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

RECEIVED
SEP 28 2015
SC Court of Appeals

Case No. 2012-CP-10-5429

Sara Y. Wilson,

Appellant,

v.

Charleston County School District,

Respondent,

FINAL BRIEF OF RESPONDENT

YOUNG CLEMENT RIVERS LLP
Stephen L. Brown
Catherine H. Chase
Leslie M. Whitten
25 Calhoun Street, Suite 400
P. O. Box 993
Charleston, SC 29402-0993
Telephone: (843) 577-4000
Facsimile: (843) 579-2983
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
lwhitten@ycrlaw.com
Attorneys for the Respondent
Charleston County School District

TABLE OF CONTENTS

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

STANDARD OF REVIEW 8

ARGUMENTS AND CITATION OF AUTHORITY 10

I. RES JUDICATA BARS THE CLAIMANT'S PSYCHOLOGICAL CLAIM. 10

a. Res judicata does not require that a claim be previously litigated and lost. 10

b. Continuing jurisdiction over a matter does not eliminate the doctrine of res judicata. 13

c. Res judicata is a bar to the Claimant's claim. 15

d. *Krell* supports the Claimant's claim being barred by the doctrine of res judicata. 17

II. THE TIMING FOR A CLAIMANT TO EXPERIENCE A CHANGE OF CONDITION IS ONE YEAR. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Allen v. Benson, 236 S.C. 22, 112 S.E.2d 722 (1960) 23, 24

Anderson v. Baptist Med. Ctr., 343 S.C. 487, 541 S.E.2d 526 (2001) 9, 13, 17, 20, 25

Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 631 S.E.2d 899 (2006) 9

Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948) 22

Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993) 22

Clark v. Aiken County Gov't., 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) 15, 17

Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) 22

Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19 (1942) 13, 14, 15

Estridge v. Joslyn Clark Controls, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997) ... 15, 16

Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001) 22

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 22

Hopper v. Terry Hunt Constr., 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) 9

Krell v. South Carolina State Hwy. Dept., 237 S.C. 584, 118 S.E.2d 322 (1961) 11, 12, 14, 15, 17, 18, 19

Mungo v. Rental Uniform Services of Florence, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009) 15

Price v. City of Georgetown, 297 S.C. 185, 375 S.E.2d 335 (Ct. App. 1988) 10, 19

Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000) 9, 17, 20, 25

Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 412 S.E.2d 434 (Ct. App. 1991), *aff'd* 309 S.C. 432, 424 S.E.2d 489 (1992) 21

Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 580 S.E.2d 100 (2003) 21, 20, 22, 24

Statutes

S.C. Code Ann. § 1-23-380 (Supp. 2006) 8, 9, 13

S.C. Code Ann. § 42-9-40 (Supp. 2006) 17

S.C. Code Ann. § 42-17-90 (Supp. 2006) 14, 19, 21, 23, 24, 25, 26

S.C. Code Ann. § 72-154 (1952) 17

Regulations

Regulation 67-602 .... 21, 22

Secondary Sources

Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L.Rev. 451 (1977) 10

STATEMENT OF THE 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 ANXIETY AND DEPRESSION BEFORE HER ORIGINAL AWARD.**

II. **WHETHER THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED WHEN IT CONCLUDED THAT MS. WILSON'S DEPRESSION HAD TO BEGIN OR WORSEN BETWEEN SPECIFIC DATES IN ORDER TO BE COMPENSABLE.**

STATEMENT OF THE CASE

The Claimant/Appellant Sara Wilson ("Claimant") was originally injured on May 6, 2006 while working as a data entry clerk for Charleston County School District ("School District"). Two students were fighting and pushed into her, pinning her against a counter and injuring her neck and back. The Claimant filed a Form 50 with the South Carolina Workers' Compensation Commission ("Commission") on August 9, 2006 to initiate her claim. (R. p. 91.) A hearing was held on October 2, 2007, at which the Claimant alleged permanent and total disability. (R. pp. 63, 66.) On November 29, 2007, the Single Commissioner found that the Claimant was not permanently and totally disabled but had a 45% disability to her back due to her cervical and lumbar injuries. (R. pp. 63-74.) The Form 19 paying this Order was filed on January 25, 2008. (R. p. 80.)

On January 7, 2009, the Claimant filed a Form 50 Notice of Claim alleging a change of condition but not requesting a hearing. (R. p. 92.) Two medical reports were attached to this notice of claim, neither of which indicated that the Claimant had sustained a change of condition in relation to her work injury. On March 29, 2011, the Claimant filed another Form 50, this time requesting a hearing on the change of condition claim. She attached the same two reports as were attached to the January 7, 2009 notice of claim but still did not attach a medical report indicating a change of condition.

The Single Commissioner heard the change of condition claim on June 29, 2011. (R. p. 75.) In an order dated November 14, 2011, the Single Commissioner made several findings relative to jurisdiction, the statute of limitations, laches, and the Claimant's claim for a change of condition regarding her psychological condition. (R. pp. 75-77.) The School District timely appealed those findings. (R. p. 78.) The Appellate Panel heard the matter on May 23, 2012, and in an order dated July 18, 2012, the Appellate Panel reversed several findings of the Single Commissioner. (R. pp. 75-90.) In relevant part, the Appellate Panel found that the Claimant had not proven a change of condition relative to her psychological condition and that she was further barred from bringing such a psychological claim under the

doctrine of res judicata.[1] (R. pp. 87-90.) The Claimant appealed the decision of the Appellate Panel to the Circuit Court.

After reviewing briefs from both parties, the Circuit Court issued an order affirming the Appellate Panel. (R. pp. 1-14.) The Claimant filed a motion to alter or amend and for reconsideration on October 20, 2014. (R. pp. 17-24.) The School District filed a reply memorandum in opposition on October 27, 2014. (R. pp. 25-31, pp. 162-495.) On October 30, 2014, the Circuit Court issued an order denying the Claimant's motion to reconsider. (R. pp. 15-16.)

The Claimant served and filed her notice of appeal. This appeal follows.

STATEMENT OF FACTS

At the change of condition hearing on June 29, 2011, the Claimant indicated that she was in so much pain that she did not want to get up in the morning. (R. p. 146, lines 5-16.) She testified that she did not go out with her friends anymore and that she felt helpless. (Id.) She admitted that she

---

[1] At the Claimant's initial hearing in 2007, she submitted a vocational expert report (R. pp. 115-124) that noted her psychological condition and treatment due to her "injuries, her ongoing chronic pain problems, and her inability to work" (R. p. 116), but she chose not to pursue a claim for injury to her psyche at that time. (Compare R. p. 91 with R. pp. 92-93.)

was taking medications for anxiety at the time of her first hearing. (R. p. 159, line 22 – p. 160, line 3.)

The parties submitted the deposition transcript of Dr. Samuel H. Rosen, the Claimant's psychiatrist, at the change of condition hearing. Dr. Rosen testified that the Claimant had anxiety and depression off and on for years, including before her injury. (R. p. 101, lines 11-20.) Dr. Rosen reviewed the vocational assessment of Dr. William Stewart from September of 2007, which indicated that the claimant had anxiety and depression and was receiving medications and treatment for that problem and that it was related to the work injury. (R. p. 101, line 21 – p. 102, line 2, pp. 115-124.) Dr. Rosen confirmed that the Claimant's depression and anxiety from her work injury existed in September 2007, prior to the first hearing in this matter. (R. p. 102, lines 3-15, p. 106, lines 5-10, p. 113, line 20 – p. 114, line 2.)

When asked "is it your opinion that Ms. Wilson had anxiety and depression from her work injury and required medication and treatment at least by September of 2007?," Dr. Rosen responded, "Yeah, that the work injury was causing some depression and anxiety by -- right." (R. p. 113, line 20 – p. 114, line 2.) Although the Claimant had anxiety and depression from her work related injury at the time of the October 2007 hearing, she did

not allege nor seek benefits for her psychological injuries or depression at that time.

Dr. Rosen also testified that when he first saw the Claimant in May 2008, she did not actually have endogenous depression. (R. pp. 94-96, p. 103, line 24 – p. 104, line 23.) He testified that she did have endogenous depression at the time of his deposition, two and a half years after the statute of limitations had run on her change of condition claim. (R. pp. 94-96, p. 114, lines 3-6.) Dr. Rosen gave no indication that the Claimant had endogenous depression within a year after the last date of payment of compensation.

A review of the record from the first hearing indicates that the Claimant did not raise a psychological claim although she claimed she was permanently and totally disabled as a result of her injury and her psychological problems. (R. p. 66.) Her vocational expert, Dr. William Stewart, indicated that the Claimant had significant depression related to the work injury. (R. pp. 115-116.) Dr. Stewart's September 6, 2007 report noted that "Ms. Wilson is suffering some psychological overlay (adjustment disorder with depression and anxiety) because of these injuries, her ongoing chronic pain problems, and her inability to work." (R. p. 116.) He also indicated that she required and continued to require "medical psychological

care with Dr. W. Pettigrew Clare, Sr., including follow up office visits and prescribed psychotropic medications for anxiety and depression." (Id.) Specifically, Dr. Stewart noted that the Claimant continued to require Lorazepam for depression/anxiety. (R. p. 118.) Dr. Stewart noted that the Claimant scored an "8" on the Beck Depression Inventory-II, which is suggestive of a minimal level of depression, and a "7" on the Beck Anxiety Inventory, which is suggestive of a minimal-mild level of anxiety. (R. p. 121.) Dr. Stewart noted that these scores were reflective of someone who appeared to be coping with her situation but noted "this most probably relates, at least in part, to the prescribed medication she is on for depression/anxiety." (Id.) Finally, Dr. Stewart opined that "Ms. Wilson is suffering some psychological overlay (adjustment disorder with depression and anxiety) because of these injuries, her ongoing chronic pain problems, and her inability to work." (R. p. 122.) He concluded that she continued "to suffer ongoing problems and limitations including chronic pain problems with increase in pain with activity, depression, anxiety and work stamina or endurance limitations that will prevent her from being able to return to the kind of work she had performed in the past." (Id.) His recommendation for the Claimant included "the continued medical pain management care, the continued medical psychological care, [the] continued prescribed medication

for pain and depression/anxiety, and the medical case management services." (R. p. 124.)

The Appellate Panel found as follows:

> IT IS FOUND AS A FACT THAT [sic]: . . . .
>
> 15. That the Claimant was sent a check paying this Order, even if she did not deposit the check due to an appeal, and the Form 19 indicating this was filed with the Workers' Compensation Commission on January 25, 2008;
>
> 16. That the last date of payment of compensation to the Claimant in this matter was January 25, 2008 at the latest;
>
> 17. That the Claimant was required to bring a claim for a change of condition, if any, by January 25, 2009, and that any change of condition claimed must have occurred by January 25, 2009;
>
> 18. That the Claimant did not allege a psychological condition at the first hearing in this matter on October 2, 2007;
>
> 19. That the Claimant's vocational expert, William Stewart, indicated in his report in September of 2007 that the Claimant had anxiety and depression and was getting medications and treatment for that problem and that it was related to the work injury;
>
> 20. That Dr. Rosen opined on page 17 of his deposition[[2]] that the Claimant's depression and

[2] (R. p. 113, line 20 – p. 114, line 3.)

> anxiety from her work injury existed in September of 2007, prior to the first hearing in this matter;
>
> 21. That no doctor has opined that the Claimant did not have work related depression prior to the October 2, 2007 hearing;
>
> 22. That no doctor has opined that the Claimant's work related depression began after October 2, 2007 or worsened between January 25, 2008 and January 25, 2009;
>
> 23. That the Claimant has not carried her burden of proving a change of condition or a new injury to the psyche;
>
> 24. That the Claimant had pre-existing depression for her work related injury by September 2007 and could have raised the psyche as an issue at the October 2, 2007 hearing, but did not; and
>
> 25. That the Claimant is barred from bringing a claim for depression or psychological injuries at this time under the doctrine of res judicata.

(R. pp. 87-88.) The Circuit Court affirmed in full the order of the Appellate Panel. (R. pp. 1-14.)

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of the Commission's decisions and establishes the "substantial evidence rule" as the standard for reviewing the Commission's factual

findings. S.C. Code Ann. § 1-23-380 (Supp. 2006). An appellate court can reverse or modify the Commission's decision only if the Claimant's "substantial rights 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." Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); see § 1-23-380(5)(d),(e).

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001). "Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive." Id. at 492-93, 541 S.E.2d at 528. "[W]hether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007) (*citing* Bursey v. South Carolina Dep't of Health & Envtl. Control, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006).

ARGUMENTS AND CITATION OF AUTHORITY

I. RES JUDICATA BARS THE CLAIMANT'S PSYCHOLOGICAL CLAIM.

The Claimant contends that the Commission denied her change of condition claim based on res judicata because she experienced anxiety and depression before her original award. This is not entirely correct. The Commission denied the Claimant's change of condition claim because she had the opportunity to raise a psychological claim at the first hearing and chose not to do so.

a. Res judicata does not require that a claim be previously litigated and lost.

The Claimant argues that res judicata does not apply in the present claim because the issue of a psychological injury was not actually litigated in the first hearing. The Claimant cites the correct law on res judicata but fails to recognize a key aspect. The doctrine of res judicata applies not only when the issues were "actually litigated" but also to the issues which "might have been litigated" in the first action. Price v. City of Georgetown, 297 S.C. 185, 189, 375 S.E.2d 335, 338 (Ct. App. 1988) (*citing* Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L.Rev. 451, 452 (1977)).

In the present matter, the Claimant certainly could have brought a psychological claim at the initial hearing in October 2007 and chose not to

do so. Dr. Stewart's report, **submitted by the Claimant at the first hearing**, states that "Ms. Wilson is suffering some psychological overlay (adjustment disorder with depression and anxiety) **because of these injuries, her ongoing chronic pain problems, and her inability to work.**" (R. p. 116 (emphasis added).) She required "medical psychological care" and "psychotropic medications for anxiety and depression." (Id.) Additionally, the Claimant's current psychiatrist, Dr. Rosen, testified the Claimant's depression and anxiety from her work injury existed in September 2007, prior to the first hearing in this matter. (R. p. 113, line 20 – p.114, line 2.)

The Supreme Court has made it clear that if a claimant could have brought a claim at the initial hearing and failed to do so, then he cannot later bring a change of condition claim on the same issue. "In a reopening proceeding, the issue before the Commission is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." Krell v. South Carolina State Hwy. Dept., 237 S.C. 584, 588-89, 118 S.E.2d 322, 324 (1961). "If claimant sustained injuries at the time of the original action which he knew about at the time of his claim but for some reason failed to include in the claim, he cannot for the

first time assert disability from these injuries in a petition based on 'Change of condition.'" Id. (internal citations omitted).

In Krell, the claimant filed a change of condition because of an alleged recurring hernia problem. Id. at 587, 118 S.E.2d at 323. The claimant alleged that the hernia was present at the time of the initial accident but filed for a review on change of condition because the hernia was giving him trouble. Id. at 588, 118 S.E.2d at 323. The Commission denied his change of condition claim because the record showed that the claimant had not alleged a hernia at the first hearing and therefore could not assert it at a change of condition hearing. Id. at 589, 118 S.E.2d at 324.

The present claim is precisely like Krell. The Claimant here filed a change of condition claim because of continuing anxiety and depression. Evidence from the Claimant's own vocational expert shows that she had anxiety and depression related to her work injury and required prescription medications for anxiety and depression at the time of the first hearing. (R. p. 118.) The testimony from the Claimant's current psychiatrist is that she suffered from work related depression before the first hearing in September 2007. (R. p. 102, lines 3-7.) The Appellate Panel properly denied the Claimant's change of condition claim in light of the fact that the record showed that the Claimant had not alleged a psychological problem at the

first hearing and therefore she could not assert it at a change of condition hearing. (R. pp. 75-90.) The Circuit Court properly affirmed this denial. (R. pp. 1-14.)

Importantly, the issue raised by the Claimant is actually whether the Claimant had enough of a psychological injury in the past to rise to the level of an injury that might have been litigated at the time of the first hearing. In other words, the Claimant's appeal is a factual one. The Commission is the finder of fact. A finding of fact made by the Commission may be overturned only if unsupported by substantial evidence. Anderson, 343 S.C. at 492, 541 S.E.2d at 528; S.C. Code Ann. § 1-23-380.

In the present appeal, the evidence presented from the Claimant's own vocational expert, Dr. Stewart, and chosen psychiatrist, Dr. Rosen, is more than sufficient to establish substantial evidence. Therefore, the findings of the Commission on this matter, which were affirmed by the Circuit Court, should also be affirmed by this Court. Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

b. Continuing jurisdiction over a matter does not eliminate the doctrine of res judicata.

The Claimant argues that the Commission has continuing jurisdiction over every case and therefore can change an award at any time. (Appellant's Br. p. 7, *citing* Cromer v. Newberry Cotton Mills, 201 S.C. 349, 23 S.E.2d 19 (1942).) This argument implies that the Commission has

free reign to change its prior orders and would make res judicata is inapplicable to workers' compensation claims. While the argument is clever, it misconstrues the law.

In Cromer, the employer argued that since the claimant had been provided with an award relative to his disability, the Commission could not later come back and pay him an increased disability amount under the doctrine of res judicata. 23 S.E.2d at 21. The Court simply held that the Commission has the power under the change of condition statute, Section 46 (now S.C. Code Ann. § 42-17-90 (Supp. 2006)[3]), to increase or diminish a prior award. A hearing on a change of condition claim is precisely what one would expect. The Commission reviews a previous award "on the ground of a change in condition." § 42-17-90. The real question which the Claimant raises is whether a claimant may raise a new issue at a change of condition hearing that **could have been raised** at the first hearing. In Cromer, the claimant was not attempting to raise an issue that could have been previously raised. 23 S.E.2d at 29. Instead, he argued his disability was worse and evidence of a later examination was considered. Id.

The Supreme Court heard Krell nineteen years after Cromer and found res judicata applicable in that workers' compensation claim. As

discussed above, the facts of Krell are much more applicable to the present claim. In fact, the Court in Krell actually cited Cromer for the proposition that the Commission, and not the appellate court, is the ultimate finder of fact. Krell, 237 S.C. at 588, 118 S.E. 2d at 323-24. Clearly the Court in Krell was unwilling to interpret Cromer to make res judicata inapplicable in workers' compensation cases.

c. Res judicata is a bar to the Claimant's claim.

The Claimant argues again that res judicata is inapplicable because the issues here were not litigated and lost. As discussed in Section I.a., *supra*, this is an incorrect limitation on the doctrine of res judicata.

The Claimant also argues that her claim is similar to Mungo v. Rental Uniform Services of Florence, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009), Estridge v. Joslyn Clark Controls, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997), and Clark v. Aiken County Gov't., 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005). The Claimant's reliance on these cases is misplaced.

The Mungo court held that a claimant may raise the issue of depression at a change of condition hearing when the symptoms of depression prior to the first hearing were "mild, undiagnosed, and untreated." 383 S.C. at 284, 678 S.E.2d at 832. The Estridge court noted

[3] The Claimant alleges a date of injury of May 9, 2006. (R. pp. 91-93.) As such, the

that "[a] symptom which is present and causally connected, but found not to impact upon the claimant's condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition. Such an occurrence is within the reasons for the code section involving a change of condition." 325 S.C. at 541, 482 S.E.2d at 581.

That is not the case in the present claim. The Claimant's vocational expert concluded that the Claimant was incapable of working due to a combination of chronic pain and psychological overlay "because of these injuries." (R. p. 122.) More importantly, he noted that she required "medical psychological care. . .including follow up office visits and prescribed psychotropic medications for anxiety and depression." (Id.) Specifically, he noted that the Claimant **continued** to require Lorazepam for depression. (R. p. 118.) In other words, the Claimant in the present claim did **not** have a "mild, undiagnosed, and untreated" psychological condition. Instead, she had a psychological condition which was diagnosed and being treated by her primary care physician prior to her first hearing. Her own expert opined that this psychological condition impacted her prior to the time of the original award.

2006 version of the South Carolina Workers' Compensation Act is controlling.

In Clark, this Court simply found that the claimant's condition following his back surgery was not ripe for review at the first hearing because he did not know how well he would recover. The fact that his condition later worsened was the subject of a new hearing. 366 S.C. at 102-03, 620 S.E.2d at 110. Clark is wholly unrelated to the present facts where the Claimant had a documented psychological condition prior to her first hearing, was receiving medication for that condition, and chose not to raise the issue other than as support for her claim that she was permanently and totally disabled.

The circuit court properly affirmed the Appellate Panel, and the circuit court's order must be affirmed because it is not affected by an error of law and substantial evidence supports the factual findings. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

d. *Krell* supports the Claimant's claim being barred by the doctrine of res judicata.

Contrary to the Claimant's argument, the Krell decision is not entirely controlled by the hernia statute, S.C. Code Ann. § 72-154 (1952) now S.C. Code Ann. § 42-9-40 (Supp. 2006). 237 S.C. at 587, 118 S.E. 2d at 323. If Krell dealt solely with the issue of the timing of when the claimant's hernia

appeared, then there would have been no need for the Court to discuss the change of condition statute.

The Claimant's argument ignored that the plain language of Krell supports the School District's position. "If claimant sustained injuries at the time of the original action which he knew about at the time of his claim but for some reason failed to include in the claim, he cannot for the first time assert disability from these injuries in a petition based on 'Change of condition.'" Krell, 237 S.C. at 589, 118 S.E.2d at 324 (internal citations omitted). In the present case, the Claimant knew at the time of her first hearing of her psychological condition. This is evidenced by her vocational expert which was presented at that hearing and the testimony of the psychiatrist who she later saw. (R. pp. 116, 118, 122, 124, p. 102, lines 3-7.) The Claimant failed to include her psychological condition as a separate claim at her first hearing. Under Krell, she may not assert for the first time at her change of condition hearing this claim. Id.

The Appellate Panel's order is written to reflect the evidence which was presented and the Claimant's failure to carry her burden to prove a change of condition. The order found that "no doctor has opined that the Claimant did not have work related depression prior to the October 2, 2007 hearing" and "no doctor has opined that the Claimant's work related

depression began after October 2, 2007 or worsened between January 25, 2008 and January 25, 2009" because these are the essential elements needed in order to show that her claim was barred by the doctrine of res judicata and that she failed to carry her burden of proving a change in condition. (R. pp. 87-88, ¶¶ 21-22.)

Because no doctor opined that the Claimant did not have work related depression prior to the October 2, 2007 hearing, which can also be stated as because her doctors found she had work related depression prior to the October 2, 2007 hearing, the Claimant's claim regarding her psychological condition is barred by the doctrine of res judicata. She could have raised this condition at the first hearing but chose not to do so. As such, it is barred by the doctrine of res judicata. Price, 297 S.C. at 189, 375 S.E.2d at 338; Krell, 237 S.C. at 589, 118 S.E.2d at 324. Similarly, because no doctor opined that the Claimant's work related depression began after October 2, 2007 or worsened between January 25, 2008 and January 25, 2009, there was no change in her condition in the necessary time to meet the burden of proving a change of condition under S.C. Code Ann. § 42-17-90.

The Appellate Panel's order demonstrates a correct understanding of the law regarding both res judicata in workers' compensation cases and the requirements for proving a change of condition. The order contains no

errors of law and is supported by substantial evidence. For these reasons, this Court should affirm the circuit court's affirmation of the Appellate Panel's order. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

II. THE TIMING FOR A CLAIMANT TO EXPERIENCE A CHANGE OF CONDITION IS ONE YEAR.

If the Court concludes that the Claimant's psychological claim was not barred by the doctrine of res judicata, the circuit court's order affirming the Appellate Panel's denial should still be affirmed because the Commission's finding that the Claimant's change of condition had to occur within one year after the date of the last payment of compensation is not an error of law. Shealy, 341 S.C. at 454, 535 S.E.2d at 442

The Appellant makes three sub-arguments that amount to a policy argument that a claimant should have no limitations on when a change of condition may occur. The clear law is simply not in line with this suggested policy argument. Such policy arguments are matters for the legislature and are not the province of the courts. Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 109 (2003) ("[S]ources of inequities are the province of the Legislature to correct by balancing the interests, risks and rewards of such a large, comprehensive program" as South Carolina's

Workers' Compensation laws.) "It is not the province of this Court to perform legislative functions." Id. at 117, 580 S.E.2d at 108 (*quoting* Spoone v. Newsome Chevrolet Buick, 306 S.C. 438, 440, 412 S.E.2d 434, 434-35 (Ct. App. 1991), *aff'd* 309 S.C. 432, 424 S.E.2d 489 (1992)).

S.C. Code Ann. § 42-17-90 (Supp. 2006) states in pertinent part:

> Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Title, and shall immediately send to the parties a copy of the order changing the award. No such review shall affect such award as regards any moneys paid and *no such review* ***shall*** *be made after twelve months from the date of the last payment of compensation pursuant to an award under this Title.*

(emphasis added).

Regulation 67-602(C) states:

> In a claim involving a change of condition, the moving party ***must*** attach to the hearing request form a medical report(s) *indicating a change in the claimant's condition*. . . .

(emphasis added)

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." Wigfall, 354 S.C. at 110, 580 S.E.2d

at 105 (*citing* Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993)). "If a statute's language is plain, unambiguous, and conveys a clear meaning 'the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'" Id. (*citing* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). The courts are "further bound by precedent to strictly construe statutes in derogation of the common law." Id. (*citing* Gilfillin v. Gilfillin, 344 S.C. 407, 544 S.E.2d 829 (2001)). "Workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights." Id. (*citing* Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948)). As such, when reading a workers' compensation statute courts strictly construe its terms, leaving it to the legislature to amend and define its ambiguities. Id.

The initial question in interpretation is whether the statute's directives are mandatory or discretionary. In Wigfall, the Supreme Court interpreted the term "shall" to be mandatory. Id. at 111, 580 S.E.2d at 105. The Supreme Court has also held the word "must" to indicate the legislature's intent to enact a mandatory requirement. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). In the present case, Regulation 67-602(C) uses the word "must" in the sentence pertaining to attaching medical reports

"indicating a change of condition" to the Form 50 in requesting a hearing for a change of condition. Similarly, S.C. Code Ann. § 42-17-90 requires that no change of condition review "shall" be made after twelve months from the date of the last payment of compensation. These mandatory requirements cannot be ignored.

The Claimant cites Allen v. Benson, 236 S.C. 22, 112 S.E.2d 722 (1960), to demonstrate that the Supreme Court has been receptive to lengthening the time in which a change of condition must occur. The Supreme Court in Allen simply found that it would be unfair to prejudice a Claimant by requiring that the **actual hearing** on his change of condition claim be heard within one year and noted that it was enough that the "application for review" be filed within one year. Id. at 31, 112 S.E.2d at 726. Allen stands for the proposition that the claimant will not be held responsible if the hearing itself does not take place within that year provided that a timely request for a hearing is filed. The Claimant still must request a hearing or "review" within a year of the last date of payment of compensation with medical proof of a change of causation.

Allowing a claimant to file a Form 50 not requesting a hearing within a year of the final payment of compensation and then to wait an additional two years to request an actual review or hearing, and for that entire time to

be included in the window for a change of condition, would eviscerate S.C. Code Ann. § 42-17-90 of all meaning. The Allen Court noted that "[a]n application might be seasonably made but due to crowded dockets or other causes could not be heard within the statutory period." Id. at 30, 112 S.E.2d at 725-26. The Allen Court found it unreasonable for the inaction of the Commission to destroy its jurisdiction to hear a timely filed application. Id. at 30, 112 S.E.2d at 726. This, however, is not the case. The Claimant failed to file a timely application for review with the necessary medical documentation requesting a hearing within twelve months of the last payment of compensation.

The Claimant also argues for a policy change that there should be some laxity in the time limit for a change of condition claim because a claimant's condition "might still be in the process of worsening as the 12 month deadline approaches." (Appellant's Br. p. 14.) Such policy changes should be addressed by the legislature and not the courts. Wigfall, 354 S.C. at 116, 580 S.E.2d at 109.

The Claimant failed to carry her burden of proving that she had a change of condition regarding her psychological condition within one year after the final payment of compensation on January 25, 2008. She experienced anxiety and depression before her first hearing and was receiving treatment for

the same. (R. pp. 116, 118, 122, 124.) Her psychiatrist testified that her depression existed prior to the first hearing, but he was unable to testify as to when it changed, merely that it changed sometime in the three and one half years since the final payment of January 2008. (R. p. 99, p. 113, line 20 – p. 114, line 6.) It was the Claimant's burden to prove that her change of condition occurred within the one year time period of S.C. Code Ann. § 42-17-90, which she failed to do. The Claimant's argument for a policy change to the interpretation of S.C. Code Ann. § 42-17-90 essentially asks this Court to find that the one year statute is inapplicable. This Court should not make such a finding and should leave such changes to the legislature.

The circuit court's order must be affirmed because it is not affected by an error of law and substantial evidence supports the factual findings. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

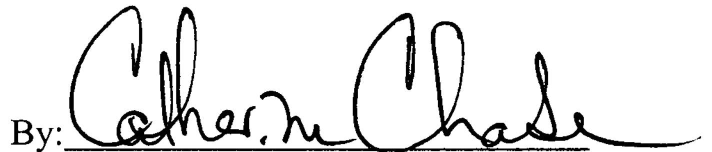
CONCLUSION

Based on the foregoing, the doctrine of res judicata is applicable to the present claim because the Claimant was suffering from work related depression and receiving medication for that depression at the time of the first hearing; thus this issue could have been litigated at the first hearing.

Also, S.C. Code Ann. § 42-17-90 creates a clear requirement that any change of condition must occur with twelve months of the last date of payment of compensation. For these reasons, the circuit court's order should be affirmed.

Respectfully submitted,

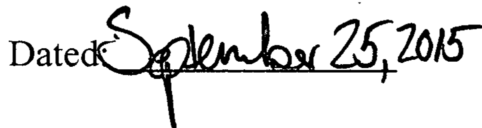
YOUNG CLEMENT RIVERS LLP

By: 

Stephen L. Brown
Catherine H. Chase
Leslie M. Whitten
25 Calhoun Street, Suite 400
P. O. Box 993
Charleston, SC 29402-0993
Telephone: (843) 577-4000
Facsimile: (843) 579-2983
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
lwhitten@ycrlaw.com

Attorneys for the Respondent Charleston County School District

Charleston, South Carolina

Dated: 

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
SEP 28 2015
SC 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,

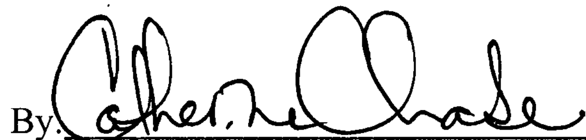
CERTIFICATION FOR FINAL BRIEF OF RESPONDENT

YOUNG CLEMENT RIVERS LLP
Stephen L. Brown
Catherine H. Chase
Leslie M. Whitten
25 Calhoun Street, Suite 400
P. O. Box 993
Charleston, SC 29402-0993
Telephone: (843) 577-4000
Facsimile: (843) 579-2983
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
lwhitten@ycrlaw.com
Attorneys for the Respondent
Charleston County School District

I, Catherine H. Chase, do hereby certify that the Final Brief of Respondent complies with Rule 211(b), *SCACR.* Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of August 13, 2007.

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: 

Stephen L. Brown
Catherine H. Chase
Leslie M. Whitten
25 Calhoun Street, Suite 400
P. O. Box 993
Charleston, SC 29402-0993
Telephone: (843) 577-4000
Facsimile: (843) 579-2983
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
lwhitten@ycrlaw.com

Attorneys for the Respondent Charleston County School District

Charleston, South Carolina

Dated: September 25, 2015

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

RECEIVED
SEP 28 2015
SC Court of Appeals

Case No. 2012-CP-10-5429

Sara Y. Wilson,

Appellant,

v.

Charleston County School District,

Respondent,

PROOF OF SERVICE

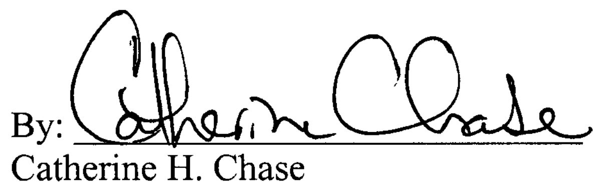
YOUNG CLEMENT RIVERS LLP
Stephen L. Brown
Catherine H. Chase
Leslie M. Whitten
25 Calhoun Street, Suite 400
P. O. Box 993
Charleston, SC 29402-0993
Telephone: (843) 577-4000
Facsimile: (843) 579-2983
E-Mail: sbrown@ycrlaw.com
cchase@ycrlaw.com
lwhitten@ycrlaw.com
Attorneys for the Respondent
Charleston County School District

I, Catherine H. Chase, of Young Clement Rivers, LLP, counsel for the Respondent above named, do hereby certify that I have served the **Final Brief of Respondent** and **Certification for Final Brief of Respondent** on the above-named Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on September 25, 2015, addressed as follows to their counsel of record:

Tiffany R. Spann-Wilder, Esquire
The Spann-Wilder Law Firm, L.L.C.
P. O. Box 70488
N. Charleston, SC 29415

Blake A. Hewitt, Esquire
John S. Nichols, Esquire
Bluestein Nichols Thompson Delgado, LLC
P. O. Box 7965
Columbia, SC 29202

YOUNG CLEMENT RIVERS, LLP



By: ______________________
Catherine H. Chase

Charleston, South Carolina

Dated: September 25, 2015