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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION**

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Appellate Case No. 2023-000403

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Paula Russell, Claimant,

Petitioner,

v.

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

Respondents.

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**PETITION FOR REHEARING**

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Wal-Mart Stores, Inc., and American Home Insurance (hereinafter “Respondents”), by and through their undersigned attorney, respectfully submit this Petition for Rehearing pursuant to South Carolina Appellate Court Rules 219, 221, and 240. The South Carolina Supreme Court issued its Order on January 29, 2025 (Opinion No. 28258), and this Petition is timely per Rule 221(a). Respondents wish to preserve the arguments from their Brief for further review. Furthermore, Respondents respectfully submit that the South Carolina Supreme Court (hereinafter “the Court”) misapprehended, disregarded, and/or overlooked the facts and the law presented. Consequently, Respondents respectfully request that this Court grant this Petition for Rehearing.

**I. The Court misapprehended, disregarded, or overlooked the evidence in this case, how the Commission weighed that evidence, and the Court’s standard of review.**

**A. The Court misapprehended, disregarded, or overlooked the expert medical evidence.**

In order to find that Russell (hereinafter “Claimant”) sustained a change of condition, the Court found that the Commission was “clearly erroneous” in “disregarding” the “uncontroverted” medical opinions of the doctors. In doing so, the Court states that Dr. Edwards unequivocally testified in his deposition that Claimant sustained a change of condition for the worse. This is factually inaccurate. In truth, Dr. Edwards’s opinion vacillated: On the one hand, if you rely only on Claimant’s complaints of new or worsening symptoms, you might believe she has sustained a change of condition; On the other hand, the expert and lay testimony, medical records, and consistent radiographical findings do not substantiate her complaints or contention that her physical condition has changed for the worse since the original award on June 8, 2011. The Court does not accurately characterize Dr. Edwards’s testimony as a whole, discounts the equivocating

nature of his opinion, and misapprehends the fact that he was unable to establish that a physical change of condition had occurred despite the question being asked directly.

Based solely on Claimant's complaints that her symptoms had changed, Dr. Edwards initially testified that she appeared to have gotten worse. However, on cross-examination, Dr. Edwards admitted that her complaints could not be otherwise substantiated, and any worsening was subjective in nature. Dr. Edwards's testimony supports the Commission's finding that Claimant was physically unchanged from the time of the prior award; the MRI scans were unchanged, her nerve root condition was unchanged, her reflexes and muscles were unchanged, and her need for surgery was unchanged. The medical records and Claimant's own hearing testimony further demonstrate that Claimant's complaints have not changed. This is echoed by Dr. Merritt, a general orthopedist, who deferred to Dr. Edwards's opinion because he is a spine surgeon.

In its Opinion, the Court explicitly states that "in [Dr. Edwards's] opinion, 'there is now a chronic change in the nerve that makes it more painful or symptomatic.'" This is a misquote that leaves out the important qualifying language preceding the sentence. Dr. Edwards actually posited that, "*it could be* that there is now a chronic change. . ." (Edwards Depo, p. 13; R. p. 218). More telling, Dr. Edwards goes on to opine that the L5 nerve root compression has been present and causing irritation to the nerve root for the duration of her original claim and since *at least* September 2010, and he could not state to a reasonable degree of medical certainty, more probably than not, that there had been a change in the nerve or her physical condition after June 8, 2011. (Edwards depo, p. 14; R. p. 221). The Court notes that Dr. Edwards found "numbness and discomfort connected to the L5 nerve root, something he had not noticed before." However, Claimant testified at the evidentiary hearing that she previously had numbness in her legs and the

medical records from before the original award document radicular pain down her legs, both of which demonstrate that her problems are not new or different. (R, pp. 188-192). Throughout the deposition, Dr. Edwards attempts to provide some common explanations for why a patient could have increased symptoms while being physically unchanged, though he was specifically unable to state any of these explanations to a reasonable degree of medical certainty, more probably than not. (See e.g., Edwards Depo, pp. 18-19; R. pp. 223-224). Our courts have long held that expert testimony that uses “could be” or “possible” is insufficient to establish causation and that expert testimony shall be given “to a reasonable degree of medical certainty” and “most probably,” not what is merely “possible.” Green v. Lilliewood, 272 S.C. 186, 249 S.E.2d 910 (1978); Payton v. Kearse, 329 S.C. 51, 495 S.E.2d 205 (1998); Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 487 S.E.2d 596 (1997); Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Brown v. Carolina Emergency Physicians, 348 S.C. 569, 560 S.E.2d 624 (Ct. App. 2001). Dr. Edwards does, however, opine that he has “no doubt” that the radiographic abnormalities – which have been present since at least September 2010 – is causing her ongoing symptoms and are unchanged. (Edwards Depo, p. 9; R. p. 214).

The Court misapprehends the law and the facts in this case. Claimant must prove by a preponderance of the evidence that she has sustained a physical change of condition for the worse after June 8, 2011, the date of the original hearing. In its Opinion, the Court concludes that Claimant’s “chronic nerve” problem is proof-positive that Claimant’s physical condition has worsened. However, Dr. Edwards repeatedly testified that the chronic nerve problem has been present and causing irritation to the nerve root since at least September 2010. The ongoing presence of the chronic nerve problem does not prove a change of condition and actually proves exactly the opposite; that Claimant’s physical condition has not changed after June 8, 2011, and her condition

was present long before even the original hearing. The chronic nerve problem is a continuation of a prior problem, not a physical change of her condition.

The only evidence in this case that Claimant has sustained a change of condition for the worse is her own, unsubstantiated complaints that she is worse. In fact, Dr. Edwards specifically testified that Claimant has a “chronic problem that has not improved, and in – *in [Claimant’s] opinion* it seems to be worsening. . .” (Edwards’ Depo, p. 13; R. p. 218). (emphasis added). It is not the job of a doctor to question the veracity of his patient’s complaints; rather, doctors are trained to take a patient’s complaints at face value and attempt to treat those symptoms. Consistent with that training, Dr. Edwards initially said that Claimant must have gotten worse simply because she said she was worse; however, the remainder of his testimony, Claimant’s testimony, and the medical records do not substantiate her complaints or contention that she has sustained a physical change of condition for the worse. The Court misapprehends, disregards, or overlooks the medical evidence and testimony of Dr. Edwards, as his opinion was not so clear-cut. The entirety of his testimony, not just one or two cherry-picked lines, must be viewed and weighed in light of all other evidence presented.

**B. The Court misapprehended, disregarded, or overlooked the Commission’s Decision and Order detailing how and why it weighed the evidence.**

The Court held that the Commission’s conclusion that Claimant did not sustain a physical change of condition for the worse is unreasonable, as the Commission created a “false equivalency” by weighing the opinions of the doctors against the MRI scans. This is a great oversimplification and demonstrates how the Court misapprehended, disregarded, or overlooked how the Commission weighed the evidence.

A plain reading of the Commission’s Decision and Order reveals that the Commission reviewed and weighed all of the evidence, both subjective and objective. As discussed above, the

doctors' opinions were nuanced and vacillating. The Commission, unlike a doctor, must review the evidence as a whole and, in doing so, assess the veracity of Claimant's complaints when compared to all other evidence.

In its Decision and Order, the Commission explicitly finds that the Claimant's subjective complaints are unpersuasive, as she "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." (Finding of Fact #7). Furthermore, a reading of the hearing transcript reveals that Claimant, under oath, initially denied having any symptoms in either leg prior to the original award. She would then change her testimony once confronted with medical records detailing her prior complaints of radicular symptoms in both legs before the original award. Because Claimant was unable to establish when her symptoms began and/or that the symptoms are new, the Commission gave very little weight to her subjective complaints that her symptomology had changed since the original award (R, p. 6.). Again, the issue in this case is not whether Claimant has symptoms; the issue is whether her physical condition worsened after June 8, 2011.

It is well within the Commission's purview to weigh evidence. The Commission weighed the fact that Claimant testified she had no symptoms in her legs prior to the original award on June 8, 2011, but the evidence establishes that those complaints were all present before the first hearing. (R. pp. 188-192). the Commission placed greater weight on the medical records, imaging, testing, and testimony of Dr. Edwards regarding Claimant's unchanged MRI scans, unchanged need for surgery, unchanged nerve problem, and unchanged physical examination. The assertion that Dr. Edwards' testimony was definitive that there was a change of condition and only the MRI showed

no change is a mischaracterization of the doctor's testimony and a failure to recognize the nuance and substance of his testimony.

Nonetheless, the Court concludes that the Commission did not properly weigh the evidence and disregarded the doctor's testimony without explanation. This is simply untrue. Three separate appellate panels of the Commission, in their discretion, weighed all of the evidence and found Claimant's subjective complaints to be less persuasive, including the complaints she reiterated to the doctors. Instead, the Commission placed greater weight on the medical records that demonstrated that Claimant's complaints are not new, the MRI scans that show that Claimant's condition had remained the same, and Dr. Edwards's testimony that showed that Claimant's complaints of a worsening condition cannot be substantiated beyond her own complaints, which the Commission did not find persuasive in light of the evidence as a whole.

**C. The Court misapprehended, disregarded, or overlooked its standard of review in this matter.**

This case solely involves questions of fact. The law is well-established that this Court may only disturb the findings of the Commission if it is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010)). Accordingly, 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, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id. Importantly, “[i]t 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)).

At its core, this case boils down to whether a reasonable mind could reach the same conclusion as the Commission. This Court concluded that no reasonable mind could reach this conclusion. However, to date, twelve reasonable people reached that exact conclusion: Three different Appellate Panels of the Workers’ Compensation Commission and three Judges of the South Carolina Court of Appeals found that Claimant could not prove that she sustained a physical change of condition for the worse after June 8, 2011, by a preponderance of the evidence. This Court misapprehends what constitutes “clearly erroneous.” A decision is clearly erroneous only when the evidence, when viewed as a whole, clearly and conclusively demonstrates that no reasonable mind could come to the same conclusion. Foran v. Murphy USA, 420 S.C. 377, 803 S.E.2d 311 (Ct.App. 2017) (holding that the Commission’s decision that the claimant sustained a non-compensable, idiopathic injury was clearly erroneous when the Employer’s objective surveillance footage conclusively demonstrated that the claimant did not fall without explanation but tripped on a mat). The evidence in this case is complex and often contradictory, which is why the Commission is given broad discretion as finder of fact to assess and weigh that evidence. When affirming the Commission’s decision in Paulino v. Diversified Coatings, Inc., this Court found that “it is a close call whether there is substantial evidence to support the commission’s finding. . . [b]ut our review is limited to a determination of whether the evidence as a whole “would allow reasonable minds to reach the conclusion that the commission reached. . . ” 443 S.C. 150, 163, 903 S.E.2d 503, 510 (2024).

Throughout the long history on this claim, the Commission never issued a finding of fact that Claimant had proven a physical change in her condition after June 8, 2011; this Court is the first body to make that factual finding. The Court in this decision usurps the Commission's statutory role as the ultimate finder of fact because it weighed the evidence itself and disagrees with the Commission's findings, not because said findings are clearly erroneous or unreasonable. The law is consistent and clear: An appellate court is not to substitute its judgment for that of the Commission on questions of fact, yet that is precisely what the Court did in this matter.

**II. In its Order, the Court misapprehended, disregarded, or overlooked the proper procedure for awarding benefits under the South Carolina Workers' Compensation Act.**

In its Order, this Court "remand[s] [the] case to the commission for an immediate order granting benefits". This directive is unclear and can be grossly misinterpreted as ordering a general "award of benefits" not based on any evidence. Respondents assume that this was not this Court's intent and contend that this Court misapprehended, disregarded, or overlooked the process by which workers' compensation benefits are awarded.

In workers' compensation, there are two questions that must be answered: First, there is the threshold issue of compensability, which was the issue taken up by this Court on appeal. If a claim is found to be compensable, the Commission must then take up the secondary task of determining the extent to which a claimant is entitled to workers' compensation benefits. Compensability of a claim and a claimant's entitlement to benefits are two separate and distinct inquiries.

There are three distinct types of benefits that a claimant may seek under the Act: (1) temporary disability benefits, (2) permanent disability benefits, and (3) medical benefits. Each type of benefits carries with it markedly different standards that a claimant must meet to prove

her entitlement to that type of benefit and must be evaluated individually based on the evidence. Consequently, no award of benefits can be made without an evidentiary hearing. This is especially true in this case given the length of time since evidence was last taken on this claim; the last evidence on this claim is from February 2013. Has Claimant been working these last 12 years? The answer to this question directly affects her entitlement to temporary disability benefits. Has she sustained an intervening accident in the last 12 years that would break the causal chain? This answer would affect whether Claimant's current condition is causally related to her work accident. What medical treatment, if any, is she entitled to at this point related to the work accident? What medical treatment has she sought and received in the last 12 years? What is Respondents' financial responsibility for any past medical treatment she received? Does she have any permanent impairment? These are but a few examples of the questions that must be answered for any award of benefits to be made, and each of these questions clearly require updated evidence to be collected by the parties, as well as an opportunity for that evidence to be heard by a commissioner. Following an evidentiary hearing, a commissioner can award specific benefits, if warranted.

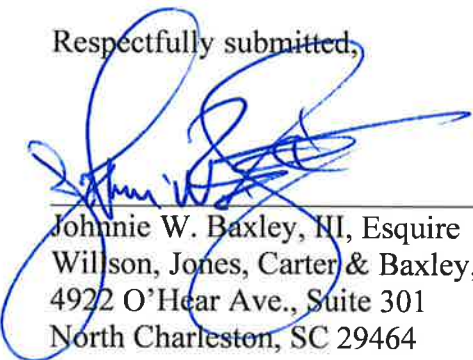
Even if this Court finds this claim compensable, remanding the case to the commission for "an immediate order granting benefits" is improper, impractical, and – quite frankly – impossible. Compensability is only a threshold issue. The inquiry now turns to the question of the extent of Claimant's entitlement to benefits, if any, which has never been an issue on this appeal. The extent of Claimant's entitlement to benefits lies with the Commission as the ultimate finder of fact. The last line of this Court's order should instead read, "we remand her case to the Commission for an immediate order finding that she has sustained a compensable change of condition for the worse and for an evidentiary hearing to determine the extent of

Russell's entitlement to benefits." It is clear that this Court misapprehended, disregarded, overlooked, or, at least, oversimplified, the process by which workers' compensation benefits may be awarded.

It is important to note that Respondents maintain this Court came to the incorrect conclusion based on the evidence and standard of review. Should this Court maintain its decision that Claimant has proven her claim, however, proper procedure would be to find the claim compensable based on a change of condition for the worse and remand the claim to the Commission for an evidentiary hearing to determine the extent of Claimant's entitlement to benefits under the South Carolina Workers' Compensation Act. Respondents respectfully request that the Court clarify its Order in this regard should the Court decline to rehear or reconsider this matter.

For the foregoing reasons, Respondents respectfully request that Respondents' Petition for Rehearing be granted by This Honorable Court.

Respectfully submitted,



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