of the original hearing. Nevertheless, the commission held Russell didn’t establish that her need for surgery arose after the original award. (R. p. 8). Its finding is clearly erroneous and is unsupported by any evidence and must be reversed.

Conclusion

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

s/ James D. George, Jr.
James D. George, Jr., Bar No. 103634
C. Daniel Vega, Bar No. 71639
Smith, Born, Leventis, Taylor & Vega, LLC
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
PH: (803) 929-3600
dvega@sbltv.law
jgeorge@sbltv.law
Attorneys for Petitioner

March 15, 2024