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

Opinion No. 5475 (S.C. Ct. App. filed March 22, 2017)
Appellate Case No. 2014-002596

Sara Y. Wilson,

Appellant,

v.

Charleston County School District,

Respondent,

PETITION FOR REHEARING

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COMES NOW the Respondent, Charleston County School District ("School District"), by and through its attorneys, pursuant to Rule 221(a), SCACR, and, upon the grounds set forth herein, hereby petitions this Honorable Court for rehearing of this appeal, which the Court decided via published opinion filed March 22, 2017, specifically, Sara Y. Wilson v. Charleston County School District, Op. No. 5475 (S.C. Ct. App. filed March 22, 2017) (Shearouse Adv. Sh. No. 12 at 13).

ARGUMENT

I. RESPECTFULLY, THE COURT OVERLOOKED OR MISAPPREHENDED A NUMBER OF MATERIAL POINTS RESULTING IN UNFAIR PREJUDICE TO THE SCHOOL DISTRICT VIA THE REMAND TO THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL FOR CONSIDERATION OF WILSON'S CHANGE OF CONDITION CLAIM.

A. The Claimant's treated depression was impacting her condition at the time of her original award.

Respectfully, the Court overlooked or misapprehended that the claimant Sara Wilson ("Claimant") experienced depression which was impacting her condition and was being treated at the time of her original award.

A review of the record from the original award 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 Court's opinion discussed Mungo v. Rental Uniform Services of Florence, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009) and Estridge v. Joslyn Clark Controls, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997), but respectfully, the Court may have overlooked or misapprehended how these cases apply to the Claimant's facts. 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 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.

Applying these facts to the established case law, the Claimant's change of condition claim for depression should be barred by the doctrine of res judicata. "The Appellate Panel is the ultimate fact finder in workers' compensation cases, and if its findings are supported by substantial evidence, it is not within our province to reverse those findings." Mungo, 383 S.C. at 279, 678 S.E.2d at 829-830. Substantial evidence in the record supports the circuit court's affirmation of the South Carolina Workers' Compensation Commission's Appellate Panel ("Appellate Panel"), and neither the Appellate Panel's order nor the circuit court's order was affected by an error of law. As such, the circuit court's order should be affirmed. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); Anderson v. Baptist Med. Ctr.,

343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001).

B. Substantial evidence in the record does not support the finding that "Wilson's psychological condition worsened at some point after the initial hearing and prior to her filing of the January 6, 2009 Form 50 alleging a change of condition."

Respectfully, the Court overlooked or misapprehended the evidence in the record when it concluded that "[o]ur review of the record reveals the substantial evidence indicates Wilson's psychological condition worsened at some point after the initial hearing and prior to her filing the January 6, 2009 Form 50 alleging the change of condition." Wilson, supra, at 22.

Dr. Rosen was unable to testify as to whether the Claimant's depression became endogenous before she filed her January 6, 2009 Form 50. Dr. Rosen testified that when he first saw the Claimant in May 2008, she did not actually have endogenous depression. (R. p. 103, line 24 – p. 104, line 23.) He testified that she did have endogenous depression at the time of his June 24, 2011 deposition, two and a half years after the statute of limitations had run on her change of condition claim. (R. 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.** If Dr. Rosen began treating the Claimant in May 2008, he should have been able to testify when her depression became endogenous and if that change occurred with the applicable time required for the change of condition to be compensable, i.e., by January 25, 2009. It is mere speculation to conclude that Dr. Oliverio referred the Claimant to Dr. Rosen because her condition had worsened. There is no support in the record for the determination that the Claimant's depression worsened before filing her January 6, 2009 Form 50.

"The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson, 343 S.C. at 492, 541 S.E.2d at 528. "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. Substantial evidence in the record support's the circuit court's affirmation of the Appellate Panel's order.

C. The Claimant's psychological claim was barred by the doctrine of res judicata.

Respectfully, the Court overlooked or misapprehended the evidence in the record or case law supporting the conclusion that the Claimant's claim was barred by the doctrine of res judicata.

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)) (emphasis added); see also Estridge, 325 S.C. at 540, 482 S.E.2d at 581.

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.) 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 Appellate Panel is the finder of fact. A finding of fact made by the Appellate Panel 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 Appellate Panel 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.

D. The Court's interpretation of S.C. Code Ann. § 42-17-90 allows an endless tolling of the time to prosecute a change of condition claim.

Respectfully, the Court overlooked or misapprehended how the Supreme Court in Allen v. Benson, 236 S.C. 22, 112 S.E.2d 722 (1960) interpreted § 42-17-90's predecessor.

The Claimant cited 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, eviscerates S.C. Code Ann. § 42-17-90 (Supp. 2006) 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 delay in hearing this case was not due to the inaction of the Commission; instead, it was due to inaction by the Claimant. Neither the Commission nor the School District had the burden on proving the Claimant's claim, thus they did not have the burden to request a hearing.

The Court accepted the Claimant's argument for a policy change by noting "[a]lthough Wilson did not file the subsequent Form 50 requesting a hearing on her change of condition until March 29, 2011, we find her January 6, 2009 Form 50 Notice of Claim alleging a change of condition satisfied the statute's plain and unambiguous requirement that such a claim be filed within the twelve-month deadline." Wilson, supra, at 26. Such an interpretation of § 42-17-90 eviscerates the statute of any deadline.

Respectfully, the Court has erred in its interpretation of § 42-17-90. While Allen allowed a change of condition review to occur more than twelve months after the date of last payment because of inaction of the Commission, the Court's decision in this case will allow a claimant to file a Form 50 (but not request a hearing) within twelve months if he thinks he may have a change of condition that is not fully formed and use this filing to effectively toll the statute of limitations created by § 42-17-90. He may now wait for the condition to develop, submit the medical report required by Regulation 67-602(C) three, five, or fifty years later, and then request a hearing. This cannot be what the Legislature intended when it drafted § 42-17-90. To construe § 42-17-90 in the manner proposed by the Court renders "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" meaningless. This Court should not construe a statute in a way which leads to an absurd result or renders it meaningless. Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418,420 (2012). The Court "should seek a construction that gives effect to every word of a statute rather than adopting an interpretation that renders a portion meaningless." Hilton v. S.C. Dep't of Probation, Parole and Pardon Svcs., 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2009).

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 § 42-17-90, which she failed to do. The policy change adopted by the Court essentially renders the one year deadline of § 42-17-90 inapplicable. Such policy changes should be addressed by the Legislature and not the courts. Wigfall v. Tidelands Utilities, Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 109 (2003).

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.

E. The Court did not address the Claimant's failure to provide a medical report supporting a change of condition with the Form 50 alleging a change of condition.

Respectfully, the Court overlooked or misapprehended the regulatory requirement that the moving party must attach to the hearing request form a medical report indicating a change of condition in a claim involving a change of condition.

The Court did not address that the Claimant was required to attach to the hearing request form a medical report indicating a change of condition in a claim involving a change of condition. Rule 220(b), SCACR, provides, "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."[1] Most respectfully, the School District submits that the Court erred in not addressing all of the distinctly stated points in its brief necessary to decision of this appeal and asks the Court to address this point via rehearing.

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[1] The School District acknowledge that Rule 220(b)(2) provides this exception: "The Court of Appeals need not address a point which is manifestly without merit[;]" however, again, most respectfully, the School District submits that it is inapplicable here and that its argument was appropriately presented and developed for the Court's consideration.

Regulation 67-602(C) (Supp. 2006) 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).

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, § 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. 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. 354 S.C. 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). These mandatory requirements cannot be ignored.

The Claimant attached the May 16, 2008 office note from Dr. Rosen to her January 6, 2009 and March 29, 2011 Form 50s. (R. pp. 92-96.) This office note does **not** indicate a change in the Claimant's condition. Dr. Rosen testified that when he first saw the Claimant in May 2008, she did not actually have endogenous depression. (R. p. 114, lines 3-6.)

The circuit court's affirmation of the Appellate Panel's order that the Claimant had not carried her burden of proving a change of condition or new injury to the psyche is not affected by an error of law and should be affirmed by the Court. Shealy, 341 S.C. at 454, 535 S.E.2d at 442.

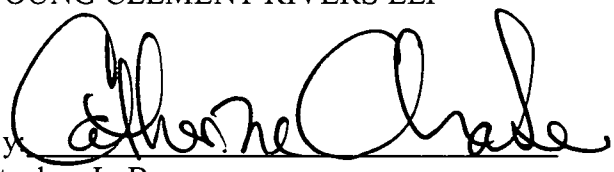
CONCLUSION

For the foregoing reasons, and for the reasons set forth in the School District's previously-filed briefs (which the School District incorporates herein by reference), the School

District asks this Court to rehear and reconsider its decision, and to affirm the Appellate Panel's denial of benefits.

Respectfully submitted,

YOUNG CLEMENT RIVERS LLP

By: 

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Dated: May 8, 2017

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May 8, 2017

VIA FEDERAL EXPRESS and FAX (803) 734-1839
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Re: Sara Y. Wilson v. Charleston County School District
Appellate Case No. 2014-002596
Case No.: 2014-002596
YCR File: 6959-20062070

Dear Ms. Kitchings:

Enclosed for service upon you, please find the original and seven (7) copies of the Petition for Rehearing, the original and one (1) copy of a Proof of Service, and this firm's check in the amount of $25.00 for filing fees. Please file these documents and return one file-stamped copy of each to me in the envelope provide.

Per my discussion this morning with Jessica in your office, the Court agrees to accept the facsimile copy of the Petition for Rehearing, which is due to be received today. I am also enclosing a copy of this firm's check. The original will follow be delivered by Federal Express tomorrow.

As always, thank you for your assistance. If you have any questions, please do not hesitate to contact me. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Catherine H. Chase

CHC/tlb
Enclosures
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I, Catherine H. Chase, of Young Clement Rivers, LLP, counsel for the Respondent above named, do hereby certify that I have served the **Petition for Rehearing** on the above-named counsel for Appellant by depositing a copy of the same in the United States Mail, postage prepaid, on May 8, 2017, and via email, addressed as follows to their counsel of record:

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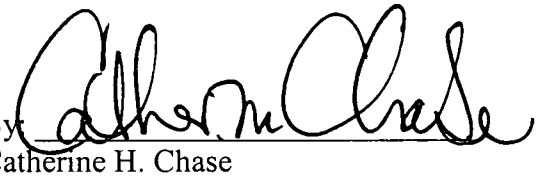
By: 
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Dated: May 8, 2017