THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5475 (S.C. Ct. App. filed March 22, 2017)

Sara Y. Wilson,

Respondent,

v.

Charleston County School District,

Petitioner,

REPLY IN SUPPORT OF CERTIORARI

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ARGUMENT

Petitioner Charleston County School District ("School District") incorporates its arguments from its Petition for Writ of Certiorari as further support in opposition to Respondent/Claimant Sara Wilson's ("Claimant") Return to the Certiorari Petition.

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

The Court of Appeals erred in overlooking that the Claimant's experienced depression was impacting her condition and was being treated at the time of her original award. The arguments presented to the Court of Appeals by the Claimant, who was the Appellant, were indeed factual arguments.

The issue raised by the Claimant was actually whether the Claimant had enough of a psychological injury in the past to rise to the level of an injury that might have been litigated at the time of the first hearing. In other words, the Claimant's appeal was a factual one. The South Carolina Workers' Compensation Commission's Appellate Panel ("Appellate Panel") is the finder of fact. A finding of fact made by the Appellate Panel may be overturned only if unsupported by substantial evidence. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492, 541 S.E.2d 526, 528 (2001); S.C. Code Ann. § 1-23-380 (Supp. 2006).

The Claimant's argument that the Appellate Panel found no impairment rating to the Claimant's depression experienced at the time of her original award is specious, at best. (Return, p. 7.) This Court has recognized that the psychological system is not a scheduled member and thus an impairment rating is not applicable. Fields v. Owens Corning Fiberglas, 301 S.C. 554, 555–56, 393 S.E.2d 172, 173–74 (1990) (rejecting an impairment rating to the whole man for a psychological injury); see also Lee v. Harborside Café, 350 S.C. 74, 80, 564 S.E.2d 354, 357 (Ct. App. 2002) (reiterating that a psychological impairment is not compensable under S.C. Code Ann. § 42-9-30).

Furthermore, the Claimant cannot shift her burden of proving a compensable injury to the School District or the Appellate Panel. (See Return, p. 7.) It is well established that "[t]he claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. Southco, Inc., 401 S.C. 627, 641, 738 S.E.2d 835, 842 (2013) (quoting Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998)). The Claimant failed to carry her burden of proving she had a change of condition regarding her psychological condition **within one year** after the final payment of compensation on January 25, 2008. She experienced anxiety and depression before her first hearing and was receiving treatment for the same. (App. pp. 119, 121, 125, 127.) Her psychiatrist testified that her depression existed prior to the first hearing, but he was unable to testify as to when it changed, instead merely testifying that it changed sometime in the **three and one half years** since the final payment of January 2008. (App. p. 102; App. p. 116, line 20 – p. 117, line 6.) It was the Claimant's burden, not that of the School District, to prove her change of condition occurred within the one year time period of S.C. Code Ann. § 42-17-90 (Supp. 2006), which she failed to do.

The Appellate Panel and circuit court correctly found the Claimant failed to meet this burden. (App. p. 91, ¶ 23; see generally, App. pp. 78–93; App. pp. 10–11; see generally, App. pp. 4–18.) Substantial evidence in the record supports the circuit court's affirmation of the Appellate Panel, and neither the Appellate Panel's order nor the circuit court's order was affected by an error of law. As such, the circuit court's order should have been affirmed. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000); Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

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

The Court of Appeals erred in overlooking or misapprehending the evidence in the record when it concluded that "[o]ur review of the record reveals the substantial evidence indicates Wilson's psychological condition worsened at some point after the initial hearing and prior to her filing the January 6, 2009 Form 50 alleging the change of condition." (App. pp. 569–70.)

The Claimant's citation to Dr. Rosen's May 16, 2008 initial appointment notes (App. p. 395) does not support that her psychological condition had changed within the requisite 12 month period. (See Return, p. 10.) In fact, he noted, "PLANS: It does not appear that she has endogenous depression." (App. p. 395.) This is further supported by his deposition testimony in which he testified that when he first saw the Claimant in May 2008, she did not actually have endogenous depression. (App. p. 106, line 24 – p. 107, line 23.) He testified that she did have endogenous depression at the time of **his June 24, 2011 deposition; two and a half years after the statute of limitations had run** on her change of condition claim. (App. p. 117, lines 3–6.) **Dr. Rosen gave no indication that the Claimant had endogenous depression within a year after the last date of payment of compensation.** If Dr. Rosen began treating the Claimant in May 2008, he should have been able to testify when her depression became endogenous and if that change occurred within the applicable time required for the change of condition to be compensable, i.e., by January 25, 2009. It is mere speculation to conclude that Dr. Oliverio referred the Claimant to Dr. Rosen because her condition had worsened. There is no support in the record for the determination that the Claimant's depression worsened before filing her January 6, 2009 Form 50.

Dr. Rosen was unable to testify as to whether the Claimant's depression became

endogenous before she filed her January 6, 2009 Form 50. "The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence." Anderson, 343 S.C. at 492, 541 S.E.2d at 528. "Where there is a conflict in the evidence, . . . the findings of fact of the Commission are conclusive." Id. at 492–93, 541 S.E.2d at 528. Substantial evidence in the record supports the circuit court's affirmation of the Appellate Panel's order. The Court of Appeals erred in reversing the Appellate Panel's determination based upon mere speculation, not substantial evidence.

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

The Court of Appeals erred in overlooking or misapprehending the evidence in the record or case law supporting the conclusion that the Claimant's claim was barred by the doctrine of res judicata.

The Claimant correctly noted that if she raised her psychological condition as a support for increased impairment at the October 2007 hearing, the School District would have asked "where's the beef?" (Return, p. 7.) In fact, the Claimant, through the report of her vocational expert, Dr. Stewart, raised the issue of her psychological condition in 2007. His report submitted at the October 2007 hearing noted, "Ms. Wilson is suffering some psychological overlay (adjustment disorder with depression and anxiety) because of these injuries, her ongoing chronic pain problems, and her inability to work." (App. p. 119; see generally App. pp. 66–74, 115–123.) He asserted the Claimant required "medical psychological care" and "psychotropic medications for anxiety and depression." (App. p. 119.) Additionally, the Claimant's current psychiatrist, Dr. Rosen, testified the Claimant's depression and anxiety from her work injury existed in September 2007, prior to the first hearing in this matter. (App. p. 102, p. 116, line 20 – p. 117, line 2.)

At the October 2007 hearing, the School District challenged the conclusions of the Claimant's vocational expert with a report and an addendum report by vocational expert David Price. (App. pp. 66–74, pp. 177–183.) Mr. Price noted the Claimant's use of "Zoloft for depression" (App. p. 178) and "Lorazepam – Taken one daily for anxiety" (App. 184), but he reached a different conclusion from Dr. Stewart. The South Carolina Workers' Compensation Commission ("Commission") found Mr. Price's vocational assessment more persuasive than that of Dr. Stewart. (App. p. 75, ¶ 19.) On November 29, 2007, the Single Commissioner found the Claimant was not permanently and totally disabled but had a 45% disability to her back due to her cervical and lumbar injuries. (App. p. 76–77.) The Claimant never appealed this order.

The doctrine of res judicata applies not only when the issues were "actually litigated" but also to the issues which "might have been litigated" in the first action. Price v. City of Georgetown, 297 S.C. 185, 189, 375 S.E.2d 335, 338 (Ct. App. 1988) (citing Stewart, *Res Judicata and Collateral Estoppel in South Carolina*, 28 S.C.L. Rev. 451, 452 (1977)) (emphasis added); see also Estridge v. Joslyn Clark Controls, 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997). The Appellate Panel's findings, which were affirmed by the circuit court, were not affected by an error of law and were supported by substantial evidence. As such, it was an error for the Court of Appeals to not affirm the same. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

IV. Various arguments presented by the Claimant were never presented to the Court of Appeals and thus are not properly preserved.

The Claimant presented various arguments in her Return that were not raised to the Court of Appeals and should not be considered.

The Claimant cited Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 782 S.E.2d 753 (Ct. App. Jan. 20, 2016), *rehrg. denied* Mar. 24, 2016, as an additional case to support the Court of

Appeals' decision in the present matter. (Return, p. 8.) The Claimant correctly noted this case was not decided when briefing to the Court of Appeals was completed in this matter in 2015. (See App. pp. 500, 521, 551.) Nonetheless, the Russell opinion was published and the petition for rehearing was denied months before the oral argument was heard by the Court of Appeals on November 3, 2016. The Claimant, who was the Appellant, did not request the Court of Appeals consider the Russell opinion. As the losing party, the Claimant had the burden of preserving this argument for appellate review. I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Even if the Court accepts the argument in Russell as timely raised, the opinion has no impact on the present appeal. The Russell opinion turns on whether the Commission required objective evidence at a change of condition hearing. The issues in the present petition are whether the Claimant's treated depression was impacting her condition at the time of her original award, whether substantial evidence in the record supports the Court of Appeals' finding that "Wilson's psychological condition worsened at some point after the initial hearing and prior to her filing of the January 6, 2009 Form 50 alleging a change of condition," whether the Claimant's psychological claim was barred by the doctrine of res judicata, whether the Court of Appeals erred in its interpretation of § 42-17-90, and whether the Court of Appeals erred in overlooking the Claimant's failure to provide a medical report supporting a change of condition with the Form 50 alleging a change of condition. (Petition, p. 1.)

The Claimant additionally cited to Wilkins v. State Compensation Commissioner, 120 W.Va. 424, 198 S.E. 869 (W. Va. 1938), Clemmons v. Lowe's Home Centers, Inc.—Harbison, 412 S.C. 366, 772 S.E.2d 517 (Ct. App. 2015),[1] and McMillian v. Midlands Human Resources,

[1] This Court reversed Clemmons v. Lowe's Home Centers, Inc.—Harbison, 412 S.C. 366, 772 S.E.2d 517 (Ct. App. 2015) in Clemmons v. Lowe's Home Centers, Inc.—Harbison, --- S.C. ---, 803 S.E.2d 268 (June 28, 2017), *rehrg.*

305 S.C. 532, 409 S.E.2d 443 (Ct. App. 1991), in support of a liberal interpretation of § 42-17-90 and the application of S.C. Code Ann. § 42-17-20 (Supp. 2006) in the present matter. (Return, pp. 9–10.) All of these cases were published before final briefing to the Court of Appeals was completed in this matter in September 2015. (See App. pp. 500, 521, 551.) Additionally, § 42-17-20 ("Hearing before commission on compensation payable") was never mentioned in briefing to the Court of Appeals or the Court of Appeals' opinion. (See App. pp. 500–520, 521–550, 551–560, 561–571.) Under I'On, LLC, the Claimant carried the burden of preserving these arguments for appellate review. 338 S.C. at 422, 526 S.E.2d at 724.

Similarly, the Claimant argues in her Return that Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995), United States Outdoor Advertising, Inc. v. South Carolina Department of Transportation, 324 S.C. 1, 481 S.E.2d 112 (1997), and Gadson v. Mikasa Corporation, 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006) support that the Claimant's filings met the requirements of Regulation 67-602(C) (Supp. 2006). (Return, pp. 10–11.) The School District raised the argument that the Claimant's filings failed to meet the requirements of this regulation in its brief to the Court of Appeals (App. pp. 544–547, see generally App. pp. 521–550), yet the Claimant failed to assert her argument that the regulation may be invalid in her reply brief to the Court of Appeals. (See App. pp. 551–560.) Again, the Claimant failed to carry her burden of preserving this argument for appellate review. I'On, LLC, 338 S.C. at 422, 526 S.E.2d at 724.

Proving that the Claimant had a compensable change of condition was not the School District's burden. It was the Claimant's burden. Crisp, 401 S.C. at 641, 738 S.E.2d at 842; Clade,

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denied, September 5, 2017. This Court's decision in Clemmons did not address the Commission's authority to hear a claim. This Court's opinion was issued and rehearing was denied before the Claimant's Return was filed on September 12, 2017.

330 S.C. at 11, 496 S.E.2d at 857. Further, it was her burden to comply with the requirements of § 42-17-90 and Regulation 67-602(C). Section 42-17-90 states in pertinent part:

> Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Title, and shall immediately send to the parties a copy of the order changing the award. No such review shall affect such award as regards any moneys paid and *no such review* ***shall*** *be made after twelve months from the date of the last payment of compensation pursuant to an award under this Title.*

(emphasis added).

Regulation 67-602(C) states:

> In a claim involving a change of condition, the moving party ***must*** attach to the hearing request form a medical report(s) *indicating a change in the claimant's condition. . . .*

(emphasis added).

Additionally, the Claimant did not raise any of these arguments to the Court of Appeals in a return to the School District's Petition for Rehearing (App. pp. 575–587). Instead, the Claimant noted that she elected to not file a return unless requested to do so by the Court and stated she believed all arguments were addressed in the Court's opinion, the briefing, and during oral arguments. As the Claimant was the appellant to the Court of Appeals, she may not now raise new arguments in her Return to the Certiorari Petition, presumably under the guise of additional sustaining grounds. Cf. I'On, LLC, 338 S.C. at 420, 526 S.E.2d at 723. Only questions raised to the Court of Appeals are to be considered in a petition for writ of certiorari.[2] Rule 242(d)(2), SCACR; see Mazloom v. Mazloom, 392 S.C. 403, 709 S.E.2d 661 (2011).

[2] For this very reason, the Supreme Court has limited extensions of time which may be requested in cases seeking a Petition for a Writ of Certiorari to Review a decision of the Court of Appeals. See Order Re: Extension in Cases

The Appellate Panel's findings, which were affirmed by the circuit court, were not affected by an error of law and were supported by substantial evidence. As such, it was an error for the Court of Appeals to not affirm the same. Shealy, 341 S.C. at 454, 535 S.E.2d at 442; Anderson, 343 S.C. at 492, 541 S.E.2d at 528.

CONCLUSION

For the foregoing reasons and the reasons in its Petition for Writ of Certiorari, the School District respectfully requests this Court to grant its petition for writ of certiorari, to reverse the Court of Appeals' order, and to affirm the Commission's decision.

[Signature on following page.]

Seeking Petition for a Writ of Certiorari to Review a Decision of the South Carolina Court of Appeals, dated July 16, 2014 (http://www.sccourts.org/opinions/advSheets/no282014.pdf).

Respectfully submitted,

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I, Stephen L. Brown, of Young Clement Rivers, LLP, counsel for the Petitioner above named, do hereby certify that I have served the *Reply in Support of Certiorari* submitted by the Petitioner on counsel for the above-named Respondent by depositing a copy of the same in the United States Mail, postage prepaid, on October 2, 2017, and via email, addressed as follows to her counsel of record:

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