THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Civil Action No.: 2011-CP-23-7975
Appellate Case No.: 2012-212924
WCC File No.: 0622179

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Jacqueline Y. Carter, Respondent,

v.

Verizon Wireless and
American Home Assurance Co., Appellants.

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# FINAL BRIEF OF RESPONDENT

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## STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard of review for decisions by the Commission. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, [the Commission] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Appellate courts will not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. See Therrell v. Jerry's Inc., 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). However, "[appellate courts] may reverse or modify [the Commission's] decision if Petitioner has suffered the appropriate degree of prejudice and the [C]ommission's decision is effected by an error of law or is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Id. at 25, 633 S.E.2d at 894-95 (quoting S.C. Code Ann. § 1-23-380(A)(6)(2005)).

## ARGUMENT

### I. THE CIRCUIT COURT PROPERLY INTERPRETED AND APPLIED THE LAW RELATIVE TO CHANGE OF CONDITION CLAIMS AS SET FORTH BY THIS COURT.

Appellants assert that regardless of whether evidence of a change of condition was ever considered by a Commissioner at the time of an original award, claimants are precluded from bringing change of condition claims if the doctor cannot specify whether the change occurred after the date of the original hearing or the award. This is not a novel argument, and it has been addressed several times by this Court. As discussed below, this Court has repeatedly found the very assertion being put forth by Appellants to be erroneous, as are the Appellants' interpretations of the statute and laws relative to change of condition claims.

**A. Review of an award at a change of condition hearing is concerned with the date as of which the claimant's condition was determined rather than the date of the actual hearing in which that award was rendered.**

Appellants argued at the February 16, 2011, hearing that Dr. Grady's opinion on Respondent's change of condition should not be considered because "[Dr. Grady] was unable to answer . . . the medical question of whether the change occurred either before the last hearing or after the last hearing because . . . he did not see [her] from January of 2008 . . . until [November of 2010]." This notion also appears in the Single Commissioner's Order ("Dr. Grady admitted that there was no way to determine whether [Respondent's] knee condition was . . . present during the periods before and after the Hearing held October of 2009."), and was discussed at length during oral argument before the Commission and the Circuit Court. R.pp. 9, 55-58, 66-67, 69-82. This argument made by Appellants represents a misunderstanding of the law.

This Court has already determined that the above argument is erroneous in Mungo v. Rental Uniform Service, 383 S.C. 270, 768 S.E.2d 825 (Ct.App.2009). In Mungo, a doctor examined the claimant a week prior to her hearing, but the record of that examination was not considered by the Hearing Commissioner because the record was not able to be submitted in a timely manner. As such, the doctor's record (which showed the conditions asserted in the change of condition actually existed prior to the hearing) were "not considered or factored into [the Hearing Commissioner's] award," which was based upon the claimant's condition as of May 2, 2003, the date she reached maximum medical improvement ("MMI"). Id. at 281. In finding that "the appropriate date from which the single commissioner should evaluate a change in [the] claimant's condition is May 2, 2003 [the date she reached MMI], not June 10, 2003, the date of the hearing," this

Court held: "Review of an award at a change of condition hearing is . . . concerned with **the date as of which the claimant's condition was determined rather than the date of the actual hearing in which that award was rendered.**" Id. at 280 (citing Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 109, 576 S.E.2d 191, 195-196 (Ct.App.2003)) (emphasis added).

Appellants argue that Mungo is solely about the "exclusion of evidence," asserting that this Court merely clarified that if you exclude evidence at the original hearing, you cannot exclude it on a change of condition.[1] This argument fails to recognize that the exclusion of evidence only matters in this instance because the evidence existed ***prior to*** *the date of the hearing*. The reason that evidence was excluded from consideration on the change of condition is because of the same error in law Appellants and the Commission have made in this instance – namely, the notion that review of an award at a change of condition hearing is concerned only with the date of the actual hearing. This is the legal error this Court addressed in Mungo, by specifically holding that the Commission's conclusion that it was unable to consider evidence which actually existed prior to the original hearing "is erroneous" because that evidence was not considered in forming the basis of the original award. Mungo, 383 S.C. at 280.

In this case, unlike Mungo, **there is no evidence establishing the conditions asserted in the change of condition claim actually existed *prior* to the original hearing**. Rather, Appellants argue that because Dr. Grady could not testify whether the

[1] Incidentally, in The Law of Worker's Compensation Insurance in South Carolina, co-authored by counsel for Defendants, Mungo is discussed under the section on "Changes of Condition." In this discussion, there is nothing mentioned regarding Mungo being merely about the exclusion of evidence. Rather, Mungo is summed-up as follows: "Review of an award at a change of condition hearing is, therefore, concerned with the date as of which the claimant's condition was determined rather than the date of the original hearing in which that award was rendered." Grady L. Beard, Esq., et al., The Law of Worker's Compensation Insurance in South Carolina, 93 (6th ed. 2012).

change took place before or after the date of the hearing, the claim is precluded. However, because the original award was based upon Dr. Grady's ratings as of March 3, 2008, and not upon any evidence asserted in the change of condition claim, Mungo instructs that it is immaterial whether Dr. Grady can make this timing assertion, because "[r]eview of an award at a change of condition hearing is . . . concerned with the date as of which the claimant's condition was determined," which, in this case, just as is true in Mungo, is the date of maximum medical improvement – **not the date of the hearing**. Id. at 280-281.

Mungo is not the first time this issue has been addressed by this Court. In Gattis, there was an initial hearing on August 19, 1998. Subsequently, an appeal was taken to the Commission, at which time the claimant sought to introduce a letter from her doctor dated August 18, 1998, which was not included in the record before the single commissioner. The Commission refused to admit and consider this letter in the appeal. On January 28, 1999, the claimant filed for a change of condition, which was found compensable by the single commissioner based upon the August 18, 1998, letter from the claimant's doctor (which obviously existed prior to the date of the original hearing). This Court affirmed the change of condition award, even though there was evidence of a change of condition before the original hearing date (in the form of the August 18, 1998, letter), because that evidence was not considered by the Commission in making its initial determination. This Court explained: "The issue before the Commission [on a change of condition claim] is sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based." Gattis, 353 S.C. at 109. As in Mungo, this Court did not find it compelling that the evidence in question actually

existed prior to the date of the original hearing where there was no evidence that the Commission *considered* that evidence in making its initial award. See Clark v. Aiken Co. Government, 366 S.C. 102, 110, 620 S.E.2d 99, 103 (Ct.App.2005) ("[In Gattis, the Court of Appeals] held that because the full commission limited its initial order to a determination of the claimant's condition **prior to the advent of the evidence in question**, the evidence was appropriate for the change of condition proceeding.") (emphasis added).

In Clark, the single commissioner found the claimant reached MMI on January 20, 2000, and awarded permanent partial disability. The claimant then appealed to the Commission. Before the appeal was heard by the Commission, the claimant's pain increased and he underwent a surgery to address it. The Commission later affirmed the single commissioner's order. Approximately ten months later, the claimant filed a claim for a change of condition, which he was awarded. The defendants appealed arguing "that because the change of condition asserted by [the claimant] occurred before the Full Commission issued its order in the initial proceeding, the change could not have occurred subsequent to the first award." Id., 366 S.C. at 107-108, 620 S.E.2d at 102. This Court, relying heavily on the decision in Gattis, disagreed with the defendants' argument, and specifically noted that "[t]he full commission did not address the issue of whether [the claimant's] condition had changed ***since he reached MMI*** . . . ." Id., 366 S.C. at 106, 620 S.E.2d at 101 (emphasis added). This Court further noted: "[I]t is undisputed that the full commission did not address any change in [the claimant's] condition at the time of its decision." Id., 366 S.C. at 110, 620 S.E.2d at 103. As is true with Mungo and Gattis, the analysis in Clark centers around what evidence the Commission actually considered and

the date on which the condition was determined (which, again, was the date of MMI – not the date of the hearing).

The 25% permanent partial disability award announced in the Order dated December 3, 2009 (pertaining to the hearing of October 15, 2009), is based upon the date of MMI on March 3, 2008, at which time Dr. Grady assigned 18% impairment. R.p. 45. There was no evidence of any other complicating or worsening condition considered by the Single Commissioner at that time. It is undisputed that the Single Commissioner did not address any change in Respondent's condition at the time of her decision, and obviously Dr. Grady's opinions on this matter had not yet even been offered as of that date. Further, Dr. Grady specifically testified he believes Respondent is worse now than she was at the time he assigned the 18% impairment to her left lower extremity which formed the basis of the award in the Order dated December 3, 2009. R.p. 130. Therefore, the change of condition must be considered in light of the evidence which formed the basis of the original award (in this case, the date Dr. Grady placed Appellant at MMI and assigned an impairment rating), not the date of the hearing.[2]

**B. This Court's decisions in Mungo, Gattis, and Clark give practical affect to § 42-17-90.**

"Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award, while review for a change of condition is concerned with conditions that have arisen thereafter." Mungo, 383 S.C. at 279, 678 S.E.2d at 830 (citing Gattis, 353 S.C. at 109, 576 S.E.2d at 195). However, "[w]hen an original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate . . . to then consider any subsequent events or diagnoses

[2] Dr. Grady did not see Appellant after January 3, 2008. The assignation of the impairment rating was done without a follow-up visit. R.pp. 116, 141-142.

made after that date when making a determination about an alleged change of condition." Id. at 279-280, 678 S.E.2d at 830 (citing Gattis, 353 S.C. at 109, 576 S.E.2d at 195-96; Clark, 366 S.C. at 110, 620 S.E.2d at 103). Again, given that the award in this instance was based upon Respondent's condition as of March 3, 2008, it is appropriate to consider Dr. Grady's diagnoses relative to a change in Respondent's condition subsequent to that time.

This Court's prior decisions operate to prevent an absurdity Appellants are attempting to exploit with this appeal. Workers' compensation awards are driven by impairment ratings assigned by doctors once a claimant has reached MMI. It is not until a claimant has reached MMI that a claim is ripe for a hearing to determine an award. Even if a claimant were to file for a hearing the exact same day he/she is placed at MMI and assigned an impairment rating, it still would be two to three months before the matter was actually heard by a Commissioner. As such, in most instances, there would be a two to three month gap *at a minimum* between the time when a claimant was last seen by a doctor and the date of the hearing.

Appellants' argument asserts that if a doctor is unable to pinpoint whether a claimant's change of condition occurred in the period between when they were last seen by the doctor and the date of the hearing (as opposed to occurring after the date of the hearing), then all such claimants are precluded from establishing a change of condition under the South Carolina Workers' Compensation Act ("the Act"). As such, if Appellants' argument is correct, the only way for a claimant to medically establish a change of condition claim would be for each claimant to be examined by the treating doctor on the date of the hearing (or the date of last payment of the award) so that a

baseline could be established. Only then could a doctor state with a reasonable degree of medical certainty that a condition which gradually changes for the worse occurred after the date of the original award.

The practical function of § 42-17-90 is to provide that changes of condition will only be considered after the time of the original award, but not more than twelve months from that time. See S.C. Code Ann. § 42-17-90(A). If a particular change in a claimant's condition was never considered at the time of the original award, then this Court logically instructs that it may be considered in a change of condition claim. In fact, our Supreme Court has held, as a matter of law: "[A] claim of change of condition may be based upon undiagnosed conditions, resulting from the original injury, which are discovered after the first award." Brayboy v. Clark Heating Co., 306 S.C. 56, 59, 409 S.E.2d 767, 769 n.2 (1991). Under Appellants' position, this would also be impossible under the Act, which underscores the error in interpretation and application inherent in that position.

## II. THE CIRCUIT COURT CORRECTLY FOUND THE COMMISSION'S ORDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As referenced above, whether Respondent experienced a change of condition for the worse was the primary issue for the Commission's consideration. The Commission found the deposition testimony of the authorized treating physician, Dr. Grady, along with the other medical evidence, as well as Respondent's hearing testimony, support a finding that there was no change of condition. As established below, not one of these items of evidence supports such a finding. To the contrary, these items of evidence plainly support a finding that there was a compensable change of condition.

### A. Dr. Grady's testimony establishes a change of condition.

The Commission determined Dr. Grady's deposition testimony supported a finding that there was no change of condition to Respondent's knee. In fact, Dr. Grady testified as follows:

- "It's my professional medical opinion within a reasonable degree of medical certainty that the patient per my examination, history, physical, etc., had a natural progression of her disease process . . . ." R.p. 121.

- Q: And doctor, it is your opinion that – to a reasonable degree of medical certainty that she had sustained a material worsening of her left knee?
  A: That's correct. R.pp. 124-125.

- "[W]hen I saw her again on November 4th, she had the joint space narrowing and collapse of the medial tibial femoral joint compartment or the inner aspect of the knee joint. That constitutes a material worsening. The other thing that constitutes a material worsening is pain. . . . If I have objective findings of diminution or decrease in range of motion, worsening of the patient's knee joint as far as the narrowing and increased pain, that's material worsening." R.p. 128.

- Q: Three months after she saw you [on November 4, 2010], her pain is constantly an eight. . . . And in your mind, knowing that there has been that kind of increase in pain, does that further solidify your opinion that there has been a change or worsening of her condition?
  A: Yes, it does. R.pp. 129-130.

- Q: One other thing, Doctor, the order in this case was actually based upon your 18 percent rating, and that's the rating that you assigned back in 2008. Is it your opinion, again, that she is worse now than she was when you made that 18 percent rating that the order was based on?
  A: Yes. R.p. 130.

There is nothing ambiguous about Dr. Grady's testimony. As the authorized treating physician who was very familiar with Respondent and her problems both well before and after she originally reached MMI in 2008, he repeatedly stated and explained his opinion that Respondent suffered a change of condition (or "material worsening" of her condition). Therefore, Dr. Grady's testimony does not support a finding that there was no change of condition.

### B. The other medical evidence establishes a change of condition.

The Commission found the medical evidence supported a finding that there was no change of condition to Respondent's knee. In fact, the medical evidence established the following:

- ***Respondent's impairment rating increased***

  Dr. Grady found Respondent reached MMI on January 3, 2008, the date he last saw her regarding her work-related left knee injury; later, on March 3, 2008, he assigned **18% impairment** to her left lower extremity. R.pp. 139-142.

  Dr. Grady saw Respondent again regarding her left knee on November 4, 2010, and concluded there had been "interval progression of arthritis when we had to remove some of the meniscus . . . . That is expected over time. Eventually she will require total knee arthroplasty." Dr. Grady opined **Respondent's impairment increased to 42%**. R.p. 156.

- ***Respondent now has crepitance in left knee***

  1/3/08: No mention of crepitus. R.pp. 139-141.
  11/4/10: Positive for crepitus on flexion and extension. R.p. 152.

- ***Respondent lost range of motion in left knee***

  1/3/08: Range of Motion of left knee = 0-120°. R.pp. 139-141.
  11/4/10: Range of Motion of left knee = 0-82°, to 90° with positive assist "but it does hurt her to take it to 90." R.p. 154.

- ***Respondent now has fluid on left knee***

  1/3/08: No mention of fluid on the knee. R.pp. 139-141.
  11/4/10: Fluid on left knee. R.p. 153.

- ***Respondent now has joint space collapse in left knee***

  1/3/08: X-ray showed "excellent joint space interval without joint space collapse to any appreciable degree." R.p. 140.
  11/4/10: x-ray showed "joint space collapse and approximately 1 mm joint space remaining," which "represents a change from 3 mm in March 2008." R.p. 154.

- ***Respondent's pain increased***

  1/3/08: pain = 5/10. R.p. 139.
  11/4/10: pain goes up as high as 6 or 7/10. R.p. 152.

There is no medical evidence other than that from the authorized treating physician, Dr. Grady. Not only is it apparent from these citations to the medical evidence there was a change in Respondent's condition, Dr. Grady personally confirmed and explained that this medical evidence led him to conclude there was a material worsening of Respondent's condition. This evidence does not support the Commission's finding to the contrary.

**C. Respondent's testimony establishes a change of condition.**

The Commission found Respondent's testimony supported a finding that there was no change of condition to her knee. In fact, Respondent testified as follows:

- Q: Now, we're here today because you believe your left knee problem has worsened, correct?
  A: Yes. R.p. 87.

- When asked why she believes her knee is worse than it was at the time of her hearing in 2009, Respondent testified: "It's constantly grinding when I walk or go up-down stairs. It's swelling. It has burning, sharp pains. There's a knot there and it feels full and heavy as the – like there's fluid on it." R.p. 93.

- In 2009, her pain averaged 5 out of 10, and when she saw Dr. Grady in November 2010, her pain averaged 5 out of 10, but went as high as 6 or 7 out of 10. Her pain as of January 2011 and continuing through the time of her hearing was up to 8 out of 10. R.pp. 93-94.

- While she has pain everyday just as she did in 2009, the level of pain she has now is "absolutely" worse. R.p. 105.

- The crunching sound in her leg (crepitance) is worse now than it was in 2009. R.p. 106.

- She is unable to flex and bend her leg as much as she could in 2009. R.p. 106.

- The problem she currently has with fluid on her knee was not present in 2009. R.p. 106.

While there are a few aspects of her condition that may not have changed for the worse, as evidenced above, there are multiple areas which have significantly changed for the worse according to Respondent. When Respondent specifically testifies that she believes she is worse, that her pain is worse, that she notices more grinding in her knee, less range of motion and now experiences fluid/swelling around her knee, it is difficult to conclude that her testimony supports a finding that there was no change in her condition. Taken together, Dr. Grady's testimony, the medical evidence, and Respondent's testimony support a finding that there was a change of condition.

## III. THE CIRCUIT COURT CORRECTLY DETERMINED THERE IS NO EVIDENCE TO SUPPORT THE COMMISSION'S FINDING THAT THERE WERE TWO INTERVENING CAUSES OF RESPONDENT'S CHANGE OF CONDITION.

As an initial matter, it is important to understand the Single Commissioner's Order and the Commission's Order both contain an internal contradiction on this point. This is because Finding of Fact Four in both the Single Commissioner's Order and the Commission's Order provide that "a physical change of condition has not occurred." R.pp. 22, 34. Then, in Finding of Fact Six of the Single Commissioner's Order and the Commission's Order, it is announced there were "at least two intervening causes" of the change in Respondent's condition. R.pp. 23, 34. **It is not possible for something to be an intervening cause of a change of condition if the change of condition "has not occurred."** The discussion below establishes there were no intervening causes of the change of condition Respondent experienced.

### A. There is no evidence "Zumba" classes were an intervening cause of Respondent's change of condition.

Other than water aerobics, the only other exercise Respondent ever ***attempted*** was "Zumba" class, which she testified is a "cardio dance class."[3] R.p. 91. According to Respondent, she wanted to try "Zumba" to work on her upper body because it has arm movements that mimic boxing. R.pp. 91-92. Respondent explained that the upper body movements were the only movements she could perform – she specifically testified that she was not able to perform any of the dance moves or get on the floor during "Zumba." R.p. 92. Respondent further testified that she could not stand for the entirety of a "Zumba" class, and ultimately decided to stop attending that class as it was not benefitting her because she could not perform any of the other movements. R.p. 92. Respondent participated in only three "Zumba" classes in this limited manner, and all of those classes were attended after she saw Dr. Grady on November 4, 2010, the date on which he found she had suffered a change of condition. R.pp. 91-104.

There is no evidence to contradict any of the aforementioned testimony by Respondent on the issue of "Zumba." There is no testimony that "Zumba" hurt Respondent or changed her condition in any way. There is no medical opinion stating that "Zumba" was an independent, intervening event. To the contrary, Dr. Grady testified: "I think overall the progression from when I initially did her surgery to the point where I saw her [on November 4, 2010] – where I noted the changes here, I think that

[3] Respondent testified she lost 48 pounds since the summer of 2010. R.p. 96. According to Respondent, she did this in part by participating in water aerobics beginning in June 2010 - something she had been previously prescribed by Dr. Grady following her knee surgery. R.p. 88. Respondent did not participate in any other exercises other than water aerobics. R.p. 99. Dr. Grady testified that if one of his patients with a knee injury like Respondent's is going to do exercise, "you want them to do it in the water" because "you have less of an impact loading" in that "[t]he buoyancy of the body in the water . . . helps you out." R.p. 102. Dr. Grady agreed that Respondent's weight loss "is going to do nothing but help her out." R.p. 103.

was expected . . . ." R.p. 119. Moreover, the evidence establishes that Respondent had not participated at all in any "Zumba" class prior to November 4, 2010, meaning that "Zumba" had no bearing at all on Dr. Grady's opinions in this matter. Therefore, there is no support for the finding that "Zumba" was an intervening cause of Respondent's change of condition.

### B. There is no evidence Respondent's broken right ankle, suffered in February 2009, was an intervening cause of her change of condition.

Respondent broke her ankle in February 2009. She had a hearing on her workers' compensation claim on October 15, 2009. No assertion was made by Appellants at the 2009 hearing that Respondent's right ankle fracture in any way constituted an intervening cause of her left leg problems. In fact, Respondent testified in that hearing her right ankle fracture did not hinder her ability to walk, and that her right ankle fracture was "fully healed." R.p. 113. In the hearing regarding her change of condition in 2011, Respondent explained that after her ankle fracture, she was not putting any weight on her left knee because she was in a wheelchair for six to eight months. R.p. 98. There is no other evidence in the record on this issue, including no opinion from Dr. Grady or any other doctor stating that Respondent's February 2009 ankle fracture in any way affected her left leg, much less rose to the level of an intervening cause of her change of condition. Thus, there is no evidence in the record upon which a finding of an intervening cause of Respondent's change of condition can be based.

## IV. IT WAS APPROPRIATE FOR THE CIRCUIT COURT TO REVERSE THE COMMISION'S ORDER IMPROPERLY LIMITING THE AWARD OF MEDICAL TREATMENT.

The original Order dated December 3, 2009, provided: "[Respondent] is entitled to causally-related Dodge medicals that may tend to lessen her period of disability, as

recommended by the authorized treating physician, including Darvocet or comparable medication."[4] R.p. 47. There is a simple explanation as to why this order specifically included "Darvocet or comparable medication" as part of the future medical to which Respondent is entitled. At the time of the October 15, 2009, hearing, an issue was raised as to whether the Darvocet Respondent was taking at the time was for her compensable left lower extremity injury, or for her unrelated right ankle fracture. Respondent testified on cross-examination that while Darvocet had been prescribed for her right ankle fracture, she was taking Darvocet for her compensable left lower extremity injury as well. R.p. 112. This issue is also discussed in the "Evidence of the Case" section of the Order dated December 3, 2009:

> [Appellant] further testified she is currently taking Darvocet for her left knee, at the direction of Dr. Grady. See Claimant's Deposition, p. 24, ll. 17-21. She also testified she is taking Darvocet for her recent right ankle fracture, which occurred in February 2009, but is unrelated to her work-related injury. See Claimant's Deposition, p. 25, l. 14 – p. 27, l. 12.

R.p. 44. The Single Commissioner determined Darvocet was necessary for Respondent's compensable left lower extremity injury, not just her unrelated right ankle fracture, which was memorialized in the Order by specifically including "Darvocet or comparable medication" in the award of future medical.

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[4] "Dodge medicals" is a much-used phrase in workers' compensation. It is a reference to Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 100, 576 S.E.2d 593 (Ct.App.1999), which provides: "[T]he fact a claimant has reached maximum medical improvement does not preclude a finding the claimant may still require additional medical care or treatment." Dodge, 334 S.C. at 581, 514 S.E.2d at 596. Therefore, "an employer may be liable for a claimant's future medical treatment if it tends to lessen the claimant's period of disability despite the fact the claimant has returned to work and has reached maximum medical improvement." Id. at 583, 514 S.E.2d at 598.

In the Order dated April 18, 2011, the Single Commissioner concluded as follows:

> Under § 42-15-60 and Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 100, 576 S.E.2d 593 (Ct.App.1999), and pursuant to the Order of Commissioner Barden filed December 3, 2009, [Appellant] is entitled to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, **specifically restricted** to Darvocet or a comparable medication.

R.p. 35 (emphasis added). This conclusion was affirmed by the Commission. R.p. 23. As explained above, this is not what was awarded in the original Order, in that the words "specifically restricted" replaced "including" relative to the provision of future medical treatment. Respondent submits this change in wording makes her argument for her, in that if "including" meant "specifically restricted," there would be no need to change the phrasing. Further, it is a contradiction to state on the one hand that medical treatment should be provided "as recommended by the authorized treating physician," then restrict that provision to one specific item. If that was the intent of the original Order, then it would have simply read: "Only Darvocet or a comparable medication shall be provided in the future." In other words, the interpretation of the original provision of Dodge medical adopted by the Commission renders the award of medical treatment "as recommended by the authorized treating physician" meaningless.

This is an extremely important issue in this case, in that the authorized treating physician has opined Respondent will eventually require a total knee arthroplasty. R.pp. 124, 127, 156. Further, while Dr. Grady testified he anticipated such an eventuality even in January 2008, the purpose of ordering that future medical treatment shall be provided "as recommended by the authorized treating physician" is to allow for medical to be adapted to address related future needs as Dr. Grady sees fit. To deny Respondent the

future medical treatment she very much needs (and which is being recommended by her authorized treating physician) would be draconian in light of the fact the original award of future medical was restricted only to the extent it must be recommended by the authorized treating physician.

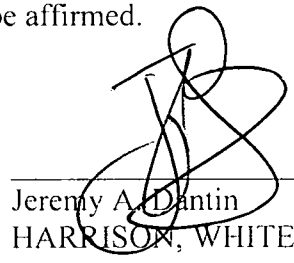
Respondent also asserts that regardless of the prior award of Dodge medical, she has suffered a change of condition, and the undisputed evidence is that she will eventually have to have her left knee replaced. Even if this Court were to believe the Single Commissioner's restriction of Dodge medical in the Order dated April 18, 2011, is not erroneous, it is now appropriate to issue an award for future medical treatment under Dodge as part of her compensable change of condition claim, so that Appellants remain liable for all the medical treatment, including future surgery, necessitated by Respondent's admitted left lower extremity injury, so long as it is recommended by her authorized treating physician and tends to lessen her period of disability.

## V. THE CIRCUIT COURT'S ORDER DOES NOT VIOLATE ANY APPELLATE RULES.

Appellants argue that the Circuit Court's Order in this instance violates Rule 208(B), SCACR. However, Rule 208 governs the requirements for initial briefs to be prepared by the parties, and Rule 208(B) specifically governs the content of the parties' initial briefs. As such, an Order from the Circuit Court is not governed by Rule 208(B), SCACR. Further, given that the Circuit Court Order is sixteen pages long and explains in detail the grounds for the decision reached, there is no basis for Appellants' assertion that they are prohibited from appropriately raising grounds for reversal on appeal.

## CONCLUSION

This Court has given logical application to § 42-17-90 in consistently finding that review of an award at a change of condition hearing is concerned with the date as of which the claimant's condition was determined, rather than the date of the actual hearing in which that award was rendered. In this case, given that the undisputed evidence establishes Respondent suffered a change in her condition (for which there is no evidence of any intervening causes), this Court's interpretation of § 42-17-90 avoids the absurd and unjust result suggested by Appellants. As such, based upon the facts and law cited above, the Circuit Court's Order reversing the Order of the South Carolina Workers' Compensation Commission should be affirmed.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Civil Action No.: 2011-CP-23-7975
Appellate Case No.: 2012-212924
WCC File No.: 0622179

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Jacqueline Y. Carter, Respondent,

v.

Verizon Wireless and
American Home Assurance Co., Appellants.

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

May 30, 2013

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PROOF OF SERVICE

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I certify that I have served the Final Brief on the above-named Appellants, Verizon Wireless Southeast and American Home Assurance Company, this 30th day of May 2013, by depositing the same in the United States Mail, first class postage prepaid, addressed to their attorney of record, as follows:

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