

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7975
W.C.C. File No.: 0622179

Jacqueline Carter, ... Respondent,

v.

Verizon Wireless Southeast and
American Home Assurance Company, ... Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S FINDING THAT CLAIMANT DID NOT SUFFER A CHANGE OF CONDITION IS AFFECTED BY AN ERROR OF LAW AND IS OTHERWISE NOT SUBSTANTIALLY SUPPORTED BY THE EVIDENCE; SAID ERROR BEING THIS HOLDING IS BASED UPON A MISAPPLICATION OF THE SUBSTANTIAL EVIDENCE STANDARD OF REVIEW?
2. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S FINDING THAT CLAIMANT DID NOT SUFFER A CHANGE OF CONDITION IS AFFECTED BY AN ERROR OF LAW AND IS OTHERWISE NOT SUBSTANTIALLY SUPPORTED BY THE EVIDENCE; SAID ERROR BEING THIS HOLDING IS BASED UPON AN ERROR OF LAW?
3. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S FINDING THAT CLAIMANT DID NOT SUFFER A CHANGE OF CONDITION IS AFFECTED BY AN ERROR OF LAW AND IS OTHERWISE NOT SUBSTANTIALLY SUPPORTED BY THE EVIDENCE; SAID ERROR BEING THE CIRCUIT COURT IGNORED OR OVERLOOKED SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION?
4. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S FINDING THAT THERE WERE TWO INTERVENING CAUSES OF CLAIMANT'S CHANGE OF CONDITION IS BOTH AN ERROR OF LAW AND CLEARLY ERRONEOUS IN LIGHT OF THE EVIDENCE; SAID ERROR BEING THE AFOREMENTIONED FINDING OF THE COMMISSION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND, THEREFORE, SHOULD NOT HAVE BEEN DISTURBED ON APPEAL?
5. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S FINDING THAT THERE WERE TWO INTERVENING CAUSES OF CLAIMANT'S CHANGE OF CONDITION IS BOTH AN ERROR OF LAW AND CLEARLY ERRONEOUS IN LIGHT OF THE EVIDENCE; SAID ERROR BEING THE CIRCUIT COURT IGNORED AND OVERLOOKED SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION?
6. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S RESTRICTION OF ADDITIONAL MEDICAL TREATMENT WAS ERRONEOUS THEREBY NECESSITATING REVERSAL; SAID ERROR BEING THE HOLDING OF THE CIRCUIT COURT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AS THE COMMISSION'S FINDING ONLY SERVES TO CLARIFY, NOT RESTRICT, FUTURE MEDICAL TREATMENT?
7. DID THE CIRCUIT COURT ERR IN HOLDING THE COMMISSION'S RESTRICTION OF ADDITIONAL MEDICAL TREATMENT WAS ERRONEOUS THEREBY NECESSITATING REVERSAL; SAID ERROR BEING THE HOLDING OF THE CIRCUIT COURT IGNORED AND OVERLOOKED SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION?

8. DID THE CIRCUIT COURT ERR IN ISSUING A FORM 4 ORDER EXCLUDING ANY EXPLANATION OR DISCUSSION REGARDING THE GROUNDS RAISED BY THE PARTIES OR THE REASONS FOR REVERSAL; SAID ERROR BEING THE CIRCUIT COURT'S EXCLUSION OF ANY EXPLANATION OR DISCUSSION OF THE REASONS FOR THE REVERSAL PROHIBITS THE DEFENDANTS FROM "CONCISELY AND DIRECTLY" RAISING SUCH GROUNDS ON APPEAL AS IS REQUIRED UNDER RULE 208 OF THE SOUTH CAROLINA APPELLATE COURT RULES?

STATEMENT OF THE CASE

This is a workers' compensation appeal involving an alleged change of condition pursuant to Section 42-17-90 of the Act. This brief is submitted on behalf of Verizon Wireless Southeast and American Home Assurance Company ("Appellants" or "Defendants") in appeal of the Order of D. Garrison Hill, Circuit Court Judge in the Greenville County Court of Common Pleas, filed on July 16, 2012.

By way of background, Jacqueline Carter ("Respondent" or "Claimant") was involved in a work-related accident on December 27, 2006, when she fell to the floor injuring her left knee. This claim was initially before the South Carolina Workers' Compensation Commission ("Commission") pursuant to the Form 21 filed by the Defendants on July 27, 2009, requesting a Hearing to determine the extent of permanent partial disability. By way of Decision and Order filed on December 3, 2009, Commissioner Susan S. Barden determined the Claimant sustained a compensable injury to her left knee on December 27, 2006; reached maximum medical improvement ("MMI") with regard to her left knee on March 3, 2008; and sustained twenty-five (25%) percent permanent partial disability to her left leg and had advanced pre-existing degenerative joint disease. (R. pp. 37-47). Commissioner Barden further held, pursuant to *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 100, 576 S.E. 2d 593 (Ct. App. 1999), that the Claimant is entitled to causally-related future medical treatment that may tend to lessen her period of disability, specifically Darvocet or a comparable medication. Neither party appealed the Order of Commissioner Barden. (R. pp. 37-47).

The Claimant subsequently filed a Form 50 on November 29, 2010, alleging she sustained a change of condition or material worsening of her left knee pursuant to Section 42-17-90 of the

Act. (R. p. 51). The Claimant also requested additional medical treatment for her left knee as recommended by Walter Grady, DO, the previously authorized treating physician. (R. p. 51). The Defendants denied the Claimant sustained a compensable change of condition with regard to her left knee and, alternatively, contended the Claimant sustained an intervening accident(s) involving her left knee subsequent to the previous Hearing before Commissioner Barden. (R. pp. 52-53).

The Hearing to address the issue raised on the Form 50 was held on February 16, 2011, before Commissioner Avery B. Wilkerson, Jr. By way of Decision and Order filed on April 18, 2011, Commissioner Wilkerson concluded the Claimant did not sustain a compensable physical change of condition with regard to her left knee; suffered at least two intervening causes for her current complaints; and concluded Darvocet or comparable medication is the only compensable medication. (R. pp. 25-36). The Claimant timely appealed the Decision and Order of Commissioner Wilkerson to the Commission. By way of Decision and Order filed on November 9, 2011, the Commission affirmed the Order of Commissioner Wilkerson in its entirety. (R. pp. 20-24).

The Claimant subsequently filed a timely appeal in the Greenville County Court of Common Pleas ("Circuit Court"). By way of Order filed on July 16, 2012, Circuit Court Judge D. Garrison Hill reversed the Decision and Order of the Commission as not supported by substantial evidence and affected by errors of law. (R. pp. 4-19). On August 2, 2012, the Defendants timely filed a Motion to Reconsider the Order of the Circuit Court. By way of Form 4 Order filed on August 8, 2012, the Motion to Reconsider was denied. (R. pp. 2-3). The Defendants then timely appealed the Order of the Circuit Court to this Court.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. Code Ann. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law. S.C. Code Ann. § 1-23-380(A)(6)(d)(Supp. 2006).

Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark*, supra.; S.C. Code Ann. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). As the South Carolina Supreme Court observed,

a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence.

Howell v. Pac. Columbia Mills, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, a decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(f).

ARGUMENT

I. THE REVERSAL OF THE ORDER OF THE COMMISSION BASED UPON AN ERROR OF LAW IS PREDICATED UPON DISREGARD FOR CONTROLLING PRECEDENT AND CLEAR LEGAL ERROR.

Section 42-17-90 allows a party of interest to apply for review of an award on the basis that the Claimant has experienced "a change of condition caused by the original injury, **after the last payment of compensation.**" S.C. CODE ANN. § 42-17-90 (Law Co-op. and Supp. 2007) (emphasis added). A review of the prior award "must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." *Id.* Importantly, the Supreme Court of South Carolina has established that a change of condition "means a change in the physical condition of the claimant as a result of the original injury, **occurring after the first award.**" *Causby v. Rock Hill Printing & Finishing Company*, 249 S.C. 225, 153 S.E.2d 697 (1967)(citing *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 23 S.E.2d 19 (1942)(emphasis added).

Additionally, it is well-established by the Supreme Court of South Carolina that the interpretation of a statute is a question of law. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011) (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011)). If the words of the statute are unambiguous, a court must apply their literal meaning. *CFRE, LLC*, 395 S.C. at 74, 716 S.E.2d at 881 (citing *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). Finally, and most importantly, "[t]he construction of a statute by the

agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons.” *CFRE, LLC*, 395 S.C. at 77, 716 S.E.2d at 882.

In the case at bar, the Circuit Court held the Commission erred as a matter of law by failing to consider the change of condition based upon the evidence which formed the basis of the original award on December 3, 2009, i.e. the date the Claimant reached MMI, March 3, 2008, instead of the date of the original Hearing or award. This constitutes an untenable misunderstanding and misapplication of Section 42-17-90 and *Causby* by the Circuit Court. Nonetheless, the Circuit Court relies upon distinguishable precedent from this Court, wherein this Court held “[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 rather than the date of the actual hearing in which that award was rendered.” *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 768 S.E.2d 825 (Ct. App. 2009)(citing *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 195-96 (Ct. App. 2003)).

The Defendants assert the holding of the Circuit Court is based upon a clear error of law, disregard of the precedent set forth in *Causby*, and represents a *de facto* repeal or amendment of Section 42-17-90 of the Act. The Circuit Court has failed to apply the literal meaning of the unambiguous statutory language of Section 42-17-90. See *CFRE, LLC, and Sloan, infra*. By committing this legal error the Circuit Court was free to likewise disregard the undisputed fact the claimant could not establish whether her alleged change of condition occurred before or after the first award.

A. **CAUSBY CONSTITUTES CONTROLLING LEGAL PRECEDENT AND IS CONSISTENT WITH SECTION 42-17-90.**

The Circuit Court committed legal error by failing to apply the controlling precedent set forth in *Causby v. Rock Hill Printing & Finishing Company*, 249 S.C. 225, 153 S.E.2d 697 (1967), which is consistent with the specific statutory language provided in Section 42-17-90. In *Causby*, the Supreme Court clearly interpreted the applicable change of condition statute to require a Claimant to prove an alleged physical change of condition occurred after the first award. *Causby*, 249 S.C. 225, 153 S.E.2d 697. The Legislature subsequently enacted Section 42-17-90 to require the Claimant to carry the burden of proving she sustained a compensable change of condition "after the last payment of compensation." The Defendants assert a plain reading of Section 42-17-90 and *Causby* requires a change of condition to have occurred after the last payment of compensation. Importantly, the Commission requires the Defendants to file a Form 19 Receipt of Compensation executed by the Claimant upon payment of any award. As such, it is untenable to reach any interpretation of the burden of proof for a change of condition claim outside that provided by *Causby* and Section 42-17-90.

In the case at bar, the claimant reached MMI with regard to her left knee on March 3, 2008. (R. p. 142). A Hearing was held before Commissioner Susan S. Barden on October 15, 2009 to determine the extent of permanent partial disability. On December 3, 2009, Commissioner Barden awarded the Claimant twenty-five (25%) percent permanent partial disability to her left leg. (R. pp. 37-47). The executed Form 19 was filed with the Commission on January 22, 2010, confirming payment of the disability award. Accordingly, and pursuant to Section 42-17-90 and *Causby*, the claimant's alleged change of condition must have occurred on or after January 22, 2010.

Defendants submit the Commission, in denying the compensability of Claimant's alleged change of condition, correctly applied *Causby* and Section 42-17-90 in determining the claimant failed to prove her change of condition occurred after January 22, 2010. As such, the decision of the Circuit Court to apply *Mungo* and hold the change of condition is determined based upon the date of which the claimant's initial condition was determined, i.e. MMI, not the date of the Hearing or award, constitutes a clear and reversible error of law.

B. **MUNGO IS INAPPLICABLE AND FACTUALLY DISTINGUISHABLE.**

The Circuit Court erroneously relied upon precedent from the Court of Appeals that "[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 rather than the date of the actual hearing in which that award was rendered." *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 768 S.E.2d 825 (Ct. App. 2009)(citing *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 195-96 (Ct. App. 2003)). Based upon this language, the Circuit Court surmised that the date from which a change of condition is determined in the matter at bar is March 3, 2008, the date of MMI. Importantly, the Court failed to explain how *Mungo* can be deemed to supersede the controlling authority provided by the Supreme Court in *Causby*, and failed to interpret its holding in conjunction with a plain reading of the unambiguous change of condition provision in Section 42-17-90, both of which confirm a change of condition must occur after payment of the first award. The Defendants submit the absence of any such analysis by the Circuit Court is nothing more than a convenient strategy to find the alleged change of condition compensable without actually applying the statute enacted to specifically address such a claim. The Defendants further assert the Circuit Court's erroneous adoption of *Mungo* in the matter at bar constitutes a

de facto repeal or amendment to Section 42-17-90, when such a determination is wholly contrary to the plain language of the statute and controlling precedent of *Causby*.

Additionally, the facts support this Court's holding in *Mungo* are clearly distinguishable from the facts at bar. In *Mungo*, the claimant sustained a compensable injury to her cervical spine and was seen by a physician seven days prior to her hearing (emphasis added). *Mungo*, 383 S.C. at 275, 678 S.E.2d at 828. The medical reports from claimant's pre-hearing visit were considered untimely and excluded. *Id.* Based upon the admissible evidence the single commissioner found that the claimant had reached MMI on May 2, 2003. *Id.* A change of condition hearing was held March 2, 2005, and the claim was denied and the medical records were again considered untimely. *Id.* at 276, 678 S.E.2d at 828. The Court of Appeals held that the proper date of review of the claimant's change of condition should have been May 2, 2003, not June 10, 2003, the date of her initial hearing; therefore, the medical records obtained just prior to the Hearing should have been considered in the subsequent change of condition claim. *Id.* at 276, 678 S.E.2d at 828.

The Court of Appeals' reasoning for the reversal is critically important to the matter at bar, and clearly demonstrates the Circuit Court's misinterpretation of the holding in *Mungo*. Specifically, the Court of Appeals reasoned that "[w]hen the original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate for the Appellate Panel to then consider any subsequent events or diagnoses made after that date when making a determination about an alleged change of condition." *Mungo*, 383 S.C. at 279, 678 S.E.2d at 830 (quoting *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 195-96 (Ct. App. 2003)). In short, the Court of Appeals simply found that since the excluded evidence was

not considered at the initial Hearing, it should have been considered at the change of condition Hearing. *Mungo*, 383 S.C. at 281, 678 S.E.2d at 831. The Court of Appeals did not and has not since held that the applicable date from which to determine whether a change of condition has occurred is the date of MMI.

By comparison, the Claimant in this case did not have a medical record to support her change of condition prior to her initial hearing. In fact, at the time of the initial hearing, for reasons completely unknown to the Defendants, the Claimant had not seen Dr. Grady in nearly twenty (20) months, and she had not requested any updated opinion regarding her condition in preparation for the Hearing. Moreover, the claimant did not actually obtain an opinion from Dr. Grady until November of 2010, nearly thirty-two (32) months after the determination of MMI. If we adopt the application of *Mungo* as determined by the Circuit Court, which certainly allowed this Claimant an additional 20 months in which to allege a change of condition, any Claimant could conceivably be allowed an infinite amount of time after the date of MMI to file a change of condition claim. (R. pp. 59-60). This is wholly contrary to the purpose for the change of condition statute, i.e. providing a claimant with a means to allege a causally-related change of condition while protecting employers and carriers from indefinite liability. It is also important to note that the Defendants agree that if this Claimant had obtained an opinion from Dr. Grady after the date of MMI but the opinion was not considered by the single commissioner in determining the extent of disability, this opinion could serve as evidence of a change of condition. The reasoning is simple - it did not provide the basis for the initial determination of disability and, therefore, should be considered to determine whether the Claimant sustained additional causally-related disability. There is no such evidence in the case at bar and, therefore, the facts in this case are clearly

distinguishable and cannot provide any sound foundation for adopting the specific holding of the Court in *Mungo*.

II. **THE CIRCUIT COURT INCORRECTLY HELD THE DETERMINATION OF THE COMMISSION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

The holding of the Circuit Court reversing the Order of the Commission based upon a lack of substantial evidence was predicated upon an incorrect application of the law. Specifically, and as addressed in Section I above, the Circuit Court disregarded the controlling precedent of *Causby* and the unambiguous language in Section 42-17-90 both of which require a change of condition occur after the first award. Defendants contend that if the Circuit Court had applied the correct legal standard, substantial evidence would certainly support the finding of the Commission that the claimant could not establish a compensable change of condition. In support of this contention, the Defendants direct the Court to the deposition testimony of Dr. Grady as well as the Hearing testimony of the claimant, both of which constitute substantial evidence to support the denial of a compensable change of condition claim pursuant Section 42-17-90 and *Causby*.

Dr. Walter Grady was the claimant's authorized treating physician and provided the only medical opinions regarding causation. After holding the change of condition should be determined based upon the change after the date of MMI, the Circuit Court cited Dr. Grady's testimony that the Claimant has sustained a material worsening of her left knee - a change of condition - since March 3, 2008, the date of MMI. Per Dr. Grady the worsening was evidenced by both the continued collapse in the medial compartment of the knee as well as the subjective pain complaints of the Claimant. (R. pp. 121, 124-125, 128-130). Interestingly, Dr. Grady admitted the Claimant's pain level in 2010 was similar to her level when Dr. Grady last examined her in January of 2008. (R. p. 34). However, assuming this testimony is even probative to the issue

of causation, which is denied, the Defendants nonetheless maintain Dr. Grady was unequivocally unable to confirm whether the alleged change of condition occurred prior to or after the date of the award on December 3, 2009. (R. p. 117). In fact, the relevant testimony proceeded as follows:

Q: There is a time period, the 20-month period of time from when you saw her in January of 2008 until her hearing, when she came into the hearing with the cane in October of 2009 - -

A: Correct.

Q: - - there's no way for you to know how her knee was doing during that period of time, is there?

A: No.

Q: Is that fair?

A: That's fair.

Q: And you didn't see her between October of 2009 until November of 2010?

A: That's correct.

Q: And then that's when she came in with this - with the problems that you've noted in your report; is that correct?

A: That is correct.

Q: Is there any way for your tell whether those problems are related to the period after the hearing or the period before the Hearing? Can you state to a reasonable degree of medical certainty whether those problems were caused by that period or that period? Is there any way for your to tell that?

A: I don't think there is any way for me to tell that.

(R. p. 118, l. 5-p. 119, l. 6).

In addition, Dr. Grady clearly testified he would not recommend any changes to the Claimant's treatment regimen as a result of the visit in November of 2010, which Defendants argue is per se evidence that a *material worsening* of the claimant's left knee has not occurred. (R. p. 127). In fact, Dr. Grady testified he believed in 2008 that the Claimant would eventually require a total knee replacement, an opinion which had not changed during the subsequent 20 months. (R. p. 124).

Moreover, the Claimant confirmed during the change of condition hearing in 2011 that her left knee condition had not changed since the initial Hearing in 2009, when she testified she experienced the "uncomfortable throbbing feeling" and "cannot sleep without being prescribed medication." (R. p. 101, l. 17-p. 102, l. 15). Interestingly, the Claimant admitted she was using a cane at the hearing in October of 2009, but rarely required the cane as of her change of condition Hearing in February of 2011. (R. p. 101, l. 15-p. 102, l. 1).

The Defendants contend the testimony of Dr. Grady and the Claimant constitutes substantial evidence to support the Commission's denial of a compensable change of condition pursuant to the plain language of Section 42-17-90 and controlling authority of *Causby*.

III. **SUBSTANTIAL EVIDENCE SUPPORTED THE COMMISSION'S FINDING OF AN INTERVENING CAUSE OF CLAIMANT'S LEFT KNEE PROBLEMS.**

The Circuit Court ignored or disregarded substantial evidence to support the Commission's finding that the Claimant sustained an intervening cause of her current left knee problems. The Defendants now submit the Order of the Court should be reversed and the finding of an intervening accident reinstated as a matter of fact.

It is well-established by the Court of Appeals that "every natural consequence which flows from a compensable injury, unless the result of an independent intervening cause sufficient to

break the chain of causation, is compensable.” *Sanders v. Wal-Mart Stores, Inc.*, 379 S.C 554, 666 S.E. 2d 297 (Ct. App. 2008) (citing *Whitfield v. Daniel Construction Co.*, 226 S.C. 37, 40-41, 83 S.E.2d 460, 462 (1954)(emphasis added)). In the matter at bar, the Commission correctly found the Claimant sustained an intervening cause of her knee problems during the summer of 2010. The Defendants submit this finding was unequivocally supported by substantial evidence, specifically the testimony of the claimant and Dr. Grady.

The Claimant has acknowledged that her left knee problems increased when she started an exercising regimen during the summer of 2010. (R. pp. 132-133). The Claimant testified she was attending exercise classes, including water aerobics, **five days per week** beginning in July of 2010, only four months before she presented to Dr. Grady in November 2010 with an alleged change of condition. (R. pp. 132-135). The Claimant's exercise regimen actually included **96 visits to the gym** between July 2010 and February 2011, and 55 visits through November 4, 2010. (R. pp. 143-151). Neither Dr. Grady nor any other medical specialist recommended or referred her for exercise or aquatic therapy. The Claimant also acknowledged attending Zumba classes after November 4, 2010, and admitted she was forced to discontinue the classes due to pain. (R. pp. 91-92).

In addition, Dr. Grady testified that it would have been important to know the Claimant's extensive exercise schedule during the months immediately preceding the visit to him on November 4, 2010, as it could have been the cause for the worsening in her left knee condition. (R. p. 120). In fact, Dr. Grady testified his notes from this visit reflect the fact the Claimant's pain began when she started using the gym, and that exercising could have caused her increased knee pain. (R. pp. 120, 122).

In sum, the testimony of the Claimant and Dr. Grady certainly constitute substantial evidence to support the finding by the Commission that the Claimant sustained an intervening cause of the increased left knee problems during the summer of 2010. The disregard of this substantial evidence by the Circuit Court is therefore reversible error.

IV. **THE CIRCUIT COURT'S REVERSAL REGARDING ADDITIONAL MEDICAL TREATMENT IS BASED UPON A DISREGARD OF SUBSTANTIAL EVIDENCE.**

The Circuit Court held the Commission's finding that the Claimant was entitled to "casually-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" was not supported by substantial evidence in the record. (R. p. 23). The primary basis for this holding is the different and clarifying language added by the Commission in the February 2011 Order denying the change of condition that was not part of the Single Commissioner's initial Order from 2009 awarding permanent partial disability benefits.

The Defendants contend the Circuit Court has again disregarded substantial evidence in the record to support the finding of the Commission, which was within the well-established precedent set forth in *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 100, 576 S.E.2d 593 (Ct. App. 1999) (A claimant may still be entitled to medical treatment post-MMI if it may tend to lessen the period of disability). In fact, the finding of the Commission only served to clarify the finding with regard to future medical treatment based upon the newly discovered medical testimony provided by Dr. Grady, the authorized treating physician. On February 3, 2011, Dr. Grady testified that his plan and recommendations from November 4, 2010, remain the same, "as [Claimant] will require analgesic medication and non-steroidal anti-inflammatory medications." (R. p. 126). Dr.

Grady further opined that there were no other changes in the Claimant's medical treatment at that time. *Id.*

As such, the Commission's ruling specifically restricting the extent of future medical treatment is nothing more than an adoption of the specific recommendations made by Dr. Grady in his deposition. Importantly, the finding of the Commission is also consistent with Section 42-15-60, which is cited by the Circuit Court and requires that "medical treatment or modalities to be provided must be set forth with as much **specificity** as possible in the single commissioner's order or the commission's order." S.C. CODE ANN. § 42-15-60 (emphasis added).

Accordingly, the Defendants maintain substantial evidence in the record supported the Commission's determination that Darvocet or comparable medication was the only compensable medication, thus clarifying any earlier decision and comporting with the requirements of Section 42-15-60. The finding of the Commission should not have been disturbed by the Circuit Court and, therefore, the Defendants respectfully request this Court to reinstate the finding of the Commission.

V. **THE ORDER OF THE CIRCUIT COURT VIOLATES RULE 208 OF THE SCACR.**

By way of Form 4, Judgment in a Civil Case, entered on June 12, 2012, the Circuit Court reversed the Decision and Order of the Commission filed on November 9, 2011. However, the Order of the Court neither addressed the grounds or arguments raised by parties nor provided the grounds or reasons explaining the reversal, but only requested counsel for the Claimant to prepare the proposed Order. On July 24, 2012, the Defendants received the Order of D. Garrison Hill, Circuit Court Judge, filed on July 19, 2012. (R. pp. 4-19). The Order reversed the Decision and Order of the Commission in its entirety. Defendants, in compliance with the rules of appellate

procedure and in an effort to obtain specificity regarding the reasons for the reversal, filed a Motion to Reconsider the Order of the Circuit Court on August 8, 2012. However, instead of issuing an Order specifying the grounds for the ruling of the Court, the Circuit Court simply denied the Motion by way of another Form 4 Order. (R. pp. 2-3).

Defendants contend the Circuit Court's exclusion of any explanation or discussion regarding the grounds raised by the parties or the reasons for reversal prohibits Defendants from "concisely and directly" raising such grounds on appeal, as is required by Rule 208(B), SCACR. *See Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct.App.2000)(remanding trial court's grant of summary judgment for an order more specifically identifying the grounds for its ruling). Additionally, under Rule 208(B), broad general statements of issues on appeal may be disregarded by the appellate court, which would be unavoidable under the current order and would certainly cause unnecessary prejudice to Defendants.

Accordingly, the Defendants request this Court to vacate the Order of the Circuit Court and remand the claim to the Circuit Court to provide for specific reasons and grounds for the reversal of the Decision and Order of the Commission.

CONCLUSION

Based upon the foregoing, the Defendants respectfully request the Court of Appeals to reverse the Decision and Order of the Circuit Court and hold the Decision and Order of the South Carolina Workers' Compensation Commission is supported by substantial evidence and not affected by legal error.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Grady L. Beard', is written over a horizontal line.

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June 3, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS

Civil Action No.: 2011-CP-23-7975
W.C.C. File No.: 0622179

Jacqueline Carter, ... Respondent,

v.

Verizon Wireless Southeast and
American Home Assurance Company, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule
211(b), SCACR.

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June 4, 2013

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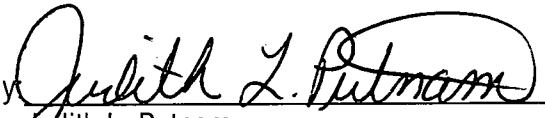
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PROOF OF SERVICE

I certify that I have served three copies of the Final Brief of Appellants and one copy of the Final Reply Brief of Appellants on Jacqueline Carter, by depositing a copy of same in the United States Mail, postage prepaid, on June 4, 2013, addressed to her attorney of record, Jeremy A. Dantin, Esquire, Harrison, White, Smith & Coggins, P.A., 178 West Main Street, Post Office Box 3547, Spartanburg SC 29304.

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