

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-000454

Paula Russell,

Appellant,

v.

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

Respondents.

INITIAL REPLY BRIEF OF APPELLANT

Wednesday, September 3, 2014

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SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CERTIFICATE OF COUNSEL 12

TABLE OF AUTHORITES

Cases

Beckman v. Sysco Columbia, LLC, Op. No. 5205
(Ct. App. filed March 19, 2014; withdrawn, substituted and refiled Jul, 9, 2014)
(Shearouse Adv. Sh. No. 27 at 42)383 S.C. 270, 678 S.E.2d 825 (2009) 9-10

Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994) 10

Statutes

S.C. Code Ann. § 42-9-20..... 9

The Appellant, Paula Russell (hereinafter "Russell") submits a Reply Brief to the Court for two reasons: First, to respond to the arguments made by the Respondents in the Initial Brief of Respondents (hereinafter "Respondents Brief"); Second, to address a very recent decision in a Workers' Compensation decision from the Court of Appeals.

In the Respondents Brief, Respondents advance essentially two arguments: First, that the Commission applied the "appropriate legal standard" when determining whether or not Russell suffered from a change of condition. Second, that the Commission's decision on the change of condition issue is well within the substantial evidence rule, and that there is some basis for the decision. Many of the same factual issues with this appeal touch on both arguments, and therefore the following applies in many ways to both arguments from the Respondents.

It remains the position of Russell that the Commission committed a legal error in applying the wrong standard, especially once the evidence of the record is reconsidered. The Respondents argue that the Full Commission's Order "states that the preponderance of the evidence does not prove a worsening of Appellant's physical condition" (Respondents Brief, p. 5). This is gross mischaracterization of what the Commission actually found in its scant order. Other than generalized preponderance of the evidence findings that denied the claim in its entirety, the Commission only made two specific preponderance of the evidence findings.

First, the Commission found that "[t]he preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan after the original award

and the MRI scan before the original award.” (1-30-2014 D&O, p. 9) (emphasis added). Second, the Commission found that “[t]he preponderance of the evidence shows that Claimant’s radiographic condition has not worsened.” (1-30-2014 D&O, p. 10). Other than these specific findings, the Commission made no other findings as to what the preponderance of the evidence actually showed. Russell submits that this is the true reason why the Commission denied her change of condition claim. While the Single Commissioner applied the correct standard, , the Full Commission erroneously found that there had to be an objective difference between MRI reports in order to establish that a change of condition occurred.

Perhaps the most damning piece of evidence against the Respondents’ case which indicates the method of thinking employed by the Commission is the complete omission of the final opinions of both treating doctors. Respondents argue that the Full Commission “reviewed the record as a whole . . .” but this is simply not true. (Respondents Brief, p. 10). The Single Commissioner found that “Dr. Merritt testified to within a degree of medical certainty Claimant suffered a change of condition for the worse,” and that “Dr. Edward’s testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.” (8-5-2013 D&O, p. 5). She further found that “Dr. Merritt testified to within a degree of medical certainty Claimant’s change of condition was a physical, anatomical change,” and that “Dr. Edward’s testified to within a degree of medical certainty Claimant’s change of condition was a physical-anatomical change.” (8-5-2013 D&O, p. 5). These findings were based on the statements of both doctors.

For example, Dr. Merritt testified:

“I would say there was a change. I mean, she was pretty clear during the first few visits that it was mainly just her back. . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort.”

(Deposition of Dr. Merritt, p. 11).

Dr. Edwards testified similarly, saying that “her symptoms are more significant now than they were when I first saw her. So you could . . . make . . . [the] conclusion” that “the nerve has worsened.” (Deposition of Dr. Edwards, p. 12, ll. 11-16). Dr. Edwards did not doubt that the condition has worsened, and stated “the disc is bulged out more and putting more pressure on the nerves . . .” and that the anatomic worsening of her symptoms means “that there is now a chronic change in that nerve that makes it more painful or symptomatic.” (Deposition of Dr. Edwards, p. 13, ll. 5-14). Dr. Edwards said that in Russell’s “opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention.” (Deposition of Dr. Edwards, p. 13, ll. 21-24).

These opinions from the doctors conclusively establish Russell’s position. Both were clear that: (1) her symptoms had worsened between the spring of 2011 and the fall of 2011; (2) she had additional symptoms that developed sometime between the spring of 2011 and fall of 2011; (3) these changes in etiology were clearly physical changes. Again, Russell encourages the Court to read the Commission’s findings on the doctor depositions. While Russell refrains from quoting them in their entirety, they run for less than a page and a half. Most importantly, **they focus almost exclusively on Russell’s MRIs.** The Commission omitted, and frankly ignored, much of the relevant testimony of the doctors.

For example, the Commission did not consider in the Order that both doctors found Russell credible, that both doctors thought she suffered from a physical change of condition, that both doctors thought her symptoms had increased in severity, and that both doctors thought that she had developed additional symptoms. Nor was the Commission able to explain why Dr. Edwards did not feel it was medically necessary to operate on Russell when he released her following her pregnancy, but by 2012 felt that a surgery would, in fact, be medically necessary. These facts were not granted less weight than other facts; they were just ignored by the Commission. A generalized finding that the “preponderance of the evidence does not prove a worsening of Claimant’s physical condition . . .” simply does not address these concerns. (1-30-2014 D&O, p. 4-5).

Respondents argue that this incredible weight of testimony was actually considered by the Full Commission, despite its failure to address *a single bit of it* in its final Order. Instead, the Respondents argue that once the Full Commission states that it has considered “all of the evidence as a whole,” it has essentially done a good enough job of protecting itself from judicial scrutiny. Imagine the nonsensical results that follow from this proposition. Any trial judge or workers’ compensation commissioner in the state could ensure that a reviewing court could never overturn their decisions, on either legal or factual bases, simply by saying “I have considered the evidence as a whole.”

That type of standard simply isn’t good enough for South Carolinians who depend on their judicial officials to engage with *all* of the evidence of record and make nuanced findings about what that evidence means. Making detailed legal findings is a complex process that

requires an adjudicator to review all of the available evidence, and explain why certain evidence is given less weight; this process is doubly complex when medical issues and testimony are involved. When the Full Commission said “[w]e are cognizant of the fact that testimony from both doctors and statements of medical reports can be **cherry-picked** to support either position on this change of condition dispute,” Russell submits that the Commission simply didn’t do its job when it came to properly engaging with the compelling evidence of record. (1-30-2014 D&O, p. 9). The Commission should have digested this testimony to determine what the doctors’ actual opinions were. Instead, the Commission solely picked through the testimony concerning Russell’s MRIs, and then punted on the remaining issues, with the ‘cherry-pickin’ language as its only excuse.

Russell again submits there is a good reason for this: Respondents were successfully able to convince the Full Commission that regardless of whether Russell was credible, whether she had experienced symptoms in her legs prior to the time she alleged a change in condition, whether she was now experiencing new symptoms, and whether she needed surgery when she was pregnant, this was all irrelevant without an ‘objective finding.’ In its short brief to the Full Commission, the Respondents used the word ‘objective’ five times, and the word ‘subjective’ five times. In oral argument, counsel for the Respondents framed the issue in the following way: “There’s really not all that much in the [initial hearing transcript] that is really going to matter to this kind of an argument one way or the other. And clearly, Ms. Russell says that her condition has worsened, which is what you would expect to see in a change of condition claim. ***This is really an issue over the doctors’ testimony and whether or not there’s been an objective physical change of condition for the worse.***” (12-16-2013 H.T., p. 4) (emphasis

added). As the Court can see, Counsel for the Respondents actually advocated to the Full Commission that any inquiry into Russell's credibility was irrelevant (probably because he knew she was credible – and admitted as much), and that the only important matter was a review of the MRI findings.

Counsel for the Respondents then went on to attempt to undermine the doctors' actual opinion, primarily through old and irrelevant medical records, but also crucially through an examination of the MRI results. (12-16-2013 H.T., p. 4-7). Russell reasserts that counsel for the Respondents have hung their collective hats on this radiological evidence throughout the claim, and that is exactly how they convinced the Commission that no change in condition had occurred. The argument is essentially: "if it doesn't show up on a radiographical study, it cannot be supported, *even when confronted by the opinion of two board-certified doctors who opine otherwise.*"

This thinking is an extraordinarily dangerous way to adjudicate workers' compensation cases, or indeed any type of legal claim which involves examining medical issues. The Commission is placing itself in a position to make its own medical conclusions, despite the fact that none of its members are physicians, medical experts or have had the necessary medical education and training. In this case, the Single Commissioner considered and properly deferred to the superior education, training, and expertise of two board-certified doctors. The Full Commission, however, put on its own white jacket and the stethoscope, fired up the computer to review the MRI scans, and concluded, using its extremely limited medical expertise that no

change in condition had occurred. There is no other explanation as to why so much evidence was ignored when making its decision, especially the opinions of the two doctors in question.

All of this is to say that the Full Commission clearly adjudicated this claim believing that an 'objective evidence' standard was required to show a change in condition, and the only way to meet that standard was with radiographical studies. The Appellant has also argued that the substantial evidence of record can point to only one conclusion: a physical change of condition occurred. The Respondents have characterized this as an argument that the substantial evidence in the case could go either way, but there is nothing further from the truth. In addition to the evidence ignored by the Commission discussed previously, there are several other issues.

First, every person involved with this case agreed the Claimant was credible. Both doctors, her attorney, the attorneys who represented the Respondents at every stage of the litigation, and even the Single Commissioner. Both doctors believed Russell's version of the events, recommended additional medical treatment, and testified that a physical change of condition had occurred. Dr. Edwards even went so far as to recommend additional surgery. Russell submits that it is extremely unlikely that a surgeon would be willing to recommend major surgery, which carries many risks (including death), unless he believes that Russell's condition had truly changed between the time he released her initially and when she returned to his care after the change of condition. The Single Commissioner observed her live, face to face, testimony during the initial hearing and found it believable. Respondents' counsel, who also saw her testify, agreed with the Single Commissioner, stating "I'd also agree with

Commissioner Roche that Ms. Russell comes across really well.” (12-16-2013 H.T., p. 8). Now counsel for the Respondents expects this Court to believe that the Claimant is not credible, after he admitted that she was credible in a judicial proceeding. Caught between the proverbial “rock and the hard place” the convenient change of position suspends reality perhaps more than any other made by the Respondents in this case, and it is being employed in an attempt to undermine the medical opinion of Drs. Merritt and Edwards.

Second, the point the Respondents offer about the Appellant’s pregnancy is a complete red herring. The timeline on this point is very simple. Russell was three months pregnant when she was initially injured in 2009; out of an abundance of caution, all but the most conservative treatment was withheld until after she delivered her child. (June 8, 2011 Order of Commissioner Wilkerson, p. 3-4). After the delivery of her child, Dr. Merritt actually opined that “no surgery was required.” (June 8, 2011 Order of Commissioner Wilkerson, p. 4). This was a finding from the unappealed initial Order, and became the law of the case. There is absolutely no indication that surgery was not considered because Russell was pregnant. Dr. Merritt did not even give his opinion that no surgery was required while she was pregnant. That opinion came *after* the birth of her child. He did not perform surgery because Russell’s symptoms had not yet become severe enough to warrant surgery. It was only after her condition worsened that surgery was deemed necessary. Russell’s pregnancy has almost nothing to do with her initial claim, and is irrelevant to her change of condition claim. Using it against her, when it is a non-issue, is yet another device employed to substitute its untrained judgment for the properly trained board-certified orthopaedic surgeon opinions.

On July 9, 2014, after Russell had submitted her Appellant Brief, the Court of Appeals issued its decision in *Beckman v. Sysco Columbia, LLC*, Op. No. 5205 (Ct. App. Filed Mar. 19, 2014; Withdrawn, Substituted and Refiled Jul. 9, 2014) (Shearouse Adv. Sh. No. 27 at 42). That case concerned the ability of a Claimant to pursue a general disability claim under S.C. Code Ann. § 42-9-20, on what is commonly known as a wage loss claim. *Id.* While the legal issues present in that case are different, the manner in which the Commission dealt with medical issues is very similar to this case. The Court of Appeals warned the Commission that attempting to create its own medical opinions from thin air and second-guess doctors will not be tolerated. *Beckman* provides guidance for the Court in this case for two different reasons: First, the Commission cannot second-guess the opinion or impressions of a doctor, and create its own medical conclusions. Second, once the doctor has indicated that certain symptoms are occurring, the substantial evidence rule requires that the Commission honor that opinion.

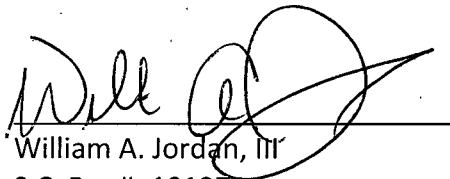
In *Beckman*, the Claimant pulled a muscle in his back, injuring his back, buttocks, both legs, and his right foot; the Defendants admitted the back injury but denied the others. *Id.* at 43. After approximately two years of treatment, the authorized treating physician released Mr. Beckman with 10% impairment to the back and 5% impairment to his SI Joint, for a combined 15% impairment rating. *Id.* at 45. An IME doctor also gave an 8% impairment rating to the back. *Id.* These were the only impairment ratings. *Id.* The Commission ultimately found that “there was no objective evidence of radiculopathy, and Dr. Zgleszewski diagnosed radiculitis based on Beckman’s subjective complaints.” *Id.* (emphasis added). In determining whether Mr. Beckman was entitled to a general disability award, the Court had to determine whether a second body part was involved, and turned to the medical evidence of record to do that.

The Court carefully examined the medical evidence, and determined that reports from June 7, 2010, and July 9, 2010, just a few months after the injury, indicated that Mr. Beckman was suffering from pain in his buttock and hip. *Id.* at 48. The same symptoms were noted in the treating physician's November 10, 2010 note. *Id.* at 48. By March and May of 2011, the treating physician reported that the pain was then radiating to his left buttock and left thigh, all the way down to his left foot, as well as affecting his left hip. *Id.* Again, in September of 2011, the treating physician's statement indicated that radiculopathy is present. *Id.* Finally, the IME doctor indicated pain in the left leg and foot in February of 2012. *Id.* The Commission, as it did in this case, ignored all of this evidence, despite standing case law indicating that "[a]ll that is required that the injury to a scheduled member also affect another body part." *Id.* at 46 (citing *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994)).

The Court found "the Appellate Panel's order was clearly erroneous in view of the substantial evidence in the record that Beckman suffered from radiculopathy as a result of his back injury." *Id.* at 49. By reading the medical records, and following the opinion of the treating doctor, the Court was able to come to the conclusion that the treating physician's opinion should actually be followed. That is all Russell is requesting of the Court in this case. The doctor's opinions, testimony, and records clearly show that a change of condition occurred. They clearly show, along with the agreement of the Single Commissioner and the counsel for the Respondents, that Russell was credible. And they clearly show that Russell's pregnancy has nothing to do with her change of condition claim.

In short, if the Court is willing to simply read the medical records and opinions of the doctors, it will reach the correct conclusion on this case. Whether that is due to applying the wrong legal standard or ignoring the substantial evidence of the record (which can only lead to a single conclusion – change of condition) is a decision for the Court, but Russell takes the position that the Commission made errors on both accounts, and therefore its decision on a change of condition should be overturned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Will A. Jordan, III', written over a horizontal line.

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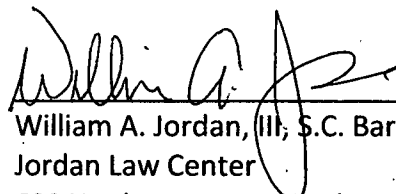
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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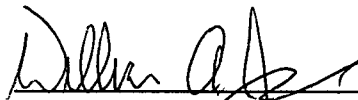
Wal-Mart Stores, Inc., and
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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant on the Respondents by depositing a copy of the document in the United States Mail, postage prepaid, on September 3, 2014, addressed to their attorney of record, Johnnie W. Baxley, III, 421 Wando Park Boulevard, Suite 100, Mt. Pleasant, S.C. 29464.

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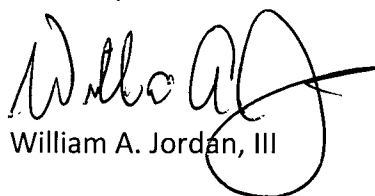
RE: Paula Russell, Appellant, v. Wal-Mart Stores, Inc., and American Home Assurance, Respondents, WCC File No: 0917785

Dear Ms. Kitchings:

Enclosed for filing please find the Appellant's Initial Reply Brief. Also, I have enclosed the original Certificate of Service in the above case.

With kindest personal regards, I am,

Sincerely,



William A. Jordan, III

WAJIII/tdh
Enclosures

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