

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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Appellate Case No.: 2014-000454

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Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc., and  
American Home Assurance,

Respondents.

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APPELLANT'S FINAL BRIEF

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Thursday, October 23, 2014

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### STATEMENT OF ISSUES ON APPEAL

- I. DID THE COMMISSION COMMIT AN ERROR OF LAW BY REQUIRING THAT THE APPELLANT'S CHANGE OF CONDITION MUST BE ESTABLISHED BY "OBJECTIVE" EVIDENCE, WHERE NO SUCH STANDARD IS REQUIRED BY CASE LAW OR STATUTE?
- II. DID THE COMMISSION ERR BY RULING THAT SUBSTANTIAL EVIDENCE EXISTED TO SUPPORT A DENIAL OF A CHANGE OF CONDITION, WHERE THE EVIDENCE OVERWHELMINGLY SHOWED THAT A CHANGE IN CONDITION DID OCCUR?
- III. DID THE COMMISSION ERR IN DETERMINING THE CLAIMANT'S STATEMENTS WERE "SELF-SERVING" AND "CONCLUSORY," AND THUS COULD NOT BE RELIED ON, WHERE THESE STATEMENTS WERE CONSISTENT WITH HER ENTIRE MEDICAL HISTORY AND RESPONDENTS AGREED SHE WAS A CREDIBLE WITNESS?

### STATEMENT OF THE CASE

This is an appeal in a Workers' Compensation case. The Claimant and Appellant, Paula Russell (hereinafter "Russell") was first injured in an admitted work-related accident on November 3, 2009. Russell's employer was Wal-Mart Stores, Inc. ("Employer"), and its carrier is American Home Assurance ("Carrier") (collectively, "Respondents"). A hearing was held on April 13, 2011. On June 8, 2011, the Commission ordered that Russell had reached Maximum Medical Improvement ("MMI") and was entitled to a 7% disability to the back, and she returned to work with moderate restrictions that did not prevent her from doing her management-level job.

Within a few months, Russell began to experience increased symptoms; she suffers from increased pain in her back as well as new radicular pain in her legs and buttock. On December 9, 2011, after discussing these new symptoms with her doctors, Russell filed a Form 50 alleging a change of condition. A hearing on this matter was held

on February 11, 2013. In an order dated August 5, 2013, the Single Commissioner ruled that Russell had experienced a change in condition, was entitled to ongoing causally related medical care and was also entitled to temporary total disability benefits from December 1, 2011 through the present and continuing.

This Order was appealed by the Respondents and a hearing was held on December 16, 2013. The Full Commission issued its order on January 30, 2014. The Full Commission found that no change in condition had occurred, based primarily on the lack of difference between several lower back MRIs. The first MRI was performed in 2010, prior to the resolution of her initial claim. The next two MRIs, from 2011, and 2012, were performed after she began experiencing new and more severe symptoms. In making this ruling, the Commission applied an "objective difference" standard, requiring Russell to prove, via some 'objective' measure, that a change in condition had occurred. The Commission found that the doctors' opinions that a change of condition had occurred, as well as Russell's otherwise credible testimony that her symptoms had increased, was not enough to prove a change of condition without being able to show an anatomical change via an MRI. Finally, the Commission found that Ms. Russell's statements about her increased symptoms were unreliable because they were both "conclusory" and "self-serving."

Russell served her Notice of Appeal on February 28, 2013, alleging three errors made by the Commission: (1) the use of an "objective" evidence standard to prove a change of condition is an error of law; (2) the substantial evidence of the case can lead

to no other conclusion but that a change in condition has occurred; and (3) the Commission erred in finding that the Claimant was not a credible witness.

### **STANDARD OF REVIEW**

The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, this Court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011); *Transp. Ins. Co. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010). “This Court’s review is, therefore, limited to determining whether the Appellate Panel’s decision is unsupported by substantial evidence or controlled by an error of law.” *Mungo v. Rental Unif. Serv. Of Florence, Inc.* 383 S.C. 270, 277, 678 S.E.2d 825, 829 (2009) (citations omitted).

The Appellate Panel of the Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, this Court must affirm the findings of fact made by the Commission if they are supported by substantial evidence. *Pierre* at 540, 689 S.E.2d at 618. “Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached.” *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). “The possibility of

drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.” *Id.* 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 that the administrative agency reached or must have reached in order to justify its action.” *Lark* at 135, 276 S.E.2d at 306.

### **ARGUMENTS**

This case has a complicated history going back to 2009 and the Appeal will undoubtedly turn on a close examination of the record; therefore a lengthy recitation of the facts is necessary before delving into the legal arguments. Russell was first injured on November 3, 2009 while lifting at work. (R. p. 3). At this point, Russell had been working at Wal-Mart for 13 years, the preceding 4 as an assistant store manager. (R. p. 3). Russell started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (R. pp. 185-186). Wal-Mart recognized her skills and she moved to North Carolina for two years to work at a store that was having personnel problems. (R. pp. 186-187). Eventually, she moved back to South Carolina and was promoted to a Co-Manager or Shift Manager position, essentially one level below the store manager. (R. p. 187, lines 6-14). This position placed her in charge of forecasting, supervision of employees, merchandise, and store finances; during her shifts, she was responsible for the operation of the entire store. (R. pp. 187-188).

Russell was 3 months pregnant at the time of her injury, and thus was treated very conservatively for the remainder of her pregnancy term. (R. pp. 3-4). After she

delivered her child, her treating physician, Dr. James Merritt, opined that “no surgery was required,” and he treated her with medication, exercises, and an injection. (R. p. 4). The Claimant admitted at the hearing that she still suffered from some back pain and had a 30 pound lifting restriction, but was able to perform her job within these restrictions. (R. p. 4). She hoped to return to her job and eventually become a full store manager. (R. p. 4). While she had experienced pelvic pain at some point in the past, that problem had resolved by the time of the hearing, and her primary diagnosis was a “back strain.” (R. p. 4).

There was no mention of any leg or buttock pain in this Order. (R. pp. 1-8). Commissioner Wilkerson’s two primary findings were: (1) Russell was entitled to ongoing *Dodge* medical in the form of anti-inflammatory medication; and, (2) she suffered from a 7% permanent partial disability to her back, and was thus entitled to a disability award under § 42-9-30. (R. pp. 5-6). This Order was never appealed and pursuant to § 42-17-60<sup>1</sup> became the law of the case. Again, there is no indication of any buttock or leg pain in this order, despite the fact that Commissioner Wilkerson did review the records relied upon by the Respondents to prove that Russell has had the same leg pain symptoms for some time now. Similarly, there is no indication that Russell’s pregnancy affected her treatment in any way, including whether or not she ultimately had surgery, other than initially receiving very conservative treatment until he had her child.

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<sup>1</sup> If the parties to the dispute fail to timely appeal the final award of the full commission, then its order “is conclusive and binding as to all questions of fact.” S.C. Code Ann. § 42-17-60 (2013).

In September or October of 2011, Russell began experiencing more intense back pain, as well as severe leg and buttock pain, a type of pain she had never experienced before. She reported this at her next appointment with Dr. Merritt, and he referred Russell for an MRI in October, where Russell gave a history of “[p]ersistent pain radiating to right leg, worse with driving.” (R. p. 73). The radiologist’s impression was “[m]ild spondylosis most pronounced at L5-S1 where there is an annular tear centrally. The annular tear and disc protrusion contacts the transiting right S1 nerve root and if patient’s symptoms correspond with a right S1 radiculopathy, this could be an etiology.” (R. p. 73). In a November 21, 2011 letter, Dr. Merritt stated:

I have reviewed Mrs. Russell’s chart and I do feel that since she is getting increasing pain that ***the condition has worsened*** and I do think that we need to continue to treat her with my recommendation at this time will be epidural injections due to this worsening pain. I do think this is medically necessary and could provide her with some relief.

(R. p. 61) (emphasis added).

A December 5, 2011 report from Dr. Merritt indicates that Russell was “continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf.” (R. p. 62). He reviewed her 2011 MRI and concluded that she had a disc protrusion at L5-S1 with contact on the nerve root. (R. p. 62). His assessment was a “[l]ow back strain with ruptured disc L5-S1 and continued symptoms in her right leg.” (R. p. 62). He recommended she stay out of work because Wal-Mart had no light duty for her. (R. p. 62).

In the meantime, Russell filed an accommodation request with Wal-Mart in early October 2011, which, if accepted, would have allowed her to move to a store location

closer to her home. (R. pp. 171-172). Russell thought having a shorter commute might help her back and leg pain and allow her to work more hours. (R. pp. 171-172). Russell continued to work until December 1, 2011, when she was told Wal-Mart could not accommodate her request, and that she must leave the premises immediately. (R. p. 172). She was told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (R. pp. 172-173). Russell ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (R. p. 9).

She was next seen by Dr. William Edwards of Pee Dee Orthopaedic Associates for an IME. (R. p. 64). In the history, Dr. Edwards stated that Russell's 2009 pain involved central low back pain "without any radicular discomfort at that time." (R. p. 64). He further stated that "[s]ymptoms are now centered into the lower part of her back but radiate into the legs more on the right than the left side." (R. p. 64). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (R. p. 64). He concluded that:

she appears to have worsening radicular symptoms predominantly on the right side, her MRI scan is unchanged and it is unlikely that the condition has worsened from an objective standpoint. I would agree with Dr. Merritt's assessment that there is an approximately 7% impairment of her spine based on this one level disc injury. Aggressive intervention from a surgical standpoint could be offered as a last resort and would most likely involve anterior lumbar interbody fusion at L5/S1 though a limited microdiscectomy at L5/S1 on the right side may be successful in alleviating some of her radicular symptoms.

(R. p. 65).

By March of 2012, Dr. Merritt had diagnosed her right leg radiculopathy as “chronic,” and stated that if it worsened “within the year that would be something reasonable and we will need to have the Workers’ Compensation’s company get her back to Dr. Edwards to discuss it but from my standpoint there is not much else I can offer and her impairment and work restrictions are as previously dictated.” (R. p. 63). Another MRI was performed on July 24, 2012, and Dr. Edwards opined that there was no change in disc pathology despite the increase in symptoms. (R. pp. 67-69). Dr. Edwards clearly recommended surgery at this point, and that it may serve to provide a “measure of improvement” in her radicular pain. (R. p. 69).

Dr. Merritt was deposed on May 23, 2012. Dr. Merritt was asked to compare the 2011 MRI to the one taken in 2010, and he stated that “I didn’t have the films to compare. They were done on two different magnets and two different machines. I don’t think there was a major change. Certainly, not a very significant one. Maybe a slightly increased sized protrusion on the second one. Nothing I felt was extremely remarkable.” (R. p.18, lines 18-24). However, the first MRI report did not “mention any contact of the transiting nerve roots. So my feeling is that it was probably not quite as big as it is. If it’s now pushing out enough to touch the transiting nerve roots at that level, it’s probably a little bigger than it was before . . . .” (R. p. 19, lines 4-12). “I think if there was contact of the transiting nerve roots I would have probably mentioned that in my dictation. So I’m assuming that that was not there and that this disk protrusion is slightly larger than it was previously.” (R. p. 25, lines 19-24). He further felt that this “little bit” of disc protrusion constituted an anatomical difference in Russell’s condition.

(R. p. 19, lines 10-12). "If you're talking a couple millimeters, larger protrusion on the second one versus the first, that may be a little hard to discern. A small difference, you know." (R. p. 26, lines 9-12).

Dr. Merritt did ultimately defer to Dr. Edwards, *but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI*, stating that "I would agree that he has more training in - - he probably has more experience in evaluating spine MRIs than me. And it's - - his opinion would probably be more expert - - I guess he is more of an expert on spine MRIs than I am." (R. p. 28, lines 13-17). Dr. Merritt did not defer to Dr. Edwards on any other issues.

Dr. Merritt gave a very clear opinion that a change in Russell's condition had occurred. When he saw Russell in September of 2011, she had "new complaints of pain more down in the legs . . . . In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area." (R. p. 17, lines 9-10, 12-15). "The leg stuff was relatively new. It was never the main problem." (R. p. 32, lines 19-20). He felt this was a new anatomical distribution, and that "she had not originally complained of pain down her legs at my visits. Although, she had some originally, I think, before I first saw her." (R. p. 17, lines 18-21).

When asked directly about a change in Russell's condition, he testified that "I would say there was a change. I mean, she was pretty clear during the first few visits that it was mainly just her back. . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort." (R. p. 21, lines 8-10, 13-15). He

stated he was basing his opinion as to a change of condition “in part on her subjective complaints as far as the development of leg pain.” (R. p. 33, lines 5-6).

He recommended additional medical care, with surgery a possibility, and indicated that any previous radicular pain she had experienced in her legs had been resolved at the time she reached MMI. (R. pp. 19, 21, 23-24). Dr. Merritt did recommend conservative treatment as a pain control measure, and opined that epidural steroid injections could be revisited; this recommendation “is not really on the knew [sic] MRI as much as she’s now having right leg radicular pain.” (R. pp. 29-30).

Dr. Edwards was deposed on September 13, 2012. (R. p. 35). When comparing the 2010 and 2012 MRIs, in his 2010 report he

didn’t state one way or the other whether there was or there was not an annular tear on either of the scans. It’s really - - I’m wanting to say that it’s irrelevant, but there was pathology that at the disc at L5-S1 on both studies. It looked substantially the same [as the 2012 MRI] to me.

(R. p. 40, lines 2-7). When asked if there was a difference between the MRIs, he stated

the answer to that’s no, unfortunately, for - - for what you’re asking me. . . . [I]t’s clear that the patient’s symptoms are now worse. I don’t have any - - I don’t have any doubt about that . . . clinically. But, radiographically, there’s not a significant difference to be noted in those three scans.

(R. p. 41, lines 2-10). He stated that all three MRIs are fairly consistent, and they all appear to show a “nerve root compression.” (R. p. 43, lines 22-24).

He stated that Russell’s symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (R. pp. 38-39). When asked about the cause of Russell’s symptoms, Dr. Edwards stated that “as early as September of 2010” he believed there was a disc pathology that was compressing the

nerve root, and that “compression, over an extended period of time, is most likely what’s causing her worsening.” (R. pp. 42-43). Dr. Edwards even stated that Russell’s “fairly significant radiculopathy” could be caused “without having pressure on . . . that nerve.” (R. p. 45, lines 22-25). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (R. p. 44, lines 15-25).

Dr. Edwards agreed with Dr. Merritt’s conclusion that the condition had become “chronic” because it had lasted so long. (R. p. 46, lines 1-5). Dr. Edwards stated that “her symptoms are more significant now than they were when I first saw her. So you could . . . make . . . [the] conclusion” that “the nerve has worsened.” (R. p. 46, lines 11-16). Dr. Edwards did not doubt that the condition has worsened, and stated “the disc is bulged out more and putting more pressure on the nerves . . .” and that the anatomic worsening of her symptoms means “that there is now a chronic change in that nerve that makes it more painful or symptomatic.” (R. p. 47, lines 5-14). Dr. Edwards said that in Russell’s “opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention.” (R. p. 47, lines 21-24).

In perhaps the most important exchange in the depositions, on cross-examination, counsel for the Respondents asked Dr. Edwards a particularly leading question:

And in this particular case the main issue is whether Ms. Russell has had a change of condition for the worse, and in South Carolina the case law and statute requires that there’s - - requires that there is a physical change in her condition for the worse. And your opinion based upon the - - the M.R.I.’s, your evaluation of her, anything you’ve done on this particular claim, can you state to a reasonable degree of medical certainty that there’s been any physical worsening of her condition in this claim?

(R. pp. 51-52).

Dr. Edwards answered:

You know, that's interesting that I have to respond to some statute there. But - - so it would imply to me that what you're saying is there's some - - something we can look at and prove that has no subjective component to it that would indicate that the condition is worse and the answer to that is, no. But if you - - if you rely on the physical examination and the demonstration of these paresthesias that we're describing into this nerve distribution, **that's part of an objective physical finding**, though it does have a subjective component to it.

(R. p. 52, lines 2-13) (emphasis added).

Dr. Edwards did opine that Russell was not considered a candidate for surgery in 2010 "because she was pregnant at the time. We certainly try not to operate on pregnant people if we can get by without it." (R. pp. 54-55). Dr. Edwards' recommended treatment going forward is surgery, and he stated he "would not have offered it if I didn't think that there was a really good chance of her getting some improvement in her - - again, predominately, the buttock and leg symptoms that she has." (R. p. 55, lines 7-11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (R. p. 159). The Respondents argued that "the depositions of Dr. Merritt and Dr. Edwards do not support a physical change of condition for the worse. That all the complaints are subjective and that the depositions bear that out." (R. p. 162, lines 15-19). Counsel for the Respondents argued first that the "case law of the Statute is pretty clear there has to be a physical change of condition," but then stated the standard actually requires "objective physical evidence of a change of condition." (R. p. 164). No legal authority was cited for the use of this

'objective' standard. Russell took the position that the standard of proof for a change of condition is "preponderance of the evidence," and that the law does not require "an objective finding per MRI or some other manner that does not require an opinion of a doctor." (R. pp. 163-164).

Russell testified at the hearing that around September or October of 2011 she "started feeling sharp pains down my leg and pressure was more intense on my lower back." (R. p. 166, lines 22-24). She began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (R. p. 167, lines 2-3, 13-16). She remembered beginning to experience these new symptoms in either September or October of 2011, and this is what led to her returning to Dr. Edward's care. (R. p. 167, lines 19-21; p. 168, lines 19-22). When asked if her condition had changed since the initial disability determination, she said "Yes, it has." (R. p. 173, line 15). Her symptoms include "still having pain and I'm still having a stabbing pain down my leg and the left leg is still hurting." (R. p. 174, lines 7-9).

When asked about the location of her pain prior to the 2011 hearing, she stated that the pain centered on her lower back and pelvic area, and that she did not experience major symptoms in her leg. (R. p. 175, lines 6-9). To the extent she experienced any symptoms in her right leg prior to the 2011 hearing, she indicated feeling "numbness," but she now describes the pain as "a sharp - - the pain that I'm having now is like a - - a - - electrical - - electrical pain down my leg." (R. pp. 175-176). She testified that she is now having "pain into [her] left leg now as well." (R. p. 177, lines 13-14).

Any pain she had indicated previously was

not - - once again, it was not the same - - the sharp pain from what I'm feeling now that when you're - - when it - - when it's coming down your leg and then you feel that like shakiness, it's like uncontrollable of your leg, it - - that's not what I had in the beginning.

(R. p. 178, lines 8-14).

It was more of the numbness and like I said it could have been from - - I don't know if it was from the pregnancy or - - I was out of work from - - when I had my baby and I was on bed rest for that period of time, almost nine months, but this is not the same pain that you're - - that I was feeling with the driving and the sharpness down my leg . . . .

(R. p. 178, lines 19-25).

Until October 2011, Russell continued to work in her shift manager position, but put in a request for an accommodation at that time because her symptoms were making the job difficult, and she wanted to work closer to home because the long drive was difficult on her back. (R. pp. 179-181). Wal-Mart refused to honor the accommodation, placed her out of work by December 2011, and she has not worked for Wal-Mart since that time. (R. p. 182). Russell waited nearly six months for Wal-Mart to accommodate her request and put her back to work, and ultimately was forced to cash out her 401K with the company just to pay her bills. (R. p. 189, lines 1-6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (R. pp. 192-198). Commissioner Roche found that after the 2011 decision of the Commission, Russell "experienced an increase in symptoms, which she testified worsened with work and activity. Claimant testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake." (R. p. 194). Commissioner Roche further found that since "December 1, 2011, Wal-Mart has

failed to provide her with work that complied with her treating physicians' work restrictions." (R. p. 194). She also found "Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible." (R. p. 195). She further found that both Dr. Merritt and Dr. Edwards testified that the Claimant suffered a change of condition for the worse, and that this change was a physical, anatomical change. (R. p. 196). Her findings of law included that Russell "suffered a change of condition for the worse," that "[p]ursuant to 42-1-120, Claimant is 'disabled,'" and that "[p]ursuant to section 42-9-10, Claimant is entitled to temporary total disability benefits." (R. p. 197).

The Respondents filed a timely appeal to the Full Commission. In their brief, Respondents relied heavily on the fact that Dr. Merritt conceded that Dr. Edwards was more of an expert on spine MRIs than him, and that therefore Dr. Edwards opinion as to whether there was a change in MRIs from 2010 to 2011/2012 was probably correct. (R. p. 200). Respondents also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (R. p. 201). Finally, Respondents also relied on the fact that Dr. Edwards indicated that Russell may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (R. p. 201).

In the brief's argument section, the Respondents relied most heavily on the fact that "[Russell] has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is any 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 202). Respondents also contended that "any alleged worsening in this case is solely based on

Claimant's subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show Claimant's condition is worse." (R. p. 204).

At the hearing before the Full Commission, counsel for the Respondents attempted to frame the issue in the following way: "This is really an issue over the doctors' testimony and whether or not there's been an objective physical change of condition for the worse." (R. p. 212, lines 15-18). As to Dr. Merritt's opinion, Respondents' counsel contended that "when you look under the surface about what he bases [his change of condition opinion] on, frankly, I think that it doesn't meet the standard, the legal standard." (R. p. 213, lines 3-6). Respondents' counsel also contended that Dr. Edwards said "that he does not believe that there's been a change of condition for the worse," despite Dr. Edwards clear opinion to the contrary. (R. p. 213, lines 7-9). Much of the argument centered around the fact that Dr. Merritt couldn't be certain about whether there was a difference between the 2010 and 2011 MRIs, but counsel also made the point that Russell's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (R. pp. 213-214).

The most crucial exchange came on the issue of Russell's credibility. Commissioner Barden pointed out that an important factor in the change of condition was the history given by Russell, "which Commissioner Roche found was credible." (R. p. 215, lines 22-24). Counsel for the Respondents stated "I would agree with Commissioner Roche that there was certainly a change in the subjective complaints. *I'd also agree with Commissioner Roche that Ms. Russell comes across really well.*" (R. p.

216, lines 5-9) (emphasis added). He went on to say that “[n]ow, is she having some continued complaints, yeah. Have those complaints even gotten worse? Dr. Edwards actually testified in his deposition that, you know, frankly *the chronic nature of this is that she’s going to have those continued complaints and they could even worsen over time.*” (R. p. 216, lines 12-19) (emphasis added). He went on to say that “in these sorts of cases the absolute most important factor is the doctor’s testimony about the actual physical condition of the back,” but was unable to cite any proposition of law supporting this point. (R. pp. 217-218).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (R. p. 223). In the recitation of the facts, the Full Commission focused the vast majority of its attention on the lack of differences between the 2010 and 2011/2012 MRIs, and made it painstakingly clear that it did not believe there was a difference between them. (R. pp. 226-227). When going through the deposition of Dr. Merritt, the order left out his opinion, made to a reasonable degree of medical certainty, that a change of condition had occurred, and instead cited him as saying that he “could not say for sure whether there was an obvious objective change or not.” (R. p. 227). The Commission similarly omitted Dr. Edwards’s opinion, made to a reasonable degree of medical certainty, that a change of condition had occurred, and instead cited his statement that “there was no objective or significant radiographical difference to be noted in the scans.” (R. p. 227).

Crucially, the Commission next found that “[c]laimant has not presented any objective testimony other than self-serving subjective complaints to demonstrate her

condition is any 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 228). Despite the Single Commissioner's finding that the Claimant was credible, as well as Respondents' stipulation that the Claimant was credible, the Commission found that she lacked credibility simply because she had reported right leg problems in 2010. (R. p. 228). The Commission found "[i]n sum, Claimant's radiographic condition has not worsened; any alleged worsening in this case is solely based on Claimant's subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show Claimant's condition is worse." (R. p. 229).

In its Findings of Fact, the Commission stated

[w]e give limited weight to the testimony of the Claimant as it is conclusory and self-serving . . . . Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award.

(R. p. 231). The greatest weight was given to Dr. Edwards' testimony over Dr. Merritt "because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment." (R. p. 231).

The Commission also found that the "preponderance of the evidence indicates that there was no *objective difference* between the Claimant's MRI scan after the original award and the MRI scan before the original award." (R. p. 231) (emphasis added). The Commission also made the statement that "[w]e are cognizant of the fact that testimony from both doctors and statements out of medical reports can be cherry-

picked to support either position on this change of condition dispute,” but that the preponderance of the evidence did not indicate a change of condition had occurred. (R. pp. 231-232). The Commission ultimately ordered that the Claimant had failed to prove a change of condition and was not entitled to any additional benefits under the Workers’ Compensation Act. (R. pp. 233-234). This Order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had actually occurred.

I. **The Commission erred by using the wrong standard when evaluating Russell’s change of condition, requiring “objective” evidence of the change of condition, where no such requirement exists in South Carolina’s Workers’ Compensation Act or workers’ compensation jurisprudence.**

The South Carolina Workers’ Compensation Act allows the Commission to review awards on the basis that a claimant’s condition has changed within one year of the last compensation payment. S.C. Code Ann. § 42-17-90 (2014).

[T]he commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence<sup>2</sup> that there has been a change of condition caused by the original injury, after the last payment of compensation.

S.C. Code Ann. § 42-17-90 (A) (2014). A change in condition is “a change in the claimant’s physical condition as a result of the original injury, occurring after the first award.” *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967). “The determination of whether a claimant experiences a change of

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<sup>2</sup> This statute, and the case law that interprets it, does not require that the change of condition be proven by ‘objective’ evidence, merely that a preponderance of the evidence standard be used – that is more likely than not.

condition is a question for the fact finder.” *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (Ct. App. 2003).

“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* at 279, 678 S.E.2d at 830 (citation omitted). “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.” *Id.* Furthermore,

‘[a] symptom which is present and causally connected, **but found not to impact upon the claimant’s condition at the time of the original award, may later manifest itself in full bloom and thereby worsen his or her condition,**’ and such an occurrence is one of the reasons the Commission may review awards through change of condition hearings.

*Id.* at 282, 678 S.E.2d at 831 (quoting *Estridge v. Joslyn Clark Controls, Inc.*, 325 S.C. 532, 540, 482 S.E.2d 577, 581 (Ct. App. 1997) (emphasis added).

“To justify a modification of an award based on a change of condition, the claimant must show the change in condition and its causal connection to the original compensable accident.” *Gattis* at 109, 576 S.E.2d at 195.

Our supreme court has recognized the purpose of . . . [permitting an action for a change of condition] is to allow the commission to terminate compensation in cases where the change in condition amounts to a complete recovery; to increase compensation where the facts of the case reveal that the change in condition is for the worse; and to allow it to diminish compensation where the change in condition is for the better.

*Gattis* at 110, 576 S.E.2d at 196 (citation omitted).

Generally, if a condition

was not causally connected or is a separate injury which could have been included in the original claim, but was not, then it cannot be considered under a 'change in condition.' Conversely, if it is causally connected and is a newly manifested symptom of [the claimant's] original injury which has caused a worsening of his condition, then it is properly considered . . .

*Estridge* at 537-38, 482 S.E.2d at 580.

"A condition which is induced by a physical injury, is thereby causally related to that injury . . . ." *Id.* at 538, 482 S.E.2d at 580. Where a condition is "a new symptom manifesting from the same harm to the body . . . it may properly be compensated in a change of condition proceeding as a part of the original injury." *Id.* at 539, 482 S.E.2d at 581.

"The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to these findings." *Brayboy v. Clark Heating Co.*, 306 S.C. 56, 58-59, 409 S.E.2d 767, 768 (1991) (citing *Hill v. Jones*, 255 S.C. 219, 178 S.E.2d 142 (1970)). "Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact." *Brayboy* at 59, 409 S.E.2d at 768 (citing *Aristizabal v. Woodside-Division of Dan River*, 268 S.C. 366, 234 S.E.2d 21 (1977)). "The Worker's Compensation Act should be liberally construed in furtherance of the purposes for which it was designed. Any reasonable doubts as to construction should be resolved in favor of the claimant by including [her] within the coverage of the Act rather than excluding [her]." *Gattis* at 111, 576 S.E.2d at 197.

This change of condition claim was denied for a single reason: The MRIs of Russell's lower back, performed in 2010, 2011, and 2012, show no definitive differences. While there were minor differences between these studies, Dr. Edwards ultimately concluded that he could not identify significant changes between them. This left the Claimant without 'objective' evidence, whatever the Respondents believe that means, to prove her claim. It appears the Respondents are arguing that this Court impose a legal standard which requires more than the opinion of a medical professional or the testimony of a claimant in order to prove a change of condition.

While the Respondents have articulated this standard, it is absent from the decisions of the Court of Appeals and Supreme Court when it comes to change of condition cases. The above-cited case law represents virtually all of the principles used by the Courts to determine whether a change of condition has occurred in a Workers' Compensation case, and the "objective" standard cannot be found. It is absent because it is not a standard that is used, or ever has been used, by South Carolina Courts in determining whether a change of condition has occurred. While the Claimant does have a burden when proving a change of condition, this burden is clearly spelled out in § 42-17-90: preponderance of the evidence. This only means that the Claimant must show it is more likely than not that his original injury was the cause of his change in condition. Similarly, there is no prohibition on lay testimony being used to make this determination. "Expert medical testimony is merely intended to aid the Appellate Panel in coming to the correct conclusion." *Corbin v. Kohler Co.*, 351 S.C. 613, 624, 571 S.E.2d

92, 98 (Ct. App. 2002) (citing *Tiller v. Nat'l Health Care Ctr.*, 334 S.C. 333, 513 S.E.2d 843 (1999)).

Throughout the course of this litigation, the Respondents have attempted to impose this “objective evidence” standard on Russell when it came to proving her change in condition. The Respondents have poisoned the well with this standard from the very beginning. Dr. Merritt’s deposition occurred first, and he was asked over and over again about the particulars of these MRIs and how he would evaluate them. (R. pp. 25-29).

In Dr. Edwards’ deposition, counsel for the Respondents attempted to bait Dr. Edwards into Respondents’ desired answer and actually asked the doctor, a man with no formal legal training, to comment on the South Carolina “case law and statute.” (R. pp. 51-52). His answer showed that he was obviously concerned with having to respond to such a leading question, and he indicated that any diagnosis not based on an MRI would have some subjective component to it. (R. p. 52). Nevertheless, he still stated that his finding that Russell’s condition had changed was an “**objective physical finding.**” *Id.* Dr. Edwards, who the Respondents have contended is the primary expert in this case, went so far as to meet the standard the Respondents proposed, but the claim was still denied.

Again at the Single Commissioner level, Respondents contended the standard requires “objective physical evidence” of a change of condition. (R. p. 164). After losing the argument in front of the Single Commissioner, Respondents again contended at the Full Commission level that the change in condition was “predominantly subjective,” Russell’s testimony was self-serving and therefore not objective, and that Dr. Edwards’

opinion had a “subjective component” to it. (R. pp. 201, 202, 204). All of this despite Dr. Edwards’ clear indication that his opinion was based on objective physical findings.

Had the Respondents been unsuccessful in convincing the Full Commission to adopt this invented “objective” standard, the Single Commissioner’s Order that a change in condition had occurred would have undoubtedly stood. The only reservations Dr. Merritt and Dr. Edwards had about concluding that Russell suffered a change in condition were based around the confusing “objective” standard put to them by counsel for the Respondents. Even then, both were unequivocally clear that a change in condition occurred. Even the Full Commission’s findings that Russell was not credible or that her pregnancy may have been the reason she needed surgery were interpreted in the light of the objective standard. Appellant submits there is only one reason that the Commission discounted the opinions of the doctors, discounted the testimony of Russell, and thought her surgery was called off because of the pregnancy: the Commission was erroneously applying the “objective” evidence standard, and all of its other findings were affected by that idea.

The Respondent asked the Commission to consider the following questions: How can you believe Dr. Merritt and Dr. Edwards regarding a change in condition when there is no definitive change in the MRI? How can you believe the claimant regarding a change of condition when there is no definitive change in the MRI? How can you be sure that the need for surgery wasn’t related to the pregnancy when there was no definitive change in the MRI?

Not only was this thought process problematic because it used the wrong legal standard, but it actually conflated the legal standard with clear medical evidence and opinions. Dr. Edwards and Dr. Merritt were very clear that a change of condition can occur without a change in an MRI, but the Respondents created enough doubt when it came to justifying a change of condition ruling because there was no “objective” evidence. Russell is clearly a credible witness offered credible testimony; she also reported her new pain complaints to her treating physician as soon as they began. Again, Respondents created doubt when it came to relying on this testimony without what they proposed was the necessary “objective” evidence. And finally, the Respondents raised concerns with the Commission about Russell potentially undergoing surgery that might be related to her pregnancy because her MRI had not changed since that time. However, Commissioner Wilkerson’s Order, dated approximately nine months after Russell delivered her child, is crystal clear that surgery *was not needed* at that time.

Once there is an understanding of the way that the invented “objective” standard was present throughout every aspect of this case, and once an observer sees the way that this standard was adopted by the Respondents at every point in the litigation, it is easy to see how the wrong legal standard applied to these facts led to the wrong conclusion. That misunderstanding colored the Commission’s thinking on each and every important factual issue, and led the case to its current procedural posture. While the Respondents used this tactic to infect every aspect of this case and essentially poison the well when it came to a proper application of the Workers’ Compensation Act,

it still does not represent the law or the clear intent of the General Assembly. That intent is that Claimants who suffer a change in condition must only prove their claims by a preponderance of the evidence, and that is the law of the State of South Carolina.

This Court should overturn the Commission's decision on the basis that the wrong legal standard was applied, and rule that Russell experienced a change of condition in the form of increased back pain and new leg and buttock pain, pursuant to §42-17-90; that Russell is entitled to medical care causally related to this change of condition; and that Russell is entitled to temporary total disability benefits from December 1, 2011 through the present date and continuing.

**II. The Commission erred in finding that Russell did not have a change in condition, because the substantial evidence of record overwhelmingly indicates that she did suffer from a change in condition for the worse.**

Regardless of whether this Court finds that the use of an "objective" evidentiary standard was proper at the Commission level, the substantial evidence of the record clearly shows that a change in Russell's condition did actually occur. First, and most importantly, both Dr. Merritt and Dr. Edwards gave their opinions that Russell's condition had changed. Their opinions are extremely clear on this point, and while they could not point to any differences between the MRIs, both still felt Russell's condition was different.

Dr. Merritt testified under oath that when he saw Russell in September of 2011 she had "new complaints of pain more down in the legs . . . . In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area." (R. p. 17, lines 9-10, 12-15). He added that the "leg

stuff was relatively new. It was never the main problem.” (R. p. 32, lines 19-20). When asked to comment *directly on whether a change in condition had occurred*, he said “I would say there was a change. I mean, she was pretty clear during the first few visits that it was mainly just her back. . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort.” (R. p. 21). While this opinion was based “in part on her subjective complaints as far as the development of leg pain,” Dr. Merritt obviously found Russell credible enough in regard to these complaints to come to this opinion. (R. p. 33, lines 5-6).

Dr. Edwards was similarly clear on this point. He said “[I]t’s clear that the patient’s symptoms are now worse. I don’t have any - - I don’t have any doubt about that . . . clinically.” (R. p. 41). Dr. Edwards opined that the longstanding and unresolved nature of the injury had caused it to become “chronic,” and this led to symptoms that are “more significant now than they were when I first saw her;” this led him to the conclusion that “the nerve has worsened.” (R. p. 46). Dr. Edwards specifically said that he had “no reason to doubt [the history given by Russell].” (R. p. 47). Dr. Edwards stated that he was making “an objective physical finding” that her condition had worsened; this was on the basis of his “physical examination” as well as the “demonstration of these paresthesias that we’re describing into this nerve distribution.” (R. p. 52).

Appellant encourages the Court to read these depositions in full; they are not lengthy, complicated depositions, and both doctors came quickly to their main conclusion: that Russell’s condition has worsened. Once again, the only thing stopping

the Full Commission from adopting the opinion of these doctors was the lack of changes between the MRIs. Notably, the Full Commission's order did not even include the doctors' opinions that a change of condition occurred; instead, it opted to focus on the difference between the MRIs. (R. pp. 226-227). The Full Commission obviously discounted these opinions on the basis of its belief that a change of condition must be proven by "objective" evidence, but had they not been operating under this misapprehension, it is very likely that they would not have discounted the doctor opinions so drastically.

The Respondents have also attempted to introduce several other red herrings. Respondents have focused heavily on Russell's pregnancy; she was three months pregnant when she initially injured her back, and some treatment was delayed until the child was delivered. (R. pp. 3-4). The Full Commission's order repeatedly referenced this fact, focusing on Dr. Edwards' testimony that Russell may have been a discectomy candidate in 2010 but for her pregnancy. (R. pp. 227-229). The simple fact of the matter is that Russell had delivered her child by June of 2010, but continued seeing Dr. Merritt until March 2011, a further *nine months of treatment*. (R. p. 224).

Dr. Merritt treated her during this time period and ultimately concluded that no surgery was required; this opinion was given long after Russell had delivered her child and moved past the complications of pregnancy. (R. p. 226). Had Russell reached MMI while she was pregnant, and received an opinion from her treating physician about surgery at that time, this would be a different story. But the reality is that Russell's pregnancy had only a minor effect on the treatment she received for her injury, and had

*zero effect* on the opinion of Dr. Merritt as to MMI, future medical care, and the need for surgery, *because she was not pregnant at the time he gave his opinion*. This issue is a complete red herring and should not affect the outcome of the case. It is very clear from the record that Russell was not a surgical candidate at the time she reached MMI in 2011, and therefore had no chance to seek that medical treatment through the Workers' Compensation system prior to a change of condition hearing.

Finally, the Respondents have contended that any symptoms of leg or buttock pain reported by Russell prior to MMI in 2011 prove that her condition has not changed. Russell's uncontradicted testimony in the record is that any leg numbness had resolved well before April of 2011, and that any symptoms she reported were likely related to her pregnancy or bed rest. (R. p. 178, lines 19-25). It is also the opinion of both Dr. Merritt and Dr. Edwards that these symptoms had resolved by the time she reached MMI, and both are in agreement that she never had major leg or buttock pain complaints until late 2011. They were aware of small issues she had in her legs beforehand, *but both were still of the opinion that her condition had changed*.

Most importantly, Commissioner Wilkerson's 2011 Order does not even address the issue of leg and buttock pain. Not one single time does Commissioner Wilkerson indicate that leg or buttock pain was an issue for Russell. He does not even indicate that she had this type of pain at some point, but it had resolved by the time of the hearing. The issue of leg and buttock pain was obviously so insignificant at that hearing that Commissioner Wilkerson did not even address it. To the extent that Russell ever reported these symptoms, they were obviously so insignificant that there was not even

any evidence as to these symptoms for him to consider. It might be a different story had he considered leg or buttock pain complaints in the Order but discounted them, or specifically found that Russell had no disability in her leg or buttock. However, the leg and buttock pain at the time of the hearing were a non-issue, and therefore never considered by Commissioner Wilkerson in coming to his decision. Commissioner Wilkerson even had the medical records available to him which the Respondents contend show the same type of leg pain Russell is experiencing now, but he did not even mention leg or buttock pain in his order.

This absence of a ruling on the leg and buttock pain has substantial legal significance. That order was unappealed, and pursuant to § 42-17-60, became the binding law of the case. Respondents cannot now go back and attempt a back-door appeal of that order, made in 2011. South Carolina case law is full of guidance for this Court on how issues either considered or not considered at an initial disability determination hearing later affect a change of condition hearing.

In *Mungo*, the Claimant had a serious back injury and underwent surgery, eventually reaching MMI according to her spine surgeon. *Mungo* at 275, 678 S.E.2d at 827. The Claimant sought treatment for pain management from a second doctor, and that doctor's records only became available 4 days before the hearing into her permanent disability. *Id.* at 275, 678 S.E.2d at 828. For this reason, those records were not considered by the Commissioner in making his final decision. *Id.* The Claimant later brought a change of condition claim, which was denied by the Single Commissioner. *Id.* at 276, 678 S.E.2d at 825.

However, in his reasoning, the Single Commissioner stated he would have ordered a compensable change in condition “if Dr. Snoderly’s [the second doctor] exam and diagnoses . . . could be taken into account . . . .” *Id.* Because the diagnoses were made “prior to the [original] hearing, they [could not] be considered for change of condition.” *Id.* The Court of Appeals reversed this decision, holding that because the Commissioner at the original hearing had excluded the records, his conclusions were not based on those records, and therefore they could be considered in a change of condition proceeding. The Court held that “because Claimant did not raise the issue . . . in her original Form 50 or at the initial hearing and because [all records from the second doctor] were excluded from evidence . . . the change of condition hearing was the first opportunity a single commissioner could consider [the new issue].”

In *Clark v. Aiken County Gov’t.*, the Claimant received a permanent disability award to his back after reaching MMI, chose to appeal that decision to the Full Commission, and while the case was pending before the Full Commission, had back surgery. *Clark v. Aiken County Gov’t.*, 366 S.C. 102, 105-06, 620 S.E.2d 99, 100-01 (2005). The Full Commission simply did not address whether a change of condition had occurred since MMI and affirmed the Order of the Single Commissioner. *Id.* at 106, 620 S.E.2d at 99. Within one year, the Claimant filed a change of condition petition, the Single Commissioner found in his favor and issued a higher disability award; this decision was affirmed by the Full Commission. *Id.*

On appeal, the carrier argued 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.* at 107-08, 620 S.E.2d at 101-02. The Court stated that the claimant “had no way of knowing if the surgery would improve his condition, and, therefore, the degree of change in condition was not yet ripe for review by the full commission.” *Id.* at 110, 620 S.E.2d at 103. Because the final and unappealed initial order “did not address any change of [claimant’s] condition” and the order “made no ruling on the issue,” that issue had not been decided. *Id.*

In *Gattis*, the Claimant suffered a back injury, reached MMI, and the Single Commissioner issued a permanent disability award. *Gattis* at 105, 576 S.E.2d at 193. The claimant appealed to the Full Commission, and attempted to introduce a letter from the claimant’s treating physician that was not included in the record before the Single Commissioner; this request was denied, and the Commission noted that the claimant could use the letter later to file for a change of condition in affirming the decision of the Single Commissioner. *Id.* at 105, 576 S.E.2d at 193-94.

The claimant did just that, and the Commission based its decision that a change of condition had occurred primarily off that letter, even going so far as to determine the date of the change of condition from that letter. *Id.* at 105-06, 576 S.E.2d at 194. The employer appealed, and argued the letter in question “was presented at the first hearing [and] was explicitly rejected. ‘Thus, the condition now asserted by Claimant existed when the commission entered [the original order].’” *Id.* at 108, 576 S.E.2d at 195. The Court of Appeals held that because “the commission limited its determination to the facts considered by the commissioner, despite claimant’s attempt to supplement

the record with [the] . . . letter,” the order was limited to a determination of the condition prior to that hearing, and the letter could be used in a subsequent change of condition hearing. *Id.* at 109, 576 S.E.2d at 195-96.

In *Estridge v. Joslyn Clark Controls, Inc.*, the claimant alleged repetitive movements caused injury to numerous body parts, and the Commission determined the claim was compensable. *Estridge* at 532, 482 S.E.2d at 578. After treatment, the Commission determined he had reached MMI, issued an award for the Claimant’s back and right upper extremity, but made “no findings regarding any nervous condition.” *Id.* at 534, 482 S.E.2d at 578-79. On appeal to the Full Commission, the claimant argued “the commissioner erred in failing to find that the Claimant was entitled to psychological help or support, there being substantial evidence in the record that claimant suffered from psychological problems due to his injuries and that he was unable to return to work.” *Id.* at 535, 482 S.E.2d at 579. However, the “commission affirmed the single commissioner’s order in its entirety without specifically addressing the alleged mental aspect of [the claimant’s] condition.” *Id.* That order was not appealed. *Id.*

The Claimant later filed for a change of condition, alleging psychological injuries, but the commissioner denied this request, concluding that “he could not consider any evidence as to [the claimant’s] mental condition . . . [because] the mental condition was not included as an injury in the [permanent disability award].” *Id.* The Court of Appeals determined the Commission’s initial order on the matter “cannot be said to resolve a claim for psychological injury by implication, since they are susceptible to the conclusion

that [the claimant] may have had such causally related symptoms, but they did not impact on his condition at that time.” *Id.* at 540, 482 S.E.2d at 581.

In sum, these cases stand for the proposition that issues properly considered by the Commission at an initial permanent disability hearing cannot later be brought under the guise of a change of condition proceeding. The corollary is that issues not considered by the Commission at an initial permanent disability hearing are ripe for the Commission to consider in a change of condition proceeding. Much of the case law surrounding §42-17-90 is concerned with these principles. South Carolina courts are simply unwilling to allow either party to a workers’ compensation claim another opportunity to litigate issues decided during final disability determinations through the change of condition process. This ‘second bite at the apple’ would undermine the previous decisions of the Commission and also presents *res judicata* issues.

By attempting to use Russell’s complaints of leg pain prior to the time she reached MMI in 2011 in this proceeding, the Respondents are attempting to re-litigate an issue that was already decided. If, like the situation in *Mungo*, Commissioner Wilkerson had noted his review of records of leg and buttock pain prior to the time of MMI and issued an opinion as to the leg’s disability, Russell would be unable to argue that she is entitled to additional Workers’ Compensation benefits *if she was suffering from the same symptoms*. However, this case is far more similar to *Estridge*, *Clark*, and *Gattis*, in that the evidence presented to the Commission during the change of condition proceeding is new evidence, not considered the first time around. The depositions of Dr. Merritt and Dr. Edwards, medical records dating after April 13, 2011 (the date of the

initial hearing), and the testimony of Russell are all new pieces of evidence which could not have been considered by Commissioner Wilkerson at the 2011 hearing.

What's more is that any medical records submitted by the Respondents to attempt to show that Russell had leg pain are not part of the record and should not be considered by this Court. The only APA submissions made during the change of condition process were the records and depositions of Dr. Merritt and Dr. Edwards, all of which date after Commissioner Wilkerson's June 8, 2011 order. (R. p. 193). The records of Dr. Edwards and Dr. Wentz, cited by the Respondents as examples of Russell's leg pain prior to MMI were not a part of the record in front of the Full Commission on appeal, and therefore should not even be considered by this Court in coming to its conclusion. (R. pp. 175-179). Instead, the binding 2011 Order of Commissioner Wilkerson should guide the Court as to any issues with prior leg pain.

To put it simply, a binding order in this workers' compensation claim determined that Russell had no problems whatsoever with leg or buttock pain as of June of 2011. Respondents are now forbidden from revisiting that issue. Furthermore, there is substantial and voluminous evidence pointing towards a change of condition in this case. This evidence is in the form of medical records, credible lay testimony, and medical opinions. The only piece of evidence lacking is that there is no distinct difference between an MRI performed before June of 2011 versus MRIs performed after June of 2011, but that evidence is not required to prove this claim. The unanimous opinion of both doctors that a change in condition occurred is more than enough to meet the standard required in § 42-17-90, and the Commission committed reversible

error by ignoring this substantial evidence in making its decision that a change of condition had not occurred on the basis of the MRIs alone.

This Court should overturn the Commission's decision on the basis that the substantial evidence of record can support only a finding of change of condition, and rule that Russell experienced a change of condition in the form of increased back pain and new leg and buttock pain, pursuant to §42-17-90; that Russell is entitled to medical care causally related to this change of condition; and that Russell is entitled to temporary total disability benefits from December 1, 2011 through the present date and continuing.

III. **The Commission erred in finding that Russell's testimony was not credible because it was conclusory and self-serving, because the Commission did not make specific findings indicating why the testimony was not credible, and the Employer, Russell's doctors, the Single Commissioner, and counsel for the Respondents all found her credible.**

Paula Russell spent virtually her entire adult life devoted to her career at Wal-Mart. She worked hard, and she was rewarded for that hard work, in the form of promotions, pay raises, and the trust Wal-Mart placed in her as a manager at multiple stores. Wal-Mart recognized she was talented and trustworthy and kept her there for 13 years, promoting her from an entry level position to a management post with major responsibilities. (R. p. 3, 185-186). They used her as troubleshooter when times were tough in North Carolina, and trusted her to carry out forecasting, supervision of employees, control of merchandise, and most importantly, direct control over the money that moved through a fully-operational Wal-Mart store. (R. pp. 186-188). Had there been questions over her credibility during her career there, she would not have

had the number of advancements that she did, and she certainly would not have had direct control over and responsibility for the multi-million dollar business that is a single Wal-Mart store.

Now, once it is her health at issue, the Respondents contend that there are major issues over her credibility. The Full Commission found that Russell “has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is any ‘different’ from her condition at the time the original Decision and Order was filed in June 2011.” (R. p. 228). The Full Commission also gave “limited weight to the testimony of the Claimant as it is conclusory and self-serving,” and found that Russell “was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award.” (R. p. 231). These were grievous errors by the Commission, for several reasons.

First, there is no requirement, either in the change of condition statute or its interpreting case law, which requires a Claimant to pin down precisely when she began experiencing a change in condition. The only requirements are that the change in condition occurs after the time where the Claimant reached MMI, and that the change of condition petition is filed within one year of the last payment of compensation. S.C. Code Ann. § 42-17-90 (2013). No other time period matters.

Furthermore, it simply is not true that Russell did not remember when she started to experience the new feelings of pain in her leg: she indicated that this

occurred in either September or October of 2011<sup>3</sup>, prior to her return to Dr. Merritt's office. In fact, she was still receiving *Dodge* medical through workers' compensation provided by Dr. Merritt, and this is where she made her first complaints of increased symptoms. As far as the "need for surgery goes," it is clear that Dr. Merritt opined well after Russell's pregnancy was over that she was not a surgical candidate. (R. p. 224). Dr. Edwards stated he had "no reason to doubt" Russell's opinion that her condition was worsening. (R. p. 47, lines 21-24). And finally, Dr. Edwards stated that the physical examination he performed led him to an "objective physical finding" that Russell's condition had worsened. (R. p. 52, lines 2-13). Are the Respondents seriously contending that this Court must trust Dr. Edwards' opinion when it comes to the differences between the MRIs, but to discount it when it comes to his findings and his opinion on his patient's credibility?

This leaves only the issue of Russell's credibility as a historian as to the location and intensity of her pain. As noted, Russell had a long and successful career with Wal-Mart prior to this injury. She was trusted with an enormous amount of responsibility, so Wal-Mart cannot now seriously claim that she is not a credible person. Furthermore, counsel for the Respondents at the Full Commission hearing actually stipulated that Russell was credible. "I would agree with Commissioner Roche that there was certainly a change in the subjective complaints. ***I'd also agree with Commissioner Roche that Ms. Russell comes across really well.***" (R. p. 216, lines 5-9) (emphasis added). In

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<sup>3</sup> While Russell refers to 2012 in this portion of the hearing transcript, the medical records indicate that she returned to Dr. Merritt's office in 2011. She also corrected this later on during the hearing. (R. p. 173, lines 18-20).

essence, the Respondents have agreed, both with their conduct and their stipulation, that Ms. Russell is a credible person and can be trusted to relay her symptoms to her doctors. For these reasons, the Commission's finding that Russell was not a credible witness is not in line with the substantial evidence and should be reversed.

This Court should overturn the Commission's decision on the basis that the substantial evidence of record can support only the conclusion that Russell was and is a credible witness, and rule that Russell experienced a change of condition in the form of increased back pain and new leg and buttock pain, pursuant to §42-17-90; that Russell is entitled to medical care causally related to this change of condition; and that Russell is entitled to temporary total disability benefits from December 1, 2011 through the present date and continuing.

#### **CONCLUSION**

South Carolina courts have traditionally construed the Workers' Compensation statutes "liberally in favor of coverage." *Hernandez-Zuniga v. Tickle*, 374 S.C. 235, 243, 647 S.E.2d 691, 694 (Ct. App. 2007). For many years, the precedent has been that "the basic purpose of the Compensation Act is the inclusion of employers and employees, and not their exclusion." *Yeomans v. Anheuser-Busch, Inc.*, 198 S.C. 65, 72, 15 S.E.2d 833, 835 (1941). Russell urges this Court to be mindful of this general presumption in favor of greater Workers' Compensation coverage on hotly contested issues such as this one.

In short, the decision to impose an "objective" evidence standard by the Commission, at the urging of the Respondents, ultimately skewed every finding of fact

and law that the Full Commission made. The imposition of this standard was outcome-determinative on its own, in that the Full Commission used the lack of difference between the MRIs as the reason for overruling the Single Commissioner. But it also led the Commission to believe that without an “objective” difference between the MRIs the treating physicians were not credible, Paula Russell’s testimony was not credible, and the recommendation for her surgery must be related to her pregnancy, not her work injury.

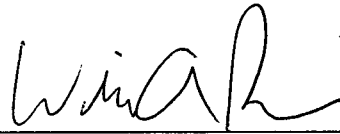
None of these findings could be further from the truth, and there is substantial evidence to back up the opinions of the doctors, the testimony of Russell, and the conclusion that surgery was not necessary until Russell’s condition changed in the Fall of 2011. The Commission committed reversible errors in making each and every one of these findings, and the Appellant prays that this Court will see the attempts of the Respondents to advance the “objective” standard as applicable in this situation for what it is: a major error of law.

For this reason, Appellant respectfully requests that this Court hold that (1) The Workers’ Compensation Commission committed a reversible error of law by requiring that Paula Russell prove her change in condition only via an MRI, and that the opinions of her treating physicians and testimony of Russell demonstrate a change of condition occurred, meeting the preponderance of the evidence standard under § 42-17-90; (2) The Commission committed reversible error in finding that a change of condition occurred, because the overwhelming and substantial evidence of record indicates a change of condition did in fact occur, the MRIs notwithstanding; and (3) that the

Commission committed reversible error in finding that the Claimant and Appellant, Paula Russell, was not a credible witness, where the medical evidence clearly shows she was credible and the conduct and stipulation of the Respondents indicates otherwise.

To these ends, the Appellant respectfully requests that this Court issue an Order finding that Russell experienced a change of condition pursuant to § 42-17-90, that Russell is entitled to ongoing causally related medical care, and that Russell is entitled to temporary total disability benefits from December 1, 2011, through the present date and continuing.

Respectfully submitted,



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Date: October 23, 2014

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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Appellate Case No.: 2014-000454

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Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc., and  
American Home Assurance,

Respondents.

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CERTIFICATE OF COUNSEL

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

Thursday, October 23, 2014



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