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 REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. THE ORDER OF THE CIRCUIT COURT IS BASED UPON LEGAL ERROR AND DISREGARD FOR CONTROLLING PRECEDENT.

A. CLAIMANT FAILED TO ADDRESS *CAUSBY*.

In support of the Order of the Circuit Court, the Claimant argues this Court has already determined that the compensability of a change of condition claim 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." *See* Initial Brief of Respondent, p. 2 (citing *Mungo v. Rental Uniform Service*, 383 S.C. 270, 768 S.E.2d 825 (Ct. App. 2009); *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003); *Clark v. Aiken County Government*, 366 S.C. 102, 620 S.E.2d 99 (Ct. App. 2005)). In other words, **all** claims for a change of condition are based upon whether the change of condition occurred after the date of MMI. This argument, which served as the basis for the Order of the Circuit Court, constitutes clear reversible legal error.

Aside from the Defendants' prior and subsequent argument that *Mungo, Gattis* and *Clark* are factually and legally distinguishable from the case at bar, the Claimant has inexplicably failed to cite and/or consider the controlling authority from the Supreme Court of South Carolina in *Causby v. Rock Hill Printing & Finishing Company*, wherein the Court held 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*, 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). The holding of the Court in *Causby* mirrors the subsequently developed change of condition statute, Section 42-17-90, which allows a party 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). Importantly, if the words of the statute are unambiguous, a court must apply their literal meaning. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (citing *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)). Pursuant to *CFRE, LLC*, the Circuit Court should have applied literal meaning of Section 42-17-90, i.e. "after the last payment of compensation" absent any evidence of ambiguity, which neither the Circuit Court nor the Claimant have raised as an issue.

Accordingly, the Claimant's interpretation of *Mungo* is in direct conflict with the controlling authority from the Supreme Court in *Causby* and the unambiguous language in Section 42-17-90, yet the Claimant (and the Circuit Court) inexplicably failed to provide any analysis of the conflict. Instead, the Claimant simply relies upon *Mungo* and its progeny for the premise that **all** claims for a change of condition are based upon whether the change of condition occurred after the date of MMI. Defendants submit this reliance is misplaced and requires a reversal by this Court based upon the failure to conduct the change of condition analysis pursuant to the controlling authority of *Causby* and the plain language of Section 42-17-90.

B. ***GATTIS* AND *CLARK* HAVE BEEN MISINTERPRETED BY THE CLAIMANT.**[1]

Claimant asserts that like *Mungo*, this Court held in *Gattis* and *Clark* that "review of an award at a change of condition hearing is concerned with the date on which the claimant's condition was determined," i.e., the date of maximum medical improvement. *See* Initial Brief of Respondent, p. 4. As is the case with her analysis of *Mungo*, the Claimant has misinterpreted this

[1]In the interest of judicial economy Defendants rely upon its Initial Brief to the Court for a discussion and analysis of the applicability of *Mungo*.

Court's holding in *Gattis* and *Clark* and consequently expanded their precedential value beyond the plain language of Section 42-17-90 and controlling authority of *Causby*. In fact, and perhaps more compelling, the Claimant and the Circuit Court failed to acknowledge that both *Gattis* and *Clark* interpret Section 42-17-90 in a manner wholly consistent with *Causby*.

The Defendants assert that *Gattis* and *Clark*, as well as *Mungo*, address essentially the same issue in applying Section 42-17-90. Specifically, whether evidence in existence prior to the original Hearing but not considered in determining the initial award of permanent partial disability may be considered as evidence to support a subsequent change of condition? In all three cases, this Court held that because the evidence was not considered as part of the initial award by the Commission, the evidence could be used to support a change of condition claim. *Mungo*, 383 S.C. at 279, 768 S.E.2d at 830 ("when 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"); *Gattis*, 353 S.C. at 109, 576 S.E.2d at 196 ("because the commission limited its order to a determination of claimant's condition prior to August of 1998, subsequent events, including Dr. Horton's changed diagnosis in August of 1998, were appropriate for consideration in an action alleging a change of condition"); *Clark*, 366 S.C. at 111, 620 S.E.2d at 102 (holding the claimant's surgery during the pendency of the full commission proceeding could be used to support a change of condition). Without argument the Defendants agree that evidence which is not considered in determining the initial award should be considered in determining whether a change of condition has occurred. However, the holdings in these cases should not be frivolously extended beyond this point.

Importantly, as and apparently ignored by the Claimant and the Circuit Court, **none** of these cases hold that the applicable date from which to determine whether a change of condition has occurred is the date of MMI. In fact, in *Gattis* this Court cited *Causby* for the precedent that "review for a change of condition is concerned with conditions that have arisen **[after the original award]**." *Gattis*, 353 S.C. at 109, 576 S.E.2d at 195 (citing *Causby*, 249 S.C. at 228, 153 S.E.2d 698-99). In *Clark*, this Court cited the Supreme Court's decision in *Cromer v. Newberry Cotton Mills*, 201 S.C. 349, 354-355, 23, S.E.2d 19, 21 (1942), in interpreting Section 42-17-90 to require that "**a change of condition must occur after the first award** for a claimant to be eligible for a review of that award." *Clark*, 366 S.C. at 108, 620 S.E.2d at 102. Defendants submit there is nothing misleading or ambiguous about the clear requirement established by the Supreme Court in *Causby* and *Cromer*, and codified in Section 42-17-90, which requires the moving party prove a change of condition occurred after the first award. Importantly, if the words of the statute are unambiguous, a court must apply their literal meaning. See *CFRE, LLC, supra.* However, the Claimant and the Circuit Court have consistently failed to acknowledge this clear controlling precedent in its analysis of whether the Claimant sustained a compensable change of condition after her first award on 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, the date of her first award. As such, the reliance by the Circuit Court and the Claimant on *Mungo*, *Gattis* and/or *Clark* to support the argument that a 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.

II. CLAIMANT FAILED TO DISPUTE HER GYM USE AS AN INTERVENING CAUSE.

Claimant argues the Circuit Court correctly determined there was no evidence to support the finding of the Commission that the Claimant sustained an intervening cause of her change of condition. However, the Claimant, like the Circuit Court, has consistently ignored or disregarded substantial evidence to support the finding of the Commission. In fact, the Claimant failed to even address the particular argument and factual analysis presented by the Defendants in its Initial Brief to the Court.

Specifically, the Claimant failed to explain or dispute her unequivocal testimony that her left knee problems increased when she started an exercise regimen during the summer of 2010. Deposition of Claimant, pp. 11-12. The Claimant further confirmed her regimen included 55 visits to the local gym between July and November 2010, the month of her evaluation by Dr. Grady, and attendance at Zumba classes which ultimately forced her to discontinue exercising altogether. (R. pp. 91-92, 132-135, 143-151). Furthermore, the Claimant failed to dispute Dr. Grady's testimony confirming the Claimant's extensive exercise regimen could have been the cause for the worsening in her left knee condition. (R. pp. 120, 122).

Instead, the Claimant simply argues that the Zumba classes did not occur until after the November 2010 evaluation with Dr. Grady and, therefore, could not have been the cause of her the change of condition found by Dr. Grady. While this argument is otherwise compelling, the Defendants assert the Claimant has missed the point of the analysis and finding of the Commission. Substantial evidence supports the intervening superseding cause of the Claimant's change of condition, if any, was admittedly her intense exercise regimen from July to November

of 2010. (R. pp. 132-135). Her inability to subsequently complete the Zumba classes was simply the result of her intervening accident, i.e. the intensive exercise regimen, and not necessarily an independent intervening cause.

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. Importantly, the Claimant does not by way of her Brief dispute this argument, which is certainly compelling. As such, the Defendants submit the decision of the Circuit Court to disregard this substantial evidence requires a reversal of the Order and reinstatement of the 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 effected by legal error.

Respectfully submitted,

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June 3, 2013

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CERTIFICATE OF COUNSEL

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

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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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