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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2012-CP-10-5429

Sara Y. Wilson, ... Appellant,

v.

Charleston County School District, ... Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Whether the South Carolina Workers' Compensation Commission erred when it held that Sara Wilson's "change of condition" claim was barred by res judicata because Ms. Wilson experienced some degree of anxiety and depression before her original award.

II. Whether the South Carolina Workers' Compensation Commission erred when it reasoned that Ms. Wilson's depression had to begin or worsen between specific dates in order to be compensable.

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Sara Wilson asked the commission to modify a previous workers' compensation award because several of her health problems have gotten worse since that award was issued. This request is called a "change of condition" claim. It is covered by section 42-17-90 of the South Carolina Code.

Ms. Wilson's original injury was a back injury that occurred in May of 2006. At the time of her injury she was working for the Charleston County School District as an administrative clerk.

Ms. Wilson was a bystander in a fight between two students. Ms. Wilson is quite small; she is roughly 4'10" tall and weighed approximately 115 pounds at the time she got hurt. Ms. Wilson was injured when she was shoved up against a countertop and suffered a herniated disc.

This was a significant injury. In March of 2007, Ms. Wilson underwent surgery to remove the herniated disc and to fuse two of her vertebra together.

Ms. Wilson's claim was processed quickly. The School District did not contest the claim's validity, and Ms. Wilson received an award from the commission in November of

2007. This award required the School District to pay Ms. Wilson weekly benefits for a period of time, and it also required the School District to provide future medical treatment.

Instead of making weekly payments, the School District paid Ms. Wilson's award in a lump sum. The School District sent the check to Ms. Wilson's lawyer in January of 2008.

Ms. Wilson started these proceedings—her change of condition claim—in January of 2009. See (Cir. Ct. Record, p.30) (the Form 50 giving notice of the claim). A little over 2 years later, in March of 2011, Ms. Wilson requested a hearing on the claim. See *Id.* at 31.

A hearing commissioner heard the change of condition claim in June of 2011.

The basis of the change of condition claim was Ms. Wilson's assertion that her back injury was affecting her mental health. Ms. Wilson said that her back pain had increased and that this pain was causing depression.

Ms. Wilson admitted that she had experienced some anxiety and depression in the past, but she claimed that her current condition was of a different character. For example, Ms. Wilson explained that while she had been depressed after her husband's death years earlier, she did not experience significant depression until after the pain from her back injury had increased significantly.

To support this claim, Ms. Wilson pointed out that it was not until early 2008—which was *after* her original award—that her primary care physician referred her to a specialist for psychiatric treatment.

The hearing commissioner agreed with Ms. Wilson's argument. Relying on precedent, he held that a mental disorder can be a part of a change of condition claim as long as the mental disorder is connected to the original injury. (Cir. Ct. Record, p.14, ¶6).

As a result of this finding, the hearing commissioner concluded that Ms. Wilson was entitled to ongoing psychiatric care and temporary total disability benefits. *Id.* at 15, ¶5.

The School District appealed the hearing commissioner's decision to the full commission. An appellate panel of the commission heard the appeal in July of 2012.

The appellate panel reversed. The panel seemed to hold that because Ms. Wilson had experienced some level of anxiety and depression before her original award, her change of condition claim was barred by res judicata.

The panel also reasoned that Ms. Wilson's depression had to worsen between specific dates—January of 2008 and January of 2009—in order to be compensable. The panel's decision was dated July 18, 2012. See generally (Cir. Ct. Record, pp.13-28).

On August 17, Ms. Wilson appealed the commission's decision to circuit court. She filed an appellate brief, the School District filed a response, and Ms. Wilson filed a reply.

Ms. Wilson's principal brief to the circuit court framed the issues the same way that she has framed the issues in this document. See (Ms. Wilson's brief to circuit court).

The School District opposed Ms. Wilson's argument by contending that the case revolved around a factual dispute and that there was ample evidence in the record to support the commission's decision that Ms. Wilson could have brought a claim for depression in her original claim. The School District saw this failure as res judicata. See (School Dist's Br.).

The School District also said Ms. Wilson had failed to prove that any depression had gotten worse within the one-year deadline for a change of condition claim. See *Id.*

Ms. Wilson's reply argued that there was no authority for applying res judicata in the way that the School District was seeking to apply that doctrine to the present case. She also

argued that the commission's decision made blanket findings without reciting specific evidence. Ms. Wilson said this suggested that the commission did not treat the case like it was driven by a factual dispute. See generally (Ms. Wilson's reply brief to circuit court).

Ms. Wilson further argued that the law does not require a change of condition claim to run its course within the one year deadline. She said taking such a view would lead to an disparate treatment of situations that were not meaningfully distinguishable and would violate the principle that the Workers' Compensation Act is supposed to be read flexibly and in favor of awarding compensation. *Id.*

The circuit court did not conduct a hearing, and on October 6, 2014, the circuit court issued an order affirming the commission's decision.

Ms. Wilson received notice of the circuit court's order on October 10, and on October 20, she filed a motion for reconsideration. See (Ms. Wilson's Rule 59 Motion).

The circuit court summarily denied reconsideration in a Form 4 order that was issued on October 30, 2014.

Neither Ms. Wilson nor any of her lawyers received written notice of this order's entry. One of her lawyers discovered the order on December 3, 2014, during a routine check of the docket. Ms. Wilson served and filed a notice of appeal that same day.

ARGUMENT

This appeal concerns Ms. Wilson's claim that her mental health has deteriorated in the time since her original award. She says that her mild and periodic depression has become significant and severe, and she says that this has been caused by constant pain from her work-related back injury which improved after surgery before eventually getting worse.

The commission denied Ms. Wilson's request, apparently by reasoning that because Ms. Wilson experienced some degree of anxiety and depression before her original award, her change of condition claim was barred by res judicata.

The commission also reasoned that Ms. Wilson's depression had to worsen between specific dates in order to be compensable.

Neither of these conclusions is correct.

Res judicata *would* bar Ms. Wilson from re-trying a claim that she previously lost, but Ms. Wilson is not claiming that her injury has always affected her mental health. She is claiming things have changed. For that reason, res judicata does not apply.

Similarly, a change of condition does not have to run its course between specific dates. A change of condition can be caused by a minor problem that is still in the process of turning serious.

The commission's decision does not demonstrate that it understood the proper application of these principles. Ms. Wilson is not arguing that it was impossible for the commission to rule against her. Her argument is that whatever the commission's ruling, the commission's order must demonstrate a correct understanding of the controlling principles.

The commission's decision does not meet this standard. For this reason, the Court should reverse this case and remand the claim for further proceedings.

I. Res Judicata Does Not Bar a Claim Just Because a Symptom Was Present at the Time of the Original Award.

The most sensible reading of the commission's decision is that the commission reasoned res judicata barred Ms. Wilson's claim because Ms. Wilson had experienced

anxiety and depression before her original award. This reasoning is not correct and should be reversed.

a. This is the first time Ms. Wilson has ever made a psychiatric claim, and res judicata generally requires that a claim have been previously litigated and lost.

Res judicata, or "claim preclusion," prohibits a second lawsuit that is based on the same claims and issues that were actually litigated or that might have been litigated in a previous lawsuit. *Price v. City of Georgetown*, 297 S.C. 185, 189, 375 S.E.2d 335, 338 (Ct. App. 1988). It generally requires that the current case have the same parties as the previous case, that the subject matter of the cases be the same, and that the issue in question have been decided in the previous matter. *Id.* at 449, 511 S.E.2d at 57. The Supreme Court has described that the primary purpose of claim preclusion is "to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." *Id.* at 449, 511 S.E.2d at 57.

The School District is not being forced to defend an action that it already defended. This is the first time Ms. Wilson has claimed that her back injury is affecting her mental health.

Ms. Wilson's original filing—the notice of a claim that she filed with the commission in August of 2006—does not mention any claim for a mental injury. (Cir. Ct. Record, p.29). In similar fashion, Ms. Wilson's original award, which the commission issued in November of 2007, does not mention a claim for a mental injury. (Cir. Ct. Record, pp.1-12).

Indeed, the commission's original award specifically recites that Ms. Wilson did not ask for anxiety treatment and believed that the anxiety she experienced at that time was due

to the death of her husband. (Cir. Ct. Record, p.7). Ms. Wilson is not re-litigating a claim that she previously brought and lost. This is a claim that she is making for the first time.

b. Because every change of condition award modifies the commission's original decision, res judicata does not apply to the commission in the same way that it applies to a court.

Although it is possible for res judicata to apply to a workers' compensation case, the Supreme Court has described that this application is different from the way res judicata applies to a decision from a court. The principal case exploring this distinction is *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 354-56, 23 S.E.2d 19, 21-22 (1942).

Cromer explains that in a court case, the court's judgment is generally conclusive once a term of court has adjourned. This finality is what gives the court's judgment preclusive effect.

Cromer recognizes that the commission operates differently. The commission has continuing jurisdiction over every case and is allowed to review every award based on the request of either party or on the commission's own motion. See S.C. Code Ann. § 42-17-90 (Supp. ____). The only limit on this review is that it occur within 12 months of the last payment of compensation. *Id.*

This distinction is important. It recognizes that *every* change of condition claim is going to involve modifying the commission's original findings. A court could not do this. No rule allows it.

The commission is *not* a court, and the reason that the change of condition process exists is so that the commission can alter an award despite that fact that the award appears,

on its face, to be final. A change of condition cannot be barred just because it involves something that was not a part of the first award. Unlike a court, the commission may change an award if the circumstances justify it.

c. A proper application of these principles and of precedent illustrates that res judicata does not bar Ms. Wilson's claim.

South Carolina courts have honored these principles as they have applied res judicata to change of condition claims.

Courts have refused to allow a claimant to use a change of condition claim to re-try an issue that the claimant lost during the original case. This is what happened in *Owenby v. Owens Corning Fiberglas* and *Mead v. Jessex*. In both cases, the driving consideration was that the commission had already decided, in the first award, that the symptoms in question were not related to the claimants' injuries. Barring an appeal, that finding was conclusive. *Mead*, 382 S.C. 525, 532-34, 676 S.E.2d 722, 726-27 (Ct. App. 2009); *Owenby*, 313 S.C. 181, 183, 437 S.E.2d 130, 131-32 (Ct. App. 1993).

This reasoning is correct. A change of condition claim is not a vehicle for rehashing an issue that the claimant has already litigated and lost.

But if the alleged change of condition involves an issue that the claimant has *not* raised before, and if the allegation is that the effects of the claimant's injury have truly changed, there is no procedural bar to the claim. This precise scenario is what happened in *Estridge v. Joslyn Clark Controls* and *Mungo v. Rental Uniform Service of Florence*.

Both *Estridge* and *Mungo* involved significant physical injuries, and both of these cases involved a change of condition based on the claim that as time lapsed, the physical

injury began to significantly affect the claimant's mental condition. See *Mungo*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009); *Estridge*, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997).

In both cases, this Court reversed the commission's finding that the mental claim was barred. There is little to no material difference between these cases and the circumstances of Ms. Wilson's case.

In *Estridge*, this Court noted that while there was *some* evidence of psychological problems at the time of the claimant's original award, these problems might not have impacted the claimant's disability at the time of the original award. See 325 S.C. at 540, 482 S.E.2d at 581. In *Mungo*, this Court noted that at the time of the original award, no physician had diagnosed the claimant with a significant psychological condition. The *Mungo* Court also noted that the claimant had not alleged a mental injury in her original claim. See 383 S.C. 270, 282-84, 678 S.E.2d 825, 831-32.

These claimants were not re-litigating issues that had already been decided. They were claiming that their physical injuries progressively caused them to have mental problems. The same is true of Ms. Wilson.

The reality is that for some claimants, medical treatment may result in permanent relief. Unfortunately, it is also possible that pain can subside after surgery, return, and get worse. That is what Ms. Wilson is claiming. See *Clark v. Aiken County Gov't*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) (pain relapse after surgery supported change of condition claim). The commission may not summarily dismiss this claim just because Ms. Wilson experienced a little anxiety and depression before her original award. If that reasoning was

valid, *Mungo*, *Estridge*, and *Clark* would have been decided differently. There is no procedural bar. The commission needs to decide this claim on the merits.

> d. If this is a fact-driven case, the commission needed to engage in detailed fact finding and to explain its decision. If Ms. Wilson always had a compensable psychological injury, where is the medical evidence of that diagnosis?

The School District's strategy at the circuit court level was to try to sell a more nuanced and fact-driven argument than it sold to the commission. It also tried to give the commission's order more credit than the order is due.

For example, the School District's argument to the circuit court was that the relevant question is whether Ms. Wilson had a compensable depression claim at the time her original award. The argument goes that if the answer to this question is "yes," the depression claim is barred by res judicata because it could have been brought previously.

This Court should reject this contention, for two reasons.

First, Ms. Wilson was able to locate four instances where appellate courts have applied res judicata in workers' compensation cases. None of those cases are comparable to Ms. Wilson's case.

Three of those cases—*Mead v. Jessex*, *Owenby v. Owens Corning Fiberglas*, and *Johnson v. Greenwood Mills*—all involved symptoms that the commission had previously adjudicated. See *Mead*, 382 S.C. at 532-34, 676 S.E.2d at 726-27; *Owenby*, 313 S.C. at 183, 437 S.E.2d at 131-32; and *Johnson*, 317 S.C. 248, 251, 452 S.E.2d 832, 833 (1994). That is not true here. Ms. Wilson did not allege compensable depression with her original award. These cases have no application.

The fourth case, *Krell v. South Carolina State Highway Department*, is a hernia case and is controlled by the hernia statute, which requires a work-related hernia to appear almost immediately after an injury in order to be compensable. See 237 S.C. 584, 118 S.E.2d 322 (1961) and S.C. Code Ann. § 42-9-40 (Supp ____) (the hernia statute). If the law requires a hernia to appear immediately, it naturally follows that it going to be impossible for a hernia to be part of a change of condition claim.

Thus, to this point, the School District has not presented any authority that follows the view of res judicata that it is espousing. It has never presented a case that looks back in time and holds that a change of condition claim is barred because the symptom in question would have been compensable in the original award.

The second reason the Court should reject the suggestion that this is a fact-driven case is because the commission's order is not written that way. The commission's decision contains blanket findings; findings like "no doctor has opined that [Ms. Wilson] did not have work-related depression prior to [her original hearing]," and "no doctor has opined that [Ms. Wilson's] work-related depression began after [the relevant date] and worsened between [certain dates]." (Cir. Ct. Record, pp.25-26, findings 21 & 22). This is not a nuanced order. It is written in broad absolutes.

The commission cannot have been viewing the law correctly if it made these sorts of findings. It does not matter whether Ms. Wilson had some degree of work-related depression prior to the first hearing. It also does not matter whether her work-related depression began between certain dates. The question is whether her mental condition has changed. The commission never made a finding about when Ms. Wilson's depression became disabling

and it never cited medical evidence which suggests that this pre-existing depression had a significant level of severity.

The essential purpose of the change of condition statute is to empower the commission to modify an award—to amend the decision it already made—because the facts and circumstances that led to the award have changed. This is what Ms. Wilson alleged here. She claimed that back pain caused her depression to go from tolerable to disabling.

It was incumbent on the commission to offer lucid explanations for rejecting this argument and to explain the reasoning behind its findings. With the utmost respect, this order does not demonstrate a correct understanding of the law and does not offer a sufficient explanation for its findings.

II. A Change of Condition Claim Is Not Tied to a Specific Date of Diagnosis. As Long as it Is Filed in the Proper Time, it Can Encompass a Problem That Is in the Process of Turning Serious.

The commission held that Ms. Wilson's depression had to worsen between specific dates—January of 2008 and January of 2009—in order to be compensable. This is not correct.

a. The purpose of the change of condition statute is to allow the commission to adjust an award based on any developments, positive or negative, in the claimant's condition.

This Court has described that the purpose of the change of condition statute is to allow the commission to decrease compensation when someone's condition has changed for the better and to increase compensation when their condition has changed for the worse. See, e.g., *Estridge*, 325 S.C. at 537, 482 S.E.2d at 580 (citing the Supreme Court's decision in

Cromer). The change of condition can be a physical change that impacts someone's earning capacity, a change in earning capacity even though someone's physical condition has not changed, or a change in the claimant's degree of disability even though his or her physical condition has not changed. *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 115, 576 S.E.2d 191, 199 (Ct. App. 2003) (Stilwell, J., dissenting).

The goal of this scheme seems relatively clear—to account for circumstances as they change over time. As this Court observed in *Estridge*, some health problems take time to appear and develop into "full bloom." 325 S.C. at 540, 482 S.E.2d at 581.

b. As long as it is filed by the proper deadline, a change of condition claim can encompass a problem that is still in the process of turning serious.

Like all parts of the Workers' Compensation Act, the change of condition statute is to be liberally construed in light of its intended purpose. One illustration of how this applies in practice arose out of the statute's requirement that the commission conduct its change of condition "review" not later than 12 months after the last payment of compensation. See Section 42-17-90(A).

The Supreme Court considered this part of the statute in *Allen v. Benson Outdoor Advertising Co.* The *Allen* decision observes that if this language was read literally, it would require the commission to hear these claims *and decide them* within the 12 month deadline.

The Supreme Court rejected this view, and in doing so, it noted the purpose of the statute, the liberal construction afforded to the statute, and the fact that other states had construed their statutes to require only that the claim be filed—not decided—within the 12-month deadline. See 236 S.C. 22, 29-31, 112 S.E.2d 722, 725-26 (1960).

Allen is just one example of the court applying the principle of reasonableness that runs though all of the cases in this area. If the claimant files a change of condition claim within the one-year deadline and pursues the claim with reasonable diligence, the court has been receptive, as it was in *Allen*. At least one foreign court has even taken judicial notice of the fact that some workers' compensation cases take years to develop. *Wilkins v. State Compensation Comm'r*, 198 S.E. 869, 872 (W. Va. 1938) (cited favorably in *Allen*, 236 S.C. at 30, 112 S.E.2d at 726).

If the claimant does *not* act with reasonable diligence, the court has not been receptive. See *Richey v. Dickinson*, 359 S.C. 609, 598 S.E.2d 307 (Ct. App. 2004) (not a change of condition case, but laches barred a claim when the claimant did not request a hearing for 11 years).

These principles should not be controversial. The claimant's condition might still be in the process of worsening as the 12 month deadline approaches, and there is no valid reason to preclude such a claim. One person's change of condition might be uncomplicated and routine, but another claimant's condition—an equally valid condition—might be less definitive and need more time to evolve.

c. The commission's decision did not appear to recognize these principles and apply them to the facts of Ms. Wilson's case.

The decision below gives no indication that it recognized or applied these principles to Ms. Wilson's claim. It recited things that were uncontested and then ended the case.

For example, the commission recited that no doctor has opined Ms. Wilson did not have work-related depression prior to her original award. (Cir. Ct. Record, p.25, ¶21). Ms.

Wilson never claimed that any doctor gave such an opinion, and as the *Estridge* and *Mungo* cases describe, the fact that Ms. Wilson had *some* depression at that time would not bar a change of condition claim if her depression was minor but subsequently became severe.

The commission also recited that no doctor had opined that Ms. Wilson's depression began after the date of her original hearing or got worse between January of 2008 and January of 2009. Again, this was not what Ms. Wilson alleged.

When she initiated this claim in January of 2009, Ms. Wilson attached a medical report which described that her primary physician had referred her to a specialist for psychiatric treatment. (Cir. Ct. Record, pp.32-34). This information was confirmed in a letter from Ms. Wilson's psychiatrist, and this letter indicated that this physician had been providing Ms. Wilson with psychiatric care since May of 2008—well in advance of the change of condition deadline. See (Cir. Ct. Record, pp.35-36).

It should not matter that this physician was not able to diagnose Ms. Wilson with a specific change of condition within a 12 month period. The important facts are that he believed Ms. Wilson needed this treatment and he opined that this treatment is connected to her work-related back injury. In order to deny this claim, the commission has to consider this argument and give a principled reason for rejecting it. The commission's decision does not indicate that it performed either of these tasks.

CONCLUSION

Res judicata does not prevent a change of condition claim when a minor problem that was present during the original award has gotten worse. Also, a change of condition claim is not tied to a specific date of diagnosis or worsening. The commission's decision does not demonstrate that it understood the proper application of these principles. The Court should reverse this case and remand it for additional proceedings.

Respectfully submitted,

March 4, 2015

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Sara Y. Wilson, ... Appellant,

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Charleston County School District, ... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Brief of Appellant* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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Erin Bridges

March 4, 2015
Columbia, South Carolina

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& DELGADO, LLC

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

March 4, 2015

VIA HAND DELIVERY

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

RE: Sara Y. Wilson v. Charleston County School District
Case Tracking No.: 2014-002596

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the *Initial Brief of Appellant* and *Designation of Matter to be Included in the Record on Appeal* in regards to this case. I have also enclosed a proof of service of this document on counsel for the Respondent. Please return the additional filed copies to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Erin Bridges
Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON & DELGADO, LLC

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Enclosures
cc: Catherine H. Chase, Esquire
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