

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

J.C. Nicholson, Jr., Circuit Court Judge

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Op. No. 5475 (S.C. Ct. App. filed March 22, 2017)  
Appellate Case Nos. 2014-002596 & 2017-001569

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Sara Y. Wilson, ..... Respondent,

v.

Charleston County School District, ..... Petitioner.

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**RETURN TO THE CERTIORARI PETITION**

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## **COUNTER-STATEMENT OF QUESTIONS PRESENTED**

This case poses two legal questions:

- I. Does the law bar a type of workers' compensation claim known as a "change of condition" when the symptom changing for the worse—in this case, depression—worsens after the original award and was not sought, granted, or denied in the original award?
- II. Is the one-year deadline for a change of condition claim satisfied as long as an injured worker files an application for a change of condition within the one-year period?

## **COUNTER-INTRODUCTION**

The Court of Appeals remanded this case to the workers' compensation commission because the commission did not ask the right questions—in lawyer jargon, the commission made errors of law. The Administrative Procedures Act mandated reversal. The opinion of the Court of Appeals followed precedent, was unanimous, and is correct.

## **COUNTER-STATEMENT OF THE CASE**

This case arises out of an admitted work-related accident. Liability for the underlying injury was not contested. (App.p.73, ¶5).

Sara Wilson worked part-time for the Charleston County School District for many years. (App.p.194). In May of 2006 she suffered a significant back injury leading to her retirement later that year (App.p.283) and requiring fusion surgery in 2007. (App.p.322). Mrs. Wilson was in her early 60s when she got hurt. (App.p.194).

Mrs. Wilson began a workers' compensation claim in August of 2006 alleging injuries to her right arm, right shoulder, neck, back, and both legs. (App.p.94, ¶1a). She

sought permanent and total disability benefits at her hearing due to the combination of her back injury and her pre-existing psychological problems. (App.p.69). Mrs. Wilson was already on anti-depression medication before she got hurt, (App.pp.178, 472), and she contended it was appropriate for the commission to consider her pre-existing depression under this Court's decision in *Ellison v. Frigidaire Home Products*, 371 S.C. 159, 164, 638 S.E.2d 664, 666 (2006) (recognizing an injured worker may show greater disability from the "combined effects" of an injury and a pre-existing condition). The commission found Mrs. Wilson was not permanently and totally disabled, instead concluding she was 45% disabled to the back. (App.p.74, ¶12). The award was issued November 29, 2007. (App.p.66).

Mrs. Wilson filed a change of condition claim in January of 2009, seeking additional compensation for a change to her back and to her psychological condition. (App.p.95, ¶1a). She alleged she needed additional medical treatment. (App.p.95, ¶6). She did not request a hearing on her change of condition claim until March of 2011. (App.p.96, ¶13b).

The change of condition claim was based on the fact that constant pain from Mrs. Wilson's injury had caused her pre-existing depression to significantly worsen. Mrs. Wilson had initially experienced good results from her March 2007 surgery. A medical record from July 2007 explained Mrs. Wilson was doing "very well." (App.p.322). A vocational evaluation from the next month reported Mrs. Wilson believed she had a "good result" and was "much improved." (App.p.185). The results were still positive in November of 2007, shortly before the original award, (App.p.323), but the positive results did not stay. By March of 2008, Mrs. Wilson was in constant pain to such a degree that she was not sleeping, was having anxiety attacks, and was depressed. (App.pp.484-485). Her primary care

physician referred her to a psychiatrist who diagnosed Mrs. Wilson with adjustment disorder, anxiety disorder, and depressive disorder. (App.pp.97-98). This was a marked difference from a few months earlier, as Mrs. Wilson had been “weaning off” anxiety medication shortly before the commission issued her original award. (App.p.151, lines 12-17).

In November of 2011 a single commissioner denied the claim of a change of condition to the back and granted the claim of a change of condition for Mrs. Wilson’s depression. (App.p.79, ¶¶5-6). The single commissioner cited *Estridge v. Joslyn Clark Controls* for the proposition that a mental condition exacerbated by a compensable injury is appropriately a change of condition claim. (App.p.79 ¶6) (citing 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997)). The order had a strong causation finding—the hearing commissioner found Mrs. Wilson’s psychological health “clearly” changed. (App.p.79, ¶6).

Both sides appealed this decision. (App.pp.81-82). Mrs. Wilson appealed the denial of the back claim. *Id.* The School District appealed the grant of the depression claim. *Id.*

The commission’s appellate panel affirmed in part and reversed in part; upholding the denial of the back claim and reversing the grant of the claim for increased depression.

The reasons for the reversal were two-fold. First, the appellate panel found Mrs. Wilson had injury-related depression before her original award and that she could have made a depression claim at the time of her original award. (App.p.90, ¶¶19-20; p.91, ¶24). The commission saw the alleged failure to raise depression as *res judicata*. (App.p.91, ¶25).

Second, the panel noted no doctor had opined either of three things: that Mrs. Wilson did not have injury-related depression before her award, that Mrs. Wilson’s depression began after the award, or that the depression worsened within a year. (App.p.90, ¶21; p.91, ¶22).

Mrs. Wilson sought judicial review in circuit court, filing briefs and a record. See (App.pp.35-45) and (App.pp.59-64). The School District filed a brief as well. (App.pp.46-58). The circuit court affirmed, (App.pp.4-17), and denied Mrs. Wilson's motion for reconsideration. (App.p.18). Mrs. Wilson appealed to the Court of Appeals. That court issued a unanimous decision reversing the commission. (App.pp.561-574).

## ARGUMENTS

*First*, this case does not involve a conflict in decisions. Three cases recognize this type of change of condition claim as compensable—*Mungo v. Rental Uniform Service of Florence*, *Estridge v. Joslyn Clark Controls*, and (to a lesser extent) *Clark v. Aiken County Government*. No case does what the commission's appellate panel did here, which was look back in time and hypothesize Mrs. Wilson would have had a compensable depression claim if she alleged one from the beginning. The appellate panel applied the wrong legal standard, asking the wrong questions and getting the wrong answers.

*Second*, the Court of Appeals properly held the one-year deadline for a change of condition claim is satisfied if an injured worker files his or her claim within the one-year period. That holding follows this Court's decision in *Allen v. Benson Outdoor Advertising* and makes sense because workers' compensation cases sometimes take time to develop.

**I. The Court of Appeals correctly held the law does not bar a change of condition claim when the symptom in question worsens after the original award and was not sought, granted, or denied in the original award.**

Change of condition claims are authorized by a specific statute giving the commission continuing jurisdiction over every case and allowing the commission to review

every award based on the request of either party or on the commission's own motion. See S.C. Code Ann. § 42-17-90. The only limit on this review is that it occur within 12 months of the last payment of compensation. *Id.*

**a. The Court of Appeals correctly identified the appellate panel's error of law.**

Mrs. Wilson's argument to the Court of Appeals relied heavily on two of that court's decisions—*Estridge v. Joslyn Clark Controls* and *Mungo v. Rental Uniform Service of Florence*. (App.pp.512-513). Those cases involved change of condition claims based on lingering work-related injuries that eventually began affecting the injured workers' mental health. See *Mungo*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009); *Estridge*, 325 S.C. 532, 482 S.E.2d 577 (Ct. App. 1997). The commission denied the change of condition claims in both cases and the Court of Appeals reversed in both cases. *Estridge* explains a symptom that is present at the time of an original award but found not to impact the claimant's condition will constitute a change of condition if it manifests later "in full bloom." 325 S.C. at 540, 482 S.E.2d at 581. *Mungo* was decided after *Estridge* and followed the same reasoning. *Mungo*, 383 S.C. at 284, 678 S.E.2d at 832.

The single commissioner relied on this reasoning in granting Mrs. Wilson's depression claim, specifically citing *Estridge*, (App.p.79, ¶6), yet, the appellate panel never mentioned the case or explained why the single commissioner's analysis was wrong. (App.pp.88-92). The appellate panel focused on the moment Mrs. Wilson's depression began, said a doctor could not pinpoint when the depression worsened, and surmised that the claim was barred because there was some evidence Mrs. Wilson's injury was affecting her

depression before her original award. (App.pp.90-91) (findings 19 to 25 and conclusion #4). Those things are not the test. The court correctly held the panel committed an error of law.

The Court of Appeals explained the appellate panel's error: the appellate panel's findings indicated it had been asking the wrong questions. The appellate panel focused its analysis on sequencing—it held Mrs. Wilson had injury-related depression at the time of her original award and it said Mrs. Wilson could not prove her injury-related depression started after the award, (App.pp.90-91)—but those points were not germane. Mrs. Wilson *admitted* pre-existing depression. She claimed it was mild but eventually became severe. The Court of Appeals correctly cited *Estridge*, explaining worsening depression *is* grounds for a change of condition if it arrives in full bloom after the original award is issued. (App.pp.569-570).

**b. The Court of Appeals correctly distinguished the School District's legal authorities and explained why the School District's factual argument was contradicted by the record.**

The Court of Appeals correctly handled the two cases the appellate panel cited in its res judicata analysis. *Krell v. South Carolina State Highway Department* involved an attempt to resurrect part of the original injury through a change of condition. After the injured worker brought a change of condition claim alleging a work-related hernia this Court explained a change of condition is not the vehicle for retroactively adding body parts to the original award. (App.p.566) (discussing *Krell*, 237 S.C. 584, 118 S.E.2d 322 (1961)). *Owenby v. Owens Corning Fiberglas* involved an attempt to bring a change of condition claim for a mental injury after the injured worker lost a claim for a mental injury in the original award. (App.p.566) (discussing *Owenby*, 313 S.C. 181, 437 S.E.2d 130 (Ct. App.

1993)). Other cases follow the same reasoning *Owenby* employs, preventing an injured worker from using a change of condition claim to re-litigate an issue that has already been lost. See, e.g., *Mead v. Jessex*, 382 S.C. 525, 532-34, 676 S.E.2d 722, 726-27 (Ct. App. 2009). Here, the Court of Appeals correctly noted Mrs. Wilson did not raise depression in her original workers' compensation claim and had not sought treatment for depression in connection with that claim. (App.p.570). Neither *Owenby* nor *Krell* explained why the single commissioner's analysis following *Estridge* was incorrect.

The School District believes this case relies on factual findings, not legal questions. The Court of Appeals correctly disagreed. Workers' compensation cases require detailed orders. A symptom is not "compensable" unless it is significant enough to impact an injured worker's disability, see S.C. Code Ann. §42-9-200, and the commission makes findings about the percentage of each body part's impairment. The appellate panel gave no impairment rating for Mrs. Wilson's "retroactive" depression claim and made no finding about when Mrs. Wilson's pre-existing depression became severe enough to impact her disability. The appellate panel cannot claim in good faith that a symptom would have been compensable without carrying the burden associated with that finding.

There is a reason these findings were omitted. The record would never support them. Mrs. Wilson's records show no change in her depression medication and no change in treatment during the period after her work-related accident. (App.pp.394-395). A vocational evaluation issued shortly before Mrs. Wilson's original award reported Mrs. Wilson had a better quality of life after her surgery. (App.p.185). If she had brought a depression claim back claim in 2006 the employer would have laughed and asked "where's the beef?"

The parties did not cite *Russell v. Wal-Mart* to the Court of Appeals—it had not been decided yet—but Mrs. Wilson’s case was reversed for the same reasons the Court of Appeals reversed in *Russell*: the commission’s appellate panel put standards in the change of condition statute that are not there. In *Russell*, the commission improperly required “objective evidence”—an MRI—that the injured worker’s back had changed. 415 S.C. 395, 400-401, 782 S.E.2d 753, 756 (Ct. App. 2016). The commission also said the injured worker could not prove precisely when her back had gotten worse. *Id.* at 398, 782 S.E.2d at 755.

The same sort of incorrect reasoning was applied to Mrs. Wilson’s case. The commission noted no doctor said Mrs. Wilson did not have injury-related depression before her original award. (App.p.90, ¶21). That is not the test. The commission also noted no doctor testified Mrs. Wilson’s depression began or got worse between specific dates. (App.p.91, ¶22). That is not the test either. Precedent explains a change of condition is appropriate when a symptom that was present at the original award manifests later in full bloom. Surgery produces great outcomes for some people, but sometimes pain subsides after surgery before coming back and getting worse. *Clark v. Aiken County Gov’t*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005) (relapse after surgery supported change of condition claim).

In order to judge this claim properly the appellate panel was required to ask whether the greater weight of evidence showed Mrs. Wilson’s back pain got worse over time and caused Mrs. Wilson’s pre-existing depression to become significant and disabling. Medical testimony is helpful and there is ample medical evidence in this case, but medical opinions are not required. The appellate panel’s order did not show that it asked the right questions. The Court of Appeals properly reversed based on these errors of law.

**II. The one-year deadline for a change of condition claim is satisfied when an injured worker files an application for a change of condition within the one-year period, as this Court held in *Allen v. Benson Outdoor Advertising*.**

The change of condition statute has a one year statute of limitations. See § 42-17-90(A). The limitations period begins “the date of the last payment of compensation pursuant to an award[.]” *Id.* The commission has promulgated a regulation requiring a party to attach a medical report indicating a change of condition to that party’s hearing request. 8 S.C. Code Ann. Regs. 67-602(C).

The school district paid Mrs. Wilson’s original award in a lump-sum in January of 2008. (App.p.83). Mrs. Wilson filed notice of her change of condition claim in January of 2009, (App.p.95), and attached the notes from her initial psychiatric appointment. (App.pp.97-99). The School District believes this was a deficient filing and that Mrs. Wilson’s claim is untimely because Mrs. Wilson did not request a hearing until March of 2011, over two years later. (App.p.96) (the hearing request).

**a. *Allen* controls and the statute is subject to a broad construction, not a narrow one.**

This Court’s decision in *Allen v. Benson Outdoor Advertising Co.* explains the change of condition statute is to be liberally construed and that other states have construed similar statutes to require only that the claim be filed within the 12-month deadline. See 236 S.C. 22, 29-31, 112 S.E.2d 722, 725-26 (1960). The decision adopts the same rule for South Carolina. A West Virginia case cited favorably in *Allen* even took judicial notice that some workers’ compensation cases take years to develop. *Wilkins v. State Compensation Comm’r*, 198 S.E. 869, 872 (W. Va. 1938). This rule is longstanding and sensible.

Employers are not disadvantaged by this rule. Multiple cases note an employer has the right to request a hearing when the parties have failed to reach an agreement on compensation. *Clemmons v. Lowe's*, 412 S.C. 366, 380, 772 S.E.2d 517, 524 (Ct. App. 2015) and *McMillan v. Midlands Human Resources*, 305 S.C. 532, 534, 409 S.E.2d 443, 444 (Ct.App.1991). A statute articulates this right. See S.C. Code Ann. §42-17-20. An employer is free to press for a hearing if it believes there has not been a change of condition and that the injured worker's initial filing is groundless.

**b. The regulation requiring proof at the same time a change of condition claim is filed is invalid under *Goodman v. City of Columbia*.**

Mrs. Wilson's filing meets the requirements of the regulation. The psychiatric report shows that within two (2) months of Mrs. Wilson's original lump-sum payment her depression has passed the point where her primary care physician feels comfortable handling the treatment on his own. Less than six months had passed and Mrs. Wilson was in serious counseling with a psychiatrist. Mrs. Wilson's medications doubled, moving from a couple of pills taken once per day to a larger dosage taken every four hours if needed. (App.p.395). This is why the hearing commissioner found a significant change Mrs. Wilson's mental health, and as outlined earlier in this return, the substantive problem with the appellate panel's decision is that the panel never explained why this reasoning is not correct.

Even though Mrs. Wilson's filing satisfied the regulation, candor requires mentioning that the regulation's requirement of a medical report is likely invalid. This Court's decision in *Goodman v. City of Columbia* held a regulation may not add threshold requirements beyond the requirements set forth in a statute. 318 S.C. 488, 491, 458 S.E.2d 531, 532

(1995). The regulation in *Goodman* upped the ante for a party who wished to appeal a single commissioner's decision to the appellate panel. This Court explained the controlling requirements were those found in the statute, not the regulation. See also *United States Outdoor Advertising, Inc. v. South Carolina Dep't of Transp.*, 324 S.C. 1, 3-4, 481 S.E.2d 112, 113 (1997) (regulations may not alter or add to the terms of a statute); *Gadson v. Mikasa Corp.*, 368 S.C. 214, 227, 628 S.E.2d 262, 269 (Ct. App. 2006) (same).

The same principal applies here. Mrs. Wilson complied with the regulation, but the change of condition statute does not require parties to present medical evidence at the time of filing. The regulation improperly adds requirements to the statute. This supports the result the Court of Appeals reached and does not afford a basis for denying Mrs. Wilson's claim.

### CONCLUSION

The decision of the Court of Appeals is correct. This Court should deny certiorari.

Respectfully submitted,



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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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September 12, 2017