

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.

RETURN TO RESPONDENTS' PETITION FOR REHEARING

Appellant, Paula Russell, by her undersigned attorney, files this return to the Respondents' Petition for a rehearing, pursuant to Rule 240, SCACR. The Appellant opposes this Petition, on the grounds that the Court properly considered the record before it and made the correct ruling as a matter of law.

The Respondents argue, in essence, that the Court's ruling in this case should be overturned because the Court did not give the proper deference to the Decision and Order of the Workers' Compensation Commission. (Respondents' Petition for Rehearing, p. 2). However, the Appellant notes that it is the role of the Court to determine whether the Commission has applied the correct legal standard in determining issues before it. As the Court noted in its opinion in this case, the Court "may reverse or modify the Commission's decision if the Appellant's substantial rights

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SC Court of Appeals

have been prejudiced because the decision is affected by an error of law or is 'clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.'" *Russell v. Wal-mart Stores, Inc.*, 3, op. No. 5376 (S.C. Ct. App. Filed Jan. 20, 2016) (Shearouse adv. Sh. No. 3 at 37). The Court did just that, when it based its ruling upon the premise that the Commission applied the wrong *legal* standard in determining whether a change of condition had occurred." *Russell* at 3.

The Respondents further argue that the Court "overlooked and disregarded the plain language of the Commission's order where it is plainly stated that both objective and subjective evidence was considered." (Respondents' Petition for rehearing, p. 2). However, the Court clearly ruled that "there is no requirement in the Workers' Compensation Act (the Act) that the evidence relied upon by the Commission be either subjective or objective." *Russell* at 4. The Court acknowledged, correctly, that there is no requirement that a change of condition be proven either by subjective or objective evidence. The Court found that "the Commission exclusively relied on the MRIs in finding Russell failed to objectively prove her claim." *Russell* at 5.

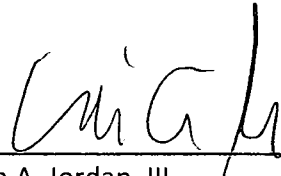
Essentially, the Court found that the Commission could not have found that a change in condition had not occurred, unless it relied solely on the lack of change between MRIs; in order to make such a finding, the Commission necessarily required that a change of condition be proven by 'objective' evidence. Especially in light of the testimony of both of the Appellant's doctors, the Court found that the Respondents were not able to put forth any evidence that a change of condition had not occurred, other than the lack of change between the various MRIs. *Id.* With nothing else on which to hang its hat, there simply was no basis for the Commission's decision, but for the use of an 'objective' standard. *Id.* Both the treating physician selected by Walmart and the

independent Medical Examiner testified there was a change in condition despite the MRIs. The Commission substituted its judgment for the doctors' judgment. *Id.* Because there was no other explanation for the Commission's decision, the Court properly found that the Commission was requiring 'objective' evidence to prove a change of condition. *Id.*

Finally, the Respondents also argue that the Court is "mistaken and confused" when drawing distinctions between weighing evidence and excluding evidence. (Respondents' Petition for Rehearing, p. 4). However, the Court made it extremely clear that it understood the distinction between weighing evidence and excluding evidence. For a start, the Court correctly set forth the legal standard when it stated: "We recognize there is no requirement in the Workers' Compensation Act (the Act) that the evidence relied upon by the Commission be either subjective or objective. The Appellate Courts have affirmed awards based solely on objective evidence and awards based solely on subjective evidence." *Russell* at 4. The Court went on to state that "the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence." *Id.* The Court also found it highly persuasive that counsel for the Respondents pushed the 'objective' theory throughout the proceedings in the Commission, and the Court ultimately placed its faith in opinion of the Appellant's treating physicians. *Id.* At 4. The Court even went so far as to note that it was "[m]indful of our standard of review of factual finding, we nevertheless conclude the Commission erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence." *Id.* At 5. (citation omitted). This issue was raised by counsel for the Respondents at oral argument and explored fully, as it was in the briefs on the issue.

Simply because the Respondents are unhappy with the final outcome in the case, does not mean that the Court was mistaken in its judgment or in the legal standard that it applied. In fact, the Court went well out of its way to make clear that it was *not* substituting its judgment for that of the factfinder, but rather requiring that the factfinder use the proper standard in reaching its conclusion. Where the Court applies the proper standard of review and acknowledges the correct legal standard for determining a change of condition, no error can be said to have been committed. The Court was 'confused' about nothing, based on the clear language of the Court's decision, which should be upheld.

For the foregoing reasons, Appellant respectfully requests that the Respondents' Petition for Rehearing be denied.



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March 1, 2016

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PROOF OF SERVICE

I certify that I have served the Return to Respondents' Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on March 1, 2016, addressed to their attorney of record:

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March 1, 2016



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March 1, 2016

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

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RE: Paula Russell v. Wal-Mart Stores, Inc.
Appellate Case No.: 2014-000454

Dear Ms. Kitchings:

Enclosed for filing please find the following documents in connection with the above-referenced matter:

1. Return to Respondents' 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 Johnnie W. Baxley, III, Attorney for Respondent.

Sincerely,

JORDAN LAW CENTER


William A. Jordan, III

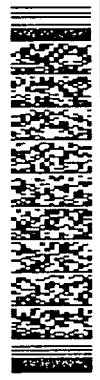
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cc: Johnnie W. Baxley, III, Esquire
C. Daniel Vega, Esquire

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WAIVER OF SIGNATURE

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