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.

REPLY BRIEF

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ARGUMENT

This is not a substantial evidence case. This case is about whether the Workers' Compensation Commission's order is detailed-enough to show that the commission followed the law. It was certainly possible to deny this claim. Few cases are clear-cut; this case is no exception. The argument here is that whatever the commission's ruling, its decision must demonstrate a correct understanding of the controlling principles. This decision does not.

A. The commission's decision does not have detailed findings of the relevant facts. This is evidenced by the Respondent's confusing theory that Ms. Wilson *always had* compensable depression which did not change and become disabling until it was too late.

One cannot judge whether the commission's order is sufficiently detailed without acknowledging Ms. Wilson's theory of the case. Ms. Wilson struggled with depression *before* she hurt her back at work. Her medical records note an episode after her husband's death in 2003 and another episode in 2005, the year before her back injury. See (R. p.94). Everyone knew this history—to take a contrary position would be to deny the facts. The claim Ms. Wilson made here was that although her back injury initially improved after surgery, the pain worsened later and caused her depression to become severe.

The hearing commissioner acknowledged this claim's nature and correctly cited this Court's decision in *Estridge v. Joslyn Clark Controls* for the proposition that if a mental condition such as depression is in any way connected to a work-related injury, the mental condition *can* be the subject of a change of condition claim. (R. p.76, ¶6). The remarkable thing about the appellate panel's decision is that although the decision is lengthy, its analysis is quite brief and never articulates why the hearing commissioner was wrong.

For example, in finding #24, the panel held that Ms. Wilson had injury-related depression "by" September of 2007. (R. p.88). Assuming this is correct, it begs the question of when that depression became *disabling*, because disability is a prerequisite for a compensation award. See S.C. Code Ann. § 42-9-200 (2015) (no compensation is payable unless the disability lasts more than 14 days). It does not matter that Ms. Wilson had *some* injury-related depression before. Compensability requires more.

Consider also the panel's findings #19 and #20, which recite medical evidence that Ms. Wilson had depression and anxiety before her original award. (R. p.87).

These findings take a very liberal view of the evidence, because any scrutiny of the record reveals that there is only one piece of evidence supporting this idea—a vocational assessment prepared by Dr. William Stewart. (R. pp.115-124). That clarification is significant because the order deciding Ms. Wilson's initial claim *rejected* this same vocational assessment as inconsistent and at odds with the medical evidence. (R. p.72, ¶19). The panel's decision never explains why this report's opinions, which were previously shunned, now conclusively establish that if Ms. Wilson *had* made a previous claim for a psychological injury, that claim would have been compensable.

The Court can find further evidence of this lack of clarity between reasoning and conclusion in the perplexing factual argument the Respondent offers for affirmance. First, the Respondent says Ms. Wilson always had a claim for injury-related depression but simply failed to bring it at the beginning. Brief of Respondent, pp.4-5. Then, the Respondent downplays the fact that Ms. Wilson's treating physician did not send her to a psychiatrist until May of 2008—months *after* Ms. Wilson's first award—by saying there is no evidence

the depression was any worse at that time. Brief of Respondent, p.5. Of course, the idea that Ms. Wilson's depression had not changed would seem to be contradicted by the fact of the referral. Finally, the Respondent dismisses the psychiatrist's diagnosis of "endogenous" depression by saying that this diagnosis did not come until two-and-a-half years later, which was when the Respondent decided to take this doctor's deposition. Brief of Respondent, p.5. In other words, Ms. Wilson *had* compensable depression originally, this was better (or there was no real difference) when her doctor sent her to a psychiatrist in 2008, and by the time Ms. Wilson's depression became disabling, it was too late. How convenient.

The panel never articulated such a carefully constructed narrative. Instead, the panel issued an order that never engaged Ms. Wilson's theory of the case. The panel was not required to adopt Ms. Wilson's argument, but the panel *was* obligated to identify it and explain why it was not persuasive. See *Canteen v. McLeod Reg'l Med. Ctr.*, 400 S.C. 551, 558-89, 735 S.E.2d 246, 250 (Ct. App. 2012) . This panel never did.

B. The commission's decision does not reveal the commission's understanding of the doctrine of res judicata. The decision contains no legal analysis beyond summarily citing two cases that are meaningfully distinguishable.

There are only five short paragraphs in the appellate panel's decision that relate to the Respondent's novel application of res judicata. Finding #19 recites Dr. Stewart's opinion that Ms. Wilson's injury-related depression and anxiety preceded her original hearing. (R. p.87). Finding #20 cites the deposition of Ms. Wilson's psychiatrist, *id.*, but in reality, the psychiatrist is simply re-stating the opinion from Dr. Stewart's report. (R. p.106). Findings #24 and #25 hold that Ms. Wilson could have raised injury-related depression previously.

(R. p.88). Conclusion #4 instructs that *Owenby v. Owens Corning Fiberglas* and *Krell v. South Carolina State Highway Department* "are applicable" to what issues may and may not be raised in a change of condition claim. (R. pp.88-89). This is the only guidance the decision gives on res judicata.

Owenby v. Owens Corning Fiberglas involved a change of condition claim based on a symptom—psychological problems—that the commission previously found did not result from the claimant's work-related injury. 313 S.C. 181, 183, 437 S.E.2d 130, 131-32 (Ct. App. 1993). The case has no meaningful application here. This is evidenced by a quick examination of the case and by the fact that the Respondent never cites it.

The best case the Respondent has is *Krell*, and Ms. Wilson continues to believe there is a meaningful difference between a change of condition claim based on a hernia and a change of condition claim based on continued pain that enhances pre-existing depression and becomes debilitating. Again, a statute requires a hernia to "immediately" follow the accident in order to be covered. S.C. Code Ann. § 42-9-40(4) (2015). It is hard to see how a hernia could ever be a part of a change of condition claim when the critical fact for a hernia's compensability is that it *must have* existed at the time of the original proceedings.

The Respondent says res judicata involves an after-the-fact view of a previous claim and preventing valid change of condition claims because the symptom in question looks like it was there from the start. Ms. Wilson has not discovered a case that follows this reasoning and the Respondent does not cite one. This Court rejected a species of this argument in *Dozer v. American Red Cross*, 411 S.C. 274, 290-91, 768 S.E.2d 222, 230-31 (Ct. App. 2014). Despite what the Respondent says, this approach *is* novel and without direct support.

The fundamental purpose of res judicata is to ensure no one is sued twice for the same cause of action. *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011). Put differently, "[t]he primary purposes of the doctrine, commonly known today as claim preclusion, are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998).

Nobody is suing the Respondent repeatedly or forcing it to defend the same action repeatedly. All Ms. Wilson is seeking is an intellectually honest adjudication of her claim that although her back injury got better following surgery, it subsequently worsened to the point that it caused constant pain which contributes to her disability. The panel held "no doctor has opined that [Ms. Wilson] did not have work-related depression prior to [her original] hearing," (R. p.87, ¶21), and that no doctor opined Ms. Wilson's work-related depression *began after* or *worsened between* specific dates. (R. p.88, ¶22). Nobody *has* to offer such opinions—the precise moment Ms. Wilson's depression began or worsened is not material. What matters is whether Ms. Wilson's depression is related to her injury and whether she filed her claim in time.

This is the same sort of claim that was present in *Mungo v. Rental Uniform Service of Florence*, 678 S.E.2d 825, 383 S.C. 270 (Ct. App. 2009) and *Estridge v. Joslyn Clark Controls*, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997). If the analysis in those cases is not persuasive, the panel must explain why. Its failure to offer an explanation leaves anyone reviewing the panel's decision to guess at its reasoning, and this sort of guesswork is not permitted. *Canteen*, 400 S.C. at 559, 375 S.E.2d at 250 (noting that the panel's decision

must demonstrate to the reviewing court that the law was applied correctly). The Respondent says Ms. Wilson's case is different from these precedents because the mental conditions in those cases were "mild," but the Respondent does not explain why that same description does not apply here, when Ms. Wilson's *pre-existing* depression continued to be treated by her primary doctor until *after* her original award, when this physician sent her to a specialist.

C. The Respondent's additional sustaining ground was rejected below and is contrary to precedent, which requires only that the change of condition claim be filed within the deadline. That was done here.

The Respondent offers the additional sustaining ground that the time for a claimant to "experience" a change of condition is one year. The hearing commissioner rejected the argument that Ms. Wilson's claim was not timely. See (R. p.76, ¶4). This was not a winning argument below.

The Respondent never explains what it means for a claimant to "experience" a change of condition. Must the worsening symptom run its full course within the one year time limit, or is it enough for the condition to have a preliminary diagnosis? Precedent appears to hold that as long as the change of condition claim is filed within the 12-month deadline, the claim is timely. *Allen v. Benson Outdoor Advertising Co.*, 236 S.C. 22, 29-31, 112 S.E.2d 722, 725-26 (1960). The Respondent does not explain how its argument is faithful to this holding or the change of condition statute's purpose.

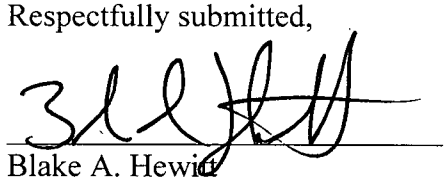
The Respondent repeatedly accuses Ms. Wilson of making "policy" arguments, but with the utmost respect, that label is not accurate. Ms. Wilson is not attempting to do anything more than explain the purpose of the change of condition statute and articulate why

it operates the way that it does. Ms. Wilson gave the Respondent timely notice of her claim, and this Court has observed that a statute gives the employer the right to request a hearing if the parties fail to reach an agreement regarding compensation. *Clemmons v. Lowe's Home Centers*, 412 S.C. 366, 379-380, 772 S.E.2d 517, 524 (Ct. App. 2015). The reality is that there is no authority supporting the Respondent's position that a change of condition claim would be barred for a symptom that begins within the one-year period, is noticed by a timely filing, but does not completely run its course until later. The Respondent's construction relies on hard deadlines because hard deadlines allow the Respondent to cut off valid claims.

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 the controlling principles. The Court should reverse this case and remand it for additional proceedings.

Respectfully submitted,



September 29, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, with two exceptions. First, the *Brief of Appellant* corrects a citation error from the initial brief. Second, the *Reply Brief* omits an incorrect factual statement that was included in the initial reply. Appellant's counsel previously disclosed these modifications to Respondent's counsel.

I also certify that these briefs comply with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Final Brief of Appellant, Reply Brief and Certificate of Compliance* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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