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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

FEB 03 2016
SC Court of Appeals

Case No. 2014-000454

PAULA RUSSELL.....APPELLANT,

v.

WAL-MART STORES, INC.
AND AMERICAN HOME ASSURANCE.....RESPONDENTS.

PETITION FOR REHEARING

Respondents, Wal-Mart Stores, Inc. and American Home Assurance, by their undersigned attorney, respectfully Petition for Rehearing of the Court's Opinion No. 5376 filed on January 20, 2016, pursuant to Rule 221 (a), SCACR. The Court of Appeals held that the South Carolina Workers' Compensation Commission erred in relying exclusively on objective evidence, in excluding subjective evidence, and in requiring that a change of condition be established by objective evidence. The Respondents respectfully assert that the Court of Appeals overlooked, disregarded, and misapprehended the order of the South Carolina Workers' Compensation Commission in arriving at this holding.

ARGUMENTS

In South Carolina workers' compensation cases, "the Full Commission is the ultimate fact finder." *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). Additionally, "[t]he

final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). Finally, “[i]t is not the task of [an appellate court] to weigh the evidence as found by the Full Commission.” *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981).

In this case, the Court held that the Workers’ Compensation Commission exclusively relied on objective evidence, excluded subjective evidence, and required that Claimant establish her claim for a change of condition by objective evidence only. However, a reading of the plain language of the Workers’ Compensation Commission’s Decision and Order indicates that the Court of Appeals misapprehended and disregarded the burden applied by the Commission and the evidence considered.

First, the Court of Appeals overlooked and disregarded the plain language of the Commission’s Order where it is plainly stated that both objective and subjective evidence was considered. On page 4 of the Order, in the general discussion of the evidence, the Commission noted Claimant’s subjective testimony. On page 6 of the Order, the Commission stated that they conducted a lengthy review of the evidence, including the medical records, deposition testimony of both doctors, and the Claimant’s testimony at the hearing. Finding of Fact #6 specifically states that the Commission reviewed and considered the Claimant’s testimony. (R. p. 231). Specifically regarding Appellant’s subjective complaints, the Full Commission stated in Finding of Fact #7, “[w]e give limited weight to the testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, we find Claimant’s lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award.” (R. p. 231). Further, the “Claimant 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 . . . occurred after the original award.” (R. p. 231). The Commission did not rely exclusively on objective evidence; the Commission’s Order plainly states that both objective and subjective evidence were considered. The Court of Appeals disregarded and overlooked this plain language in the Commission’s Order in reaching their decision on this claim.

Second, the Court of Appeals misapprehended the Commission’s burden of proof; there is no indication in the Commission’s Order that it required proof of a change of condition exclusively by objective evidence. The burden of proof was plainly set forth by the Commission in its Order:

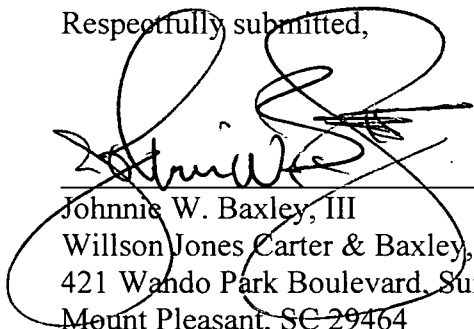
The law concerning change of condition claims in South Carolina is well established. Section. 42-17-90 provides, “the Commission may review an award and on that review make an award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.” In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in “physical condition” as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. *Id.* (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. *Id.* at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a “change in condition.” *Id.*

There is no indication anywhere in the Commission’s Order that it was requiring proof exclusively by objective evidence on this change of condition claim. The holding by the Court of Appeals disregards and overlooks the plain language in the Commission’s Order and misapprehends the actual burden stated by the Commission.

In this matter, the Commission did not exclude subjective evidence or rely exclusively on objective evidence. Instead, the Commission considered all of the evidence but gave more weight to certain evidence and less weight to other evidence. That is exactly what the Workers' Compensation Commission, as fact finder, is authorized and empowered to do on these claims. The Court of Appeals seems to have mistaken and confused weighing of the evidence (which is a proper role of the Commission) with exclusion and failure to consider evidence (which would not be a proper role of the Commission). Based on the plain language of the Commission's Order, the Commission considered both subjective and objective evidence, and simply gave more weight to the objective evidence than it did to the subjective evidence in making its Findings of Fact and Conclusions of Law. That is the proper role of the Commission as fact finder, and the Respondents assert that the Court of Appeals was mistaken and misapprehended the role and actions of the Commission in this matter.

For the foregoing reasons, Respondents would respectfully request an opportunity for this case to be reheard by this honorable Court.

Respectfully submitted,



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February 2, 2016

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In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2014-000454
Opinion No. 5376 (Filed January 20, 2016)

Paula Russell, Claimant,

Appellant,

v.

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

Respondents.

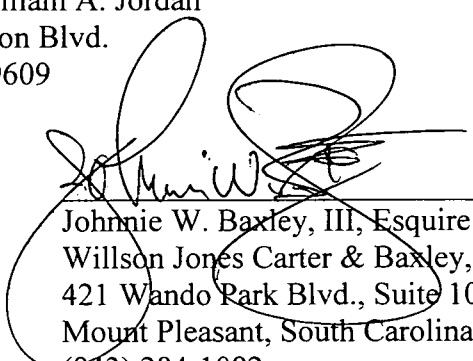
CERTIFICATE OF SERVICE

I certify that the Petition for Rehearing was served on Appellant, Paula Russell, on February 2, 2016, via UPS overnight delivery addressed to her attorney of record:

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Via UPS Overnight Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court
Court of Appeals of South Carolina
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Columbia, SC 29201

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SC Court of Appeals

Re: Paula Russell vs. Wal-Mart Stores, Inc.
Appellate Case No.: 2014-000454
WCC File No.: 0917785 DOI: 11/3/09
Carrier: American Home Assurance - Claim No.: 5943261
WJC&B File No.: 0170.01754

Dear Ms. Kitchings:

Enclosed herein, please find the following items for filing in the above-referenced matter:

1. Petition for Rehearing (original and six copies);
2. Certificate of Service.

By copy of this letter, we are serving a copy of the same on C. Daniel Vega, Attorney for Appellant.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.


Johnnie W. Baxley, III

Enclosures

cc: C. Daniel Vega, Esq.
William Jordan, Esq.
Ms. Anita Adams (via e-mail)

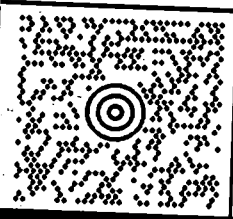
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COLUMBIA SC 29201-3769



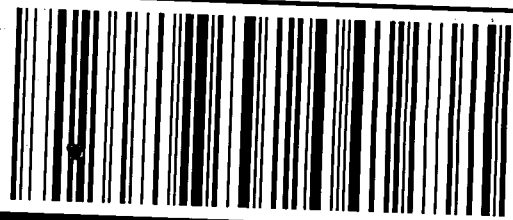
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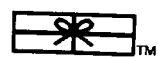
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Reference # 1: Paula Russell v. Wal-Mart
Reference # 2: 0170.01754

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