

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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Civil Action No.: 2011-CP-23-7975  
Appellate Case No.: 2012-212924  
WCC File No.: 0622179

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7/21/17

Jacqueline Y. Carter,

Respondent,

v.

Verizon Wireless and  
American Home Assurance Co.,

Appellants.

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PETITION FOR REHEARING

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SC Court of Appeals

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## STATEMENT OF ISSUES FOR REHEARING

1. DID THE COURT OVERLOOK OR MISAPPREHEND DR. GRADY'S OPINION THAT WHILE RESPONDENT HAD A PRE-EXISTING ARTHRITIC CONDITION, THE NATURAL PROGRESSION OF THAT CONDITION WAS DUE TO THE SURGICAL REMOVAL OF SOME OF THE MENISCUS WHICH WAS DAMAGED IN HER WORK INJURY?
2. DID THE COURT MISAPPREHEND THE SCOPE OF ITS REVIEW IN SUBSTITUTING ITS OWN FINDING OF FACT THAT RESPONDENT'S CHANGE OF CONDITION WAS DUE TO THE NATURAL PROGRESSION OF HER PRE-EXISTING DEGENERATIVE DISEASE?
3. DID THE COURT MISAPPREHEND THE LAW AS INTERPRETED IN MUNGO, AND OVERLOOK THE FACT THAT THE COMMISSIONER AT THE INITIAL HEARING IN 2009 DID NOT BASE HER AWARD ON ANY OF THE EVIDENCE ESTABLISHING A CHANGE OF CONDITION DEVELOPED SUBSEQUENT TO THAT DATE?
4. DID THE COURT OVERLOOK OR MISAPPREHEND THE TESTIMONY REGARDING RESPONDENT'S LEVEL OF PAIN?

## STATEMENT OF THE CASE

In an Order from Commissioner Susan S. Barden dated December 3, 2009, Jacqueline Carter ("Respondent"), was awarded 25% permanent partial disability to her left lower extremity, as well as causally-related Dodge medicals that may tend to lessen her period of disability, as recommended by the authorized treating physician, including Darvocet or comparable medication. Respondent filed for a change of condition, based upon worsening problems she began experiencing with her knee in the summer of 2010. An Order was issued by Commissioner Avery B. Wilkerson, Jr., on April 18, 2011, finding Respondent did not suffer a compensable change of condition for the worse, and that her future medical treatment was restricted to Darvocet or a comparable medication. On November 9, 2011, the Appellate Panel of the South Carolina Workers' Compensation Commission ("the Commission") fully affirmed Commissioner Wilkerson's Decision & Order. Respondent appealed this decision to the Circuit

Court, and on July 16, 2012, Judge D. Garrison Hill reversed the Commission's Decision & Order. Verizon Wireless Southeast and American Home Assurance Company ("Appellants"), appealed to this Court. On January 29, 2014, this Court affirmed in part and reversed in part. (Exhibit A).

## ARGUMENT

I. DID THE COURT OVERLOOK OR MISAPPREHEND DR. GRADY'S OPINION THAT WHILE RESPONDENT HAD A PRE-EXISTING ARTHRITIC CONDITION, THE PROGRESSION OF THAT CONDITION WAS DUE TO THE SURGICAL REMOVAL OF SOME OF THE MENISCUS WHICH WAS DAMAGED IN HER WORK INJURY?

This Court's decision that a change of condition was not established appears to be primarily based upon a finding that Respondent's change of condition "was the result of the natural progression of her pre-existing degenerative joint disease and not the result of her original injury." As an initial matter, Respondent respectfully suggests that either she had a change of condition or she did not – concluding there is no change of condition, while at the same time stating the reason for the change in her condition is not compensable, is a contradiction. This conflict in reasoning should itself serve as a basis for this Court to reconsider its decision in this matter.<sup>1</sup>

Further, the Court cites to bits of testimony from Dr. Walter Grady for the proposition that there was a "natural progression" of her disease. The Court appears to have overlooked the fact that in his report dated November 4, 2010, Dr. Grady wrote in ¶5 under the "ASSESSMENT" portion: "Significant issue of chronic pain secondary to the [degenerative joint

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<sup>1</sup> Likewise, in Footnote 4 of the subject Order, this Court postulates that "[Respondent] may have confused **the degeneration of her condition caused by her injury** with the degeneration of her condition caused from the natural progression of her pre-existing degenerative disease." (emphasis added). To the extent this Court apparently believes there was "degeneration of [Respondent's] condition caused by her injury," then that change/degeneration is compensable. Finding there was degeneration caused by Respondent's injury again contradicts this Court's finding that there was substantial support to conclude Respondent suffered no change of condition.

disease] with presumptive interval progression of her arthritis **considering the fact that some of the meniscus had to be removed.**” R. pp. 155-156 (emphasis added). In fact, Dr. Grady reiterated this under the “PLAN/RECOMMENDATION” portion of his report, writing:

As I previously mentioned, there is an issue of interval progression of arthritis **when we have to remove some of the meniscus and the patient already has arthritis.** *That is expected over time.* Eventually she will require total knee arthroplasty.

R. p. 156 (emphasis added). This point is even contained in Commissioner Wilkerson’s Decision and Order, which observes: “Dr. Grady noted he would **expect a change because some of the cushioning was removed from the claimant’s knee.** See Deposition of Dr. Grady, p. 18.” R. p. 33 (emphasis added).

In the subject Order, this Court noted that our Supreme Court has held “[A] condition due *solely* to natural progression of a preexisting disease is not compensable.” Brown v. R.L. Jordan Oil Co., 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987) (as emphasized in the subject Order). However, this Court apparently overlooked or misapprehended the complete context and holding in Brown, which provides:

When a previously diseased condition is aggravated by injury or accident arising out of and in the course of the employment, disability is a compensable injury. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as he finds him. **If the accident accelerates or aggravates a preexisting condition, the resulting injury is compensable.** On the other hand, a condition due solely to natural progression of a preexisting disease is not compensable.

Brown, 291 S.C. at 275 (citations omitted)(emphasis added). Understanding the entirety of the holding in Brown is critical, in that when Dr. Grady offered testimony characterizing Respondent’s change of condition as “a natural progression,” he meant it was the natural progression he expected *based upon the fact he had to perform surgery to remove some of the*

*meniscus in a knee already vulnerable to arthritis* – not a natural progression independent of the surgery necessitated by her work injury. This is evident from Dr. Grady’s deposition testimony, wherein he consistently references this surgery as the point of progression. R. p. 23 (“And I have to keep referencing back to my expected outcome, as far as the natural progression **stemming from the time that I did surgery . . . .** I think the overall progression **from when I initially did her surgery** to the point where I saw her – where I noted the changes here, I think that was expected . . . .”); R. p. 28 (“It’s my professional medical opinion within a reasonable degree of medical certainty that the patient per my examination, history, physical, etc., had a natural progression of her disease process **from the time I did surgery on her** until the time that I saw her on November 4<sup>th</sup>, 2010.”) (emphasis added).

Taken in context, Dr. Grady was testifying in this manner because he was being questioned as to whether Respondent’s exercise habits could have been an intervening injury which caused her change in condition, and he was simply establishing that after doing surgery to remove some of the cushion in her knee, he expected a natural progression or deterioration of the joint regardless of her activity. In fact, when Dr. Grady testified Respondent was going to “arrive at the same end result whether it would have been six months later, eight months later, or [twelve] months later,” he was answering the following question: “[W]as there any acceleration though of her condition by the fact that she was exercising 55 times in the interim?” R. p. 121.

This Court concluded the testimony of Dr. Grady and Respondent provides substantial support for the Commission’s finding that no change of condition was established. Given this conclusion appears to be based chiefly upon the mistaken finding that the change in this instance was *solely* due to the natural progression of a pre-existing condition, this Court should reconsider this finding. This is particularly true in that both Dr. Grady and Respondent specifically testified

there were changes in Respondent's condition for the worse, which was further evidenced by numerous medical findings:

- **Respondent's impairment rating increased.** R. pp. 139-142; 156.
- **Respondent now has crepitance in left knee.** R. pp. 139-141; 152.
- **Respondent lost range of motion in left knee.** R. pp. 139-141; 154.
- **Respondent now has fluid on left knee.** R. pp. 139-141; 153.
- **Respondent now has joint space collapse in left knee.** R. pp. 140; 154.

Additionally, while Respondent believes this Court reached the correct decision as to the improper restriction of her entitlement future medical treatment, the reasoning offered in support of this decision is at odds with this Court's reversal on the issue of the compensability of her change of condition. This Court necessarily would have to find the "progression of her disease process from the time that [Dr. Grady] did surgery on [Respondent]" was related to her work-injury - and thus compensable - in order for her to be entitled to treatment arising as a result of that progression. This Court further noted Dr. Grady "repeatedly opined" that Respondent's knee had "materially worsened." Again, this underscores Respondent's point that there is really no questioning the fact that Respondent experienced a change in her condition for the worse, and that Dr. Grady's testimony fully supports this fact.

Respondent had a pre-existing degenerative condition in her right knee, which made her vulnerable to additional problems if she suffered trauma to that knee. Unfortunately, that is exactly what happened. Worse still, this particular work-related trauma necessitated removal of the cushion in her knee, which led Dr. Grady to expect interval progression of her condition from that surgery. As such, the change in condition Respondent has experienced is compensable.

II. DID THE COURT MISAPPREHEND THE SCOPE OF ITS REVIEW IN SUBSTITUTING ITS OWN FINDING OF FACT THAT RESPONDENT'S CHANGE OF CONDITION WAS DUE TO THE NATURAL PROGRESSION OF HER PRE-EXISTING DEGENERATIVE DISEASE?

This Court correctly observed: "The Appellate Panel is the ultimate factfinder in workers' compensation cases." citing Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). However, this Court substituted its own factual finding as the basis for concluding Respondent did not suffer a change of condition. Specifically, the Commission never made any factual finding that Respondent's current condition was a result of the natural progression of her pre-existing degenerative disease - this finding was made only by this Court. "A determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission." Brown, 291 S.C. at 275, 353 S.E.2d at 282 (citation omitted). At the very least, if this Court believes there may be an issue regarding whether the natural progression referenced by Dr. Grady relates only Respondent's pre-existing condition, as opposed to being the result of the surgery necessitated by her work-injury, this matter should be remanded to the Commission to make such a factual determination.

III. DID THE COURT MISAPPREHEND THE LAW AS INTERPRETED IN MUNGO, AND OVERLOOK THE FACT THAT THE COMMISSIONER AT THE INITIAL HEARING IN 2009 DID NOT BASE HER AWARD ON ANY OF THE EVIDENCE ESTABLISHING A CHANGE OF CONDITION DEVELOPED SUBSEQUENT TO THAT DATE?

This Court did not address its previous decision in Mungo v. Rental Uniform Service relative to this matter, which was the primary issue on appeal. 383 S.C. 270, 768 S.E.2d 825 (Ct.App.2009). In Mungo, this Court specifically held the Commission's conclusion that it was unable to consider evidence which actually existed prior to the original hearing is erroneous because that evidence was not considered in forming the basis of the original award, providing: "Review of an award at a change of condition hearing is . . . concerned with **the date as of**

**which the claimant's condition was determined rather than the date of the actual hearing in which that award was rendered."** *Id.* at 280 (citing Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 195-196 (Ct.App.2003)) (emphasis added).

It appears this Court misapprehends the law to provide that because there was a hearing on October 15, 2009, any evidence of change before that date may not be considered in the change of condition claim. This is plainly at odds with the decision in Mungo. There was an initial hearing in Mungo as well, but the evidence of a change of condition was considered in the later hearing despite the fact it existed subsequent to the date of maximum medical improvement but prior to the initial hearing, because that evidence was not considered at the time of that initial hearing. Here, not only did the Commissioner not consider any of the evidence later raised in the change of condition claim, **that evidence did not even exist prior to the date of the hearing.** Thus, regardless of whether the award was based upon Respondent's condition as of March 3, 2008, or October 15, 2009, the Commissioner still did not consider any of the change of condition evidence, such that it may be considered now.

#### IV. DID THE COURT OVERLOOK OR MISAPPREHEND THE TESTIMONY REGARDING RESPONDENT'S LEVEL OF PAIN?

This Court stated as fact the following: "[W]hile Dr. Grady and Claimant disagreed as to her level of pain when he saw her on November 4, 2010, he testified that it remained the same as when he saw her in 2008." **This is incorrect.** Dr. Grady testified one of the things "that constitutes material worsening is pain." R. p. 43. He continued, testifying that when he saw Respondent again on November 4, 2010, "she established that her pain was about a five, but it went up to a six or seven out of ten," and that such "increased pain" constituted "material worsening." R. p. 43. Further, Respondent specifically testified that her pain could have been a "five out of ten" on November 4, 2010, but it was "constantly an eight [as of the time of her

deposition].” R. pp. 136-137. Dr. Grady was notified of Respondent’s testimony regarding her then-current level of pain as being an eight out of ten, which he confirmed solidified his “opinion that there has been a change or a worsening of [Respondent’s] condition.” R. p. 130. As such, there is no disagreement between the testimony offered by Dr. Grady and that offered by Respondent, such that there is no question of credibility in this instance as this Court suggests in the subject Order.

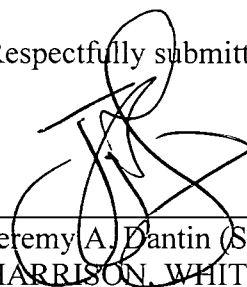
## CONCLUSION

Respondent respectfully asks this Court to reassess its Order, considering the points of fact and law raised above which demonstrate the following:

- The law provides that injuries are compensable in a situation where the injury “accelerates or aggravates” a pre-existing condition. The law further provides that evidence not considered in the original hearing may be considered as part of a change of condition hearing.
- The evidence establishes Dr. Grady believes Respondent’s change of condition represented a natural progression of her condition after he had to remove the cushion from her knee as a result of her work-accident (as opposed to some alleged intervening event or solely because of a pre-existing condition).
- If there is a question as to whether Respondent’s condition was accelerated by her injury, this matter should be remanded so the Commission can make a factual finding on that issue. Given Dr. Grady’s testimony, there should be no question that Respondent’s condition was accelerated by her injury, and thus no need for remand.
- Dr. Grady’s testimony and records (including objective findings), as well as Respondent’s testimony, establish Respondent suffered a change of condition.

For these reasons, Respondent requests an opportunity to be heard again on these matters so this Court may reach a final decision which is unaffected by any errors of fact or law.

Respectfully submitted,



February 5, 2014

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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Civil Action No.: 2011-CP-23-7975  
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WCC File No.: 0622179

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Jacqueline Carter,

Respondent,

v.

Verizon Wireless Southeast, and  
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Appellants.

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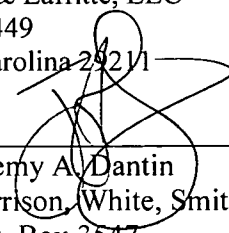
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I certify that I have served the Petition for Rehearing on the above-named Appellants, Verizon Wireless Southeast and American Home Assurance Company, this 5th day of February 2014, by depositing the same in the United States Mail, first class postage prepaid, addressed to their attorney of record, as follows:

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February 5, 2014

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Jacqueline Carter v. Verizon Wireless Southeast  
Appellate Case No.: 2012-212924  
WCC file No.: 0622179

Dear Ms. Kitchings:

Enclosed are the following:

- The original and six (6) copies of the Petition for Rehearing;
- A Proof of Service; and
- A filing fee of \$25.00.

By copy of this letter, we are serving the defendant's attorney with copies of these documents.

Sincerely,

  
Jeremy A. Dantin

JAD/nmp  
Enclosures

cc: Grady L. Beard, Esq.  
Nicolas L. Haigler, Esq.

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