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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 0917785
Appellate Case No. 2017-002122

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company,

Respondents.

APPENDIX

Other Counsel of Record:

Johnnie W. Baxley
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
PH: (843) 284-1080
Attorney for Respondents

C. Danial Vega, Esquire, Bar. No. 71639
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
PH: (803) 929-3600
dvega@csa-law.com
**Attorney for Paula Russell,
Petitioner**

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov

AMENDED



WCC File #: 0917785
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Paula D. Russell SSN: _____ Employer's Name: WalMart #0586
Address: Freedom Blvd., Apt 1 _____ Address: 2709-A Church Street
City: Florence State: SC Zip: 29505 City: Conway State: SC Zip: 29526
Home Phone: (843) 260-9868 Work Phone: () - Insurance Carrier: Illinois National Insurance Company
Preparer's Name: C. Daniel Vega Law Firm: Chappell, Smith & Arden Preparer's Phone #: 803-929-3600

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 11/3/2009

☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to See 1b below on 11/3/2009 in Horry South Carolina

1b. Body part(s) affected are: abdomen and back

Briefly describe how the accident occurred. Lifting pallet felt a pull in abdomen and middle of back

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 11/3/2009 in the following manner:
Notified Supervisor

☒ 6. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: abdomen and back

☐ (b) additional medical examination and treatment for: abdomen and back

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
Date of injury to present and continuing

☒ 8. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):

☒ (1) General Disability:

☒ Total

☒ (2) Specific Disability:

☐ Total

☐ (3) Wage Loss

☒ Partial

☒ Partial

☐ 9. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the Claimant was paid weekly wages of \$1153.8 and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
WalMart #0586

11a. Further grounds or unusual aspects of claim:

As may be developed, Claimant reserves the right to amend the Form 50.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:

Advanced Women's Care, Florence, SC; Carolinas Occupational Health, Florence, SC; Conway Medical Center, Conway, SC

11c. To the best of your knowledge, did you have any prior permanent disability? None Known

If yes, describe:

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☒ 13a. I am filing a claim. I am not requesting a hearing at this time.

☐ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature _____ Attorney at Law _____ dvega@csa-law.com _____ Date 2/6/10
Title _____ Email _____

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

South Carolina Workers' Compensation Commission

P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803) 737-5700

JC File # 0917785

Carrier File # 5943261

Carrier Code #

Employer FEIN

Paula Russell				Wal-Mart Stores, Inc.
Claimant's Name	SSN	Employer's Name		
Freedom Blvd., Apt	Florence, SC 29505	2709-A Church Street, Conway, SC 29526		
Address	City	State	Zip	Address
(843) 260-9868				American Home Assurance
Home Phone	Work Phone	Insurance Carrier		
	Johnnie W. Baxley, III	(843) 284-1082		
	Preparer's Name	Phone #		

The date of injury reported on the Form 12A is: 11/3/2009

Check applicable section(s). The employer's representative requests a hearing to:

☐ I. Stop payment of compensation. Compensation payments are current as of _____ and shall continue until _____ date

otherwise ordered or until a Form 17 is signed by the claimant. A Form 17 was offered and refused on _____ date

The basis of the stop payment hearing is (check one):

- ☐ (a) The authorized health care provider states the claimant has reached maximum medical improvement.
☐ (b) The authorized health care provider states the claimant is able to return to the same or other suitable job and has assigned an impairment rating, if any, and the same or suitable job has been offered to the claimant.
☐ (c) The authorized health care provider states the claimant is unable to return to the same or other suitable job and has assigned an impairment rating, if any.

☐ II. Terminate temporary compensation suspended per R.67-505. Date suspended. _____

The basis for suspension of benefits is (check one):

- ☐ (a) The claimant refuses medical treatment.
☐ (b) The employer states the claimant is working, has worked for at least fifteen calendar days, and the claimant refuses to sign the Form 17 Requesting: ☐ Informal Conference ☐ Hearing

☒ III. Pay compensation in the amount of \$ [To Be Determined], based on the following grounds: _____

Based upon the report of Dr. Merritt dated 2/2/11 placing claimant at MMI and assigning an impairment rating

☐ IV. Request Credit for overpayment of temporary compensation.

☐ V. Reduce Payment of compensation from \$ _____ to \$ _____, based on the following grounds: _____

Compensation payments are current as of _____ date and shall continue until otherwise ordered or until a

Form 17 is signed by the claimant.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to C. Daniel Vega, Esquire,
P.O. Box 12330, 1510 Calhoun Street, Columbia, SC 29211; and Virginia Crocker, Judicial Director, SC WCC, P.O. Box 1715,
Columbia, SC 29202-1715

On the 25th day of February, 2011 by X first class postage, _____ certified mail, _____ personal service.

Preparer's Signature

Johnnie W. Baxley, III
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464

Attorney for Defendants
Title

February 25, 2011
Date

The claimant may respond by writing the preparer at the address above and filing a copy of the response with the Commission's Judicial Department at the address at the top of the form. Refer to R 67-208, R 67-211, R 67-505, R 67-506 and R 67-601 - R 67-616. Questions about the use of this form should be directed to the Judicial Department at (803) 737-5675.

DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,		)	
	Employee,	)	
	Claimant,	)	
vs.		)	
Wal-Mart Stores, Inc.,		)	
		)	
and	Employer,	)	
		)	
American Home Assurance,		)	
		)	
	Carrier,	)	
	Defendants.	)	

HEARING:

Held in Myrtle Beach, South Carolina on April 13, 2011.

APPEARANCES:

Claimant represented by C. Daniel Vega, Esquire of Columbia, South Carolina.

Defendants represented by Johnnie W. Baxley, III, Esquire of Willson Jones Carter & Baxley, P.A., Mt. Pleasant, South Carolina.

PURPOSE OF HEARING:

To determine the issues as set forth on the Form 21.

DECISION AND ORDER:

By Avery B. Wilkerson, Jr., Commissioner

FILED:

June 8, 2011.

I. APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

- APA #1: Records of Dr. Maria Perez-Garcia, dated 11/25/09 – 8/23/10, consisting of pages 1-32.
- APA #2: Records of Florence MRI, dated 8/16/10, consisting of pages 33-34.
- APA #3: Records of Dr. Bill Edwards, dated 9/14/10, consisting of pages 35-37.
- APA #4: Records of Dr. Ken Wenz, dated 11/22/10, consisting of pages 38-40.
- APA #5: Reports of HealthSouth FCE, dated 1/25/11, consisting of pages 41-51.
- APA #6: Records of Dr. James Merritt, dated 10/25/10 – 3/29/11, consisting of pages 52-59.

II. STIPULATIONS

Counsel for the respective parties stipulated at the time of the hearing to the following issues:

1. The purpose of the hearing is to determine the issues as set forth in the Form 21 and any other issues which may timely come before the Commission;
2. That the Claimant's accident occurred on November 3, 2009;
3. The Claimant's average weekly wage was \$1232.52 with a corresponding compensation rate of \$681.36 (maximum compensation rate for 2009);
4. Notices were timely and properly served upon all parties of interest;
5. Venue, set in Horry, is proper as agreed by all parties;
6. That the South Carolina Workers' Compensation Commission has jurisdiction over the parties and issues involved;
7. The issues for determination are the Claimant's entitlement to permanent partial disability compensation and future medical benefits and any other issues which may timely come before the Commission.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declaration or unstipulated medical reports.

III. STATEMENT OF THE CASE

This case was heard by the undersigned Commissioner in Myrtle Beach, South Carolina, on April 13, 2011. The Commission's file in this claim reflects that this is an admitted claim. It is Claimant's position in this matter that she has sustained permanent partial disability to the back per 42-9-30, and that she is entitled to future medical treatment consistent with the report from Dr. James Merritt. The Claimant indicated that she was paid salary continuance for all periods of time that she missed from work, and thus no temporary compensation is owed, and that all of her medical bills have been paid. The Defendants agreed that the only two issues for determination are extent of permanent disability and entitlement to future medical treatment.

The claimant testified at the hearing in this matter, and her testimony allowed this Commissioner to observe the Claimant, to ask questions to the Claimant and to judge her credibility as a witness.

IV. EVIDENCE OF THE CASE

The Claimant testified that she is 36 years old, not married and has three daughters (11 months old, 10 years old, and 13 years old). She graduated from high school, has taken some college classes, and served in both the National Guard and U.S. Army, where she received a bad conduct discharge for an issue with a gentleman. She has worked at Wal-Mart for 13 years, and has been a shirt manager (assistant store manager) since 2007. She is a salaried member of management at Wal-Mart.

On November 3, 2009, she was lifting and hurt her back and pelvis. The accident was timely reported and medical treatment was provided to her. At that time, Claimant was three months pregnant and thus treatment for the first several months did not include diagnostic testing

and was very conservative. After she successfully delivered her daughter and recovered from her caesarian section surgery, she had an MRI scan and began treating with Dr. Merritt. Dr. Merritt indicated that no surgery was required and treated Claimant with medications, exercises, and an injection. Claimant admitted that she had been released from medical care.

The Claimant indicated that she continues to have pain in her back, especially with prolonged standing and walking or any heavy lifting. She has been restricted to no lifting over 30 pounds, but she is able to do her job as a shift manager within those restrictions. The Claimant has been back at work for quite some time, and she plans to continue working and hopefully become a store manager. The Claimant testified that her pelvic pain last surfaced during her FCE, but those problems have essentially resolved.

The Claimant continues to take two medications prescribed by Dr. Merritt. She takes Flexeril (muscle relaxer) a couple times per week as needed, and she takes Naproxen (anti-inflammatory) twice per day every day. On the Form 14B, Dr. Merritt indicated that Claimant would need to continue the anti-inflammatories (Naproxen).

The medical records indicate that Claimant was diagnosed with a back strain and that she has degenerative disc disease at L5-S1. The records detail the medical treatment and her current abilities. The final medical report from Dr. Merritt indicates that Claimant has a 3% rating to the whole person as a result of her back injury, which converts to a 7% regional rating to the lumbar spine.

A record such as was necessary for a decision was made of the proceeding and after careful consideration and study of all the evidence, the following findings of fact are accordingly made.

V. FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paula Russell as Employee-Claimant and Wal-Mart Stores, Inc. as Employer and American Home Assurance as Carrier, Defendants.

2. That Claimant was an employee of the above-named Employer on and prior to November 3, 2009, on which date she did sustain an injury to the back arising out of and in the course of her employment, and proper notice was given to Employer. This was an accepted claim, and Claimant has received appropriate medical benefits and is not entitled to any temporary total compensation (she received salary continuance for all periods of time out of work).

3. That the average weekly wage of Employee at the time of the above-described accident was \$1232.52, making a compensation rate of \$681.36 (maximum compensation rate for 2009) applicable in this matter.

4. That Claimant reached maximum medical improvement on February 2, 2011, for the injuries resulting from the November 3, 2009, accident.

5. That Claimant has sustained 7% permanent partial disability to her back as a result of the accidental injury on November 3, 2009. This finding is based upon the Claimant's testimony and the medical records.

6. That Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

7. At this time, Claimant is not entitled to any other benefits or compensation under the South Carolina Workers' Compensation Act other than those benefits specifically awarded above.

VI. CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant did sustain an injury to her back by accident arising out of and in the course and scope of her employment on November 3, 2009.
3. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until February 2, 2011. Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.
4. Under § 42-9-30, Claimant has sustained 7% permanent partial disability to the back.

VII. ORDER/AWARD

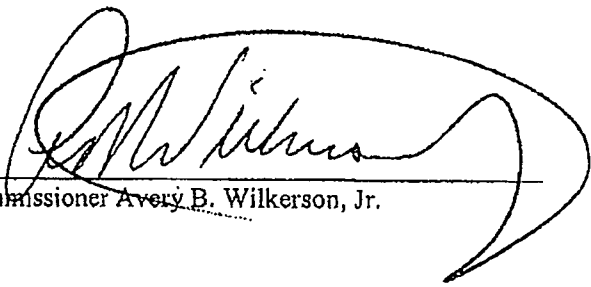
IT IS HEREBY ORDERED that as a result of Claimant's accidental injury occurring on November 3, 2009, she has sustained 7% permanent partial disability to the back, for which she is entitled to 21 weeks of compensation, at the compensation rate of \$681.36 per week, for a total of \$14,308.56.

IT IS FURTHER ORDERED Claimant reached maximum medical improvement on February 2, 2011, and Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Avery B. Wilkerson, Jr.

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

June 8, 2011

By: Elaine Boyc, Administrative Assistant to Commissioner Wilkerson

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Paula D Russell,

Claimant,

vs.

WalMart #0586,

Employer,

American Home Assurance,

Carrier/Defendants.

Decision and Order

WCC FILE NO: 0917785

A hearing in this matter was scheduled before Commissioner Andrea C. Roche on February 11, 2013, in Columbia, SC, to determine issues set forth on Forms 50 and 51. Present at the hearing was C. Daniel Vega, attorney for the Claimant and Katie Veatch O'Neill, attorney for Defendants.

STIPULATIONS

The parties stipulated to the following issues at the call of the hearing:

1. The parties to these proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paula Russell as Employee-Claimant, Wal-Mart Stores, Inc. as Employer, and American Home Assurance Carrier, Defendant.
2. Notice of hearing was timely and properly served on all parties of interest.
3. Venue was proper in Horry County.

4. The purpose of the hearing is to determine issues as set forth in the Forms 50 and 51.
5. Claimant's average weekly wage is \$1,232.52 and the compensation rate is \$681.36.
6. Claimant sustained a compensable work related injury on November 3, 2009.

APA SUBMISSIONS

Pursuant to the Administrative Procedures Act the following were made a part of the record without objection:

Provider	Date of Service	Page Nos.
APA 1 James Merritt, M.D.	11/21/11-03/14/12	1-3
APA 2 W. S. Edwards, M.D.	02/16/12-07/31/12	4-15
Deposition William S. Edwards, MD	09/13/2012	
Deposition James O. Merritt, IV, MD	05/23/12	

STATEMENT OF THE CASE

Claimant contends that she suffered a change of condition for the worse. Claimant suffered a change to her low-back condition, requiring additional medical care and attention, including but not limited to a surgery recommendation by Dr. Edwards. Claimant also contends that because Defendants filed a Form 51, admitting the change of condition for the worse and in response to Claimant's first Form 50, served December 14, 2012, they are estopped from now denying that the claim should be admitted. Claimant seeks an order from the Commission ordering Defendants to pay for causally related medical care and treatment and temporary total disability benefits.

Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits. Defendants contend Claimant can not carry her burden of proving a change of condition for the worse as required under the Act. Defendants further contend that the

medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse because the complaints are subjective. Finally, Defendants contend that the Claimant did not timely file the second Form 50 and, therefore, the claim should be barred by the statute of limitations.

EVIDENCE OF THE CASE

Claimant worked at Wal-Mart for thirteen (13) years and has been a shift manager (assistant store supervisor) since 2007. Claimant testified that she continued working at Wal-Mart as the shift manager after the Hearing and Decision of the Commission dated April 13, 2011. Subsequently, Claimant 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. As a result of the increase in symptoms, Claimant found it more difficult to continue making the hour-long drive to and from work everyday and to continue working the same hours she had prior to her injury.

Claimant wanted to remain employed with Wal-Mart because she hoped to eventually become a store manager. In order to achieve this goal, Claimant put in a request for an accommodation that would allow her to work for a Wal-Mart closer to home. In December, 2011, rather than approving the requested accommodations, she was required to turn in her keys and asked to leave the store. Since December 1, 2011, Wal-Mart has failed to provide her with work that complied with her treating physicians' work restrictions.

Claimant reported to Dr. James O. Merritt after the Hearing and Decision of the Commission dated April 13, 2011. Dr. Merritt testified in his deposition that Ms. Russell reported to his office on September 16, 2011 with new complaints of pain down into her legs. When asked

whether he believed a change of condition existed, Dr. Merritt testified numerous times that he believed there was a change. Dr. Merritt testified that a comparison of the results of an MRI taken on August 16, 2010, to the MRI taken by his office on October 21, 2011, showed a slight increase in the size of the disc protrusion. He opined there was an anatomical difference between the two MRIs. Dr. Merritt also wrote a letter, dated November 21, 2011, asserting that Claimant's condition had changed for the worse.

Claimant also reported to Dr. William S. Edwards after the Hearing and Decision of the Commission dated April 13, 2011. Dr. Edwards testified in his deposition that the patient's symptoms were worse and further stated that he had no doubt the worsening symptoms were present. Dr. Edwards testified Claimant had development of numbness and discomfort in the distribution of the L5 nerve root that he had not noted in his previous exams. Dr. Edwards stated the worsening of Claimant's symptoms could anatomically be caused by the nerve making it more painful or symptomatic. He stated surgery may be an option in dealing with her symptoms. Dr. Edwards stated his opinion to within a degree of medical certainty, based on medical evidence he believed to be objective.

FINDINGS OF FACT

1. I find Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible.
2. I find Claimant reasonably and timely sought additional medical care and attention as a result of her worsening symptoms.
3. I find Claimant attempted to comply with the restrictions placed on her by her physicians.

4. Dr. Merritt testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
5. Dr. Merritt testified to within a degree of medical certainty Claimant's change of condition was a physical, anatomical change.
6. Dr. Merritt's letter dated November 21, 2011 supports both that Claimant underwent a change of condition for the worse and that future treatment, including but not limited to epidural injections, is medically necessary.
7. I find Dr. Merritt's testimony consistent with the requirements of a change of condition pursuant to the Act.
8. Dr. Edward's testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
9. Dr. Edward's testified to within a degree of medical certainty Claimant's change of condition was a physical-anatomical change.
10. I find Dr. Edward's testimony consistent with the requirements of a change of condition pursuant to the Act.
11. I find Claimant is in need of additional medical treatment.
12. The defendants shall provide medical care and attention pursuant to Claimant's change of condition.
13. I find the defendants required Claimant to turn in her keys December 1, 2011.
14. I find the defendants have not provided Claimant work hours since December 1, 2011.
15. I find Claimant was given work restrictions by Dr. Merritt prior to December 1, 2011.
Those limitations continue to the present.

16. The defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.
17. The defendants admitted a change of condition in their initial Form 51, dated January 3, 2012, and did not amend or ask to amend their Form 51 until the date of the Hearing. Because I find a change of condition on the merits I do not issue a finding or order on Claimants estoppel contention.
18. The defendants failed to file a Form 51 in response to Claimant's second Form 50, served on September 20, 2012, and have therefore waived the statute of limitations defense.

FINDINGS OF LAW

1. Pursuant to S.C. Code Ann. section 42-17-90, Claimant suffered a change of condition for the worse.
2. Pursuant to S.C. Code Ann. Regs. 67-602(C), Claimant attached medical reports to the hearing request indicating a change in the claimant's condition.
3. Pursuant to section 42-15-60, Claimant is entitled to additional medical care and attention.
4. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.
5. Pursuant to 42-1-120, Claimant is "disabled."
6. Pursuant to section 42-9-10, Claimant is entitled to temporary total disability benefits.

AWARD

In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:

1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
2. Defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.

AND IT IS SO ORDERED!



Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

August 5, 2013

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Roche

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. Box 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #:	0917/05
Carrier File #:	5943261
Carrier Code #:	
Employer FEIN #:	

Claimant's Name: Paula Russell SSN: Employer's Name: Wal-Mart Stores, Inc.
Address: Freedom Blvd., Apt. 1 Address: 2709-A Church Street
City: Florence State: SC Zip: 29505 City: Conway State: SC Zip: 29526
Home Phone: (843) 260-9868 Work Phone: Insurance Carrier: American Home Assurance
Preparer's Name: Johnnie W. Baxley, III Law Firm: Willson Jones Carter & Baxley, P.A. Preparer's Phone #: (843) 284-1082

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 11/3/2009

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009 accident at work, error being that the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since the back surgeon, Dr. Edwards, testified that he could not identify any objective difference between any of claimant's MRIs, and thus, he could not state to a reasonable degree medical certainty that claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ **Mediation**

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify that I have served this document pursuant to R 67-212 by delivering a copy to: C. Daniel Vega, P.O. Box 12330, 1510 Calhoun Street,
Name & Address
Columbia, SC 29211 and Virginia Crocker, Judicial Director, SC WCC, P.O. Box 1715, Columbia, SC 29202 on the 7th day of August, 2013 by ☒ first class mail ☐
personal service ☐ certified mail

Johnnie W. Baxley, III
Preparer's Signature

Attorney for Defendants
Title

jwbaxley@wjlaw.net
Email

08/09/2013
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,	)	
	)	
Employee,	)	
Claimant/Respondent,	)	
	)	
vs.	)	
	)	
Wal-Mart Stores, Inc.,	)	BRIEF OF DEFENDANTS/APPELLANTS
	)	
	)	
Employer,	)	
and	)	
	)	
American Home Assurance,	)	
	)	
	)	
Carrier,	)	
Defendants/Appellants.	)	

STATEMENT OF THE CASE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

On February 11, 2013, a hearing was held before Commissioner Andrea C. Roche to determine the issues raised in Claimant's Form 50. After considering the evidence presented, the Commissioner found that Claimant suffered a change of condition for the worse and is entitled to additional medical care and attention as well as temporary total disability benefits. The Decision and Order from the hearing was filed on August 5, 2013, and Appellants subsequently timely filed a Form 30 appealing this Decision and Order on August 9, 2013.

EVIDENCE OF THE CASE:

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant's November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merritt testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). At the visit in September 2011, however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24—page 8, lines 4-11). Although Dr. Merritt didn't have the films from the MRIs to compare, he didn't think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines

16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and, her reflexes remain the same (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

ISSUE PRESENTED

- I. Did the Hearing Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work when the preponderance of evidence in the record does not support such findings?**

ARGUMENTS/DISCUSSION

- II. The Hearing Commissioner erred in finding Claimant/Respondent sustained a change of condition for the worse under Sec. 42-17-90 because Claimant failed to meet her burden of proof demonstrating to a reasonable degree of medical certainty that there were any objective changes in her physical condition.**

At the hearing before the single Commissioner, Claimant's medical records from Dr. Merritt and Dr. Edwards were made part of the record (APA 1, pages 1-3; APA 2, pages 4-15) as well as the deposition transcripts of Dr. Edwards taken on September 13, 2012, and Dr. James Merritt taken on May 23, 2012. Claimant's attorney used these submissions along with the testimony of Claimant in support of his argument that Claimant sustained a change of condition for the worse and is entitled to further medical care and treatment and other benefits under the

Act. Based on the evidence presented, however, Appellants assert Claimant did not meet the burden of proof as required by Sec. 42-17-90.

Sec. 42-17-90 provides, "the Commission may review an award and on that review make an award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions *different* from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id.

In the case at hand, Claimant/Respondent 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. Specifically, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into the leg before she saw him at her first visit. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg

associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she "started receiving them". (Tr. at 9: 11-21).

While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Deposition, page 8, lines 13-24). Dr. Edwards did review and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant's disc protrusion at L5-S1 has been contacting the nerve root and causing irritation throughout the course of her claim; she has not developed any weakness in her muscles innervated by that particular nerve; and, her reflexes have remained the same. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing. Based on this testimony, Appellants argue the preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2). In sum, Claimant's radiographic condition has

App. p. 23

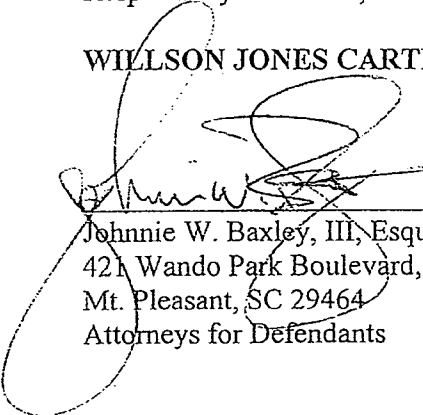
not worsened; any alleged worsening in this case is solely based on Claimant's subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show Claimant's condition is worse. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6; page 18, lines 5-8). Appellants assert this does not meet the preponderance of the evidence standard as required by the Act and case law.

CONCLUSION

For all of these reasons, Appellants argue the Hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since Claimant's treating spine specialist testified that he could not identify any objective difference between any of Claimant's MRIs, and thus, he can not state to a reasonable degree medical certainty that Claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



Johnnie W. Baxley, III, Esquire
421 Wando Park Boulevard, Suite 100
Mt. Pleasant, SC 29464
Attorneys for Defendants

Date: October 17, 2013

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

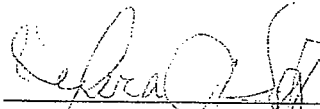
Paula Russell,)
Employee,)
Claimant/Respondent,)
vs.)
Wal-Mart Stores, Inc.,)
Employer/Appellant,)
and)
American Home Assurance,)
Carrier,)
Defendants/Appellants.)

CERTIFICATE OF SERVICE

I, Sylvia Hoff, do hereby certify that I am the Paralegal for Johnnie W. Baxley, III, Esquire, attorney for the Appellants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 18th day of October, 2013, I mailed the foregoing BRIEF OF DEFENDANTS/APPELLANTS to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

C. Daniel Vega, Esquire
Chappell, Smith & Arden, P.A.
P.O. Box 12330, 1510 Calhoun Street
Columbia, SC 29211

Ms. Virginia L. Crocker
Judicial Director
South Carolina Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715



Paralegal to Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY, P.A.

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 0917785

Paula D. Russell,

Claimant/Respondent,

vs.

WalMart #0586,

Employer,

Illinois National Insurance Company,

Defendants/Appellants.

REPLY BRIEF OF
CLAIMANT/RESPONDENT

STATEMENT OF THE CLAIM

Claimant filed a Form 50 request for a change of condition on December 14, 2012.

Claimant contended she suffered a physical change of condition for the worse that requires surgery. Defendants initially filed a Form 51 admitting the change of condition, initially paid temporary total benefits, but failed to provide medical treatment pursuant to the change of condition request. At the call of the hearing on February 11, 2013, Defendants denied Claimant suffered a change of condition for the worse. The Single Commissioner issued an order finding Claimant sustained a change of condition for the worse and awarded benefits. From the decision Defendants appeal.

EVIDENCE

Claimant worked for Wal-Mart for 13 years. During that time she worked first in shipping and receiving, then as a support manager, assistant manager and shift manager. She began working as a shift manager in 2007. As a shift manager she had responsibility of the entire store, including:

forecasting merchandise, managing associates and managing finances. After her injury she returned to work and continued working until Wal-Mart would no longer accommodate her limitations and asked for her keys December 1, 2011.

After the initial award Claimant experienced a marked increase in symptoms and returned to the authorized treating physician for an opinion. James Merritt, MD, opined Claimant suffered a change of condition in a letter dated November 21, 2011. (APA 1 page 1). He also stated Claimant had an anatomical change of condition in his deposition. (Dr. Merritt Deposition, page 9, lines 3-12). William Edwards, MD, was also deposed and also testified claimant suffered an anatomical worsening of her condition. (Dr. Edwards Deposition, page 13, lines 11-170).

Issue

Did the Hearing Commissioner err in finding claimant sustained a change of condition for the worse pursuant to S. C. Code Ann. Sec. 42-17-90.

ARGUMENT

The Hearing Commissioner did not err in finding Claimant sustained a change of condition for the worse pursuant to section 42-17-90 when the greater weight and preponderance of the evidence demonstrates claimant in fact suffered a change of condition

Defendants assert claimant must provide proof by a preponderance of the evidence that there has been a change of "physical" condition as a result of the original injury in order to establish entitlement to 42-17-90 benefits. Defendants also assert "Claimant has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is 'different.'" A review of the evidence however demonstrates Defendants assertion is not entirely accurate.

After receiving permanent partial disability benefits pursuant to an order dated June 8, 2011, Claimant continued treating with the authorized treating physicians James Merritt, MD, and Bill Edwards, MD. Due to her complaints of increased symptoms and new dermatomal patterns of

symptoms Claimant sought an opinion from Dr. Merritt with regards to a change of condition for the worse. Dr. Merritt wrote a letter in which he stated "I do feel that since she is getting increased pain that the condition has worsened." (APA 1, page 1). In his deposition Dr. Merritt testified Claimant's annular bulge is "probably a little bigger than it was before." (Deposition, page 9, lines 6-9). He then agreed that even though it is only a little bit bigger there was an anatomical difference. (Id. lines 10-12). When asked whether he was stating a change in condition to within a degree of medical certainty, he stated, "I would say there was a change." (Deposition, page 11, lines 3-15).

Claimant was authorized to be evaluated by Dr. Edwards, who likewise stated in deposition Claimant suffered a change of condition for the worse. Dr. Edwards stated to within a degree of medical certainty that the worsening being experienced by the Claimant is an anatomic change in the nerve. (Deposition, page 13, lines 2-17).

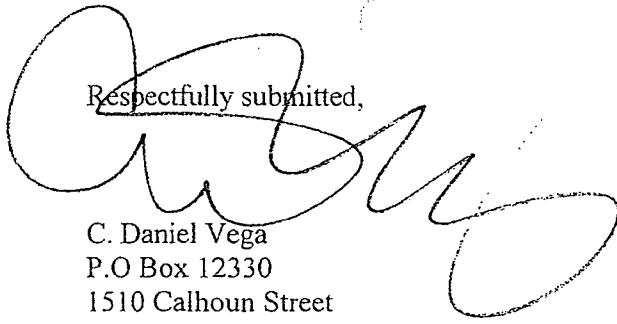
It is also noted that Dr. Edwards refused to characterize the medical findings as purely subjective. He acknowledged both an objective and subjective component but did not change his opinion and continued to opine Claimant suffered a change of condition. (Deposition, page 18, lines 8-14).

Given the above referenced medical evidence the Single Commissioner issued a finding Claimant indeed suffered a change of condition for the worse in accordance with section 42-17-90.

CONCLUSION

Claimant contends the record supports only a finding in favor of Claimant's change of condition for the worse. Claimant respectfully requests the Full Commission affirm the order of the Single Commissioner.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to C. Daniel Vega, is written over the text "Respectfully submitted,".

C. Daniel Vega
P.O Box 12330
1510 Calhoun Street
Columbia, South Carolina 29211
(803) 929-3600

November 1, 2013

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,

RESPONDENT
CLAIMANT,

vs.

Wal-Mart Stores, Inc.,

EMPLOYER,

and

American Home Assurance,

CARRIER,
DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina,
on December 16, 2013 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
_____, 2014

APPEARANCES:

Respondent Paula Russell, Claimant, represented by Daniel
C. Vega, Esquire of Chappell, Smith & Arden in Columbia,
South Carolina.

Defendants/Appellants represented by Johnnie W. Baxley,
III, Esquire of Willson Jones Carter & Baxley, P.A. in Mt.
Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Andrea C. Roche, on February 11, 2013, in Columbia, South Carolina. On August 5, 2013, Commissioner Roche issued the following Order:

In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:

1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
2. Defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.

AND IT IS SO ORDERED!

Within the statutory period, Defendants filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on December 16, 2013, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009 accident at work, error being that the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since the back surgeon, Dr. Edwards,

testified that he could not identify any objective difference between any of claimant's MRIs, and thus, he could not state to a reasonable degree medical certainty that claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, the preponderance of evidence in the record supports a reversal of the Hearing Commissioner's award and finding that Claimant had sustained a compensable change of condition for the worse and was therefore entitled to additional benefits under the SC Workers' Compensation Act.

STATEMENT AND DISCUSSION OF EVIDENCE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The Defendants argue that the medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

The law concerning change of condition claims in South Carolina is well established. Section. 42-17-90 provides, "the Commission may review an award and on that review make an

award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in "physical condition" as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. *Id.* (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. *Id.* at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." *Id.*

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant's November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merritt testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21— page 14, line 1). At the visit in September 2011,

however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24----page 8, lines 4-11). Although Dr. Merritt didn't have the films from the MRIs to compare, he didn't think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines 16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and, her reflexes remain the same (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was

pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

After a lengthy review of the evidence, including the medical records, deposition testimony of both doctors, and the Claimant's testimony at the hearing, we find that Claimant did not meet her burden of proving that she sustained a physical worsening of her condition subsequent to the original hearing on this claim per 42-17-90, and that she is, therefore, not entitled to any additional benefits under the South Carolina Workers' Compensation Act.

In the case at hand, Claimant 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. However, even the Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award. Specifically, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into her right leg before she saw him at her first visit. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010, all of which occurred prior to the original hearing. (Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg was new and different than before, although she could not remember exactly when she "started receiving them" and whether those issues started before or after the original hearing. (Tr. at 9: 11-21).

The objective medical testimony and medical testing certainly does not support Claimant's assertion that she sustained a worsening of her physical condition after the original award. While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Deposition, page 8, lines 13-24). Dr. Edwards did review

and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant's disc protrusion at L5-S1 has been contacting the nerve root and causing irritation throughout the course of her claim; she has not developed any weakness in her muscles innervated by that particular nerve; and, her reflexes have remained the same. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing. We give greater weight to the opinion of Dr. Edwards on these issues 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. The preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2). In 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. (Dr. Edwards Deposition, page 12, lines 24-25; page

13, lines 5-6; page 18, lines 5-8). The evidence in this matter simply does not meet the preponderance of the evidence standard as required by the Act and case law to establish a worsening of Claimant's physical condition occurring after the original award.

For these reasons, we find that the hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.
2. The Claimant worked for Wal-Mart Stores, Inc. and suffered an injury to her back arising out of and in the course and scope of her employment on November 3, 2009.
3. This claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issued on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.
4. Subsequent to the original award, the Claimant filed an application for a change of condition per 42-17-90.
5. Defendants mistakenly filed a Form 15 on this claim, and that issue was adjudicated by

Order of Commissioner Melody James dated September 18, 2012. That Order specifically held all claims of change of condition by Claimant and all defenses by Defendants in abeyance for future determination.

6. We have reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders.

7. We give limited weight to the testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, we find Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award. 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. The lay testimony simply did not carry the burden of proving a compensable change of condition claim.

8. We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts in this case. Among the medical experts, we give the greatest weight to Dr. Edwards' testimony and opinion 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.

9. The medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse. 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.

10. We 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. However, when reviewing the evidence as a whole and giving weight to the various pieces of

evidence, it is our view that the preponderance of the evidence does not establish that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

11. Both Dr. Merritt and Dr. Edwards ultimately testified that was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award.

12. Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. The preponderance of the evidence does not support Claimant's contention that her need for surgery is new or developed after the original award.

13. The preponderance of the evidence shows that Claimant's radiographic condition has not worsened.

14. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

15. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

I. Pursuant to S.C. Code Ann. section 42-17-90, Claimant failed to prove by a

preponderance of the evidence that Claimant suffered a change of condition for the worse.

2. Pursuant to section 42-15-60, Claimant is not entitled to additional medical care.

3. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.

4. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

5. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Claimant failed to prove by a preponderance of the evidence in the record that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

IT IS FURTHER ORDERED that as a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

IT IS FURTHER ORDERED that notwithstanding #14 above, per the previous Order

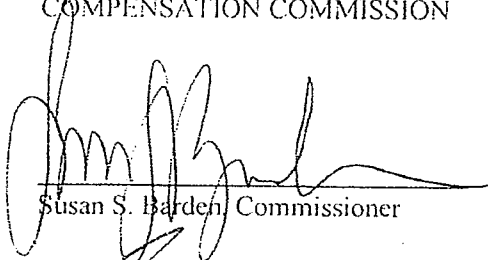
of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

IT IS FURTHER ORDERED that Claimant application for additional benefits under the South Carolina Workers' Compensation Act for a worsening of condition per 42-17-90 is hereby denied and dismissed with prejudice.

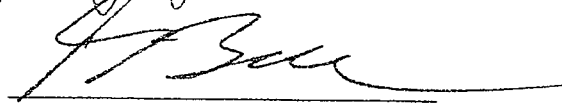
AND IT IS SO ORDERED.

FULL REVERSAL
UNANIMOUS DECISION

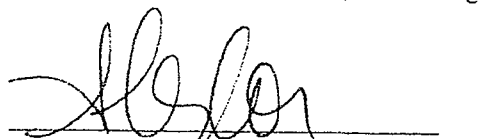
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Susan S. Barden, Commissioner



T. Scott Beck, Commissioner, concurring



Aisha Taylor, Commissioner, concurring

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on January 30, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

WCC File No: 0917785

Paula Russell, Appellant,

v.

Walmart Associates
Incorporated and Illinois
National Insurance Company, Respondents.

NOTICE OF APPEAL

Paula Russell appeals the decision of the Workers' Compensation Commission dated January 30, 2014. Appellant received an electronic copy of this decision on January 30, 2014.

Pursuant to S.C. Code Ann. section 42-17-60, Appellant hereby petitions this Court for review based on the following grounds for appeal and alleged errors of law:

1. Did the Full Commission err in determining Claimant did not suffer a change of condition for the worse by relying on a standard requiring an "objective" change of condition, where no such standard is required by law or statute?
2. Did the Full Commission err in its conclusion a change of condition had not occurred because no "objective" evidence supported such a finding, when the greater weight and preponderance of the evidence demonstrates Claimant suffered a change of condition for the worse?
3. Did the Full Commission err in determining Claimant did not suffer a change of condition for the worse where both authorized treating physicians testified under oath that a change of condition occurred; and where no contrary opinion exists in the record?

4. Did the Full Commission err in determining Claimant's statements were "self-serving" and "conclusory," when defendants stipulated Claimant was credible, and where the Full Commission had no evidence and made no findings that the Claimant lacked credibility?

Respectfully Submitted,

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February 28, 2014

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2014-000454

Paula Russell,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF APPELLANT

Wednesday, June 25, 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*, 386 S.C. 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. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). At this point, Russell had been working at Wal-Mart for 13 years, the preceding 4 as an assistant store manager. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). Russell started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (2-11-2013 H.T., p. 27-28). Wal-Mart recognized her skills and she moved to North Carolina for two years to work at a store that was having personnel problems. (2-11-2013 H.T., p. 28-29). 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. (2-11-2013 H.T., p. 29, ll. 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. (2-11-2013 H.T., p. 29-30).

Russell was 3 months pregnant at the time of her injury, and thus was treated very conservatively for the remainder of her pregnancy term. (June 8, 2011 Order of Commissioner Wilkerson, p. 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. (June 8, 2011 Order of Commissioner Wilkerson, 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. (June 8, 2011 Order of Commissioner Wilkerson, p. 4). She hoped to return to her job and eventually become a full store manager. (June 8, 2011 Order of Commissioner Wilkerson, 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." (June 8, 2011 Order of Commissioner Wilkerson, p. 4).

There was no mention of any leg or buttock pain in this Order. (June 8, 2011 Order of Commissioner Wilkerson, p. 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. (June 8, 2011 Order of Commissioner Wilkerson, p. 5-6). This Order was never appealed and pursuant

to § 42-17-60¹ 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.

In September or October of 2011, Russell began experiencing more intense back pain, as well as severe leg and buttock pain, of a type 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." (APA, p. 13). 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." (APA, p. 13). 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.

(APA, p. 1) (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

¹ 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).

leg into the calf.” (APA, p. 2). He reviewed her 2011 MRI and concluded that she had a disc protrusion at L5-S1 with contact on the nerve root. (APA, p. 2). His assessment was a “[l]ow back strain with ruptured disc L5-S1 and continued symptoms in her right leg.” (APA, p. 2). He recommended she stay out of work because Wal-Mart had no light duty for her. (APA, p. 2).

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. (2-11-2013 H.T., p. 13-14). Russell thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (2-11-2013 H.T., p. 13-14). 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. (2-11-2013 H.T., p. 14). She was told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (2-11-2013 H.T., p. 14-15). Russell ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (12-9-2011 Form 50).

She was next seen by Dr. William Edwards of Pee Dee Orthopaedic Associates for an IME. (APA, p. 4). In the history, Dr. Edwards stated that Russell’s 2009 pain involved central low back pain “without any radicular discomfort at that time.” (APA, p. 4). 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.” (APA, p. 4). He noted that since a 2010 MRI performed at his office there were “more significant radicular symptoms in the right buttock and leg.” (APA, p. 4). 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.

(APA, p. 5).

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." (APA, p. 3). 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. (APA, p. 7-9). Dr. Edwards clearly recommended surgery at this point, and that it may serve to provide a "measure of improvement" in her radicular pain. (APA, p. 9).

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." (Deposition of Dr. Merritt, p.8, ll. 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" (Deposition of Dr. Merritt, p. 9, ll. 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." (Deposition of Dr. Merritt, p. 15, ll. 19-24). He further felt that this "little bit" of disc protrusion constituted an anatomical difference in Russell's condition. (Deposition of Dr. Merritt, p. 9, ll. 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." (Deposition of Dr. Merritt, p. 16).

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." (Deposition of Dr. Merritt, p. 18, ll. 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." (Deposition of Dr. Merritt, p. 7, ll. 9-10, 12-15). "The leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, ll. 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." (Deposition of Dr. Merritt, p. 7, ll. 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." (Deposition of Dr. Merritt, p. 11). 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." (Deposition of Dr. Merritt, p.23, ll. 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. (Deposition of Dr. Merritt, p. 13-14, 19, 21). 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." (Deposition of Dr. Merritt, p. 19-20).

Dr. Edwards was deposed on September 13, 2012. (Deposition of Dr. Edwards, p. 1). 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.

(Deposition of Dr. Edwards, p. 6, ll. 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.

(Deposition of Dr. Edwards, p. 7, ll. 2-10). He stated that all three MRIs are fairly consistent, and they all appear to show a "nerve root compression." (Deposition of Dr. Edwards, p. 9).

He stated that Russell's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (Deposition of Dr. Edwards, p. 4-5). 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." (Deposition of Dr. Edwards, p. 8-9). Dr. Edwards even stated that Russell's "fairly significant radiculopathy" could be caused "without having pressure on . . . that nerve." (Deposition of Dr. Edwards, p. 11, ll. 22-25). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (Deposition of Dr. Edwards, p. 10, ll. 15-25).

Dr. Edwards agreed with Dr. Merritt's conclusion that the condition had become "chronic" because it had lasted so long. (Deposition of Dr. Edwards, p. 12, ll. 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.” (Deposition of Dr. Edwards, p. 12, ll. 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.” (Deposition of Dr. Edwards, p. 13, ll. 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.” (Deposition of Dr. Edwards, p. 13, ll. 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?

(Deposition of Dr. Edwards, p. 17-18).

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.

(Deposition of Dr. Edwards, p. 18, ll. 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." (Deposition of Dr. Edwards, p. 20-21). 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." (Deposition of Dr. Edwards, p. 21, ll. 7-11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (2-11-2013 H.T., p. 1). 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." (2-11-2013 H.T., p. 4, ll. 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." (2-11-2013 H.T., p. 6). 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." (2-11-2013 H.T., p. 5-6).

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." (2-11-2013 H.T., p. 8, ll. 22-24). She began feeling pain in "especially the leg - -

the tingling in my leg," and indicated unequivocally that these were "new symptoms." (2-11-2013 H.T., p. 9, ll. 2-3, ll. 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. (2-11-2013 H.T., p. 9, ll. 19-21; p. 10, ll. 19-22). When asked if her condition had changed since the initial disability determination, she said "Yes, it has." (2-11-2013 H.T., p. 15, l. 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." (2-11-2013 H.T., p. 16, ll. 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. (2-11-2013 H.T., p. 17, ll. 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." (2-11-2013 H.T., p. 17-18). She testified that she is now having "pain into [her] left leg now as well." (2-11-2013 H.T., p. 19, ll. 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.

(2-11-2013 H.T., p. 20, ll. 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

(2-11-2013 H.T., p. 20, ll. 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. (2-11-2013 H.T., p. 21-23). 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. (2-11-2013 H.T., p. 24). 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. (2-11-2013 H.T., p. 31, ll. 1-6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (8-5-2013 D&O, p. 1-7). 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." (8-5-2013 D&O, p. 3). 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." (8-5-2013 D&O, p. 3). She also found "Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible." (8-5-2013 D&O, p. 4). 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. (8-5-2013 D&O, p. 5). 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." (8-5-2013 D&O, p. 6).

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. (10-17-2013 Brief, p. 2). Respondents also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (10-17-2013 Brief, p. 3). 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. (10-17-2013 Brief, p. 3).

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." (10-17-2013 Brief, p. 4). 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." (10-17-2013 Brief, p. 6).

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." (12-16-2013 H.T., p. 4, ll. 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." (12-16-2013 H.T., p. 5, ll. 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. (12-16-2013 H.T., p. 5, ll. 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. (12-16-2013 H.T., p. 5-6).

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." (12-16-2013 H.T., p. 7, ll. 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.*" (12-16-2013 H.T., p. 8, ll. 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.*" (12-16-2013 H.T., p. 8, ll. 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. (12-16-2013 H.T., p. 9-10).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (1-30-2014 D&O, p. 1). 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. (1-30-2014 D&O, p. 4-5). 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." (1-30-2014 D&O, p. 5). 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." (1-30-2014 D&O, p. 5).

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." (1-30-2014 D&O, p. 6). 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. (1-30-2014 D&O, p. 6). 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." (1-30-2014 D&O, p. 7).

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.

(1-30-2014 D&O, p. 9). 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." (1-30-2014 D&O, p. 9).

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." (1-30-2014 D&O, p. 9) (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. (1-30-2014 D&O, p. 9-10). 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. (1-30-2014 D&O, p. 11-12). 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 evidence² 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

² 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 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 is missing. 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. (Deposition of Dr. Merritt, p. 15-19).

In Dr. Edwards' deposition, counsel for the Respondents attempted to bait Dr. Edwards into desired answer, that no physical change had occurred, and actually asked the doctor, a man with no formal legal training, to comment on the South Carolina "case law and statute." (Deposition of Dr. Edwards, p. 17-18). 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. (Deposition of Dr. Edwards, p. 18). 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. (2-11-2013 H.T., p. 6). 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 not objective and self-serving, and that Dr. Edwards' opinion had a "subjective component" to it. (10-17-2013 Brief, p. 3, 4, 6). 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, it 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." (Deposition of Dr. Merritt, p. 7, ll. 9-10, 12-15). He added that the "leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, ll. 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." (Deposition of Dr. Merritt, p. 11). 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. (Deposition of Dr. Merritt, p.23, ll. 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." (Deposition of Dr. Edwards, p. 7). 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." (Deposition of Dr. Edwards, p. 12). Dr. Edwards specifically said that he had "no reason to doubt [the history given by Russell]." (Deposition of Dr. Edwards, p. 13). 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." (Deposition of Dr. Edwards, p. 18).

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. (1-30-2014 D&O, p. 4-5). 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. (June 8, 2011 Order of Commissioner Wilkerson, p. 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. (1-30-2014 D&O, p. 5-7). 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*. (1-30-2014 D&O, p. 2).

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. (1-30-2014 D&O, p. 4). Had Russell reached Maximum Medical Improvement (hereinafter "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. (2-11-2013 H.T., p. 20, ll. 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. (8-5-2013 D&O, p. 2). 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. (2-11-2013 H.T., p. 17-21). 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. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). (2-11-2013 H.T., p. 27-28). 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. (2-11-2013 H.T., p. 28-30). 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 Wal-Mart.

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." (1-30-2014 D&O, p. 6). 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." 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 2011³, 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. (1-30-2014 D&O, p. 2). Dr. Edwards stated he had "no reason to doubt" Russell's opinion that her condition was worsening. (Deposition of Dr. Edwards, p. 13, ll. 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. (Deposition of Dr. Edwards, p. 18, ll. 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?

³ 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. (2-11-2013 H.T., p. 15, ll. 18-20).

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.*" (12-16-2013 H.T., p. 8, ll. 5-9) (emphasis added). In 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.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2014-000454

Paula Russell,..... Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE APPELLATE PANEL APPLY THE CORRECT LEGAL STANDARD AND CORRECTLY DETERMINE THE CLAIMANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD?
2. DOES SUBSTANTIAL EVIDENCE SUPPORT THE COMMISSION'S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE?

STATEMENT OF THE CASE

On November 3, 2009, Appellant sustained an admitted injury to her back arising out of and in the course of her employment with Wal-Mart. A hearing was held on April 13, 2011, and on June 8, 2011, the Commission ordered that Appellant reached maximum medical improvement for her work-related injury on February 2, 2011, and was entitled to a 7% permanent partial disability to the back. The Commission further ordered that Appellant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by treating provider Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability.

On December 9, 2011, Appellant filed a Form 50 claiming she was experiencing a change of condition for the worse with allegations of new and increased symptoms including radicular pain in her legs. A hearing on the change of condition claim was held on February 11, 2013, before Commissioner Andrea Roche who found on August 5, 2013, that Appellant suffered a change of condition for the worse and ordered Respondents to provide Appellant with medical care and attention for the change of condition and temporary total disability benefits starting on December 1, 2011 to the present.

The August 5, 2013, Order was timely appealed by Respondents and a hearing was held before the Appellate Panel (Full Commission) on December 16, 2013. The Appellate Panel issued its Order on January 30, 2014, finding Appellant failed to prove by a preponderance of the evidence in the record that she sustained a change of condition for the worse. The Order further states that the preponderance of the evidence does not prove a worsening of Appellant's physical condition as a result of the original injury and occurring after the first award. The Commission found Appellant is ineligible for any further benefits under the South Carolina Worker's Compensation Act. Notwithstanding this outcome, the Commission found Appellant is still entitled to ongoing anti-inflammatory medication as per the original order in the case. In making this ruling, the Commission considered all of the evidence as a whole but gave greater weight to the medical records, the diagnostic tests, and the testimony of the medical experts in reaching a decision. Among the medical experts, the Appellate Panel gave the greatest weight to spine surgeon Dr. Edwards' testimony. In contrast, limited weight was given by the Commission to the lay testimony of the Claimant. In sum, the Commission found the medical records, diagnostic tests, and medical opinions did not support a *physical* change of condition for the worse; instead, the Appellate Panel concluded the preponderance of the evidence showed no objective difference between the Claimant's MRI scan after the original award and the MRI scan before the original award.

Appellant subsequently served her notice of Appeal on February 28, 2013. Respondents now timely submit this brief arguing the Appellate Panel's Decision and Order should be upheld as a matter of law.

STATEMENT OF THE FACTS

After the original Hearing and Decision of the Commission for Appellant's November 3, 2009, back claim, Appellant alleges she experienced new and increased symptoms including radiating pain into her legs requiring additional medical treatment to include surgery by Dr. Edwards. (Roche Hearing Tr. at 4: 3-6). Specifically, Appellant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011 original Hearing and June 8, 2011 Decision and Order of the Commission with alleged new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). When Dr. Merritt was deposed, however, he admitted he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21— page 14, line 1). In September 2011, Dr. Merritt ordered an MRI to compare to Appellant's prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24— page 8, lines 4-11). Although Dr. Merritt did not have the films from the MRIs to compare, he did not think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

~~Dr. Merritt sent Appellant for further evaluation with spine surgeon Dr. William S.~~
Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition,

page 5, lines 16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies, that they looked substantially the same to him, and that there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, he opined Appellant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Appellant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root, that Appellant does not have any weakness in her muscles innervated by that particular nerve, and that Appellant's reflexes remain the same. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions of the Workers’ Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 730 S.E.2d 296, 398 S.C. 418 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, “[i]n workers’ compensation cases, the Appellate Panel is the ultimate fact finder.” Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers’ compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly

from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

ARGUMENT

I. THE APPELLATE PANEL APPLIED THE APPROPRIATE LEGAL STANDARD AND CORRECTLY DETERMINED APPELLANT FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE IN THE RECORD THAT SHE SUSTAINED A WORSENING OF HER PHYSICAL CONDITION AS A RESULT OF THE ORIGINAL INJURY AND OCCURRING AFTER THE FIRST AWARD.

The record and the Decision and Order show that the Appellate Panel considered the record as a whole and reached a reasonable conclusion based on all of the evidence submitted by both parties. Contrary to the arguments of Appellant, they did not apply the wrong legal standard or fail to consider any evidence in this matter.

S.C. Code Ann. § 42-17-90 provides, “the Commission may review an award and on that review make an award . . . on proof *by a preponderance of the evidence* that there has been a change of condition caused by the original injury, after the last payment of compensation.” (emphasis added). In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in “*physical condition*” as a result of the original injury and occurring after the first award. (emphasis added).

~~To justify a modification of an award based on a change of condition, therefore, the claimant~~
bears the burden of proving the actual change in condition and its causal connection to the

original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1961)). The determination of whether a claimant experiences a change of condition is a question for the fact finder and must be affirmed if substantial evidence supports the Full Commission's finding. Clark v. Aiken County Government, 620 S.E.2d 99 (S.C. Ct. App. 2005) (citing Gattis, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 415 S.E.2d 841, 843 (S.C. Ct. App. 1992)). Further, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Bentley v. Spartanburg County, 730 S.E.2d 296 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)).

- a. **The Commission correctly reviewed the record as a whole and in its discretion determined Claimant did not meet her burden of proving a change of condition by a preponderance of the evidence.**

As indicated by the extensive case law cited above, the Claimant must prove by a preponderance of the evidence that there has been a change in the physical condition caused by the original injury after the last payment of compensation. It is the duty and obligation of the Commission, in its role as fact finder, to consider all of the evidence presented and, in reviewing the record as a whole, to use its discretion as to the weight given to the evidence submitted in forming findings and conclusions based on that evidence. This is precisely what the Appellate Panel did in this matter.

The Commission correctly applied this preponderance of the evidence standard and properly weighed the various evidence presented, as supported by various Findings of Fact in the January 30, 2014 Appellate Panel Order. Specifically, Findings of Fact 7 on page 9 states, "[w]e give limited weight to the testimony of the Claimant as it is conclusory and self-serving . . . when considering all of the evidence as a whole, we find Claimant's lay testimony about her past and ongoing complaints does not carry the burden o[f] proving a worsening of condition after the

original award.” Further, Findings of Fact 8 on page 9 says, “[w]e give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts in this case . . . we give the greatest weight to Dr. Edwards’ testimony and opinion 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.” Most importantly, the Commission specifically held in Findings of Fact 10, “[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 . . . [h]owever, when reviewing the evidence as a whole and giving weight to the various pieces of evidence, it is our view that the preponderance of the evidence does not establish that Claimant has sustained a change of condition for the worse.” (Appellate Panel Order, page 9).

While the Commission did note the lack of differences between the 2010 and the 2011/2012 MRIs in the January 30, 2014, Order, the Commission also cited to deposition testimony of the medical providers and testimony of the Claimant. Specifically, the Order references testimony from Dr. Edwards stating Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered because Claimant was pregnant. (Appellate Panel Order, page 5). The Order further cites to testimony from Dr. Edwards that Claimant had not developed any weakness in her muscles and that her reflexes have remained the same. (Appellate Panel Order, page 7). The Commission also referenced testimony from Dr. Merritt that Appellant had some complaints of pain going into her right leg before she saw him at her first visit as well as testimony from Claimant that she believed the pain in her right leg was new and different than before. (Appellate Panel Order, page 6).

The Appellate Panel fulfilled its obligation to consider and weigh all of the presented

evidence in order to reach a determination as to whether the Claimant's legal burden had been met. The clear language of the Order indicates that all evidence was considered and which evidence was given more or less weight and the reasons therefore.

b. Appellant's argument that the Commission applied the wrong standard when evaluating Appellant's change of condition claim is unsubstantiated by the record.

Appellant now contends the Commission erred by using the wrong standard when evaluating Appellant's change of condition by requiring objective evidence of the change of condition. This argument is simply invalid. At no point in the Appellate Panel's Order does the Appellate Panel include a finding which would imply or indicate that only objective evidence was being considered in reaching a conclusion. Rather, the Commission clearly lays out that they considered all of the evidence as a whole. The Commission considered the medical reports, the diagnostic tests, the testimony of Dr. Merritt, the testimony of Dr. Edwards, and the testimony of the Claimant. The Commission did not prohibit, ignore, or disallow evidence that was not objective evidence. In fact, the plain language of the Commission's Order makes it extremely clear that the Commission considered and weighed all of the evidence.

Appellant has asserted that this change of condition claim was denied for the single reason that there was no definitive difference between the MRI scans before and after the original award. This argument is disingenuous. The Appellate Panel notes in Findings of Fact #6 that they reviewed all of the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders. (Appellate Panel Order, page 9). The Appellate Panel then details, in Findings of Fact #7-14 all categories of the evidence presented, the weight given to the evidence, and their reasons therefore. (Appellate Panel Order pages 9-10). At no point in the Order does the Appellate Panel indicate

or imply that the change of condition claim was being denied for a single reason, and this assertion by Appellant is without merit.

Appellant has argued that Claimant's testimony and complaints were ignored, but that is simply not the case. The Appellate Panel considered and weighed that evidence, and they found that the Claimant's lay testimony about her past and ongoing complaints did not carry the burden of proving a worsening of condition and that greater weight is given to the medical records, the diagnostic tests, and the testimony of the medical experts. The Commission did not prohibit or disallow lay testimony by the Claimant; instead, the Commission reviewed and considered Claimant's testimony but gave her statements less weight than the expert testimony of the medical providers.

The Appellant also repeatedly asserts that Respondents have argued the wrong legal standard. This argument is without merit for two reasons. First, it is irrelevant to a judicial review as to which legal standard was argued by Respondents; the only relevant standard is the one applied by the Appellate Panel and in this case, the evidence is abundantly clear that the correct legal and evidentiary standards were applied. Second, the Appellant has mischaracterized the Respondents' argument. In the case at hand, Respondents timely submitted a brief to the Appellate Panel discussing the applicable case law on change of condition claims in South Carolina in support of their argument that Appellant 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. Likewise, at oral argument, Respondents argued to the Appellate Panel that while the Claimant's ~~testimony is indeed one factor to be considered, the most important factor is the doctor's~~ testimony about the actual physical condition of the back. (Appellate Panel Hearing Transcript,

page 9, line 19- page 10, line 1). Respondents conceded at oral argument that all testimony must be considered but they have also repeatedly argued that there must be a “physical change of condition for the worse” which is consistent with long-standing case law. (Appellate Panel Hearing Transcript, page 8).

The Appellant repeatedly asserts in her Brief that Respondent argued that objective evidence should be relied upon as opposed to subjective testimony. The Appellant cites this as proof of application of the wrong legal standard. It is not. It is simply argument by the Respondents over the weight given to testimony. The Respondents have argued from the beginning of the claim, and still argue at this time, that objective evidence should be given more weight than subjective evidence. It has never been argued that subjective evidence cannot be considered, nor has it been argued that there must be objective proof of a change of condition. The Respondents have simply argued that based upon the particular circumstances present in this case, the objective evidence and the testimony of the doctors based upon that objective evidence should be given more weight than the subjective complaints of claimant. The Appellate Panel decided that the medical records, diagnostic testing, and medical opinions should be afforded more weight on this particular claim, which is well within their discretion to determine.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION’S FINDING THAT APPELLANT DID NOT SUSTAIN A PHYSICAL CHANGE OF CONDITION FOR THE WORSE.

This Court should uphold the decision of the Appellate Panel because substantial evidence supports the Commission’s finding that Appellant did not sustain a physical change of condition for the worse. In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in “physical

condition” as a result of the original injury and occurring after the first award. (emphasis added). To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a “change in condition.” Id. Further, where one relies upon expert medical testimony to show a causal connection between an injury and a subsequent condition, the testimony must meet the “most probably” rule and it is not sufficient under our case law to establish the condition in question “possibly”, “could have”, or “might have” resulted from the injury. Gambrell v. Burleson, 165 S.E.2d 622, 623 (S.C. 1969) (citing Cross v. Concrete Materials, 114 S.E.2d 828 (S.C. 1960)). The determination of whether a claimant experiences a change of condition is a question for the fact finder and must be affirmed if substantial evidence supports the Full Commission’s finding. Clark v. Aiken County Government, 620 S.E.2d 99, 366 S.C. 102 (S.C. App. 2005) (citing Gattis, 353 S.C. at 107, 576 S.E.2d at 194; Solomon v. W.B. Easton, Inc., 415 S.E.2d 841, 843 (S.C. Ct. App. 1992)).

In the case at hand, Appellant contends that she began to experience new complaints of pain in her legs after the June 8, 2011, Order issued by the single Commissioner placing her at maximum medical improvement and assigning a seven percent impairment rating to her back. On May 23, 2012, however, Claimant’s treating provider Dr. Merritt testified that Claimant had some complaints of pain going into the leg before she returned to see him in September of 2011. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the

hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (Roche Hearing Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she “started receiving them.” (Roche Hearing Tr. at 9: 11-21).

While a new MRI was ordered by Claimant’s treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case and testified that he didn’t think there was a major change . . . “[n]othing I felt was extremely remarkable”. (Dr. Merritt Deposition, page 8, lines 13-24). He then testified on cross examination that he would defer to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans from 2010 to 2011, agreed that Dr. Edwards probably has more experience in evaluating spine MRIs and would be more of an expert on spine MRIs than he was, and ultimately agreed with Dr. Edwards’ opinion there was no change in the MRI scan before and after the first hearing. (Dr. Merritt Deposition, page 18, lines 3-19).

As indicated above, Dr. Edwards did review and compare the MRI studies from 2010 and 2011 after which he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant’s disc protrusion at L5-S1 has been contacting the nerve root and causing irritation throughout the course of her claim; she has not developed any weakness in her muscles innervated by that particular nerve; and, her reflexes have remained the same. (Dr. Edwards

Deposition, page 16, lines 17-21; page 17, lines 9-12).

The substantial evidence in the record, including the medical records, the diagnostic testing, and the medical testimony, support the finding of the Appellate Panel that Appellant did not sustain a physical change of condition after the original award.. The expert testimony of both Dr. Merritt and Dr. Edwards, the medical records, and the diagnostic tests constitute substantial evidence to support the finding that Appellant did not sustain a change of condition for the worse.

Appellant has argued the wrong standard on this issue. On page 27 of her Brief, the Appellant states that the substantial evidence supports a finding of a change of condition. That is not the inquiry of this Court. The legal inquiry and review of this Court is limited to whether there is substantial evidence to support the findings of the Appellate Panel, not whether there is substantial evidence to support opposite findings. In this appeal, the only inquiry is whether there is substantial evidence to support the findings of the Appellate Panel, and there is substantial evidence in this matter.

Appellant also alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Roche Hearing Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2). Specifically, he testified, “[w]e certainly try not to operate on pregnant people if we can get by without it.” (Dr. Edwards Deposition, page 21, lines 1-2). He also opined that surgery for this type of problem is not something that “has” to be done the majority of the time; rather, it’s something that is offered to

patients in an effort to try to give them some relief for their pain. (Dr. Edwards Deposition, page 14, lines 4-11). Based upon Dr. Edwards' testimony, Claimant's current condition is not new but is merely the same problem that she had before the original award.

Appellant also alleges that Dr. Edwards came to the conclusion that Appellant's "nerve has worsened." When reading the actual complete testimony of Dr. Edwards, however, he actually states, "the worsening of [Appellant's] symptoms, anatomically, could be that there is now a chronic change in that nerve that makes it more painful or symptomatic." (Dr. Edwards Deposition, page 13, lines 11-14) (emphasis added). When questioned on whether irritation of a nerve that continues over time would cause the nerve to worsen, Dr. Edwards testified, "[i]t can". (Dr. Edwards Deposition Testimony, page 12, lines 6-10). He then testified that radiographically Claimant's condition was not worsening and that her alleged "worsening" was predominantly a subjective or symptomatic worsening. (Dr. Edwards Deposition, page 12, line 24-page 13, line 6). While Dr. Edwards also opined that chemicals inside a disc can also cause nerve root irritation if those leak out, he could not state to a reasonable degree of medical certainty that Appellant has had chemical leaking affecting the nerve root and even stated that "there's just no way to prove that one way or the other". (Deposition of Dr. Edwards, page 18, line 15-page 19, line 14). The Appellate Panel declined to base its decision on evidence from a doctor that something "could" be a cause especially where the doctor conceded that he could not offer his opinion to a reasonable degree of medical certainty.

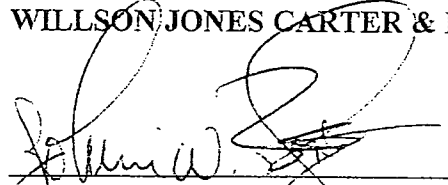
Finally, Appellant argues about the weight given to claimant's testimony and about the credibility determinations as to her testimony made by the Appellate Panel. As asserted fully above, it has long been held by our courts that the Appellate Panel is empowered to adjudicate credibility of witnesses and weight of evidence, and the courts will not disturb those judgments.

CONCLUSION

Based on the foregoing, this Court should affirm the Appellate Panel Decision and Order.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

A handwritten signature in black ink, appearing to read "Johnnie W. Baxley, III", is written over a horizontal line.

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Attorneys for Respondents

Date: July 25, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2014-000454

Paula Russell, ... Appellant,

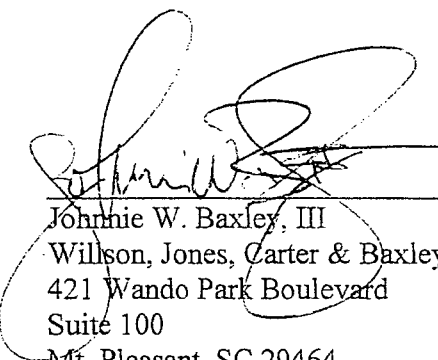
v.

Wal-mart Stores, Inc., and American Home Assurance, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on the Appellant by depositing a copy of the document in the United States mail, first class postage prepaid, on July 25, 2014, Paula Russell's counsels of record, William A. Jordan, III, Esquire, 622 Wade Hampton Boulevard, Greenville, SC 29609; and C. Daniel Vega, Esquire, 1510 Calhoun Street, Columbia, SC 29201.

July 25, 2014



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Russell v. Wal-Mart Stores, Inc.

Court of Appeals of South Carolina

October 20, 2015, Heard; January 20, 2016, Filed

Opinion No. 5376

Reporter

415 S.C. 395 *: 782 S.E.2d 753 **: 2016 S.C. App. LEXIS 3 ***

Paula Russell, Appellant, v. Wal-Mart Stores, Inc., and American Home Assurance, Respondents.

Subsequent History: Rehearing denied by Russell v. Wal-Mart Stores, 2016 S.C. App. LEXIS 42 (S.C. Ct. App., Mar. 24, 2016)

Prior History: [***1] Appeal From The Workers' Compensation Commission. Appellate Case No. 2014-000454.

Disposition: REVERSED AND REMANDED.

Counsel: C. Daniel Vega, of Chappell Smith & Arden, of Columbia, and William Ashley Jordan, III, of Jordan Law Center, LLC, of Greenville, both for Appellant.

Johnnie W. Baxley, III, of Willson Jones Carter & Baxley, P.A., of Mount Pleasant, for Respondents.

Judges: SHORT, J. GEATHERS and MCDONALD, JJ., concur.

Opinion by: SHORT

Opinion

[*396] [**754] **SHORT, J.:** In this workers' compensation action against Wal-Mart Stores, Inc. and American Home Assurance (Wal-Mart), Paula Russell appeals, arguing the South Carolina Workers' Compensation [*397] Commission erred in (1) requiring a change of condition to be established by objective evidence; (2) ruling substantial evidence existed to deny a change of condition; and (3) finding Russell's statements were self-serving and conclusory. We reverse and remand.

BACKGROUND FACTS

In 2009, Russell was employed by Wal-Mart as an assistant store manager and had been an employee for more than ten years. On November 3, 2009, she was lifting something in the course of her employment and hurt her back and pelvis. Because she was pregnant at the time, her treatment did not include diagnostic testing and was very conservative. [***2] After her pregnancy, she had an MRI scan and was treated with medication, exercises, and an injection. At the time, her treating doctor, Dr. James O. Merritt, IV, determined no surgery was required.

Russell continued to work at Wal-Mart with a heavy-lifting (over thirty pounds) restriction. The medical records indicated Russell was diagnosed with back strain and had degenerative disc disease at L5-S1. By single commissioner order filed June 8, 2011, Russell was found to have reached maximum medical improvement (MMI) on February 2, 2011, and was awarded seven percent permanent partial disability. The award also provided for "ongoing anti-inflammatory medication . . . as long as such medication is causally related to her work accident and tends to lessen her period of disability."

[**755] On December 9, 2011, Russell filed a Form 50, alleging a change of condition for the worse to her back requiring additional medical treatment, including surgery. After a hearing on February 11, 2013, the single commissioner noted Russell testified she experienced new symptoms, including pain radiating down into her legs and shaking; she found her hour-long

drive to and from work difficult; she requested to be [***3] transferred to a Wal-Mart closer to home; and in December 2011, Wal-Mart fired her rather than honoring her request. Finding Russell's testimony to be credible and relying on the testimony of Drs. Merritt and William S. Edwards, the commissioner found Russell suffered a change of condition and ordered Wal-Mart to provide medical care and temporary total disability benefits.

[*398] After a hearing, the full commission (the Commission) reversed the single commissioner. The Commission gave "limited weight to the testimony of [Russell] as it is conclusory and self-serving." The Commission found Russell was unable to establish (1) she suffered any new complaints; (2) when her condition worsened; and (3) that her need for surgery was new or occurred after the original award.

Although the Commission stated it gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts[.]" the Commission concluded, "[t]he 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." Thus, the Commission denied Russell's claim for additional benefits. This appeal [***4] followed.

III. STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Commission. *Carolinas Recycling Grp. v. S.C. Second Injury Fund*, 398 S.C. 480, 482, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights 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." See *S.C. Code Ann. § 1-23-380(5)(e)* (Supp. 2015).

LAW/ANALYSIS

I. Objective Evidence

Russell argues the Commission erred in requiring a change of condition to be established by objective evidence. We agree.

Section 42-17-90(A) of the South Carolina Code permits the review of a previous compensation award "on proof by a preponderance of the evidence 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)* [*399] (2015). "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award." *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003). "Generally, an appeal of a workers' [***5] compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter." *Id.* at 109, 576 S.E.2d at 195 (citation omitted). "The determination of whether a claimant experiences a change of condition is a question for the fact finder." *Id.* at 107, 576 S.E.2d at 194.

We recognize there is no requirement in the Workers' Compensation Act (the Act) that the evidence relied upon by the Commission be either subjective or objective. The appellate courts have affirmed awards based solely on objective evidence and awards based solely on subjective evidence. See *id.*, 353 S.C. at 110, 576 S.E.2d at 196 (affirming the Commission's finding, which was based in part on updated diagnostic tests); *Robbins v. Walgreens & Broadspire Servs., Inc.*, 375 S.C. 259, 265-66, 652 S.E.2d 90, 94 (Ct. App. 2007) (affirming the Commission's denial of a claim for change of condition where medical tests performed both before and after the [***756] settlement of the claim showed the same condition despite claimant's continuing pain); *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23-24, 716 S.E.2d 123, 126-27 (Ct. App. 2011) (explaining the Commission may consider lay and medical evidence and disregard medical evidence if the record contains other competent evidence, and reiterating the appellate court does not balance objective against subjective findings of medical witnesses, [***6] or weigh the testimony of one witness against that of another, in reviewing the Commission's findings); see

also *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999) (explaining the Commission has discretion to weigh and consider all evidence, both lay and expert, when determining causation); *Ballenger v. S. Worsted Corp.*, 209 S.C. 463, 467, 40 S.E.2d 681, 682-83 (1946) (finding despite doctor's testimony that there was not a connection with the accident that caused almost boiling dye to fly in claimant's face and eyes and his subsequent eye problems, lay testimony of claimant's good vision before the accident was sufficient to support an award).

[*400] We further recognize the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence. Rather, the order states the Commission "reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders." However, the hearing before the Commission and the Commission's order make it clear the Commission exclusively relied on the MRIs in finding Russell failed to objectively prove her claim. At the hearing, Wal-Mart argued, "This is really an issue over the doctors' testimony and whether or not there's been an objective physical change of condition for the [***7] worse." (Emphasis added.). Although the order stated the Commission gave "more weight to the medical records, the diagnostic tests, and the testimony of the medical experts" and they did "not support a physical change of condition for the worse[.]" the order also concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between" the MRIs. The Commission found both doctors "ultimately testified that [there] was no objective or significant radiographical difference to be noted in the MRI scans[.]" and "[t]he preponderance of the evidence shows that [Russell's] radiographic condition has not worsened." However, the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. He based his opinion on the MRIs and "in part on her subjective complaints." Dr. Edwards testified to a reasonable degree of medical certainty there was a chronic change in Russell's nerve, making it more painful or more symptomatic.

We find the Commission relied exclusively on objective [***8] evidence, the MRIs, in denying Russell's claim. Mindful of our standard of review of factual finding, we nevertheless conclude the Commission erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence. See *Grant v. Gram Textiles*, 372 S.C. 196, 200-01, 641 S.E.2d 869, 871 (2007) (stating an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but it may reverse where the decision is affected by an error of law or is unsupported by substantial [*401] evidence). The Act provides, "the [C]ommission may . . . make an award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury . . ." *S.C. Code Ann. § 42-17-90(A)* (2015). There is no requirement in the Act that a claimant prove the change of condition by objective evidence. Thus, we reverse and remand to the Commission.

II. Remaining Issues

Russell argues the Commission erred in finding she did not suffer a change of condition and in finding her statements were self-serving and conclusory. Because we find the Commission erred in requiring a change of condition to be established by objective evidence and reverse and remand on that issue, [***9] the court need not consider Stewart's remaining issues. See *Futch v. McAllister*, [**757] *Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (finding it unnecessary to remaining issues when resolution of a prior issue was dispositive).

CONCLUSION

Accordingly, we find the Commission erred in requiring Russell to establish her claim for a change of condition by objective evidence and reverse and remand to the Commission.

REVERSED AND REMANDED.

GEATHERS and MCDONALD, JJ., concur.

Russell, Ms. Paula D.
Case #: 206062

Case Type: WC
Class: APP

DOI: 11/3/2009
Assigned: KWS

LIM Date: 11/2/2011
Date Opened: 1/18/2010

2/16/2018 10:40 AM

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Date: 06/01/2016 05:47 PM Staff: KWS

Topic: Email Received

Case Status ☐

Barbara,

I am in receipt of the hearing notice in this matter. I would appreciate you getting this email to Commissioner Campbell as soon as possible.

Based upon the hearing notice that I have received, it appears as though this matter has been set for a de novo hearing before the single Commissioner. I believe this to be in error based upon the remand from the South Carolina Court of Appeals. The Court of Appeals specifically remanded this case to the Commission to consider both objective and subjective evidence in the record in determining whether there has been a change of condition for the worse. The Court of Appeals has specifically found that the Commission erred in requiring claimant to establish her claim for a change of condition for the worse by objective evidence only, and has remanded this matter to the Commission for consideration of the legal issue based upon all of the submitted evidence. There is nothing in the remand from the Court of Appeals which indicates that a new hearing should be held and that new evidence should be taken on the claim; instead, the commission is simply supposed to reconsider the existing evidence and issue new factual findings in accordance with the legal issues raised by the Court of Appeals. I believe that having a new hearing, which would necessarily include taking new evidence and giving both parties a "second bite at the apple" is improper from a legal and procedural perspective.

I am surprised that this matter was not considered by the Full Commission and that new factual findings were not issued in accordance with the directives of the Court of Appeals. Any new factual findings coming from a single Commissioner will simply necessitate more appeals and more litigation. Regardless of that issue, I certainly don't see any basis for a de novo hearing or consideration of new evidence; the remand from the Court of Appeals simply directs the Commission to reconsider the existing evidence in light of their legal determination.

If Commissioner Campbell or anyone from the commission would like further discussion or argument on this issue, I would be happy to participate in a telephone conference at any time. I do not believe that an email or telephone conference is the time to argue the facts or the law on the case, but I think that we need to address procedural issues up front. Thank you for your consideration of my thoughts.

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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0917785

Paula Russell,

Claimant,

vs.

Wal-Mart #0586,

Employer,

Illinois National Insurance Company,

Carrier/Defendants.

DECISION AND ORDER

Commissioner:

The Honorable R. Michael Campbell, II.

Hearing:

Judgment of the Commission based upon a review of the record.

Purpose:

To determine issues remanded to the Commission from the South Carolina Court of Appeals.

Attorneys:

Claimant represented by C. Daniel Vega, Esq., of Columbia, S.C.

Defendant Illinois National Insurance Company represented by Johnnie W. Baxley, III, Esq., of Mount Pleasant, S.C.

STATEMENT OF THE CASE

The present claim comes before the Commission pursuant to *remittiture* from the Court of Appeals with instructions to the Commission remanding and reversing its previous order denying benefits. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016).

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

Within a few months, Claimant began to experience increased symptoms. Claimant suffered 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, Claimant 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 Claimant 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 Defendants and a hearing was held on December 16, 2013. The Full Commission issued its order on January 30, 2014. The Full Commission found no change in condition occurred, based on the lack of difference between lower back

MRI's. 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 Claimant prove, via an 'objective' measure, that a change in condition had occurred. The Commission found the doctors' opinions that a change of condition had occurred, as well as Claimant's otherwise credible testimony her symptoms 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 Claimant's statements about her increased symptoms were unreliable because they were both "conclusory" and "self-serving."

Claimant served her Notice of Appeal to the South Carolina Court of Appeals 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.

Claimant's appeal was heard by the South Carolina Court of Appeals on October 20, 2014, and its decision was filed January 20, 2016. The Court of Appeals reversed and remanded finding error in the Full Commission's Order. Specifically, the Court found the Commission erred in requiring Claimant establish her claim for a change of condition with objective evidence. Instead, the Court ruled the proper standard for proving a change of condition for the worse is a preponderance of evidence. The Court remanded to the Commission so it could make a factual determination as to whether Claimant proved her claim of change of condition for the worse by a preponderance of evidence.

APA SUBMISSIONS

The present claim comes before the Commission pursuant to a letter of *remittiture* from the Court of Appeals dated May 3, 2016. The letter contains a copy of the judgement of the Court of Appeals. The instructions do not require a hearing *de novo* and no new evidence is contained herein. The present order is issued based on a review of the records and proceedings preserved in the claim.

CLAIM

This case has a complicated history going back to 2009; therefore, a lengthy recitation of the facts is necessary. Claimant was first injured on November 3, 2009, while lifting at work. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). At this point, Claimant had been working at Wal-Mart for 13 years, the preceding 4 as an assistant store manager. (Order, Wilkerson, p. 3). Claimant started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (2-11-2013 H.T., p. 27-28). Wal-Mart recognized her skills and she moved to North Carolina for two years to work at a store that was having personnel problems. (2-11-2013 H.T., p. 28-29). 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. (2-11-2013 H.T., p. 29, II. 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. (2-11-2013 H.T., p. 29-30).

Claimant was 3 months pregnant at the time of her injury, and was treated very conservatively for the remainder of her pregnancy term. (Order, Wilkerson, p. 3-4). After she

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

There was no mention of any leg or buttock pain in the Order. (Order, Wilkerson, p. 1-8). Commissioner Wilkerson's two primary findings were: (1) Claimant was entitled to ongoing *Dodge* medicals, in the form of anti-inflammatory medication; and, (2) she suffered from a 7% permanent partial disability pursuant to § 42-9-30. (Order, Wilkerson, p. 5-6). This Order was not appealed.

In September or October of 2011, Claimant began experiencing more intense back pain, as well as severe leg and buttock pain of a type she had never experienced before. She reported this at her next appointment with Dr. Merritt, and he referred Claimant for an MRI in October, where Claimant gave a history of "[p]ersistent pain radiating to right leg, worse with driving." (APA, p. 13). 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 SI nerve root and if patient's symptoms correspond with a right SI radiculopathy, this could be an etiology." (APA, p. 13). 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.

(APA, p. 1) (emphasis added).

A December 5, 2011 report from Dr. Merritt indicates Claimant was "continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf." (APA, p. 2). He reviewed her 2011 MRI and concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (APA, p. 2). His assessment was a "[l]ow back strain with ruptured disc L5-S1 and continued symptoms in her right leg." (APA, p. 2). He recommended she stay out of work because Wal-Mart had no light duty for her. (APA, p. 2).

In the meantime, Claimant 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. (2-11-2013 H.T., p. 13-14). Claimant thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (2-11-2013 H.T., p. 13-14). Claimant 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. (2-11-2013 H.T., p. 14). She had previously been told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (2-11-2013 H.T., p. 14-15). Claimant ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (12-9-2011 Form 50).

She was next seen by Dr. William Edwards of Pee Dee Orthopedics Associates for an IME. (APA, p. 4). In the history, Dr. Edwards stated that Claimant's 2009 pain involved central low back pain "without any radicular discomfort at that time." (APA, p. 4). He further stated "[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." (APA, p. 4). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (APA, p. 4). He concluded:

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.

(APA, p. 5).

By March of 2012, Dr. Merritt 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." (APA, p. 3). Another MRI was performed on July 24, 2012, and Dr. Edwards opined that there was no change in disc pathology despite an increase in symptoms. (APA, p. 7-9). Dr. Edwards clearly recommended surgery at this point, because it would serve to provide a "measure of improvement" in her radicular pain. (APA, p. 9).

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 there is "a slightly increased sized protrusion on the second one." (Deposition of Dr. Merritt, p.8, ll. 18-24). He then testified, 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" (Deposition of Dr. Merritt,

p. 9, ll. 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." (Deposition of Dr. Merritt, p. 15, ll. 19-24). He further felt the "little bit" of disc protrusion constituted an anatomical difference in Claimant's condition. (Deposition of Dr. Merritt, p. 9, ll. 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." (Deposition of Dr. Merritt, p. 16).

Dr. Merritt did ultimately defer to Dr. Edwards, *but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI* (Deposition of Dr. Merritt, p. 18, ll. 13-17). Dr. Merritt, however, did not defer to Dr. Edwards on any other issues and maintained his opinion as stated within a reasonable degree of medical certainty that Claimant's condition had worsened.

Dr. Merritt gave a very clear opinion that a change in Claimant's condition had occurred. When he saw Claimant 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." (Deposition of Dr. Merritt, p. 7, ll. 9-10, 12-15). "The leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, ll. 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." (Deposition of Dr. Merritt, p. 7, ll. 18-21).

When asked directly about a change in Claimant'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." (Deposition of Dr. Merritt, p. 11). Dr. Merritt 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." (Deposition of Dr. Merritt, p.23, ll. 5-6).

He recommended additional medical care, possibly surgery, and indicated that any previous radicular pain she had experienced in her legs had been resolved at the time she reached MMI. (Deposition of Dr. Merritt, p. 13-14, 19, 21). 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." (Deposition of Dr. Merritt, p. 19-2).

Dr. Edwards was deposed on September 13, 2012. (Deposition of Dr. Edwards, p. 1).

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 LS-S1 on both studies. It looked substantially the same [as the 2012 MRI] to me.

(Deposition of Dr. Edwards, p. 6, ll. 2-7). When asked if there was a difference between the MRI's, 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.

(Deposition of Dr. Edwards, p. 7, ll. 2-10). He stated that all three MRI's are fairly consistent, and they all appear to show a "nerve root compression." (Deposition of Dr. Edwards, p. 9).

He stated that Claimant's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (Deposition of Dr. Edwards, p. 4-5).

When asked about the cause of Claimant'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." (Deposition of Dr. Edwards, p. 8-9). Dr. Edwards even stated that Claimant's "fairly significant radiculopathy" could be caused "without having pressure on...that nerve." (Deposition of Dr. Edwards, p. 11, ll. 22-25). Instead, prolonged chemical irritation to the nerve is, most likely to a reasonable degree of medical certainty, the cause of the increase in symptoms. (Deposition of Dr. Edwards, p. 10, ll. 15-25).

Dr. Edwards stated "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." (Deposition of Dr. Edwards, p. 12, ll. 11-16). Dr. Edwards did not doubt that the condition has worsened. (Deposition of Dr. Edwards, p. 13, ll. 5-14). Dr. Edwards said that in Claimant's "opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention." (Deposition of Dr. Edwards, p. 13, ll. 21-24).

In perhaps the most important exchange in the depositions, on cross-examination, counsel for the Defendants 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?

(Deposition of Dr. Edwards, p. 17-18).

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.

(Deposition of Dr. Edwards, p. 18, II. 2-13) (emphasis added).

Dr. Edwards also opined Claimant 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." (Deposition of Dr. Edwards, p. 20-21). 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." (Deposition of Dr. Edwards, p. 21, II. 7-11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (2-11-2013 H.T., p. 1). Defendants argued, "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." (2-11-2013 H.T., p. 4, II. 15-19). Counsel for the Defendants 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." (2-11-2013 H.T., p. 6). No legal authority was cited for the use of this "objective" standard.

Claimant took the position the standard of proof for a change of condition is "preponderance of the evidence," and the law does not require "an objective finding per MRI or some other manner that does not require an opinion of a doctor." (2-11-2013 H.T., p. 5-6).

Claimant testified at the hearing that around September or October of 2011 she "started feeling sharp pains down [her] leg and pressure was more intense on [her] lower back." (2-11-2013 H.T., p. 8, II. 22-24). She began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (2-11-2013 H.T., p. 9, II. 2-3, II. 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. (2-11-2013 H.T., p. 9, II. 19-21; p. 10, II. 19-22). When asked if her condition had changed since the initial disability determination, she said "Yes, it has." (2-11-2013 H.T., p. 15, I. 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." (2-11-2013, H.T., p. 16, II. 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. (2-11-2013 H.T., p. 17, II. 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." (2-11-2013 H.T., p. 17-18). She testified that she is now having "pain into [her] left leg now as well." (2-11-2013 H.T., p. 19, II. 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.

(2-11-2013 H.T., P: 20, II. 8-14).

Until October 2011, Claimant continued to work in her shift manager position. Because of her symptoms she put in a request for an accommodation. During this time her symptoms were making the job difficult and she wanted to work closer to home. Claimant was having symptoms because the long drive was difficult on her back. (2-11-2013 H.T., p. 21-23). Wal-Mart refused to honor the accommodation and placed her out of work in December 2011. Claimant has not worked for Wal-Mart since that time. (2-11-2013 H.T., p. 24). Claimant was ultimately forced to cash out her 401K with the company just to pay her bills. (2-11-2013 H.T., p. 31, ll. 1-6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (8-5-2013 D&O, p. 1-7). Commissioner Roche found that after the 2011 decision of the Commission, Claimant "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." (8-5-2013 D&O, p. 3). 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." (8-5-2013 D&O, p. 3). She also found "Claimant's testimony, stating that she suffered a worsening of symptoms, to be credible." (8-5-2013 D&O, p. 4). 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. (8-5-2013 D&O, p. 5). Her findings of law included that Claimant "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." (8-5-2013 D&O, p. 6).

The Defendants filed a timely appeal to the Full Commission. In their brief, Defendants relied heavily on the fact Dr. Merritt conceded Dr. Edwards was more of an expert on spine MRI's than him, and that, therefore, Dr. Edwards' opinion as to whether there was a change in MRI's from 2010 to 2011/2012 was probably correct. (10-17-2013 Brief, p. 2). Defendants also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (10-17-2013 Brief, p. 3). Finally, Defendants also relied on the fact that Dr. Edwards indicated that Claimant may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (10-17-2013 Brief, p. 3).

In the brief's argument section, the Defendants 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." (10-17-2013 Brief, p. 4). Defendants 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." (10-17-2013 Brief, p. 6).

At the hearing before the Full Commission, counsel for the Defendants 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." (12-16-2013 H.T., p. 4, ll. 15-18). As to Dr. Merritt's opinion, Defendants' 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." (12-16-2013 H.T., p. 5, ll. 3-6). Defendants' 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. (12-16-2013 H.T., p. 5, II. 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 MRI's, but counsel also made the point that Claimant's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (12-16-2013 H.T., p. 5-6).

The most crucial exchange came on the issue of Claimant's credibility. The Commission pointed out that an important factor in the change of condition was the history given by Claimant, "which Commissioner Roche found was credible." (12-16-2013 H.T., p. 7, II. 22-24). Counsel for the Defendants 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.*" (12-16-2013 H.T., p. 8, II. 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.*" (12-16-2013 H.T., p. 8, II. 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. (12-16-2013 H.T., p. 9-10).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (1-30-2014 D&O, p. 1). 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 MRI's, and made it painstakingly clear that it did not believe there was a difference between them. (1-30-2014 D&O, p. 4-5). 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.” (1-30-2014 D&O, p. 5). The Commission similarly omitted Dr. Edwards’ 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.” (1-30-2014 O&O, p. 5).

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.” (1-30-2014 D&O, p. 6). Despite the Single Commissioner’s finding that the Claimant was credible, as well as Claimants’ stipulation that the Claimant was credible, the Commission found that she lacked credibility simply because she had reported right leg problems in 2010. (1-30-2014 D&O, p. 6). 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.” (1-30-2014 D&O, p. 7).

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.

(1-30-2014 D&O, p. 9). 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.” (1-30-2014 D&O, p. 9).

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.” (1-30-2014 D&O, p. 9) (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. (1-30-2014 D&O, p. 9-10). 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. (1-30-2014 D&O, p. 11-12). This Order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had actually occurred.

After receiving the Full Commission's order, Claimant appealed to the South Carolina Court of Appeals asserting three points of error. The Commission erred by: (1) requiring a change of condition be established by objective evidence, (2) ruling substantial evidence existed to deny a change of condition, and (3) finding Claimant's statements were self-serving and conclusory.

The Court of Appeals issued its opinion as *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016). The Court restated the law of change of condition for the worse by quoting S.C. Code Ann. § 42-17-90(A) (2015) which states, a review of a previous award is proper “on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.” Moreover, the Court noted, “A change of condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award,” and, “[g]enerally, an

appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter," *Gattis v. Murrells Inlet VFW No. 10-420*, 353 S.C. 100, 107-09, 576 S.E.2d 191, 1946 (Ct. App. 2003).

Regarding the first point of alleged error, the Court cited *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999) which held both lay and expert testimony may be considered when determining causation. Additionally, the court cited *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23-24, 716 S.E.2d 123, 126-27 (Ct. App. 2011), which held the commission may disregard medical evidence and instead rely upon lay testimony if the record contains competent evidence, and held the court does not balance objective against subjective findings of medical witnesses. Upon the Court of Appeal's review of the record and the Full Commission's Order, it found the Commission exclusively relied upon the MRIs in finding Claimant failed to objectively prove her claim. *Russell* at 756. Further, the Court of Appeals noted the Commission's order "ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition." *Id.*

As a result, the Court of Appeals found "the Commission relied exclusively on objective evidence, the MRIs, in denying Russell's claim." *Id.* Correspondingly, the Court found the Commission "erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence." *Id.* Therefore, the court held a change of condition for the worse can be proven with subjective evidence. *Id.* The court of appeals reversed the Commission's requirement that Claimant prove her claim by a preponderance of the evidence, and remanded the remaining issues – whether Claimant suffered

a change of condition and whether the statements were self-serving and conclusory – to the Commission.

On remand, the undersigned Commissioner reviewed the record and issues this order without hearing additional testimony from the parties.

Findings of Fact

Based upon the above stated evidence as well as a review of the record in its entirety, the undersigned Commissioner makes the following Findings of Fact:

1. Based upon a review of the record, as outlined in the order of Commissioner Wilkerson, Commissioner Roche, the Full Commission, as well as a review of the order of the Court of Appeals, Claimant shall receive benefits.
2. Claimant worked for Wal-Mart Stores, Inc., and suffered an admitted injury to her back arising out of and in the course and scope of her employment November 3, 2009.
3. Prior to her injury, Claimant was an employee of Walmart for 13 years.
4. At the time of her injury, Claimant was working as an Assistant Store Manager.
5. Claimant received compensation and medical care for the November 3, 2009, accident, until the claim was adjudicated before Commissioner Avery Wilkerson, April 13, 2011.
6. Commissioner Wilkerson issued a signed decision and order June 8, 2011.
7. Pursuant to Commissioner Wilkerson's order Claimant reached maximum medical improvement February 2, 2011.
8. Pursuant to Commissioner Wilkerson's order Claimant was awarded seven (7) percent permanent partial disability to the back.

9. Pursuant to Commissioner Wilkerson's order Claimant was awarded ongoing anti-inflammatory medications, as long as such medication is causally related to her work accident and tends to lessen the period of her disability.
10. Pursuant to Commissioner Wilkerson's order Claimant became pregnant during her claim, because of her pregnancy Claimant was offered conservative medical care, after Claimant's pregnancy, Dr. Merritt opined surgery was not necessary.
11. Pursuant to Commissioner Wilkerson's order, Claimant had pelvic pain that resolved by the time of the hearing.
12. Commissioner Wilkerson's June 8, 2011 Order did not find Claimant had leg or buttock pain.
13. Commissioner Wilkerson's Order did not find Claimant had work restrictions.
14. Commissioner Wilkerson set Claimant's compensation rate at \$681.36.
15. Commissioner Wilkerson's June 8, 2011 order was not appealed.
16. Subsequent to Commissioner Wilkerson's hearing Claimant continued working for Wal-Mart.
17. A review of the record demonstrates Claimant hoped to become a store manager for Wal-Mart.
18. A review of the record demonstrates Claimant began experiencing more intense back pain and new severe pain in her leg and buttock around September and October of 2011.
19. A review of the record demonstrates Claimant returned to Dr. Merritt for medical care related to her new symptoms.

20. On November 21, 2011, Dr. Merritt opined Claimant's condition worsened. Dr. Merritt also recommended an MRI of the lumbar spine and recommended Claimant only work light duty, or not work if light duty was not available.
21. Claimant requested Walmart accommodate her restrictions and transfer her to a store closer to home so she would spend less time making a painful commute.
22. On December 1, 2011, Walmart refused to accommodate Claimant's request and told her she must leave the premises immediately.
23. On December 5, 2011, Dr. Merritt stated Claimant had a disc protrusion at L5-S1 with contact on the nerve root.
24. Claimant subsequently filed an application for a change of condition pursuant to S.C. Code Ann. § 42-17-90 on December 9, 2011.
25. A review of the record demonstrates Defendants sent Claimant to Dr. Edwards for an IME February 16, 2012.
26. Dr. Edwards opined Claimant did not have radicular symptoms after her 2009 injury, but now has pain centered in her lower back that radiates into her legs.
27. Dr. Edwards stated surgery might successfully alleviate Claimant's radicular symptoms.
28. Dr. Edwards again recommended surgery after a July 24, 2012 MRI.
29. Dr. Merritt provided deposition testimony on May 23, 2012.
30. Dr. Merritt testified there was a slightly larger disc protrusion in the MRI that was touching the nerve root.
31. Dr. Merritt stated Claimant's leg symptoms were new radicular symptoms.
32. Dr. Merritt opined the disc protrusion was an anatomical difference, despite the disc protrusion being only slightly larger.

33. Dr. Merritt testified, to a reasonable degree of medical certainty, Claimant suffered a change in condition for the worse.
34. A review of his deposition demonstrates Dr. Merritt recommended Claimant receive additional treatment, up to but not excluding surgery.
35. Dr. Edwards provided deposition testimony on September 13, 2012.
36. In his deposition Dr. Edwards testified, "it's clear that [Claimant's] symptoms are now worse. I don't have any – I don't have any doubt about that . . . clinically."
37. Dr. Edwards, testified there was a change to Claimant's nerve making it more painful or more symptomatic, and that his opinion was held to a reasonable degree of medical certainty.
38. Dr. Edwards said Claimant's symptoms were worse, and clinically different in 2012 than in 2010.
39. Dr. Edwards stated Claimant's radiculopathy is caused by a combination of mechanical direct compression and chemical irritation to the nerve.
40. Dr. Edwards testified disc pathology was compressing the nerve root and the compression over an extended period of time was causing Claimant's worsening.
41. Dr. Edwards testified he had no reason to doubt Claimant's subjective accounts of her pain and symptoms.
42. Dr. Edwards testified that reliance upon physical examination and a demonstration of parasthesias into the nerve distribution is an objective analysis.
43. Dr. Edwards recommended surgery for the changed condition.
44. A hearing was held on the matter of Claimant's change of condition for the worse on February 11, 2013, before Commissioner Andrea C. Roche.

45. Commissioner Roche issued a Decision and Order on August 5, 2015.
46. At the hearing Defendants argued “objective evidence” is required to prove a change of condition.
47. Claimant testified her symptoms worsened and changed since the initial disability determination and award.
48. Claimant testified she began feeling sharp pains in her leg and increased pressure on her back in September or October of 2011.
49. Pursuant to Commissioner Roche’s order Claimant testified credibly.
50. Pursuant to Commissioner Roche’s order Defendants admitted Claimant is credible.
51. Commissioner Roche found Dr. Merritt testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.
52. Commissioner Roche found Dr. Merritt testified within a reasonable degree of medical certainty Claimant’s change of condition was a physical, anatomical change.
53. Commissioner Roche found Dr. Edwards testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.
54. Commissioner Roche found Dr. Edwards testified within a reasonable degree of medical certainty Claimant’s change of condition was a physical, anatomical change.
55. Commissioner Roche found Dr. Merritt’s and Dr. Edwards’ testimony consistent with the requirements of a change of condition for the worse.
56. Pursuant to Commissioner Roche’s order Claimant suffered a change of condition for the worse.
57. Pursuant to Commissioner Roche’s order Claimant attempted to comply with the restrictions placed on her by her physicians.

58. Pursuant to Commissioner Roche's order Walmart failed to provide Claimant work within the restrictions of the authorized treating physician.
59. Pursuant to Commissioner Roche's order Walmart required Claimant to turn in her keys and leave the premises.
60. Commissioner Roche found Claimant is in need of additional medical treatment.
61. Commissioner Roche found Claimant suffers ongoing temporary disability.
62. Commissioner Roche concluded as a matter of law Claimant suffered a change of condition for the worse.
63. Commissioner Roche concluded as a matter of law Claimant was disabled.
64. Commissioner Roche concluded as a matter of law Claimant was entitled to temporary total disability benefits.
65. Commissioner Roche ordered Defendants pay temporary total disability benefits from December 1, 2011 to the present and continuing.
66. Commissioner Roche ordered Defendants provide Claimant with causally related medical care and treatment for a change of condition.
67. Defendants appealed Commissioner Roche's Order to the Full Commission.
68. In the appeal Defendants argued Claimant did not present objective evidence to demonstrate her condition had changed.
69. Defendants argued Claimant's change of condition was subjective only.
70. Defendants argued radiographic evidence did not support a finding of change of condition.
71. Defendants argued Dr. Merritt's testimony did not meet the legal standard for a change of condition.

72. Defendants argued Dr. Edwards did not believe there was a change of condition for the worse.
73. Defendant's admitted before the Full Commission Claimant "comes across well" when addressing her credibility.
74. Claimant argued her symptoms, along with radiographic evidence, and the doctors' opinions stated to a reasonable degree of medical certainty support the award for change of condition.
75. The Full Commission reversed the order of the Single Commissioner.
76. The Full Commission found Claimant did not present objective evidence demonstrating a change of condition for the worse.
77. The Full Commission found Claimant's testimony was self-serving and conclusory.
78. The Full Commission found both Dr. Merritt and Dr. Edwards testified there was no objective radiographic evidence to be noted on the MRI's done before and after the original award.
79. The Full Commission found Claimant's radiographic condition had not changed.
80. The Full Commission found Claimant's need for surgery was not new and did not developed after the original award.
81. The Full Commission found the preponderance of the evidence did not indicate a change of condition had occurred.
82. The Full Commission found Claimant ineligible for further benefits under the Workers' Compensation Act.
83. Claimant appealed the decision of the Full Commission to the South Carolina Court of Appeals.

84. Claimant alleged in her appeal before the South Carolina Court of Appeals that the use of an objective evidence standard to prove a change of condition is an error of law.
85. Claimant alleged in her appeal the substantial evidence of the case can lead to no other conclusion but that a change of condition has occurred.
86. Claimant also alleged in her appeal the Commission erred in finding Claimant was not a credible witness.
87. The Court of Appeals reversed and remanded the decision of the Full Commission in an opinion filed January 20, 2016.
88. The Court of Appeals found the Commission relied exclusively on objective evidence, the MRIs, in denying a change of condition.
89. The Court of Appeals found the Commission erred as a matter of law by imposing a requirement to the statute mandating Claimant prove her change of condition by objective evidence.
90. The Court of Appeals found the Commission must base an award for a change of condition on proof by a preponderance of the evidence.
91. The Court of Appeals found Dr. Merritt testified there was a change based on his review of the MRI, in part, and Claimant's subjective complaints, in part, even if it was not an obvious, objective change.
92. The Court of Appeals found Dr. Edwards testified there was a chronic change in Claimant's nerve, making her condition more painful or more symptomatic.
93. The Court of Appeals found both doctors concluded, to a reasonable degree of medical certainty, Claimant suffered a change of condition.

94. The Court of Appeals found the Commission ignored that both doctors concluded, to a reasonable degree of medical certainty, Claimant suffered a change of condition.
95. The South Carolina Court of Appeals reversed the Appellate Panel's order and remanded the matter to the Commission to enter an order consistent with their findings.
96. Because the Court of Appeals found the Commission erred in requiring a change of condition be established by objective evidence, and reversed and remanded on that issue, it did not consider additional issues in the appeal.
97. Pursuant to the Order of the Court of Appeals the claim has been remanded to the jurisdictional Commissioner and the current order ensues.
98. I find, based upon a review of the record, Claimant suffered a change of condition for the worse as outlined in the order of Commissioner Roche.
99. Claimant testified she suffered increased symptoms, including new symptoms radiating down into her legs, causing her legs to shake.
100. Claimant testified she suffered new difficulties driving and working.
101. Claimant reasonably sought additional medical care and attention for her worsening symptoms.
102. Dr. Merritt testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.
103. Dr. Merritt testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.
104. Dr. Merritt's testimony is consistent with the requirements of a change of condition pursuant to the Act.

105. Dr. Edward testified within a reasonable degree of medical certainty Claimant suffered a change of condition for the worse.
106. Dr. Edward testified within a reasonable degree of medical certainty Claimant's change of condition was a physical, anatomical change.
107. Dr. Edward's testimony is consistent with the requirements of a change of condition pursuant to the Act.
108. The appropriate standard of proof required for a change of condition for the worse is not objective evidence.
109. The appropriate standard of proof required for a change of condition for the worse is preponderance of evidence.
110. Claimant's testimony is admittedly credible.
111. The Full Commission erred in finding Claimant's testimony was conclusory and self-serving.
112. Claimant was able to establish she had new complaints that were not present at the time of the original award.
113. Claimant's present condition is different than the condition in existence when the first award was made.
114. Claimant established her condition worsened.
115. Claimant established her need for surgery is new and occurred after the original award.
116. Claimant established she has difficulty driving and working due to her symptoms.
117. The preponderance of evidence supports a finding Claimant suffered a change of condition for the worse.

118. Claimant is eligible for further benefits under the South Carolina Workers' Compensation Act.
119. Claimant is entitled to benefits as outlined by the Single Commissioner in her Order of August 5, 2013.
120. Claimant is entitled to further medical care and attention to be provided by Defendants.
121. Claimant is entitled to compensation for her out of pocket medical costs that are causally related to her change of condition for the worse.
122. Claimant attempted to comply with the restrictions placed on her by her physicians.
123. Claimant was terminated December 1, 2011.
124. Claimant is entitled to temporary total disability benefits from December 1, 2011 through the present and continuing.

CONCLUSIONS OF LAW

In accordance with S.C. Code Ann. § 42-17-40, the following are made as conclusions of law:

1. Pursuant to the Order of Commissioner Avery B. Wilkerson, Jr., issued June 8, 2011, Claimant suffered an admitted injury to the low back November 3, 2009; Claimant was found to be at maximum medical improvement February 2, 2011, and awarded future anti-inflammatory medication as may be reasonably necessary; and Claimant was awarded seven (7) percent permanent partial disability for loss of use of the low back.
2. Pursuant to the Order of Commissioner Andrea C. Roche issued August 5, 2013, Claimant was awarded a change of condition for the worse commencing November 21, 2011; Claimant was awarded ongoing temporary total disability benefits commencing December 1, 2011, to the present and continuing; Claimant was awarded causally related

medical care and treatment for the change of condition commencing November 21, 2011, along with reasonable reimbursement for costs and expenses incurred while obtaining care.

3. Pursuant to § 42-17-50, the Full Commission reversed the order of the Single Commissioner awarding benefits, by finding Claimant failed to prove she suffered a change of condition for the worse. It was the determination of the Full Commission Claimant was ineligible for benefits awarded pursuant to the previous change of condition award.
4. Pursuant to § 42-17-60, Claimant filed an appeal to the Court of Appeals contending the Commission erred in mandating Claimant prove she suffered a change of condition by objective evidence.
5. Pursuant to the opinion of the Court of Appeals in *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016), the order of the Commission denying Claimant suffered a change of condition for the worse because she lacked objective evidence is reversed and remanded with instructions to determine whether Claimant suffered a change of condition by proof of preponderance of the evidence.
6. Pursuant to a letter of *remittiture* signed by the Honorable V. Claire Allen, Deputy Clerk, South Carolina Court of Appeals, May 3, 2016, the claim is remitted to the Commission along with a copy of the judgment of the Court.
7. Pursuant to § 42-17-40, the below signed Commissioner R. Michael Campbell, II, was conferred jurisdiction to hear the issues in dispute in accordance with the judgment of the Court of Appeals.

8. Pursuant to § 42-17-90, Claimant has met her burden of proving a change of condition for the worse commencing November 21, 2011.
9. Pursuant to § 42-15-60, Claimant is awarded causally related medical care and treatment commencing November 21, 2011, along with reasonable reimbursement for costs and expenses incurred while obtaining care.
10. Pursuant to § 42-9-10, Claimant is awarded temporary total disability benefits commencing December 1, 2011, to the present and continuing.
11. Pursuant to § 42-1-40, Claimant's average weekly wage is \$1,232.52.
12. Pursuant to § 42-9-10, Claimant's compensation rate is \$681.36 per week.

ORDER

IT IS THEREFORE ORDERED the Findings of Fact and Conclusions of Law be incorporated herein as if set forth verbatim and:

1. DEFENDANTS SHALL pay Claimant benefits pursuant to a change of condition for the worse, commencing November 21, 2011, of the lumbar injury sustained November 3, 2009.
2. DEFENDANTS SHALL provide and pay for Claimant's medical care and treatment related to the change of condition for the worse, commencing November 21, 2011, to the present and continuing until further order of the Commission.
3. DEFENDANTS SHALL pay for Claimant's reasonable costs and expenses incurred while obtaining medical care and treatment related to the change of condition for the worse, commencing November 21, 2011, to the present and continuing until further order of the Commission.

4. DEFENDANTS SHALL pay Claimant temporary total disability benefits in the amount of \$681.36 per week, commencing December 1, 2011, to the present and continuing until further order of the Commission.

AND IT IS SO ORDERED!


Commissioner Mike Campbell

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

March 20, 2017

By: Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell

South Carolina Workers' Compensation Commission
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WCC File #:	0917785
Carrier File #:	5943261
Carrier Code #:	
Employer FEIN #:	

Claimant's Name: Paula Russell SSN: Employer's Name: Wal-Mart Stores, Inc.
Address: Freedom Blvd., Address: 2709-A Church Street
City: Florence State: SC Zip: 29505 City: Conway State: SC Zip: 29526
Home Phone: (843) 260-9868 Work Phone: Insurance Carrier: Illinois National Insurance Company
Preparer's Name: Johnnie W. Baxley, III Law Firm: Willson Jones Carter & Baxley, P.A. Preparer's Phone #: (843) 284-1082

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ Claimant ☒ Employer (check one) Date of Injury or Illness: 11/3/2009

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attached Grounds for Review.

Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to: C. Daniel Vega, P.O. Box 12330, 2801 Devine Street, Suite 300(29205) Columbia, SC 29211 and Judicial Director, SC WCC, P.O. Box 1715, Columbia, SC 29202 on the 31st day of March, 2017 by ☒ first class mail ☐ personal service ☐ certified mail

Johnnie W. Baxley, III
Preparer's Signature

Attorney for Defendants
Title

jwbaxley@wjlaw.net
Email

03/31/2017
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-607 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

WCC Form # 30
Revised 7/13

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REQUEST FOR COMMISSION REVIEW

It is respectfully submitted that the single Commissioner erred in finding as a fact and concluding as a matter of law in the following particulars listed below. Such errors are errors of fact and law.

1. Did the single Commissioner err in Findings of Fact #1, in basing his decision on workers' compensation benefits in part on the prior factual findings of Commissioner Roche, which were set aside by the Full Commission and have no precedential value or weight, instead of reviewing the record de novo using the preponderance of the evidence standard as instructed by the Court of Appeals?
2. Did the single Commissioner err in Findings of Fact #12 and #13, in stating conclusively that the Claimant did not have any prior work restrictions or leg or buttock pain based on Commissioner Wilkerson's June 8, 2011 order, even though Commissioner Wilkerson did not address these issues in his order?
3. Did the single Commissioner err in Findings of Fact #18 and #19, in stating that the Claimant's "new" pain and symptoms began in her leg and buttock around September or October of 2011, such findings being based on surmise and conjecture, rather than medical evidence stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support this factual finding?
4. Did the single Commissioner err in Findings of Fact #20, in concluding that Dr. Merritt opined that Claimant's condition had worsened contrary to the greater weight and substantial evidence of record, especially taking into consideration that Dr. Merritt did not state his opinion to reasonable degree of medical certainty on November 21, 2011? Does the preponderance of evidence in the record support this factual finding?
5. Did the single Commissioner err in Findings of Fact #21 and 22, in indicating that Wal-Mart refused to accommodate the Claimant's restrictions and terminated her, even though the greater weight of the evidence proves that Wal-Mart was accommodating the Claimant's restrictions and that the Claimant voluntarily resigned from Wal-Mart? Does the preponderance of evidence in the record support these factual findings?
6. Did the single Commissioner err in Findings of Fact #26, in stating that Dr. Edwards opined that Claimant did not have radicular symptoms after her 2009 injury, but now has pain centered in her lower back that radiates into her legs, even though Dr. Edwards did not offer an opinion as to this matter and the medical narrative simply reiterated the Claimant's subjective history? Does the preponderance of evidence in the record support this factual finding?
7. Did the single Commissioner err in Findings of Fact #28, by stating that Dr. Edwards recommended surgery after a July 24, 2012 MRI, when he did not recommend surgery and only discussed surgery with the Claimant on her own request?
8. Did the single Commissioner err in Findings of Fact #30, 31, and 32, in stating that Dr. Merritt testified that there was a slightly larger disc protrusion in the MRI that was touching the nerve root and that the Claimant had new radicular symptoms, when his testimony regarding these issues were speculative and not stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?

9. Did the single Commissioner err in Findings of Fact #33, by stating to a reasonable degree of medical certainty that Claimant suffered a change in condition for the worse, even though Dr. Merritt's deposition, taken as a whole, is speculative and does not meet the standard of medical evidence to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?
10. Did the single Commissioner err in Finding of Fact #34, by stating that Dr. Merritt recommended additional treatment, up to but not excluding surgery, even though his deposition testimony did not take an affirmative stance on the Claimant's future surgical needs?
11. Did the single Commissioner err in Findings of Fact #36, 37, 38, 39, 40, 41, 42, and 43, by mischaracterizing or misstating Dr. Edwards testimony when:
 - a. Fact #36 only provided part of Dr. Edwards answer, and omitted Dr. Edwards' testimony that "radiographically, there's not a significant difference" in the MRI scan?
 - b. Fact #37 indicated that Dr. Edwards testified to a reasonable degree of medical certainty that there was change to the Claimant's nerve making it more painful, but Dr. Edwards did not provide this opinion to a reasonable degree of medical certainty as indicated on page 13 of his deposition transcript?
 - c. Fact #38 indicated that the Claimant's symptoms were worse and clinically different in 2012 than 2010, even though Dr. Edwards clarified that radiographically she was not worse?
 - d. Fact #39 indicates that Dr. Edwards stated the Claimant's radiculopathy was caused by a combination of mechanical direct compression and chemical irritation to the nerve, when he was unable to state this fact to a reasonable degree of medical certainty and merely postulated that chemical leaking and mechanical compression could be causing the Claimant's subjective symptoms?
 - e. Fact #40 indicates that Dr. Edwards testified that the disc pathology was causing the Claimant's worsening, when he did not state that fact and merely indicated that the Claimant's disc pathology was causing her symptoms and that the disc pathology was fairly consistent before and after the alleged worsening?
 - f. Fact #42 omitted certain testimony from Dr. Edwards answer on page 18 of his deposition transcript?
 - g. Fact #43 incorrectly stated that Dr. Edward recommended surgery for the changed condition, when he never stated to a reasonable degree of medical certainty that the Claimant has suffered a worsening of her condition?

Are these findings supported by the preponderance of evidence in the record, or are they snippets of testimony cherry-picked to provide the basis for an award despite the weight of the evidence?



12. Did the single Commissioner err in Findings of Fact #45 - #66, by stating as fact any findings by Commissioner Roche when her Order was expressly overturned by the Full Commission and therefore such findings are entitled to no weight or precedential value in saying that the? Did the single Commissioner incorrectly rely upon prior single Commission findings that were expressly overturned by the Full Commission? Does the preponderance of evidence in the record support these findings?
13. Did the single Commissioner err in Findings of Fact #68 - 72 by mischaracterizing and misinterpreting the basis for Defendants appeal and arguments?
14. Did the single Commissioner err in Findings of Fact #91-94 by mischaracterizing the "findings" of the Court of Appeals and basing his decision in part upon mischaracterized factual findings which were not made by the Court of Appeals?
15. Did the single Commissioner err in Findings of Fact #95, when stating that the South Court of Appeals reversed and remanded the matter to the Commission to enter an order consistent with their findings, when the Court of Appeals merely reversed and remanded the matter to the Commission to evaluate this case and make its own findings under a preponderance of the evidence standard? Did this misunderstanding by the single Commissioner of the directives of the Court of Appeals lead to this erroneous decision and factual findings that are not supported by the preponderance of the evidence?
16. Did the single Commissioner err in Findings of Fact #98, in stating that the Claimant suffered a change of condition for the worse as outlined in the overturned order of Commissioner Roche? Did the single Commissioner fail to properly review the preponderance of the evidence and make factual findings, as opposed to relying upon old factual findings that had already been overturned by the Full Commission? Does the preponderance of the evidence in the record support this finding?
17. Did the single Commissioner err in Finding of Fact #102, 103, and 104, in stating that Dr. Merritt testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though preponderance of the evidence states otherwise? Did the single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?
18. Did the single Commissioner err in Findings of Fact #105, 106, and 107, in stating that Dr. Edwards testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though substantial evidence states otherwise? Did the single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?
19. Did the single Commissioner err in Findings of Fact #108 and #109 in implying that objective evidence is not appropriate in a change of condition for the worse standard even though objective evidence is an integral part of the preponderance of evidence standard?

20. Did the single Commissioner err in Findings of Fact #110 and #111, in finding the Claimant's testimony "admittedly credible" and that the Full Commission erred in finding the Claimant's testimony conclusory and self-serving, based on the fact that Defense counsel simply stated that she came across well?
21. Did the single Commissioner err in Findings of Fact #112, 113, and 114, in stating that the Claimant was able to establish that she had new complaints that were not present at the time of the original award, that her present condition is different than the condition in existence when the first award was made, and that her condition had worsened, when such factual findings are based exclusively on the claimant's testimony and not based upon a preponderance of evidence in the record? Did the single Commissioner err in basing these factual findings on only certain evidence while ignoring other competent evidence as opposed to making factual findings based upon the preponderance of evidence in the record?
22. Did the single Commissioner err in Findings of Fact #115 that the Claimant needs surgery and that her need is new and occurred after the original award, even though there is evidence to the contrary in this claim? Does the preponderance of evidence in the record support this factual finding?
23. Did the single Commissioner err in Findings of Fact #116, in stating affirmatively that the Claimant had difficult driving and working due to her symptoms, even though the preponderance of objective evidence shows that she was able to complete her job without issue?
24. Did the single Commissioner err in Findings of Fact #117 and 118 finding that a preponderance of evidence supports a finding that Claimant suffered a change of condition for the worse, is eligible for further benefits under the Act?
25. Did the single Commissioner air in Findings of Fact #119-124 by simply restating the award of Commissioner Roche which has no weight or precedential value since it was overturned by the Full Commission, and where such findings are not supported by the preponderance of evidence?
26. Did the single Commissioner err in Findings of Fact #123, in stating that the Claimant was terminated on December 1, 2011, when the greater weight of the evidence indicates that the Claimant was being accommodated prior to December 1, 2011 and that she resigned her employment sometime after December 1, 2011 when Defendants would not move her to another location?
27. Did the single Commissioner err in Findings of Fact #124, in reinstating Commissioner Roche's award of temporary total disability benefits from December 1, 2011, to the present and continuing? Procedurally, did the single Commissioner err in awarding back temporary benefits without the taking of any new testimony or evidence regarding that issue and reinstating an award that was based upon testimony and evidence from February 2013? Does the preponderance of evidence in the record support such an award? Is the reinstatement of the original award from the single Commissioner an error of law?

28. Did the single Commissioner err in concluding as a matter of law, in Conclusions of Law #2, based on Commissioner Roche's overturned Order that the Claimant was awarded a change of condition for the worse commencing on November 21, 2011, ongoing temporary total disability benefits commencing December 1, 2011, to the present and continuing, and causally related medical care and treatment for the change in condition along with reasonable reimbursement costs and expenses? Was it factual error for the Commissioner to simply reinstate the old findings of Commissioner Roche as opposed to making new findings based upon a preponderance of evidence in the record?
29. Did the single Commissioner err in concluding as a matter of law, in Conclusions of Law #8, that Claimant has met her burden of proving a change of condition for the worse commencing November 21, 2011?
30. Did the single Commissioner err in concluding as a matter of law, in Conclusions of Law #9 and #10, that the Claimant is awarded causally related medical care and treatment along with reasonable reimbursement costs for expenses incurred while obtaining care and temporary total disability benefits commencing December 1, 2011, to the present and continuing? Are these awards errors of law procedurally and factually?
31. Did the single Commissioner err in failing to make factual findings regarding the weight given to the competing evidence in this matter?
32. Did the single Commissioner err in failing to make factual findings regarding whether there has been proof by a preponderance of the evidence that there has been a change of condition caused by the original injury occurring after the last payment of compensation?

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,	)	
	)	
Employee,	)	
Claimant/Respondent,	)	
	)	
vs.	)	
	)	
Wal-Mart Stores, Inc.,	)	BRIEF OF DEFENDANTS/APPELLANTS
	)	
Employer,	)	
and	)	
	)	
Illinois National Insurance Company,	)	
	)	
Carrier,	)	
Defendants/Appellants.	)	

STATEMENT OF THE CASE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act based on a preponderance of evidence.

PROCEDURAL HISTORY

On February 11, 2013, a hearing was held before Commissioner Andrea C. Roche to determine the issues raised in Claimant's Form 50. After considering the evidence presented, Commissioner Roche found that Claimant suffered a change of condition for the worse and was entitled to additional medical care and attention as well as temporary total disability benefits. Defendants appealed this decision and a hearing was held before the Full Commission on December 16, 2013. The Full Commission issued its order on January 30, 2014, and found that no change in condition had occurred due to the fact that no objective evidence showed a change in

condition and the greater weight of the evidence did not support a worsening of condition. Claimant appealed this decision to the South Carolina Court of Appeals arguing that the Full Commission erred by using an objective evidence standard. The South Carolina Court of Appeals heard the appeal on October 20, 2014, and issued its decision on January 20, 2016. The Court of Appeals found that the Full Commission erred in requiring the Claimant to establish her claim for a change of condition with objective evidence. The Court reiterated the standard that the Commission use a preponderance of evidence standard when deciding these claims.

The Court of Appeals remanded to the Commission to determine if the Claimant sustained a changed in condition based upon a preponderance of evidence. The Court of Appeals found that the Commission erred in requiring a change of condition to be established by objective evidence and they reversed and remanded on that issue alone. On remand and without a hearing, Commissioner Campbell concluded that the Claimant met her burden of proving a change of condition for the worse. Additionally, Commissioner Campbell reinstated the original award of Commissioner Roche which awarded causally related medical care and treatment commencing November 21, 2011, and temporary total disability benefits commencing December 1, 2011, to the present and continuing. Commissioner Campbell's Decision and Order was filed on March 20, 2017, and Appellants subsequently and timely filed a Form 30 appealing this Decision and Order on March 31, 2017.

STATEMENT OF THE FACTS/EVIDENCE

Claimant was injured on November 3, 2009, while lifting an object at work. (Commissioner Wilkerson's Order, June 8, 2011, p., 3). At the time of her injury, she had been working for Wal-Mart for 13 years and was an assistant store manager since 2007. (Commissioner Wilkerson's Order, June 8, 2011, p., 3). The Claimant reached maximum medical improvement and, on June 8, 2011, Commissioner Wilkerson found that she suffered a 7% permanent partial disability pursuant to Sec. 42-9-30 and was entitled to ongoing *Dodge* medicals in the form of anti-

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inflammatory medication. (Commissioner Wilkerson's Order, June 8, 2011, p., 5-6). Subsequently, Claimant alleged that she experienced new and increased symptoms, beginning in September or October of 2011, although she could not remember exactly when they started. (Roche Hrg. Tr. p., 4, ll. 3-6; p., 9, ll. 17-21).

Regarding medical treatment, Claimant reported to Dr. James O. Merritt on September 16, 2011 and alleged new complaints of pain down her legs. (Dr. Merritt Depo. p., 7, ll. 9-10). Although the Claimant alleged that the pain going down her legs was a new symptom (Roche Hrg. Tr. p., 9, ll. 11-16), she clearly complained of radiating pain into her legs to Dr. Wentz prior to her original hearing with Commissioner Wilkerson. (Roche Hrg. Tr. p., 20, ll. 1-25; Defendants' APA 5, p., 72). Further, Dr. Merritt testified at his deposition that his notes reflected that the Claimant had complaints of pain radiating into her leg before she initially saw him in 2010. (Dr. Merritt Depo. p., 13, l. 21; p., 14, l. 1).

At the medical appointment on September 16, 2011, Dr. Merritt ordered an MRI to compare to her prior August 2010 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Depo. p., 7, l. 24; p., 8, ll. 4-11). Although Dr. Merritt did not have the films from the MRIs to compare, he did not think there was a major change between the two. (Dr. Merritt Depo. p., 8, ll. 18-21). In fact, he testified that there was nothing he felt was "extremely remarkable" after reviewing the MRI reports. (Dr. Merritt Depo., p., 8, ll. 13-14; 21-24). Dr. Merritt also conceded that Dr. Edwards, as a spine surgeon, would be "more of an expert on spine MRIs" and that Dr. Edwards' opinion indicating there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Depo. p., 18, ll. 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who reviewed the actual MRI studies at issue in this case. (Dr. Edwards Depo. p., 5, ll. 16-17; p., 16, ll. 22-25). Dr. Edwards concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical

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difference to be noted in the scans. (Dr. Edwards Depo. p., 6, ll. 5-7; p., 7, ll. 8-10; p., 17, ll. 1-3). Dr. Edwards also obtained his own MRI on July 24, 2012, after the alleged change in condition, and he noted that all three MRI's were fairly consistent and that they all appear to show a "nerve root compression." (Dr. Edwards Depo., p., 9). When questioned whether the Claimant's condition had worsened, Dr. Edwards' simply hypothesized that you "could" make that conclusion based on the Claimant's subjective complaints, but that objectively/radiographically "it's not worsening." (Dr. Edwards Depo., p., 9). (Dr. Edwards Depo. p., 9, ll. 9-25; p., 12, ll. 24-25; p., 13, ll. 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root, she does not have any weakness in her muscles that are innervated by that particular nerve, and her reflexes remain the same. (Dr. Edwards Depo. p., 16, ll. 17-21; p., 17, ll. 9-12). Dr. Edwards also opined that Claimant was likely a candidate for a discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was pregnant. (Dr. Edwards Depo. p., 20, ll. 19; p., 21, l. 2).

Regarding the Claimant's work with Wal-Mart, she was working full time with her restrictions being accommodated until she requested a store transfer on October 6, 2011, to move closer to her home. (Roche Hrg. Tr. p., 22, ll. 12-15; p., 23, ll. 9-21). When she learned that Wal-Mart was unable to accommodate her request to move stores on December 1, 2011, the Claimant submitted her resignation. (Roche Hrg. Tr. p., 14, ll. 8-19; p., 13, ll. 13-25; p., 14, ll. 1-3; p., 24, ll. 12-15). She filed her Form 50 alleging a change of condition on December 9, 2011. (12-9-2011 Form 50).

ISSUES PRESENTED

- I. Did the Hearing Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work when the preponderance of evidence in the record does not support such findings?
- II. Did the Hearing Commissioner err in failing to review the evidence de novo to determine whether the Claimant sustained a change of condition for the worse by a preponderance of the evidence?

ARGUMENTS/DISCUSSION

- I. Did the Hearing Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009 accident at work? (Grounds for Appeal # 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 18, 21, 22, 23, 24, 26, 29, 30, 31, 32)

The preponderance of evidence does not support the Claimant's allegations that she sustained a change of condition. Specifically, the objective evidence does not show a physical change that can be stated to a reasonable degree of medical certainty and the subjective evidence indicates that the Claimant had the same or similar symptoms to the current alleged complaints prior to the final hearing on the original claim. As such, based on a preponderance of evidence, taking into consideration both the objective and subjective evidence, the record does not support a change in condition.

S.C Code Sec. 42-17-90 provides, "the Commission may review an award and on that review make an award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a Claimant experiences a change in physical condition as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the Claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. Id. (citing Krell v. S.C.

State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). A change of condition refers to conditions *different from those in existence when an award was originally made*. Id. at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)(emphasis added). A continued or ongoing incapacity of the same character and kind and for the same injury is not a "change in condition." Id.

In this case, Claimant/Respondent has not presented any evidence 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. Claimant contends that she began to experience new complaints of pain in her legs after the June 8, 2011, Order issued by the single Commissioner placing her at maximum medical improvement and assigning a seven percent impairment rating to her back. On May 23, 2012, however, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into the leg before she returned to see him in September of 2011. (Dr. Merritt Depo. p., 13, l. 21; p., 14, l. 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010. (Roche Hrg. Tr. p., 18, ll. 21-25; p., 20, ll. 2-23). Nevertheless, she testified that she believed the pain in her right leg associated with her claim for a change of condition was new and different than before, although she could not remember exactly when she "started receiving them." (Roche Hrg. Tr. p., 9, ll. 11-21).

While a new MRI was ordered by Claimant's treating provider based on her continued subjective complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Depo. p., 8, ll. 13-24). Dr. Edwards, however, did review and compare the MRI studies from 2010 and 2011, and he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical

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difference to be noted in the scans. (Dr. Edwards Depo. p., 5, ll. 16-17; p., 6, ll. 5-7; p., 7, ll. 8-10; p., 16, ll. 22-25; p., 17, ll. 1-3). Dr. Edwards also opined that Claimant's disc protrusion at L5-S1 has been contacting the nerve root and causing irritation throughout the course of her claim, she has not developed any weakness in her muscles innervated by that particular nerve, and her reflexes have remained the same. (Dr. Edwards Depo. p., 16, ll. 17-21; p., 17, ll. 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing.

Claimant also alleges that she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Roche Hrg. Tr. p., 12, ll. 4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Appellant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Depo. p., 20, l. 19; p., 21, l. 2). Specifically, he testified, "[w]e certainly try not to operate on pregnant people if we can get by without it." (Dr. Edwards Depo. p., 21, ll. 1-2). He also opined that surgery for this type of problem is not something that "has" to be done the majority of the time; rather, it's something that is offered to patients in an effort to try to give them some relief for their pain. (Dr. Edwards Depo. p., 14, ll. 4-11). Based upon Dr. Edwards' testimony, Claimant's current condition is not new but is merely the same problem that she had before the original award.

Claimant also alleges that Dr. Edwards came to the conclusion that Appellant's "nerve has worsened." When reading the actual complete testimony of Dr. Edwards, however, he actually states, "the worsening of [Appellant's] symptoms, anatomically, could be that there is now a chronic change in that nerve that makes it more painful or symptomatic." (Dr. Edwards Depo. p., 13, ll. 11-14). When questioned on whether irritation of a nerve that continues over time would

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cause the nerve to worsen, Dr. Edwards testified, “[i]t can”. (Dr. Edwards Depo. p., 12, ll. 6-10). He then testified that radiographically Claimant’s condition was not worsening and that her alleged “worsening” was predominantly a subjective or symptomatic worsening. (Dr. Edwards Depo. p., 12, l. 24; p., 13, l. 6). While Dr. Edwards also opined that chemicals inside a disc can also cause nerve root irritation if those leak out, he could not state to a reasonable degree of medical certainty that Appellant has had chemical leaking affecting the nerve root and even stated that “there’s just no way to prove that one way or the other”. (Dr. Edwards Depo. p., 18, ll. 15; p., 19, l. 14). The Appellate Panel cannot properly base its decision on evidence from a doctor that something “could” be a cause especially where the doctor conceded that he could not offer his opinion to a reasonable degree of medical certainty.

Based on this evidence, Appellants argue that the preponderance of the evidence does not support a change in condition, taking into consideration the weight of the objective evidence clearly shown by prior complaints noted in the medical narratives and in the lack of an objective physical change in the radiographic evidence and the weight of the Claimant’s subjective complaints that shows the Claimant experienced similar symptoms to the alleged change in condition prior to the original hearing on the claim. The Claimant did not suffer a condition worse than was in existence when the original award was made which is necessary under the law for the Commission to find a change in condition occurred.

In South Carolina workers' compensation cases, “the Full Commission is the ultimate fact finder.” Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). Additionally, “[t]he final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission.” Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969). Finally, “[i]t is not the task of [an appellate court] to weigh the evidence as found by the Full Commission.” Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981).

In its previous Order, the Full Commission did not exclude subjective evidence or rely
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exclusively on objective evidence. Instead, the Commission considered all of the evidence but gave more weight to certain evidence and less weight to other evidence. That is exactly what the Workers' Compensation Commission, as fact finder, is authorized and empowered to do on these claims. The Court of Appeals seems to have mistaken and confused weighing of the evidence (which is a proper role of the Commission) with exclusion and failure to consider evidence (which would not be a proper role of the Commission). Defendants have argued from the beginning of the claim, and still argue at this time, that objective evidence in this case should be given more weight than subjective evidence. It has never been argued that subjective evidence cannot be considered, nor has it been argued that there must be objective proof of a change of condition. Defendants have simply argued that based upon the particular circumstances present in this case, the objective evidence and the testimony of the doctors based upon that objective evidence should be given more weight than the subjective complaints of claimant. Defendants contend that the greater weight of the evidence does not support a finding of a change of condition for the worse.

The preponderance of evidence in the record including the medical records, the diagnostic testing, and the medical testimony, and the testimony of the Claimant do not support the finding of the Hearing Commissioner that Claimant sustained a physical worsening of condition after the original award.

II. The Hearing Commissioner erred in failing to review the evidence de novo to determine whether the Claimant sustained a change of condition for the worse by a preponderance of the evidence. (Grounds for Appeal # 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 27, 28, 29, 30, 31, 32)

When a case that has been appealed is remanded by the Court of Appeals to the South Carolina Workers' Compensation Commission with specific directions, the Commission must proceed in accordance with those directions. 101 C.J.S. Workmen's Compensation § 790 at 37 (1958). The Court of Appeals reversed and remanded this claim to the Commission to determine if the Claimant sustained a change in condition based on a preponderance of evidence. That was

On that sole issue of remand, it was proper for the Hearing Commissioner to review the medical records, depositions, transcript of testimony, and other documents that were submitted at the original hearing in order to make that determination. A de novo hearing was not required to adjudicate that one issue on remand.

However, the Hearing Commissioner then took the additional step of not only addressing the issue on remand but also reinstating the original award of Commissioner Roche which had previously been overturned by the Full Commission. Defendants assert that this was legal error.

First, Defendants assert that the Hearing Commissioner erred in awarding benefits since this is outside the scope of remand from the Court of Appeals. The Court of Appeals specifically found that "the Commission erred in requiring a change of condition to be established by objective evidence and [we] reverse and remand on that issue" The award of benefits is clearly outside the scope of remand on that one issue.

Second, even if the Hearing Commissioner properly addressed benefits after finding a compensable change of condition, such benefits should have only been awarded after an evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits. It was improper and an error of law for the Hearing Commissioner to simply reinstate the prior Decision and Order of Commissioner Roche dated August 5, 2013. Those previous findings and the award had already been overturned by the Full Commission, and as an operation of law, the findings, conclusions, and award of Commissioner Roche no longer existed and cannot be reinstated. Further, it is improper and prejudicial to both parties to simply reinstate findings that are almost 4 years old. If benefits are going to be awarded, there must be an evidentiary hearing so that accurate and up-to-date findings and awards can be made.

Furthermore, by simply reinstating the findings of prior orders instead of reviewing medical records, depositions, transcript of testimony, and other documents that were submitted at the original hearing, the Hearing Commissioner inadvertently misstated and mischaracterized a

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number of important and relevant facts. For example, the Hearing Commissioner found as a fact that the Claimant did not have prior work restrictions or leg or buttock pain (Findings of Fact # 12 and #13) before the alleged change of condition, which is incorrect based on a review of the record. Further, the Hearing Commissioner found as fact that the Claimant had “new” pain and symptoms in her leg and buttock that began in September or October of 2011, even though the record clearly shows that this finding is based on surmise and conjecture rather than medical evidence given to a reasonable degree of medical certainty. Finally, the Hearing Commissioner found as fact that Wal-Mart refused to accommodate the Claimant’s restrictions and terminated her, when the record very clearly states that Wal-Mart was accommodating the Claimant’s restrictions until she voluntarily resigned. (Roche Hrg. Tr. p., 13, ll. 13-25; p., 14, ll.1-3; p., 14, ll. 8-19; p., 22, ll. 12-15; p., 23, ll. 9-21; p., 24, ll. 12-15). In sum, the above examples are just a few of the many misstatements and mischaracterizations in the recent Decision and Order, outlined in Defendants Form 30 and incorporated fully herein, that came from the recitation and reinstatement of prior orders, including Commissioner Roche’s order which was overturned by the Commission, instead of a fresh review of the evidence.

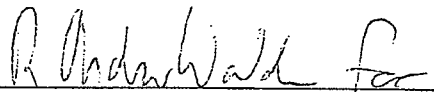
Based on the above arguments, Defendants assert that the Court of Appeals’ instructions were to review the medical records, depositions, transcript of testimony, and other documents that were submitted at the original hearing in order to make a determination as to whether the preponderance of evidence supported a change of condition. However, even if the Hearing Commissioner correctly addressed benefits outside the scope of remand, Defendants assert that an evidentiary hearing was necessary to determine accurate and up-to-date findings.

CONCLUSION

For all of these reasons, the Hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings. Further, the Hearing Commissioner erred in reinstating Commissioner Roche's findings and benefits award.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

A handwritten signature in cursive script, appearing to read "Johnnie W. Baxley, III", written over a horizontal line.

Johnnie W. Baxley, III, Esquire
421 Wando Park Boulevard, Suite 100
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Attorneys for Defendants

Date: May 19, 2017

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

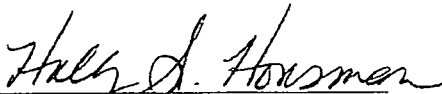
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Paula Russell,	)	
Employee,	)	
Claimant,	)	
	)	
vs.	)	
	)	
Wal-Mart Stores, Inc.,	)	CERTIFICATE OF SERVICE
	)	
Employer,	)	
and	)	
	)	
Illinois National Insurance Company,	)	
	)	
Carrier,	)	
Defendants.	)	

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 19th day of May, 2017, I mailed the foregoing BRIEF OF DEFENDANTS/Appellants to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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June 2, 2017

Via Hand Delivery

Ms. Amy Bracy, Judicial Director
South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

RE: Paula D. Russell v. WalMart #0586
SCWCC File No. 0917785

Dear Ms. Bracy:

Enclosed are the original and three copies of our Brief of Claimant/Respondent in the above-referenced appeal. Additionally, enclosed is a certificate of service showing that we have served a copy upon Johnnie W. Baxley, III, counsel for the defendant.

Thank you for your continuing cooperation in this and other matters.

Very truly yours,

C. Daniel Vega
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Direct Dial: 803-509-5830

CDV/ks

Enclosures

cc: Johnnie W. Baxley, III

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

Paula D. Russell,

Claimant,

vs.

WalMart #0586,

Employer,

Illinois National Insurance Company,

Carrier/Defendants.

WCC FILE NO: 0917785

CERTIFICATE OF SERVICE

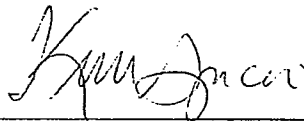
Kim W. Spicer, being first duly sworn, says that she is the paralegal for the Claimant's/Employee's attorney of Chappell, Smith & Arden located at 2801 Devine Street, Columbia, Suite 300, South Carolina; 29205 and, that on June 2, 2017, she forwarded a copy of the attached **Brief of Claimant/Respondent** to:

Via First Class US Mail:

Johnnie W. Baxley, III
Willson, Jones, Carter & Baxley, LLC
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Mt. Pleasant, SC 29464

Via Hand Delivered:

South Carolina Workers' Compensation Commission
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Columbia, SC 29202-1715



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BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION
COMMISSION

WCC FILE NO: 0917785

Paula D. Russell,

Claimant/Respondent,

vs.

Wal-Mart Stores Inc.,

Employer,

Illinois National Insurance Company,

Defendants/Appellants.

BRIEF OF CLAIMANT/RESPONDENT

STATEMENT OF THE CASE

The present claim comes before the Commission pursuant to Defendants/Appellants' Form 30 request for Commission Review. Commissioner Campbell found Respondent suffered a change of condition for the worse and awarded benefits. Respondent argues Commissioner Campbell's findings are supported by a preponderance of the evidence and are not affected by any error of law. Appellants, conversely, allege eighty-four (84) points of error.

Procedural Posture

Paula Russell (hereinafter "Respondent") first suffered an injury in an admitted work-related accident on November 3, 2009. Respondent's employer was Wal-Mart Stores, Inc. ("Employer"), and its carrier is American Home Assurance ("Carrier") (collectively, "Appellants"). A hearing was held on April 13, 2011. On June 8, 2011, Commissioner Wilkerson

Ordered Respondent had reached Maximum Medical Improvement (“MMI”) and was entitled to a compensation for a 7% disability to the back.

Within a few months, Respondent began to experience increased symptoms. Respondent suffered 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, Respondent 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, Commissioner Roche ruled Respondent experienced a change of condition for the worse, 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 Appellants and a hearing was held on December 16, 2013. The Appellate Panel of the Workers’ Compensation Commission issued its Order on January 30, 2014. The Appellate Panel found no change of condition occurred, based on the lack of objective differences between lower back MRIs. The first MRI was performed in 2010, prior to the resolution of her initial claim. The next two MRIs, 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 Respondent prove, via an “objective” measure, that a change of condition had occurred. The Commission also found Respondent’s otherwise credible testimony that her symptoms had increased was not enough to prove a change of condition, for she must show an anatomical change via objective evidence.

Respondent served her Notice of Appeal to the South Carolina Court of Appeals 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 only leads to the conclusion Respondent suffered a change of condition; and (3) the Commission erred in finding Respondent was not a credible witness.

Respondent's appeal was heard by the South Court of Appeals on October 20, 2015, and its decision was filed January 20, 2016. The Court of Appeals reversed and remanded finding error in the Appellate Panel's Order. Specifically, the Court found the Commission erred in requiring Respondent establish her claim for a change of condition with objective evidence. Instead, the Court ruled the proper standard for proving a change of condition for the worse is a preponderance of the evidence. The Court remanded to the Commission so it could make a factual determination as to whether Respondent proved her claim for change of condition for the worse by a preponderance of the evidence.

After the remand from the Court of Appeals, this matter was initially set for a *de novo* hearing before a Single Commissioner. However, on a request of Appellants and with consent from Respondent, Commissioner Campbell issued an opinion after a review of a record in its entirety, but without taking new evidence or testimony. Commissioner Campbell found a review of all the evidence—subjective and objective, as required by the Court of Appeals—shows Respondent met her burden of proof by a preponderance of the evidence. Therefore, Commissioner Campbell Ordered Respondent was entitled to medical care and temporary total disability benefits as previously awarded.

SUMMARY OF EVIDENCE

The Injury by Accident

This case has a complicated history going back to 2009; therefore, a lengthy recitation of the facts is necessary. Respondent was first injured on November 3, 2009, while lifting at work. (June 8, 2011 Order of Commissioner Wilkerson, p. 3). At this point, Respondent had been

working at Wal-Mart for thirteen years, the preceding four as an assistant store manager. (Order, Wilkerson, p. 3). Respondent started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (2-11-2013 H.T., p. 27-28). Wal-Mart recognized her skills, and she moved to North Carolina for two years to work at a store that was having personnel problems. (2-11-2013 H.T., p. 28-29). 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. (2-11-2013 H.T., p. 29, II. 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. (2-11-2013 H.T., p. 29-30).

Respondent was three months pregnant at the time of her injury, and was treated conservatively for the remainder of her pregnancy term. (Order, Wilkerson, p. 3-4). Months after she delivered her child, her treating physician, Dr. James Merritt, opined, "no surgery was required," and treated her with medication, exercises, and an injection. (Order, Wilkerson, p. 4). Respondent stated at the hearing she still suffered from some back pain and had a 30 pound lifting restriction, but was able to perform her job within these restrictions. (Order, Wilkerson, p. 4). She hoped to return to her job and eventually become a full store manager. (Order, Wilkerson, p. 4). While she experienced pelvic pain occasionally, that problem resolved by the time of the hearing, and her primary diagnosis was a "back strain." (Order, Wilkerson, p. 4).

There was no mention of any leg or buttock pain in the Order. (Order, Wilkerson, p. 1-8). Commissioner Wilkerson's two primary findings were: (1) Respondent was entitled to ongoing *Dodge* medicals, in the form of anti-inflammatory medication; and, (2) she suffered from a 7% permanent partial disability pursuant to section 42-9-30. (Order, Wilkerson, p. 5-6). This Order was not appealed.

New Symptoms

In September or October of 2011, Respondent began experiencing more intense back pain, as well as severe leg and buttock pain of a type she had never experienced before. She reported this at her next appointment with Dr. Merritt, and he referred Respondent for an MRI in October, where Respondent gave a history of “[p]ersistent pain radiating to right leg, worse with driving.” (APA, p. 13). 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 SI nerve root and if patient's symptoms correspond with a right SI radiculopathy, this could be an etiology.” (APA, p. 13). 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.

(APA, p. 1) (emphasis added).

A December 5, 2011, report from Dr. Merritt indicates Respondent was “continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf.” (APA, p. 2). He reviewed her 2011 MRI and concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (APA, p. 2). His assessment was a “[l]ow back strain with ruptured disc L5-S1 and continued symptoms in her right leg.” (APA, p. 2). He recommended she stay out of work because Wal-Mart had no light duty for her. (APA, p. 2).

Respondent's Termination

In the meantime, Respondent 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. (2-11-2013 H.T., p. 13-14). Respondent thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (2-11- 2013 H.T., p. 13-14). Respondent 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. (2-11-2013 H.T., p. 14). She had previously been told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (2-11-2013 H.T., p. 14-15). Respondent ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (12-9-2011 Form 50).

Medical Records from Drs. Edwards and Merritt

She was next seen by Dr. William Edwards of Pee Dee Orthopedics Associates for an IME. (APA, p. 4). In the history, Dr. Edwards stated that Respondent's 2009 pain involved central low back pain "without any radicular discomfort at that time." (APA, p. 4). He further stated "[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." (APA, p. 4). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (APA, p. 4). He concluded:

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.

(APA, p. 5).

By March of 2012, Dr. Merritt 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.” (APA, p. 3). Another MRI was performed on July 24, 2012, and Dr. Edwards opined that there was no change in disc pathology despite an increase in symptoms. (APA, p. 7–9). Dr. Edwards clearly recommended surgery at this point, because it would serve to provide a “measure of improvement” in her radicular pain. (APA, p. 9).

Dr. Merritt's Deposition

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 there is “a slightly increased sized protrusion on the second one.” (Deposition of Dr. Merritt, p.8, ll. 18–24). He then testified 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” (Deposition of Dr. Merritt, p. 9, ll. 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.” (Deposition of Dr. Merritt, p. 15, ll. 19–24). He further felt the “little bit” of disc protrusion constituted an anatomical difference in Respondent's condition. (Deposition of Dr. Merritt, p. 9, ll. 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.” (Deposition of Dr. Merritt, p. 16).

Dr. Merritt did ultimately defer to Dr. Edwards, *but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI* (Deposition of Dr. Merritt, p. 18, ll. 13–17). Dr.

Merritt, however, did not defer to Dr. Edwards on any other issues and maintained his opinion as stated within a reasonable degree of medical certainty that Respondent's condition had worsened.

Dr. Merritt gave a very clear opinion that a change in Respondent's condition had occurred. When he saw Respondent 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." (Deposition of Dr. Merritt, p. 7, II. 9-10, 12-15). "The leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, II. 19-20). He felt this was a new anatomical distribution, and stated, "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." (Deposition of Dr. Merritt, p. 7, II. 18-21).

When asked directly about a change in Respondent'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." (Deposition of Dr. Merritt, p. 11). Dr. Merritt 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." (Deposition of Dr. Merritt, p.23, II. 5-6).

He recommended additional medical care, possibly surgery, and indicated that any previous radicular pain she had experienced in her legs had been resolved at the time she reached MMI. (Deposition of Dr. Merritt, p. 13-14, 19, 21). 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." (Deposition of Dr. Merritt, p. 19-20).

Dr. Edwards's Deposition

Dr. Edwards was deposed on September 13, 2012. (Deposition of Dr. Edwards, p. 1).

When comparing the 2010 and 2012 MRIs, Dr. Edwards stated that 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.

(Deposition of Dr. Edwards, p. 6, ll. 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.

(Deposition of Dr. Edwards, p. 7, ll. 2-10). He stated that all three MRI's are fairly consistent, and they all appear to show a "nerve root compression." (Deposition of Dr. Edwards, p. 9).

He stated that Respondent's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (Deposition of Dr. Edwards, p. 4-5). When asked about the cause of Respondent'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. (Deposition of Dr. Edwards, p. 8-9). Dr. Edwards even stated that Respondent's "fairly significant radiculopathy" could be caused "without having pressure on...that nerve." (Deposition of Dr. Edwards, p. 11, ll. 22-25). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (Deposition of Dr. Edwards, p. 10, ll. 15-25).

Dr. Edwards stated, "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." (Deposition of

Dr. Edwards, p. 12, II. 11–16). Dr. Edwards did not doubt that the condition has worsened. (Deposition of Dr. Edwards, p. 13, II. 5–14). Dr. Edwards said that in Respondent’s “opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention.” (Deposition of Dr. Edwards, p. 13, II. 21–24).

In perhaps the most important exchange in the depositions, on cross-examination, counsel for the Appellants 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?

(Deposition of Dr. Edwards, p. 17–18).

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.

(Deposition of Dr. Edwards, p. 18, II. 2–13) (emphasis added).

Dr. Edwards also opined Respondent 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.” (Deposition of Dr. Edwards, p. 20–21). Dr. Edwards’s recommended treatment going forward is surgery, and he stated he “would not have offered it if [he] 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.” (Deposition of Dr. Edwards, p. 21, II. 7–11).

Hearing with Commissioner Roche

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (2-11-2013 H.T., p. 1). Appellants argued, “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.” (2-11-2013 H.T., p. 4, II. 15-19). Counsel for the Appellants 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.” (2-11-2013 H.T., p. 6). No legal authority was cited for the use of this “objective” standard.

Respondent took the position the standard of proof for a change of condition is “preponderance of the evidence,” and the law does not require “an objective finding per MRI or some other manner that does not require an opinion of a doctor.” (2-11-2013 H.T., p. 5-6).

Respondent testified at the hearing that around September or October of 2011 she “started feeling sharp pains down [her] leg and pressure was more intense on [her] lower back.” (2-11-2013 H.T., p. 8, II. 22-24). She began feeling pain in “especially the leg - - the tingling in my leg,” and indicated unequivocally that these were “new symptoms.” (2-11-2013 H.T., p. 9, II. 2-3, II. 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. Edwards’s care. (2-11-2013 H.T., p. 9, II. 19-21; p. 10, II. 19-22). When asked if her condition had changed since the initial disability determination, she said, “Yes, it has.” (2-11-2013 H.T., p. 15, I. 15). Her symptoms included “[that she was] still having pain, and [she was] still having a stabbing pain down [her] leg and the left leg [was] still hurting.” (2-11-2013, H.T., p. 16, II. 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. (2-11-2013 H.T., p. 17, II. 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." (2-11-2013 H.T., p. 17-18). She testified that she is having "pain into [her] left leg now as well." (2-11-2013 H.T., p. 19, II. 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.

(2-11-2013 H.T., P: 20, II. 8-14).

Until October 2011, Respondent continued to work in her shift manager position. Because of her symptoms, she put in a request for an accommodation. During this time her symptoms were making the job difficult and she wanted to work closer to home. Respondent was having symptoms because the long drive was difficult on her back. (2-11-2013 H.T., p. 21-23). Wal-Mart refused to honor the accommodation and placed her out of work in December 2011. Respondent has not worked for Wal-Mart since that time. (2-11-2013 H.T., p. 24). Respondent was ultimately forced to cash out her 401K with the company just to pay her bills. (2-11-2013 H.T., p. 31, II. 1-6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (8-5-2013 D&O, p. 1-7). Commissioner Roche found that after the 2011 decision of the Commission, Respondent "experienced an increase in symptoms, which she testified worsened with work and activity. Respondent testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake." (8-5-2013 D&O, p. 3). 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.” (8-5-2013 D&O, p. 3). She also found “Respondent's testimony, stating that she suffered a worsening of symptoms, to be credible.” (8-5-2013 D&O, p. 4). She further found that both Dr. Merritt and Dr. Edwards testified that the Respondent suffered a change of condition for the worse, and that this change was a physical, anatomical change. (8-5-2013 D&O, p. 5). Her findings of law included that Respondent “suffered a change of condition for the worse,” that “[p]ursuant to 42-1-120, Respondent is ‘disabled,’” and that “[p]ursuant to section 42-9-10, Respondent is entitled to temporary total disability benefits.” (8-5-2013 D&O, p. 6).

Appeal to the Full Commission

Appellants filed a timely appeal to the Full Commission. In their brief, Appellants relied heavily on the fact Dr. Merritt conceded Dr. Edwards was more of an expert on spine MRIs than him, and that, therefore, Dr. Edwards’s opinion as to whether there was a change in MRIs from 2010 to 2011/2012 was probably correct. (10-17-2013 Brief, p. 2). Appellants also focused on one statement in particular from Dr. Edwards, that “any worsening was predominantly subjective.” (10-17-2013 Brief, p. 3). Finally, Appellants also relied on the fact that Dr. Edwards indicated that Respondent may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (10-17-2013 Brief, p. 3).

In the brief’s argument section, the Appellants 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.” (10-17-2013 Brief, p. 4). Appellants also contended that “any alleged worsening in this case is solely based on Respondent'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 Respondent's condition is worse." (10-17-2013 Brief, p. 6).

At the hearing before the Full Commission, counsel for the Appellants 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." (12-16-2013 H.T., p. 4, II. 15-18). As to Dr. Merritt's opinion, Appellants' 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." (12-16-2013 H.T., p. 5, II. 3-6). Appellants' 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's clear opinion to the contrary. (12-16-2013 H.T., p. 5, II. 7-9). Much of the argument centered around the fact that Dr. Merritt could not be certain about whether there was a difference between the 2010 and 2011 MRIs, but counsel also made the point that Respondent's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (12-16-2013 H.T., p. 5-6).

The most crucial exchange came on the issue of Respondent's credibility. The Commission pointed out that an important factor in the change of condition was the history given by Respondent, "which Commissioner Roche found was credible." (12-16-2013 H.T., p. 7, II. 22-24). Counsel for the Appellants 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.*" (12-16-2013 H.T., p. 8, II. 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.” (12–16–2013 H.T., p. 8, II. 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. (12–16–2013 H.T., p. 9–10).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (1–30–2014 D&O, p. 1). 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. (1–30–2014 D&O, p. 4–5). 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.” (1–30–2014 D&O, p. 5). 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.” (1–30–2014 D&O, p. 5).

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.” (1–30–2014 D&O, p. 6). Despite the Single Commissioner’s finding that Respondent was credible, as well as Appellants’ stipulation that the Respondent was credible, the Commission found that she lacked credibility simply because she had reported different right leg problems in 2010. (1–30–2014 D&O, p. 6). The Commission found “[i]n sum, [Respondent]’s radiographic condition has not worsened; any alleged worsening in this case is solely based on Respondent’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 Respondent's condition is worse." (1-30-2014 D&O, p. 7).

In its Findings of Fact, the Commission stated:

[w]e give limited weight to the testimony of the [Respondent] as it is conclusory and self-serving . . . [Respondent] 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.

(1-30-2014 D&O, p. 9). The greatest weight was given to Dr. Edwards's 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." (1-30-2014 D&O, p. 9).

The Commission also found, the "preponderance of the evidence indicates that there was no *objective difference* between the Respondent's MRI scan after the original award and the MRI scan before the original award." (1-30-2014 D&O, p. 9) (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. (1-30-2014 D&O, p. 9-10). The Commission ultimately ordered that the Respondent had failed to prove a change of condition and was not entitled to any additional benefits under the Workers' Compensation Act. (1-30-2014 D&O, p. 11-12). This Order never cited the opinions of Dr. Edwards and Dr. Merritt that a change of condition for the worse had actually occurred.

South Carolina Court of Appeals

After receiving the Full Commission's order, Respondent appealed to the South Carolina Court of Appeals asserting three points of error. The Commission erred by: (1) requiring a change

of condition be established by objective evidence, (2) ruling substantial evidence existed to deny a change of condition, and (3) finding Respondent's statements were self-serving and conclusory.

The Court of Appeals issued its opinion as *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016). The Court restated the law of change of condition for the worse by quoting S.C. Code Ann. § 42-17-90(A) (2015) which states, a review of a previous award is proper "on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." Moreover, the Court noted, "A change of condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award," and, "[g]enerally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the Commission. Review for a change of condition is concerned with conditions that have arisen thereafter." *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107-09, 576 S.E.2d 191, 196 (Ct. App. 2003).

Regarding the first point of alleged error, the Court cited *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999), which held both lay and expert testimony may be considered when determining causation. Additionally, the Court cited *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23-24, 716 S.E.2d 123, 126-27 (Ct. App. 2011), which held the Commission may disregard medical evidence and instead rely upon lay testimony if the record contains competent evidence, and held the Court does not balance objective against subjective findings of medical witnesses. Upon the Court of Appeal's review of the record and the Full Commission's Order, it found the Commission exclusively relied upon the MRIs in finding Respondent failed to objectively prove her claim. *Russell* at 756. Further, the Court of Appeals

noted the Commission's order "ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition." *Id.*

As a result, the Court of Appeals found "the Commission relied exclusively on objective evidence, the MRIs, in denying Russell's claim." *Id.* Correspondingly, the Court found the Commission "erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence." *Id.* Therefore, the Court held a change of condition for the worse can be proven with subjective evidence. *Id.* The Court of Appeals reversed the Commission's requirement that Respondent prove her claim by a preponderance of the evidence, and remanded the remaining issues—whether Respondent suffered a change of condition and whether the statements were self-serving and conclusory—to the Commission. *Id.*

On Remand Before Commissioner Campbell

On remand Commissioner Campbell reviewed the record in its entirety and issued his Order without hearing additional testimony from the parties. Commissioner Campbell found as fact the preponderance of the evidence supports a finding Claimant suffered a change of condition for the worse. (March 20, 2017, Order of Commissioner Campbell, p. 28). He further found Claimant was terminated from her employment with Wal-Mart on December 1, 2016, and that she has a present need for surgery. (*Id.*). Therefore, Commissioner Campbell Ordered Appellants pay for causally related medical treatment and pay back owed temporary total disability benefits from December 1, 2011, to the present and continuing. (*Id.* at 28–29).

STANDARD OF REVIEW

There are, in essence, two standards of review present in this appeal. The Appellate Panel is a fact finder for Workers' Compensation cases. Pursuant to the Court of Appeals, the Appellate

Panel has the ability to make its own findings of fact and reach its own conclusions of law. *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 281–82, 519 S.E.2d 583, 591, rehearing denied, certiorari denied (Ct. App. 1999) (quoting *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992)). The Appellate panel may review Commissioner Campbell’s finding on change of condition to ensure his Order is supported to by a preponderance of the evidence. However, the Appellate Panel may not address any other issues included in Appellants’ brief or form 30 addendum. Each of these issues has been abandoned by the doctrine of issue preclusion, for a failure to adequately preserve those issues. See *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) (all issues must be presented and argued in the brief); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (an issue is deemed abandoned on appeal and, therefore, not presented for review if it is argued in a short conclusory statement without supporting authority). See Argument II for further discussion of issue preservation. Through the course of the preceding appeals and this current appeal, Appellants have abandoned each issue contained in their Form 30 addendum and argued in their brief with the exception of their claim for error in Commissioner Campbell’s findings of change of condition. Consequently, the Appellate Panel may make new findings regarding Respondent’s change of condition if it were to find Commissioner Campbell erred, but may not issue findings or conclusions on any other issues, which were not previously litigated, for they are not properly before this Panel.

ARGUMENTS

I. The Preponderance of the Evidence Supports the Single Commissioner’s Finding of a Change of Condition for the Worse.

Commissioner Campbell correctly found Respondent suffered a change of condition for the worse. This finding is correct for two reasons: Respondent testified credibly she developed

new symptoms, and the medical evidence supports this finding. Consequently, the preponderance of the evidence supports a finding of change of condition for the worse.

Respondent's Credible Testimony

Commissioner Campbell's finding Respondent testified credibility is mentioned as a fact of this case, not as an argument on appeal. Appellants included Commissioner Campbell's findings on credibility in their Form 30 addendum, which listed points of alleged error. However, as stated by the South Carolina Court of Appeals, "An issue raised on appeal but not argued is deemed abandoned and will not be considered." *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993). Appellants did not include this issue in their brief and may not preserve that issue by including it during oral arguments. *See South Carolina Dep't of Social Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2011). Therefore, Respondent does not address Appellant's credibility appeal, for that issue cannot be heard by the Appellate Panel. Credibility, nevertheless, and Commissioner Campbell's finding of credibility are used to support Commissioner Campbell's finding of change of condition for the worse.

Respondent 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 her talent and trustworthiness and kept her in their employ for 13 years, promoting her from an entry level position to a management post with major responsibilities. (June 8, 2011 Order of Commissioner Wilkerson, p. 3; 2-11-2013 H.T., pp. 27-28). They used her as a trouble shooter when times were tough in North Carolina and trusted her to carry out forecasting, supervision of employees, control of merchandize, and most importantly, direct control over the money that moved through a fully-operational Wal-Mart store. (2-11-2013 H.T. pp. 28-30). Had there been questions of her

credibility during her career there, she would not have had the number of advancements she did, and she certainly would not have had direct control over and responsibility for the multi-million dollar business that is Wal-Mart. Now that her health is at issue, Appellants contend there are major issues over her credibility.

In Commissioner Campbell's Order, he made multiple findings as to Respondent's credibility. He found, "Claimant's testimony was admittedly credible." (March 20, 2017, Order of Commissioner Campbell, p. 28). He further found, "the Full Commission erred in finding Claimant's testimony was conclusory and self-serving." (*Id.*). Additionally, Commissioner Campbell noted as fact Commissioner Roche, who actually witnessed Respondent's February 11, 2013, testimony, found Respondent testified credibly.

Respondent testified she began to suffer from sharp pain in her leg and more intense pressure in her back in September or October of 2011. (2-11-2013 H.T., p. 8, ll. 22-24). She further stated unequivocally these were symptoms that were not present when she adjudicated her claim before Commissioner Wilkerson. (2-11-2013 H.T., p. 9 ll. 13-16). When asked explicitly by counsel if her condition had worsened since her initial hearing, Respondent stated "Yes, it has." (2-11-2013 H.T., p. 15 l. 15). Prior to her 2011 hearing, any symptoms from which she suffered were limited to a feeling of numbness and were not major. (2-11-2013 H.T., p. 17, ll. 6-9; p 17-18). The pain from which she suffers now she described as sharp or electrical. (2-11-2013 H.T., p. 17). Respondent further testified any symptoms in her legs prior to April of 2011 were likely the result of her pregnancy or bed rest and resolved themselves well before she testified before Commissioner Wilkerson. (2-11-2013 H.T., p. 20, ll. 19-25).

This opinion is corroborated by both by the opinions of Drs. Merritt and Edwards, and the Order of Commissioner Wilkerson. Both physicians authorized by Appellants to treat Respondent

were aware she had previously suffered from minimal leg issues, but stated her major leg and buttock pain did not arise until late 2011. Moreover, Commissioner Wilkerson's Order does not note any leg or buttock pain—a symptom which certainly would have been addressed when determining Respondent's degree of impairment if they were present at that time. However, those symptoms were not present.

Of note, Appellants cite Commissioner Campbell's Finding of Fact number 12 on page 11 of their brief as an example of an error and as an example of his incorrect view of the record. Finding of Fact number 12 directly states "Commissioner Wilkerson's June 8, 2011, Order did not find Claimant had leg or buttock pain." This is fact; this is not an error on the part of Commissioner Campbell. Commissioner Wilkerson's Order contained no findings of leg or buttock pain. Appellants claim in their brief the example cited above "[is] just [one] of many misstatements and mischaracterizations in the recent Decision and Order." Appellants could not correctly cite one example of facts Commissioner Campbell "misstated and mischaracterized." Most importantly, however, is the importance of the lack of a finding in Commissioner Wilkerson's Order on leg and buttock pain and the legal significance of such absence. That Order was unappealed, and pursuant to section 42-17-60 of the South Carolina Code, became the binding law of the case. Appellants cannot now go back and attempt a back-door appeal of that Order, issued in 2011.

Therefore, Claimant's testimony of her worsening symptoms is credible as found by Commissioner Campbell, and the issue was not briefed and consequently abandoned. Her testimony is corroborated by her physicians and is supported by the Order of Commissioner Wilkerson, which is the law of the case. Therefore, her testimony is probative and supports Commissioner Campbell's finding of a change of condition for the worse. This can and should be considered by the Commission, for her lay testimony is admissible and should be aptly considered

by the fact finder pursuant to the South Carolina Court of Appeals opinion in *Linen v. Ruscon Const. Co.*, 286 S.C. 67, 68, 332 S.E.2d 211, 212 (1985).

Medical Evidence

The medical evidence contained in the record further supports Commissioner Campbell's finding Claimant suffered a change of condition for the worse. "Medical evidence" is defined in the South Carolina Code at section 42-1-172 (C) as "expert opinion or testimony stated to a reasonable degree of medical certainty. . . ." Therefore, the opinions of Drs. Edwards and Merritt, which are stated to reasonable degree of medical certainty, are *per se* medical evidence. The Court of Appeals explicitly stated, "both doctors concluded, to a reasonable degree of medical certainty, that [Respondent] suffered a change of condition." *Russell v. Walmart Stores, Inc.*, 415 S.C. 395, 400, 782 S.E.2d 753, 756 (2016). This means there is *per se* medical evidence Respondent suffered a change of condition for the worse. Keep in mind, these were the opinions of doctors selected by the Appellants; the Court of Appeals was not relying on the opinions of physicians who conducted IMEs for Respondent, but rather the opinions of the authorized treating physicians. So, Commissioner Campbell's Order is supported by *per se* medical evidence.

Dr. Merritt and Dr. Edwards's opinions are clear on this point, and while they could not point to any differences between the MRIs, both still believed Respondent's condition was different. Dr. Merritt testified under oath that when he saw Respondent 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 [of 2011] that she was having increasing pain down her legs and into the buttock area." (Deposition of Dr. Merritt, p. 7, ll. 9-10, 12-15). He added that the "leg stuff was relatively new. It was never the main problem." (Deposition of Dr. Merritt, p. 22, ll. 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.” (Deposition of Dr. Merritt, p. 11). 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, and subjective evidence must be considered as stated by the Court of Appeals. (Deposition of Dr. Merritt, p. 23, ll. 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.” (Deposition of Dr. Edwards, p. 7). 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 when I first saw her”; this led him to the conclusion that “the nerve has worsened.” (Deposition of Dr. Edwards, p. 12). Dr. Edwards specifically said that he had no reason to doubt [the history given by respondent].” (Deposition of Dr. Edwards, p. 13). Dr. Edwards stated that he was making “an objective physical finding” that the 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.” (Deposition of Dr. Edwards, p. 18).

Appellants have tried repeatedly to use Respondent’s pregnancy to argue their position is supported by the preponderance of the medical evidence, but this is a red herring. Respondent was three months pregnant when she initially injured her back, and some treatment was delayed until the child was delivered. (June 8, 2011, Order of Commissioner Wilkerson, pp. 3–4). Appellants repeatedly reference this fact, focusing on Dr. Edwards’s testimony that Respondent may have been discectomy a candidate in 2010, but for her pregnancy. The simple fact of the matter is

Respondent delivered her child by June of 2010, but continued to see Dr. Merritt until March of 2011, after an additional nine months of treatment. (1-30-2014 D&O, p. 2). Dr. Merritt treated her during this time and ultimately concluded no surgery was required; this opinion was given long after Respondent delivered her child and moved past the complications of pregnancy. (1-30-2014 D&O, p. 4). Had Respondent 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 treatments 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 this case. It is very clear from the record that Respondent was not a surgical candidate at the time she reached MMI in 2011, but she is now a candidate due to her change of condition.

Consequently, the preponderance of the medical evidence supports a finding of change of condition for the worse, and Commissioner Campbell's Order correctly finds she did in fact suffer such change. The statement of the Court of Appeals that the physicians, stated to a reasonable degree of medical certainty, that Respondent suffered a change of condition, and the definition of medical evidence provided in the Code cannot be disputed. Respondent suffered a change of condition for the worse, and this fact is supported by substantial medical evidence. The lack of findings in the MRIs does not change that the preponderance of the medical evidence, the opinions of the only physicians deposed or cited in the record, supports a finding of a change of condition for the worse. A combination of this medical evidence with Respondent's credible testimony of her new symptoms and pain establishes by a preponderance of the evidence Respondent suffered a change of condition for the worse.

II. The Appellate Panel May Not Properly Hear Appellants' Arguments on Medical Treatment, Medical Benefits, Temporary Benefits, or Termination, for Those Issues Have Been Abandoned by Appellants.

Appellants have abandoned their arguments on the issues of medical treatment, medical benefits, temporary benefits, and termination, and the Appellate Panel may not properly hear those arguments. Each of these issues has been abandoned, for they were either not included or were not adequately briefed in one or several of the following: Appellants' May 19, 2017, Brief to the Workers' Compensation Commission; Appellants' March 31, 2017, Form 30 Request for Commission Review and Addendum; Appellants' February 2, 2016, Petition for Rehearing to the Court of Appeals; Appellants' October 17, 2013, Brief to the Workers' Compensation Commission; Appellants' August 9, 2013, Form 30 Request for Commission Review.

For an issue to remain preserved, it must have been presented to all preceding courts. Unpreserved issues, moreover, will not be considered. Stated differently, appellate courts will not decide issues advanced by appellants, which have not been advanced properly at every step of their case. *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952). As held by the South Carolina Supreme Court "arguments not raised to the workers' compensation commission . . . are not preserved for appeal." *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 466 S.E.2d 357 (1996). Moreover, an issue cannot merely be raised. It must be briefed, and it must be briefed with more than conclusory statements. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and the argument in a brief is conclusory, the issue is deemed abandoned); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (appellant was deemed to have abandoned the issue where he failed to provide any argument or supporting authority). Appellants may not now save issues properly included in their 2017 Form 30, but not briefed adequately, for an appellant may not use oral

argument as a vehicle to argue issues not argued in their appellant brief. *South Carolina Dep't of Social Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2011) (*Citing In the Interest of Bruce O.*, 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993)).

Appellants, in their Form 30 from August 9, 2013, alleged 20 points of error, but only briefed one point. Specifically, the entirety of the Appellant's October 17, 2013, brief's argument section is dedicated to arguing one point—that Commissioner Roche erred in finding Respondent suffered a change of condition for the worse. Therefore, the following findings and awards were either not appealed, or were not adequately briefed:

2. I find Claimant reasonably and timely sought additional medical care and attention as a result of her worsening symptoms.
3. I find Claimant attempted to comply with the restrictions placed her by her physicians.
4. Dr. Merritt testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
5. Dr. Merritt testified to within a degree of medical certainty Claimant's change of condition was a physical, anatomical change.
6. Dr. Merritt's letter dated November 21, 2011, supports both that Claimant underwent a change of condition for the worse and that future treatment, including but not limited to epidural injections, is medically necessary.
8. Dr. Edwards testified to within a degree of medical certainty Claimant suffered a change of condition for the worse.
10. I find Claimant is in need of additional medical treatment.
11. The Defendants shall provide medical care and attention pursuant to Claimant's change of condition.

13. I find the defendants required Claimant turn in her keys December 1, 2011.
14. I find the defendants have not provided Claimant work hours since December 1, 2011.
15. I find Claimant was given work restrictions prior to December 1, 2011. Those limitations continue to the present.
16. The defendants shall provide temporary total disability benefits from December 1, 2011, through the present date and continuing.
17. The defendants admitted a change of condition in their initial Form 51, dated January 3, 2012, and did not amend or ask to amend their Form 51 until the date of the Hearing. Because I find a change of condition on the merits, I do not issue a finding or Order on Claimant's estoppel contention.
18. The defendants failed to file a Form 51 in response to Claimant's second Form 50, served on September 20, 2012, and have therefore waived the statute of limitations defense.
 1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
 2. Defendants shall provide temporary total disability benefits from December 1, 2011 through the present and continuing.

Consequently, each of the above is now the law of this case. Those issues may not be relitigated, for doing so is barred by collateral estoppel or issue preclusion because Appellants failed to adequately preserve any issue they originally had with those findings and award.

Therefore, Appellant's claims in their brief for a new hearing or additional evidence on the issues of medical treatment, medical benefits, and temporary benefits are erroneous. The findings and award of Commissioner Roche were properly reinstated by Commissioner Campbell, for they have always been the law of the case. They were not appealed, so when the full commission

previously overturned Commissioner Roche's finding of change of condition for the worse, each of the above findings remained the law of the case. *Greene v. City of Columbia*, 311 S.C. 78, 80, 427, S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the single commissioner become the law of the case unless within the scope of the appellant's exception to the single commissioner's order) *abrogated in part on other grounds by Bone v. U.S. Food service*, 404 S.C. 67, 744 S.E.2d 552 (2013). It would have been improper for Commissioner Campbell to issue any finding or award inconsistent with the portions of Commissioner Roche's Order included, *supra*, for those issues had already been litigated, were unappealed, and could not be relitigated.¹

In essence, the only issue Appellants have properly presented before this panel is their argument Respondent did not suffer change of condition. Any issue presented by Appellants which was previously litigated and not included in every Form 30 subsequent to its litigation, not properly briefed in every appellant's brief since its litigation, and not properly included in the petition for a rehearing before the Court of Appeals may not properly be brought before the Appellate Panel. The above quoted findings from Commissioner Roche are unappealed and are the law of the case, as are any additional findings made by Commissioner Campbell except for the change of condition, for they were either not included in Appellants' Form 30, or they were not properly briefed.

III. Appellants are Barred by the Doctrine of Judicial Estoppel from Claiming a *De Novo* hearing should be held.

As an additional point, argued alternatively, Appellants cannot now ask for a *de novo* hearing or for new evidence to be taken on these issues. Appellants, through their attorney,

¹ Moreover, the findings of Commissioner Campbell's Order to which Appellants object – medical treatment, medical benefits, temporary benefits, and termination – are clearly supported by a preponderance of the evidence. See 2-11-2013 H.T. p. 24, p. 31 (Respondent was terminated or constructively discharged); Deposition of Dr. Edwards pp. 20-21 (Respondent is in need of surgery).

previously requested the hearing with Commissioner Campbell be conducted upon a review of the existing evidence without the taking of additional testimony or evidence. (E-mail from Johnnie W. Baxley III, Attorney, Willson Jones Carter & Baxley, P.A., to Barbara Cheeseboro, Administrative Assistant to Commissioner Campbell, South Carolina Workers' Compensation Commission (June 1, 2016) (included in the Commission file)). Specifically, Appellants stated,

I believe [setting a *de novo* hearing] to be in error based upon the remand from the South Carolina Court of Appeals. . . . There is nothing in the remand from the Court of Appeals which indicates that a new hearing should be held and that new evidence should be taken on the claim; instead, the commission is simply supposed to reconsider the existing evidence and issue new factual findings in accordance with the legal issues raised by the Court of Appeals. I believe that having a new hearing would necessarily include taking new evidence and giving both parties a 'second bite of the apple' is improper. . . . I certainly don't see any basis for a *de novo* hearing or consideration of new evidence.

Id.

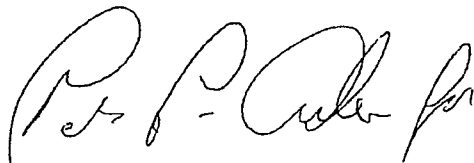
The doctrine of judicial estoppel "precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). This is different from arguing in the alternative, but rather, is saying one thing and then arguing for the opposite. In this matter, Appellants should be estopped from arguing for a *de novo* hearing, for that position is diametrically opposed to the position they adopted in the summer of 2016. To allow anything else would impair the integrity of the judicial process. The goal of judicial estoppel is the preservation of judicial integrity. Moreover, if the Commission were to find judicial estoppel inapplicable finding this is a legal issue, it should still prevent Appellants from taking two inconsistent positions on this issue. The goal of the rule of judicial estoppel remains the same, and that goal, judicial integrity, is impaired by Appellants' picking and choosing of inconsistent positions in the same matter. While Appellants attempt to rectify the inconsistencies between their email and their current brief, they

cannot do so; their positions are patently inconsistent. Appellants now request a *de novo* hearing of everything except the determination of a change of condition, but in their email, they clearly stated no new evidence was needed “on the claim” and that giving the “parties a ‘second bite of the apple’ is improper.” Appellants at the time of the email thought a *de novo* hearing would be improper and should not be allowed to argue the opposite after receiving an Order with which they disagree.

CONCLUSION

Therefore, the preponderance of the evidence supports Commissioner Campbell’s finding Claimant suffered a change of condition for the worse, for Respondent’s testimony, coupled with the substantial medical evidence, prove Respondent did in fact suffer a change of condition. Similarly, Commissioner Campbell’s other findings are proper, for he restated findings that are the law of the case; these issues cannot be appealed, for they were not properly preserved. For those reasons, Respondent respectfully requests this Appellate Panel affirm Commissioner Campbell’s Order or issue findings in accord with his Order.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "C. Daniel Vega", written in a cursive style.

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June 2, 2017

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0917785

Paula Russell,	CLAIMANT/RESPONDENT,
vs.	
Wal-Mart Stores, Inc.,	EMPLOYER,
and	
Illinois National Insurance Company,	CARRIER, DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South Carolina,
on June 19, 2017, per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
9-15, 2017

APPEARANCES:

Respondent Paula Russell, Claimant represented by C. Daniel Vega, Esquire, of Chappell, Smith & Arden in Columbia, South Carolina.
Defendants/Appellants represented by Johnnie W. Baxley, III, Esquire of Willson Jones Carter & Baxley, P.A. in Mt. Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, and on March 20, 2017, he issued the following Order:

IT IS ORDERED that Defendants shall pay Claimant benefits pursuant to a change of condition for the worse, commencing on November 21, 2011, of the lumbar injury sustained November 3, 2009.

IT IS FURTHER ORDERED that Defendants shall provide and pay for Claimant's medical care and treatment related to the change of condition for the worse, commencing November 21, 2011 to the present and continuing of the further order of the Commission.

IT IS FURTHER ORDERED that Defendants shall pay for Claimant's reasonable costs and expenses incurred while obtaining medical care and treatment related to the change of condition for the worse, commencing November 21, 2011 to the present and continuing of the further order of the Commission.

IT IS FURTHER ORDERED that Defendants shall pay temporary total disability benefits in the amount of \$681.36 per week, commencing December 1, 2011, to the present and continuing until further order of the Commission.

IT IS SO ORDERED!

Within the statutory period, Defendants filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on June 19, 2017, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Single Commissioner erred in finding as a fact and concluding as a matter of law in the following particulars listed below. Such errors are errors of fact and law:

- 1. Did the Single Commissioner err in Findings of Fact #1, in basing his decision on workers' compensation benefits in part on the prior factual findings of Commissioner Roche, which were set aside by the Full Commission and have no precedential value or weight, instead of reviewing the record de novo using the preponderance of the evidence standard as instructed by the Court of Appeals?*
- 2. Did the Single Commissioner err in Findings of Fact #12 and #13, in stating conclusively that the Claimant did not have any prior work restrictions or leg or buttock pain based on Commissioner Wilkerson's June 8, 2011 order, even though Commissioner Wilkerson did not address these issues in his order?*
- 3. Did the Single Commissioner err in Findings of Fact #18 and #19, in stating that the Claimant's "new" pain and symptoms began in her leg and buttock around September or October of 2011, such findings being based on surmise and conjecture, rather than medical evidence stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support this factual finding?*
- 4. Did the Single Commissioner err in Findings of Fact #20, in concluding that Dr. Merritt opined that Claimant's condition had worsened contrary to the greater weight and substantial evidence of record, especially taking into consideration that Dr. Merritt did not state his opinion to reasonable degree of medical certainty on November 21, 2011? Does the preponderance of evidence in the record support this factual finding?*
- 5. Did the Single Commissioner err in Findings of Fact #21 and 22, in indicating that Wal-Mart refused to accommodate the Claimant's restrictions and terminated her, even though the greater weight of the evidence proves that Wal-Mart was accommodating the Claimant's restrictions and that the Claimant voluntarily resigned from Wal-Mart? Does the preponderance of evidence in the record support these factual findings?*
- 6. Did the Single Commissioner err in Findings of Fact #26, in stating that Dr. Edwards opined that Claimant did not have radicular symptoms after her 2009 injury, but now has pain centered in her lower back that radiates into her legs, even though Dr. Edwards did not offer an opinion as to this matter and the medical narrative simply reiterated the Claimant's subjective history? Does the preponderance of evidence in the record support this factual finding?*

7. *Did the Single Commissioner err in Findings of Fact #28, by stating that Dr. Edwards recommended surgery after a July 24, 2012 MRI, when he did not recommend surgery and only discussed surgery with the Claimant on her own request?*

8. *Did the Single Commissioner err in Findings of Fact #30, 31, and 32, in stating that Dr. Merritt testified that there was a slightly larger disc protrusion in the MRI that was touching the nerve root and that the Claimant had new radicular symptoms, when his testimony regarding these issues were speculative and not stated to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?*

9. *Did the Single Commissioner err in Findings of Fact #33, by stating to a reasonable degree of medical certainty that Claimant suffered a change in condition for the worse, even though Dr. Merritt's deposition, taken as a whole, is speculative and does not meet the standard of medical evidence to a reasonable degree of medical certainty? Does the preponderance of evidence in the record support these factual findings?*

10. *Did the Single Commissioner err in Finding of Fact #34, by stating that Dr. Merritt recommended additional treatment, up to but not excluding surgery, even though his deposition testimony did not take an affirmative stance on the Claimant's future surgical needs?*

11. *Did the Single Commissioner err in Findings of Fact #36, 37, 38, 39, 40, 41, 42, and 43, by mischaracterizing or misstating Dr. Edwards testimony when:*

a. *Fact #36 only provided part of Dr. Edwards answer, and omitted Dr. Edwards' testimony that "radiographically, there's not a significant difference" in the MRI scan?*

b. *Fact #37 indicated that Dr. Edwards testified to a reasonable degree of medical certainty that there was change to the Claimant's nerve making it more painful, but Dr. Edwards did not provide this opinion to a reasonable degree of medical certainty as indicated on page 13 of his deposition transcript?*

c. *Fact #38 indicated that the Claimant's symptoms were worse and clinically different in 2012 than 2010, even though Dr. Edwards clarified that radiographically she was not worse?*

d. *Fact #39 indicates that Dr. Edwards stated the Claimant's radiculopathy was caused by a combination of mechanical direct compression and chemical irritation to the nerve, when he was unable to state this fact to a reasonable degree of medical certainty*

and merely postulated that chemical leaking and mechanical compression could be causing the Claimant's subjective symptoms?

e. Fact #40 indicates that Dr. Edwards testified that the disc pathology was causing the Claimant's worsening, when he did not state that fact and merely indicated that the Claimant's disc pathology was causing her symptoms and that the disc pathology was fairly consistent before and after the alleged worsening?

f. Fact #42 omitted certain testimony from Dr. Edwards answer on page 18 of his deposition transcript?

g. Fact #43 incorrectly stated that Dr. Edward recommended surgery for the changed condition, when he never stated to a reasonable degree of medical certainty that the Claimant has suffered a worsening of her condition?

Are these findings supported by the preponderance of evidence in the record, or are they snippets of testimony cherry-picked to provide the basis for an award despite the weight of the evidence?

12. Did the Single Commissioner err in Findings of Fact #45 - #66, by stating as fact any findings by Commissioner Roche when her Order was expressly overturned by the Full Commission and therefore such findings are entitled to no weight or precedential value? Did the Single Commissioner incorrectly rely upon prior Single Commission findings that were expressly overturned by the Full Commission? Does the preponderance of evidence in the record support these findings?

13. Did the Single Commissioner err in Findings of Fact #68 - 72 by mischaracterizing and misinterpreting the basis for Defendants' appeal and arguments?

14. Did the Single Commissioner err in Findings of Fact #91-94 by mischaracterizing the "findings" of the Court of Appeals and basing his decision in part upon mischaracterized factual findings which were not made by the Court of Appeals?

15. Did the Single Commissioner err in Findings of Fact #95, when stating that the South Carolina Court of Appeals reversed and remanded the matter to the Commission to enter an order consistent with their findings, when the Court of Appeals merely reversed and remanded the matter to the Commission to evaluate this case and make its own findings under a preponderance of the evidence standard? Did this misunderstanding by the Single Commissioner of the directives

of the Court of Appeals lead to this erroneous decision and factual findings that are not supported by the preponderance of the evidence?

16. Did the Single Commissioner err in Findings of Fact #98, in stating that the Claimant suffered a change of condition for the worse as outlined in the overturned order of Commissioner Roche? Did the Single Commissioner fail to properly review the preponderance of the evidence and make factual findings, as opposed to relying upon old factual findings that had already been overturned by the Full Commission? Does the preponderance of the evidence in the record support this finding?

17. Did the Single Commissioner err in Finding of Fact #102, 103, and 104, in stating that Dr. Merritt testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though preponderance of the evidence states otherwise? Did the Single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?

18. Did the Single Commissioner err in Findings of Fact #105, 106, and 107, in stating that Dr. Edwards testified within a reasonable degree of medical certainty, consistent with the requirements of the Act, that Claimant suffered a change of condition for the worse and that the change of condition was a physical, anatomical change, even though substantial evidence states otherwise? Did the Single Commissioner err in failing to make factual findings in light of the preponderance of evidence and instead just re-stated the findings of Commissioner Roche?

19. Did the Single Commissioner err in Findings of Fact #108 and #109 in implying that objective evidence is not appropriate in a change of condition for the worse standard even though objective evidence is an integral part of the preponderance of evidence standard?

20. Did the Single Commissioner err in Findings of Fact #110 and #111, in finding the Claimant's testimony "admittedly credible" and that the Full Commission erred in finding the Claimant's testimony conclusory and self-serving, based on the fact that Defense counsel simply stated that she came across well?

21. Did the Single Commissioner err in Findings of Fact #112, 113, and 114, in stating that the Claimant was able to establish that she had new complaints that were not present at the time of the original award, that her present condition is different than the condition in existence when the first award was made, and that her condition had worsened, when such factual findings are based exclusively on the claimant's testimony and not based upon a preponderance of evidence in the record? Did the Single Commissioner err in basing these factual findings on only

certain evidence while ignoring other competent evidence as opposed to making factual findings based upon the preponderance of evidence in the record?

22. *Did the Single Commissioner err in Findings of Fact #115 that the Claimant needs surgery and that her need is new and occurred after the original award, even though there is evidence to the contrary in this claim? Does the preponderance of evidence in the record support this factual finding?*

23. *Did the Single Commissioner err in Findings of Fact #116, in stating affirmatively that the Claimant had difficulty driving and working due to her symptoms, even though the preponderance of objective evidence shows that she was able to complete her job without issue?*

24. *Did the Single Commissioner err in Findings of Fact #117 and 118 finding that a preponderance of evidence supports a finding that Claimant suffered a change of condition for the worse, is eligible for further benefits under the Act?*

25. *Did the Single Commissioner err in Findings of Fact #119-124 by simply restating the award of Commissioner Roche which has no weight or precedential value since it was overturned by the Full Commission, and where such findings are not supported by the preponderance of evidence?*

26. *Did the Single Commissioner err in Findings of Fact #123, in stating that the Claimant was terminated on December 1, 2011, when the greater weight of the evidence indicates that the Claimant was being accommodated prior to December 1, 2011 and that she resigned her employment sometime after December 1, 2011 when Defendants would not move her to another location?*

27. *Did the Single Commissioner err in Findings of Fact #124, in reinstating Commissioner Roche's award of temporary total disability benefits from December 1, 2011, to the present and continuing? Procedurally, did the Single Commissioner err in awarding back temporary benefits without the taking of any new testimony or evidence regarding that issue and reinstating an award that was based upon testimony and evidence from February 2013? Does the preponderance of evidence in the record support such an award? Is the reinstatement of the original award from the Single Commissioner an error of law?*

28. *Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #2, based on Commissioner Roche's overturned Order that the Claimant was awarded a change of condition for the worse commencing on November 21, 2011, ongoing temporary total disability benefits commencing December 1, 2011, to the present and continuing, and causally related medical care and treatment for the change in condition along with reasonable reimbursement costs and expenses? Was it factual error for the Commissioner to simply reinstate the old findings of Commissioner Roche as opposed to making new findings based upon a preponderance of evidence in the record?*

29. *Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #8, that Claimant has met her burden of proving a change of condition for the worse commencing November 21, 2011?*

30. *Did the Single Commissioner err in concluding as a matter of law, in Conclusions of Law #9 and #10, that the Claimant is awarded causally related medical care and treatment along with reasonable reimbursement costs for expenses incurred while obtaining care and temporary total disability benefits commencing December 1, 2011, to the present and continuing? Are these awards errors of law procedurally and factually?*

31. *Did the Single Commissioner err in failing to make factual findings regarding the weight given to the competing evidence in this matter?*

32. *Did the Single Commissioner err in failing to make factual findings regarding whether there has been proof by a preponderance of the evidence that there has been a change of condition caused by the original injury occurring after the last payment of compensation?*

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Single Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, we find that the Single Commissioner should have had a full evidentiary hearing on the issue of benefits to be awarded if there is a finding of a change of condition for the worse. Due to the failure to conduct such a hearing on that issue and the Single Commissioner's improper reinstatement of a previous award of Commissioner Roche, we vacate the Order dated March 20, 2017, and remand the matter back to the Single Commissioner for a full evidentiary hearing.

PROCEDURAL HISTORY

On February 11, 2013, a hearing was held before Commissioner Andrea C. Roche to determine the issues raised in Claimant's Form 50. After considering the evidence presented, Commissioner Roche found that Claimant suffered a change of condition for the worse and was entitled to additional medical care and attention as well as temporary total disability benefits. Defendants appealed this decision and a hearing was held before the Full Commission on December 16, 2013. The Full Commission issued its order on January 30, 2014, and found that no change in condition had occurred due to the fact that no objective evidence showed a change in condition and the greater weight of the evidence did not support a worsening of condition. Claimant appealed this decision to the South Carolina Court of Appeals arguing that the Full Commission erred by using an objective evidence standard. The South Carolina Court of Appeals heard the appeal on October 20, 2014, and issued its decision on January 20, 2016. The Court of Appeals found that the Full Commission erred in requiring the Claimant to establish her claim for a change of condition with objective evidence. The Court reiterated the standard that the Commission use a preponderance of evidence standard when deciding these claims.

The Court of Appeals remanded to the Commission to determine if the Claimant sustained a changed in condition based upon a preponderance of evidence. The Court of Appeals found that the Commission erred in requiring a change of condition to be established by objective evidence and they reversed and remanded on that issue alone. On remand and without a hearing, Commissioner Campbell concluded that the Claimant met her burden of proving a change of condition for the worse. Additionally, Commissioner Campbell reinstated the original award of Commissioner Roche which awarded causally related medical care and treatment commencing November 21, 2011, and temporary total disability benefits commencing December 1, 2011, to

the present and continuing. Commissioner Campbell's Decision and Order was filed on March 20, 2017, and Appellants subsequently and timely filed a Form 30 appealing this Decision and Order on March 31, 2017.

ISSUES PRESENTED

- I. Did the Single Commissioner err in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work when the preponderance of evidence in the record does not support such findings (Grounds for Appeal # 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 17, 18, 21, 22, 23, 24, 26, 29, 30, 31, 32)?
- II. Did the Single Commissioner err in failing to review the evidence de novo to determine whether the Claimant sustained a change of condition for the worse by a preponderance of the evidence and in awarding benefits (Grounds for Appeal # 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 27, 28, 29, 30, 31, 32)?

DISCUSSION

The Appellate Panel first addresses Issue II, as our ruling on that issue necessitates our decision to vacate the order of Commissioner Campbell and remand the case. The Defendants argued that, even if there had been a compensable change of condition for the worse, the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of benefits. We agree.

Although we find that the Single Commissioner properly addressed benefits, such benefits should have only been awarded after a full evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits. It was improper and an error of law for the Single Commissioner to simply reinstate the prior award of benefits by Commissioner Roche dated August 5, 2013. Those previous findings and the award had already been overturned by the Full Commission, and as an operation of law, the findings, conclusions, and award of Commissioner Roche no longer existed and cannot be reinstated. Claimant argues Commissioner

Campbell properly reinstated Commissioner Roche's findings because Commissioner Roche's findings are the "law of the case." Claimant argues the Orders must necessarily have been consistent with one another because those issues had already been litigated, were unappealed, and could not be relitigated. However, the Full Commission unanimously reversed Commissioner Roche's findings, stating Claimant failed to meet her burden of proof that she sustained a change of condition for the worse and reversing her award of benefits. Thus, it is legal error to reinstitute Commissioner Roche's overturned findings.

Further, the award of benefits in this matter without allowing Defendants to have an evidentiary hearing, to present evidence, or to cross-examine the claimant, had the effect of denying the Defendants due process to present a defense to this claim for benefits. By reinstating the award of Commissioner Roche from 2013, which consisted of an award of ongoing temporary benefits and medical treatment, it deprived the Defendants of the opportunity to challenge the claimant's entitlement to any of those benefits or present evidence on those issues. Obviously, the Defendants had an opportunity to present evidence before Commissioner Roche's original award, but that occurred at an evidentiary hearing in February 2013. Since that time, the Defendants have had no opportunity to present any additional evidence regarding Claimant's entitlement to workers' compensation benefits. The Single Commissioner's decision to simply reinstate the award of Commissioner Roche denied the Defendants due process on the issue of benefits.

Finally, the Single Commissioner made an award of benefits that apply to the time period from November 21, 2011, through the present and continuing without any factual or evidentiary basis for such award. As indicated above, the last time either party submitted any testimony or evidence was at a hearing on February 11, 2013. The Single Commissioner made an award of ongoing temporary compensation and medical treatment even after that date despite a complete

lack of evidence and testimony as to whether the claimant's need for medical treatment has continued and temporary disability has continued. There is simply no evidence or factual basis for such an award since there was not a full evidentiary hearing.

It is improper and prejudicial to both parties in this claim to simply reinstate findings that are almost four years old. If benefits are to be awarded, there must be an evidentiary hearing so that accurate and up-to-date factual findings and awards can be made. We find that the Single Commissioner, on the issue of whether there had been a change of condition for the worse, correctly limited his review to the evidence and record that had been presented at the hearing on February 11, 2013. We find that the Single Commissioner erred in not having a full evidentiary hearing and accepting new testimony on the issue of benefits due if there has been a change of condition for the worse.

The Defendants also asserted that the Single Commissioner inadvertently misstated and mischaracterized a number of important and relevant facts. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

Additionally, the Defendants have asserted that the preponderance of evidence in the record including the medical records, the diagnostic testing, and the medical testimony, and the testimony of the Claimant do not support the finding of the Single Commissioner that Claimant sustained a physical worsening of condition after the original award. The Claimant has asserted that the preponderance of the evidence in the record supports that the Claimant has sustained a worsening of her condition. Again, the appellate panel does not need to address this issue. We have decided to vacate the order of Commissioner Campbell and remand the claim for a new hearing based upon

the award of benefits issue, and thus there is no need to address this additional ground.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.

2. The claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issued on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

3. Subsequent to the original award, the Claimant filed an application for a change of condition per section 42-17-90.

4. A hearing regarding the alleged change of condition was adjudicated before Commissioner Andrea Roche on January 16, 2013. Commissioner Roche found Claimant sustained a compensable change of condition claim, and awarded Claimant ongoing medical treatment.

5. Defendants/Appellants appealed to the Full Commission and received an Order in their favor dated January 30, 2014. The Full Commission unanimously reversed Commissioner Roche's findings, stating Claimant failed to meet her burden of proof that she sustained a change of condition for the worse.

6. The Claimant appealed to the South Carolina Court of Appeals, and it heard the case

on October 20, 2015. The South Carolina Court of Appeals issued its decision on January 20, 2016, reversing and remanding the Full Commission's January 30, 2014 Order. The South Carolina Court of Appeals found the Commission erred in requiring Claimant to establish her claim for a change of condition by objective evidence. See Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016). The Court of Appeals remanded this matter to the Commission.

7. Commissioner R. Michael Campbell adjudicated the case on remand without a hearing and issued an Order on March 20, 2017. The Single Commissioner reinstated Commissioner Roche's findings and benefits award.

8. Defendants/Appellants filed a Form 30 to appeal the Single Commissioner's Order, and the Full Commission heard the case on June 19, 2017.

9. We find that the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of benefits. Any award of benefits should have only been awarded after a full evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits.

10. The award of benefits in this matter without allowing Defendants to have an evidentiary hearing, to present evidence, or to cross-examine the claimant, had the effect of denying the Defendants due process to present a defense to this claim for benefits. By reinstating the award of Commissioner Roche from 2013, which consisted of an award of ongoing temporary benefits and medical treatment, the Single Commissioner deprived the Defendants of the opportunity to challenge the claimant's entitlement to any of those benefits or present evidence on those issues.

11. The Single Commissioner made an award of benefits that applied to the time period from November 21, 2011, through the present and continuing without any factual or evidentiary basis for such award. The last time either party submitted any testimony or evidence was at a hearing

on February 11, 2013. The Single Commissioner made an award of ongoing temporary compensation and medical treatment even after that date despite a complete lack of evidence and testimony as to whether the claimant's need for medical treatment has continued and temporary disability has continued.

12. The Defendants also asserted that the Single Commissioner inadvertently misstated and mischaracterized a number of important and relevant facts. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

13. The Defendants also asserted that the preponderance of evidence in the record including the medical records, the diagnostic testing, and the medical testimony, and the testimony of the Claimant do not support the finding of the Single Commissioner that Claimant sustained a physical worsening of condition after the original award. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, there is no need for us to address this issue.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to S.C. Code Ann. section 42-17-90, 42-9-10, 42-9-30 et seq., we find that the Single Commissioner erred in simply reinstating the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing on the issue of any award of benefits under the

Act.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

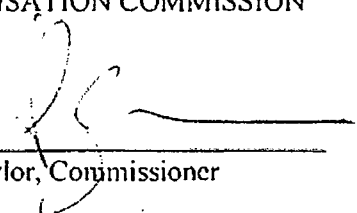
IT IS, THEREFORE, ORDERED that the Single Commissioner's March 20, 2017 Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing. The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof.

IT IS FURTHER ORDERED that at the remand hearing, the Single Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90. At the remand hearing, the Single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable.

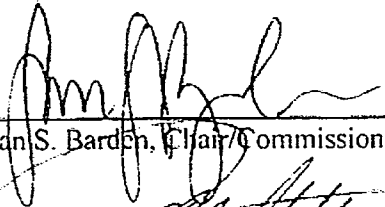
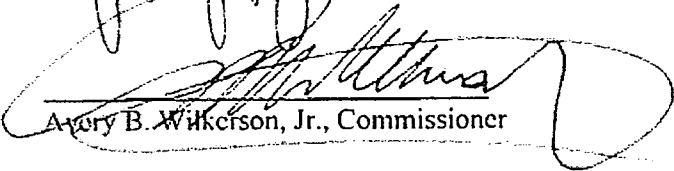
AND IT IS SO ORDERED!

VACATED AND REMANDED

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Aisha Taylor, Commissioner


Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on September 14, 2017

Part of the



CHAPPELL, SMITH & ARDEN
ATTORNEYS AT LAW

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Georgia and the
District of Columbia

October 13, 2017

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED
OCT 13 2017
SC Court of Appeals

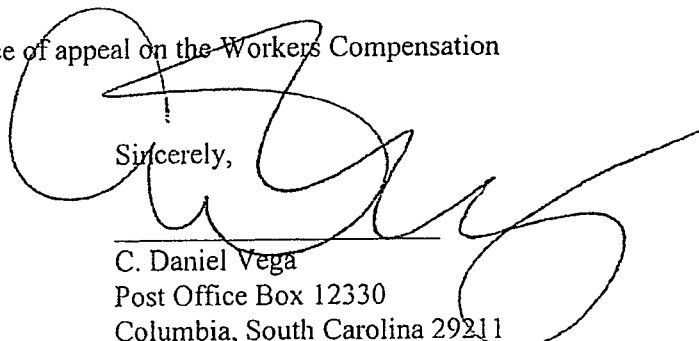
RE: Paula Russell, Appellant, v. Wal-Mart Stores, Inc., Respondent,
WCC File No. 0917785

Dear Ms. Kitchings:

Enclosed for filing is a Notice of Appeal to the Court of Appeals. Also
enclosed are the following:

- (1) Proof of service of the notice of appeal on the defendant/respondents.
- (2) A copy of the order which is to be challenged on appeal.
- (3) A filing fee of \$100.00.
- (4) Proof of service of the notice of appeal on the Workers Compensation
Commission.

Sincerely,


C. Daniel Vega
Post Office Box 12330
Columbia, South Carolina 29211
(803) 929-3600
Attorney for Appellant

cc: Johnnie W. Baxley, III
421 Wando Park Blvd., Suite 100
Mt. Pleasant, South Carolina 29464
(843) 284-1082
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

RECEIVED

OCT 13 2017

SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company,

Respondents.

NOTICE OF APPEAL

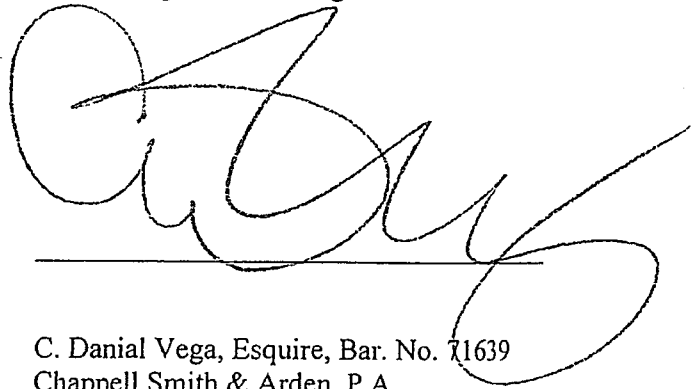
Paula Russell, through her attorney of record, C. Danial Vega, appeals the order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated September 15, 2017. Appellant received the order September 14, 2017.

Pursuant to S.C. Code Ann. section 42-17-60, Appellant hereby petitions this Court for review based on the following grounds for appeal and alleged errors of law:

1. Did the Appellate Panel of the South Carolina Workers' Compensation Commission err in not following the specific instructions of the Court of Appeals as stated by the Court in its opinion *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016).
2. Did the Full Commission err in vacating the order of Commissioner Campbell issued March 20, 2017, when the Full Commission cited no reversible error in support of its decision to vacate the order.

3. Did the Appellate Panel of the South Carolina Workers' Compensation Commission err in expunging the record received upon remand from the Court of Appeals, by vacating the order of Commissioner Campbell issued March 20, 2017, and remanding the claim for a hearing de novo.
4. Did the Full Commission err in not finding defendants waived their right to an evidentiary hearing when defendants unequivocally waived their right to a hearing.

October 13, 2017



C. Danial Vega, Esquire, Bar. No. 71639
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
PH: (803) 929-3600
dvega@csa-law.com
**Attorney for Paula Russell,
Appellant**

Other Counsel of Record:

Johnnie W. Baxley
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
PH: (843) 284-1080
Attorney for Respondents

The State of South Carolina
In The Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

WCC No. 1002408

RECEIVED
OCT 18 2017
SC Court of Appeals

Paula Russell,

Claimant/Appellant,

v.

Wal-Mart Stores, Inc.

Employer,

and

Illinois National Insurance Company,

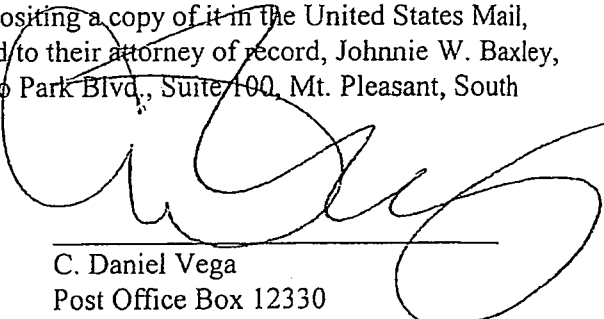
Carrier,

Defendants/Respondents,

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Wal-Mart Stores, and Illinois National Insurance Co., Defendants/Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on October 13, 2017, addressed to their attorney of record, Johnnie W. Baxley, III, Willson, Jones, Carter & Baxley, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, South Carolina 29464.

October 13, 2017


C. Daniel Vega
Post Office Box 12330
Columbia, South Carolina 29211
(803) 929-360
Attorney for Appellant

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

and

American Home Assurance,

Respondents.

RESPONDENTS' MOTION TO DISMISS

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully move to dismiss the appeal of C. Daniel Vega, attorney for Appellant, on the ground that the appeal is interlocutory and not subject to review under S.C. Code Ann. §1-23-380. This motion is based on the following grounds:

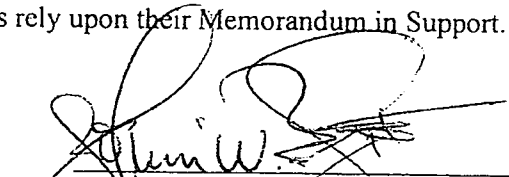
1. Appellant prematurely filed an appeal after the South Carolina Workers' Compensation Commission vacated and remanded an order by the Single Commissioner. The Full Commission remanded this matter to a Single Commissioner to hold a hearing on the existing record to determine if the Claimant sustained a change of condition for the worse and, if so, to conduct an evidentiary hearing with updated evidence as to Claimant's entitlement to benefits under the Act.

2. As there has not been a final agency decision in this matter, Appellant is not permitted to appeal this order vacating and remanding the matter for further adjudication. S.C. Code Ann. §1-23-380(1).

WHEREFORE, Respondents respectfully request that the Court grant its Motion to Dismiss and enter an order dismissing, without prejudice, Appellant's appeal. Respondents further requests an award of costs and attorney's fees associated with this Motion and any other relief this Court deems just and proper.

In support of this Motion, Respondents rely upon their Memorandum in Support.

October 24, 2017



Johnnie W. Baxley, III
Willson, Jones, Carter & Baxley
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

American Home Insurance,

Respondents.

RESPONDENTS' MEMORANDUM IN SUPPORT
OF ITS MOTION TO DIMISS

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully submit this memorandum in support of their motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

This claim has a lengthy and factually involved procedural posture, starting when the Appellant was injured on November 3, 2009. The Appellant was pulling a wooden pallet when she sustained a strain to her abdomen and middle of her back. Respondents accepted the claim as compensable, and medical treatment was promptly provided. The Appellant was released at Maximum Medical Improvement (“MMI”) on February 2, 2011, and was ultimately provided with a 7% impairment rating to the spine. The parties appeared for a hearing in front of Commissioner Avery Wilkerson. On June 8, 2011, Commissioner Wilkerson, in accordance with the Form 14B releasing the Appellant at MMI with a 7% impairment rating to the spine, awarded the Appellant 21 weeks of Permanent Partial Disability, which amounted to \$14,308.56. A Form 19 was then filed with the Commission to close the file.

Appellant’s attorney filed a Form 50 alleging that the Appellant was entitled to further medical treatment because she sustained a change of condition for the worse under S.C. Code Ann. §42-17-90. On August 5, 2013, Commissioner Roche found that the Appellant sustained a change of condition for the worse and ordered Respondents to provide medical treatment and temporary total disability (“TTD”) benefits. Respondents appealed the order to the Full Commission. On January 30, 2014, The Full Commission reversed and found that the Appellant failed to prove that she sustained a compensable change of condition for the worse. Appellant then appealed to the Court of Appeals.

On March 24, 2016, this Court found that the Commission erred by relying on objective evidence only and by discounting the Appellants subjective complaints. Citing S.C. Code Ann. §42-17-90(A), this Court stated, “There is no requirement in the Act requiring the Claimant to

prove the change of condition by objective evidence. Thus, we reverse and remand to the Commission.” *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016).

On March 20, 2017, on remand and without a hearing, Commission Campbell concluded that the Appellant met her burden of proving a change of condition for the worse. Moreover, Commissioner Campbell reinstated the original award of Commissioner Roche, dated February 2, 2011, which awarded causally related medical care and treatment as well as TTD benefits commencing December 1, 2011, to the present and continuing. Based on this order, Respondents again appealed to the Appellate Panel.

On September 14, 2017, the Full Commission found that the Single Commissioner erred by simply reinstating the prior award of benefits Commissioner Roche issued in 2011. The Full Commission noted that the previous findings and award had already been overturned by the Full Commission, and by operation of law, those findings and conclusions, including the final award, could not be reinstated. The Full Commission found that it was improper and prejudicial to both parties to simply reinstate findings and awards that are over four years old. The Full Commission vacated the order of Commissioner Campbell and remanded the claim for a new hearing. This appeal followed.

II. DISCUSSION

A. Appellant’s appeal constitutes an interlocutory appeal not permitted under S.C. Code Ann. § 1-23-380.

S.C. Code Ann. § 1-23-380(A) provides, “A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review...” Specifically, S.C. Code Ann. § 1-23-380(A)(1) provides that “[p]roceedings for review are instituted by serving and filing a notice of appeal as provided in

the South Carolina Appellate Court Rules within thirty days after the final decision of the agency....”

In this case, Appellant has not “exhausted all remedies available within the agency, and thus there is not a “final decision” from which an appeal may be taken. As stated in the facts above, the Full Commission remanded the case for a full hearing on the merits and, as such, a final decision as to both compensability and entitlement to benefits has not yet been rendered. The Appellant’s notice of appeal stems from an intermediate remand and offers no basis providing this court with subject matter jurisdiction.

B. The Supreme Court of South Carolina has addressed this issue in *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, 399 S.C. 566, 733 S.E.2d 200 (2012) and *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Env’tl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The South Carolina Supreme Court addressed the current issue in another workers’ compensation case. In that case, the claimant filed a workers’ compensation claim after injuring her back at work. A hearing Commissioner found that the claimant had failed to meet her burden of proving an injury by accident arising out of and in the course of her employment. The Appellate Panel subsequently affirmed the Single Commissioner’s findings, and the claimant then appealed. The circuit court reversed and remanded the decision for further adjudication by the Commission. However, the employer and its workers’ compensation carrier immediately appealed. The Court of Appeals dismissed the appeal on the basis that the appeal was interlocutory. The employer then filed a petition for a writ of certiorari, which was granted. See generally *Bone v. U.S. Food Serv.* 399 S.C. 566, 733 S.E.2d 200 (2012) (holding that

appealability of an administrative order is governed by S.C. Code Ann. § 1-23-380 and that a “final order” is required).

The South Carolina Supreme Court, noting that there had been “lingering confusion” in this area of law after passage of the APA, decided to clarify the issue. The court first averred that interlocutory orders are not directly appealable. The court stated, citing earlier precedent, “We granted the respondent’s motion to dismiss the appeal . . . In so doing, we relied upon the final judgment rule articulated in section 1-23-390 of the APA and observed that ‘we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.’” *Bone*, 399 S.C. at 571, 733 S.E.2d at 202 (quoting *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994)).

The court then outlined the difference between the “general appealability” statute of Section 14-3-330 and the appeals controlled by Section 1-23-380 of the APA. While recognizing that some interlocutory orders, at least those from the circuit court, are suitable for immediate appeal, the court reiterated that appeals in administrative agency matters are handled differently. The court stated, “Thus, while appeals from the circuit court in other cases are subject to the general appealability statute of section 14-3-330, which allows appeals from interlocutory orders in certain instances (such as where the interlocutory order involves the merits), this provision and its concepts are inapplicable in matters subject to the APA.” *Bone*, 399 S.C. at 574, 733 S.E.2d at 204; see also *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The court declined to analyze the appealability of an order under the strictures of Section 14-3-330, which involves deciding whether the order “involves the merits.” In fact, the court overruled any precedent that had the effect of analyzing appeals from administrative agencies

under that standard. The court has clarified the correct standard—the “final judgment standard”—by stating, “We considered the meaning of a ‘final decision’ and stated, ‘If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. Rather, ‘a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.’” *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895 (citing *Good v. Hartford Accident and Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)).

The court in *Bone* then reaffirmed this standard and stated, “A ‘final judgment’ is defined in this context as was stated in *Charlotte-Mecklenburg* i.e., the order must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done by to enforce what has already been determined. *Bone* 399 S.C. at 575, 733 S.E.2d at 204; *Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 267, 692 S.E.2d at 895. Lastly, the court noted that allowing an appeal under circumstances where a final order has not been rendered would result in numerous appeals—namely an appeal from an interlocutory order and then again after the final order—and would stifle judicial economy. The court also noted that allowing such appeals creates “piecemeal appeals” in agency cases, which would compromise informed appellate review. *Bone*, 399 S.C. at 575, 733 S.E.2d at 205.

The current case has a procedural history and facts almost identical to the case discussed above. Here, the Full Commission vacated and remanded the final order Commissioner Campbell issued. The Full Commission remanded the case for a full evidentiary hearing, where compensability and benefits will ultimately be adjudicated. Specifically, the Full Commission

ordered that at the remand hearing, the single Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the Claimant has had a change of condition for the worse per Section 42-17-90. This is directly in response to the remand instructions from the Court of Appeals. Additionally, the Full Commission ordered that at the remand hearing, the single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable. This hearing has not been scheduled or conducted, and no further orders have been issued from the Commission. Therefore, there is no final judgment from the Workers' Compensation Commission upon which to base an appeal.

Appellants will likely rely on the narrow exception contained in S.C. Code Ann. §1-23-380(A), which states, in relevant part, that "a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." Appellants will likely argue that a final agency decision will not provide an "adequate remedy" and therefore are permitted to appeal the Full Commission's decision. S.C. Code Ann. §1-23-380(A); see also *Hilton v. Flakeboard America Ltd.*, 418 S.C. 245, 791 S.E.2d 719 (2016). In that case, the claimant appealed an interlocutory decision of the Workers' Compensation Appellate Panel. The interlocutory decision vacated and remanded the single commissioner's order, which found that the claimant had not reached MMI. The Court of Appeals dismissed the appeal, and the claimant petitioned for a writ of certiorari. The court agreed, "under [those] unusual facts" that review of the final agency decision would not provide the claimant with an adequate remedy.

The *Hilton* case involved a claimant who suffered an admittedly compensable injury as the result of an insect or spider bite. The single commissioner agreed with Hilton that he had not reached MMI, and further agreed that any misrepresentations he made during the course of the claim were the result of a cognitive deficiency from a previous injury. “The defendant appealed to the Commission, raising four ‘General Exceptions’ and 102 specific exceptions to the single commissioner’s order. The four ‘General Exceptions’ raised the issues of MMI, temporary disability, Hilton’s entitlement to further medical treatment, and Hilton’s credibility. Neither the four general exceptions nor the 102 specific exceptions raised issues of competency, the appointment of a Guardian ad Litem, or any claim that [defendant] had been denied its right to have Hilton evaluated by a physician of its choice.” *Hilton*, 418 S.C. at 247, 791 S.E.2d at 720.

The crux in that case revolved around the preservation of issues for appeal via the Form 30. The Full Commission—notably without observing Hilton—issued an order vacating and remanding the Decision and Order of the single commissioner to determine whether or not Hilton was competent to testify and whether or not he needed a Guardian ad Litem. *Id* at 248, 791 S.E.2d at 721. The court noted that “[o]nly issues raised to the Commission within the application for review of the single commissioner’s order are preserved for review. *Id* at 249, 791 S.E.2d at 721 (citing *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952)). Because neither the claimant nor the defendant had ever raised the issue of competency, the court found it was in error to consider the issue for the first time on appeal. The court stated, “ Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him with an adequate remedy. *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722. The court took particular concern that the

Commission raised the issue of competency *sua sponte*, “without the benefit of personally observing Hilton.” *Id.*

In the current case, there is no dispute regarding the Commission’s *sua sponte* raising of issues for the first time on appeal. In fact, the only issues for determination in the case at bar are whether the Appellant’s change of condition claim is compensable and, if so, what benefits she is entitled to. Compensability and benefits are the most commonly litigated issues in workers’ compensation cases, and to allow appeals in such matters would overburden the court’s docket and create needless litigation expenses. Indeed, the court in *Hilton* warned, “We caution that circumstances such as these that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) ‘are about as rare as the proverbial hens’ teeth.’” *Id.* at 251, 791 S.E.2d at 723 (citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

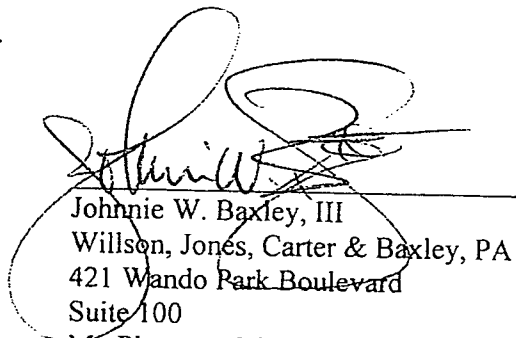
In the instant matter, the Form 30 appeal filed by Defendants on March 31, 2017, asserted 32 exceptions, which can be fairly summarized into two general exceptions: (1) the Hearing Commissioner erred in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original injury on November 3, 2009; and (2) the Hearing Commissioner erred in failing to review the evidence *de novo* and instead just reinstated a 2013 award of benefits. Specifically, Respondents asserted that any award of benefits was outside the scope of remand from the Court of Appeals. They further asserted that even if the Commissioner properly awarded benefits after finding a compensable change of condition, such benefits should have only been awarded after an evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits. It was improper and an error of law for the Hearing Commissioner to simply reinstate the prior

Decision and Order of Commissioner Roche dated August 5, 2013, because those previous findings and the award had already been overturned by the Full Commission, and as an operation of law, the findings, conclusions, and award of Commissioner Roche no longer existed and cannot be reinstated. Further, Defendants asserted that it was improper and prejudicial to both parties to simply reinstate findings that are almost 4 years old; if benefits are going to be awarded, there must be an evidentiary hearing so that accurate and up-to-date findings and awards can be made.

Based upon the appeal by Defendants, the Full Commission found that Commissioner Campbell's simple reinstatement of the order from 2011 was in error. The Full Commission vacated and remanded the case based on the exceptions set forth by the Defendants in a properly filed appeal. The current facts are exceedingly distinguishable from those in *Hilton*, and are instead almost identical to those found in *Bone*. Thus, the interlocutory appeal in this matter is not proper.

WHEREFORE, Respondents respectfully request that the Court grant their Motion to Dismiss and enter an order dismissing, without prejudice, the Appellant's appeal. Respondent further requests an award of costs and attorney's fees associated with this Motion and any other relief this Court deems just and proper.

October 24, 2017



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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

and

American Home Assurance,

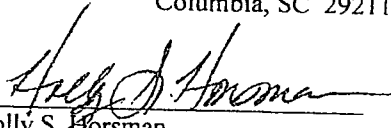
Respondents.

CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 24th day of October, 2017, I mailed the foregoing **RESPONDENTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

C. Daniel Vega, Esq.
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October 24, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company - Claim No.: 5943261
WJC&B File No.: 0170.01754
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Please find enclosed the following documents (an original and six copies) for filing in regards to the above-referenced case.

1. Respondents' Memorandum in Support of its Motion to Dismiss; Proof of Service
2. Respondents' Motion to Dismiss; Proof of Service; and
3. \$25.00 Filing Fee

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB/hsh
Enclosures
cc: Daniel C. Vega, Esq.
Jonathan Webster (via e-mail)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

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SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

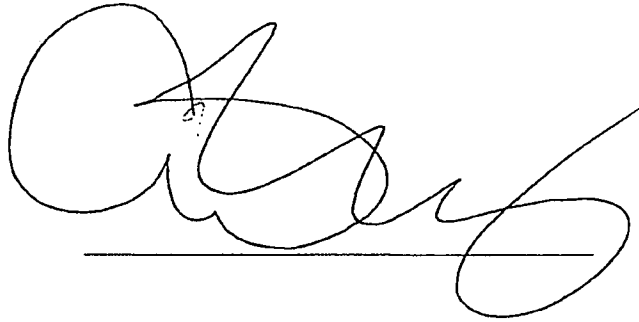
Carrier, Respondents.

APPELLANT'S RETURN TO MOTION

Paula Russell, by and through her undersigned attorney, respectfully opposes Johnnie W. Baxley, III's, attorney for the respondent, motion to dismiss the pending appeal, for this case is immediately appealable pursuant to S.C. Code Ann. § 1-23-380 (A). This Return is based on the following grounds:

1. The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2017 order, thereby denying Appellant of an adequate remedy.
2. The Commission ignored the Court of Appeals, but ordered an unexplained "do over" of the litigation, thus leaving Appellant without an adequate remedy.

3. The Commission acted upon issues not properly preserved for appeal, which leaves Russell without an adequate remedy.

A handwritten signature in black ink, appearing to read 'C. Vega', written over a horizontal line.

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**Attorney for Paula Russell,
Appellant**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
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NOV 02 2017

SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

**APPELLANT'S MEMORANDUM IN SUPPORT
OF ITS RETURN TO RESPONDENTS' MOTION**

Paula Russell ("Appellant"), by and through her undersigned attorney, respectfully
submits this memorandum in opposition of Respondents' motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

This claim began in 2009 when Paula Russell (“Russell”) suffered work related injuries to her back and Pelvis. After initially adjudicating the claim, Russell developed new radicular symptoms and requested a review of her previous award on the ground of change of condition for the worse. Respondents (“Wal-Mart”) denied Russell’s claims, provided no medical treatment, and fired her instead of honoring her request for work modification. The parties were heard on February 11, 2013, by Commissioner Andrea C. Roche, who agreed Russell suffered a change of condition for the worse, found Russell disabled, and ordered she receive benefits.¹ Wal-Mart filed an appeal to the Appellate Panel of the South Carolina Workers’ Compensation Commission and continued to provide no benefits.

Before the Appellate Panel, Wal-Mart focused solely on the issue of compensability and relied solely on the argument Russell presented no “objective evidence.” The Commission’s appellate panel agreed and found Russell had not presented any “objective evidence” other than self-serving subjective complaints, found Russell was not credible, and found Russell had not suffered a change of condition for the worse. After receiving the Appellate Panel’s order, Russell properly filed an appeal with the Court of Appeals.

On January 20, 2016, the Court of Appeals found the Commission “erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence.”² This Court further pointed out that the Commission ignored the fact that both of Russell’s authorized treating physicians testified she suffered a change of condition for the

¹ At points, Wal-Mart’s memorandum in support of its motion to dismiss this appeal inadvertently states an incorrect date of the hearing before Commissioner Roche and an incorrect date of the order that resulted from that hearing. The Correct date of the hearing is February 11, 2013, and the correct date of the order is August 5, 2013.

² Wal-Mart’s memorandum in support of its motion to dismiss this appeal inadvertently referred to the date the Court of Appeals decided *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016) as the date this court denied rehearing. *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016) was decided January 20, 2016.

worse. This Court ultimately reversed and remanded this matter to the Commission with specific instructions to use a preponderance of the evidence in its review of the record.

On remand Commissioner Michael R. Campbell reviewed the entire record and concluded Russell met her burden of proving a change of condition for the worse and found Russell was entitled medical care and temporary total disability benefits. Wal-Mart appealed and continued to provide no benefits or medical treatment.

On September 7, 2017, the Commission's Appellate Panel issued an order stating, "the Single Commissioner's March 20, 2017, Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing." The Order further stated the hearing should be a *de novo* hearing. The Order alleges the Commission did not—and did not need to—consider the threshold issue of compensability, but still reversed and remanded on that issue. The Order alleges Commissioner Campbell only reinstated Commissioner Roche's order and ignores the one hundred additional findings made by Commissioner Campbell. The Order cites no reversible error. The Order ignores the argument, briefed for the Commission by Russell, that many of Wal-Mart's issues were barred from relitigation by the doctrine of issue preclusion. As a result of the nature of that appellate panel order, the fact Russell has received no medical treatment during the entire litigation of the change of condition, the overall duration of the claim, and the ever growing procedural history of this claim, Russell filed this appeal.

DISCUSSION

This appeal is immediately appealable under section 1-23-380(A). Appeals from administrative agencies, including the Workers Compensation Commission, are governed by the Administrative Procedures Act. *Bone v. U.S. Food Service*, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Section 1-23-380(A) of the APA states a "preliminary, procedural, or intermediate agency

action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” The South Carolina Supreme Court has stated that whether a review of the final agency decision would or would not provide an adequate remedy is decided on a case-by-case basis. *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016) (citing *The Island Packet v. Kittrell*, 365 S.C. 332, 339, 617 S.E.2d 730, 734 (2005)). Under the extraordinary circumstances, the oddities, and the egregious errors in the Appellate Panel’s order, Russell submits to this Court that the standard set by section 1-23-380(A) has been met.³

I. The Court of Appeals Gave Specific Instructions on Remand, Which the Commission Ignored in its 2017 Order, Thereby Denying Russel an Adequate Remedy.

The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2017 order. This Court has stated “where a case that has been appealed is remanded by the court to the workers’ compensation commission with specific directions, the commission must proceed in accordance with those directions. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen’s Compensation* § 790 at 37 (1958)). Further, this Court opined, “[i]n such a case, the order limits the authority of the commission.” *Id.* The Supreme Court of South Carolina has additionally held that an administrative body could not consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for further consideration. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

³ In this Return, Russell does not address every error or specific exception she claims arose from the Appellate Panel’s order, but rather addresses only those that are so extraordinary as to cause the appeal to meet the standard set out in 1-23-380(A).

In the case at bar, this Court found in 2016 that the Commission committed legal error in requiring Russel prove her change of condition with purely objective evidence, stated the appropriate standard was a preponderance of the evidence, and remanded to the Commission to determine if Russell suffered a change of condition by applying the appropriate standard. 415 S.C. at 400-01, 782 S.E.2d 756. The Commission, however, issued an order compelling the Single Commissioner to “conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence. . . .” In essence, the Commission has attempted to expunge the record with regard to all issues previously litigated.

The Commission was instructed, by the Court of Appeals, to consider whether or not Russell suffered a change of condition, but instead is forcing Russell to relitigate this entire claim. Because the Commission disregarded the directions of this Court in its 2017 order, any subsequent hearings held or orders drafted pursuant to and consistent with that order will inherently be contrary to the directions of the Court of Appeals. Therefore, Russell has no adequate remedy, as any final decision from the Commission will be inconsistent with this Court’s directives.

II. The Commission not only Ignored the Court of Appeals but also Ordered an Unexplained “Do Over” of the Litigation, thus Depriving Russell of an Adequate Remedy.

In its September 14, 2017 order the Commission vacated and remanded the claim for a hearing de novo of all issues including a change of condition and payment of benefits. The order states:

IT IS THEREFORE ORDERED that the Single Commissioner’s march 20, 2017 Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing. The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof.

And,

IT IS FURTHER ORDERED that at the hearing, the Single Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90. At the remand hearing, the Single Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable.

The Commission, in effect, is ordering a hearing de novo on the issue of change of condition, and, if, and only if, there is a change of condition, a hearing de novo to determine if claimant should be paid benefits. The order emphasizes, each de novo hearing shall be full evidentiary hearings. The order gives no legal explanation or basis in support of de novo proceeding requiring new evidence. Therefore the Commission effectively gives Wal-Mart a “unexplained do over” of the entire litigation of the claim.

This is grossly similar to what the Commission did in *Hilton v. Flakeboard*, 418 S.C. at 251, 791 S.E.2d at 722. In *Hilton*, the Commission gave no reason to support its command that additional medical evidence was needed. (Id.) The *Hilton* court therefore found the order was immediately appealable and permitted the alleged “interlocutory” appeal to proceed.

The issue of change of condition for the worse, essentially compensability, is the threshold issue discussed by the Court of Appeals in its *Russel* opinion. The Court specifically instructed the Commission to issue an order consistent with its own findings. No instruction can be found in the Court’s order, ordering new evidentiary proceedings. It is not an issue which needs be re-litigated. Additional appeals are certain and the parties will undoubtedly be before this Court again. Therefore, the Court should deny respondents motion and allow the appeal to continue meritoriously.

III. The Appellate Panel of the South Carolina Workers' Compensation Commission Acted upon Issues not Properly Preserved for Appeal, Which Leaves Russell Without an Adequate Remedy.

The Appellate Panel of the South Carolina Workers' Compensation Commission acted upon issues not properly preserved for appeal. Only issues raised to the Commission within the application for review of the Single Commissioner's order are preserved for review. *Id.* (Citing *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (holding that all findings of fact and law by the Hearing Commissioner became and are the law of the case, unless within the scope of the appellant's exception to the Full Commission); *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the Single Commissioner become and are the law of the case unless excepted to by appellant) abrogated in part on other grounds by *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the Single Commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order) abrogated in part on other grounds by *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). The Supreme Court has also held that general exceptions, such as "the commission erred in making an award," are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review. See *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944). Moreover, the Supreme Court has held issues raised on appeal must not simply be included in a form 30, but must also must be briefed with more than just conclusory statements. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and the argument in a brief is conclusory, the issue is deemed abandoned); *First Sav. Bank*

v. *McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (appellant was deemed to have abandoned the issue where he failed to provide any argument or supporting authority).

In *Hilton v. Flakeboard*, the Supreme Court explained that the Commission's raising of issues not appealed by either party was an error sufficient to justify a direct appeal of an interlocutory order to the appellate courts. 418 S.C. at 251-52, 791 S.E.2d at 722-23. The court reasoned that when the Commission ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, the claimant effectively would not receive an adequate remedy if he waited for a final order from the Commission. Indeed, the case at bar has uncanny similarities with *Hilton v. Flakeboard* in that the Commission considered and reacted to issues not properly before it. While the Commission did not act *sua sponte* like in *Hilton v. Flakeboard*, the impact on Russell is the same. Reopening issues such as Claimant's need for medical treatment, medical benefits, and temporary benefits, despite the fact these have been properly adjudicated and not appealed or not properly appealed, is error sufficient to justify a direct appeal.

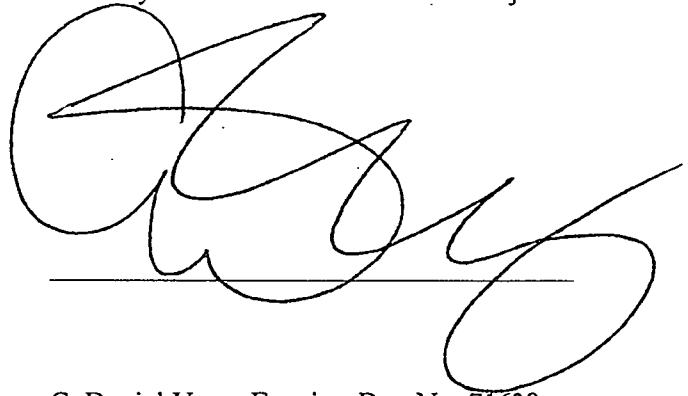
Russell's need for medical treatment, for example, was not appealed in Wal-Mart's 2013 appeal to the Commission. Wal-Mart did not list Commissioner Roche's Finding of Fact number eleven, "I find [Russell] is in need of additional medical treatment," on its Form 30 request for commission review and did not brief that issue. Nevertheless, the Commission found Commissioner Campbell erred in not conducting a full evidentiary hearing on the issue of medical treatment and stated that Wal-Mart's "due process" rights were violated, for Wal-Mart did not have "the opportunity to challenge [Russell's] entitlement to [medical treatment]." However, Wal-Mart had the opportunity to challenge her need for medical treatment, but choose not to appeal that issue in its 2013 request for commission review.

Nevertheless, the Commission repeatedly asserts that there is a need for additional fact finding regarding benefits. This, however, is erroneous, for those issues have already been decided. When Wal-Mart choose not to appeal and/or brief its objections to Commissioner Roche's findings of Russell's entitlement to and need for benefits, it consented to those findings becoming the law of the case. Then, when the 2013 appellate panel of the Commission concluded Russell did not suffer a change of condition, it did not, and could not, address Russell's need for benefits. Functionally, Russell was then no longer entitled to benefits, for the law of the case, at that time, was that she had not met the threshold step of proving a change of condition. However, after the remand from this Court and after Commissioner Campbell's finding based on a review of the record that Russell had suffered a change of condition, the unappealed findings of Commissioner Roche again became relevant and controlled the case. Commissioner Campbell had no choice but to issue findings consistent with Commissioner Roche's unappealed findings. Wal-Mart repeatedly acknowledges this fact and stated in its memorandum in support of its pending motion that "any award of benefits was outside the scope of remand from the Court of Appeals."

Therefore, the prejudicial impact of the Commission's order is nearly identical to that of Hilton's in *Hilton v. Flakeboard*. Requiring Russell wait until a final decision to appeal would not provide her with an adequate remedy. The Commission has ordered that the parties begin anew and completely relitigate the issue previously litigated in 2013 of whether or not Russell is entitled to benefits. This would be patently unfair to Russell, for any inconsistent findings would require this Court's intervention, years down the road. She has already waited many years for the surgery for which her authorized treating physicians assert she has a medical need.

CONCLUSION

Therefore, Russell, by and through her undersigned attorney, respectfully requests that the Court deny Wal-Mart's motion to dismiss her appeal. Russell further requests an award of costs and attorney's fees associated with this motion and any other relief this Court deems just and proper.

A handwritten signature in black ink, appearing to read 'C. Vega', is written over a horizontal line.

C. Danial Vega, Esquire, Bar. No. 71639
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
PH: (803) 929-3600
dvega@csa-law.com
**Attorney for Paula Russell,
Appellant**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

RECEIVED

NOV 02 2017

SC Court of Appeals

Appellate Case No. 2017-002122

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

CERTIFICATE OF SERVICE

Liliana Bourdon, being first duly sworn, says that she is a paralegal for the Claimant/Appellant's attorney of Chappell, Smith & Arden located at 2801 Devine Street, Columbia, Suite 300, South Carolina; 29205 and, that on November 2, 2017, she forwarded a copy of the attached Memorandum in support of Appellant's Memorandum in Support to:

Via First Class US Mail:

Johnnie W. Baxley, III
Willson, Jones, Carter & Baxley, LLC
421 Wando Park Blvd., Suite 100
Mt. Pleasant, SC 29464



Liliana Bourdon
Chappell, Smith & Arden
PO Box 12330, Columbia, SC, 29211
803-929-3600

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
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November 2, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED

NOV 02 2017

SC Court of Appeals

RE: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company – Claim No.: 5943261
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Enclosed please find the following documents (and original and six copies) for filing regarding the above referenced matter:

1. Appellant's Return to Motion
2. Memorandum in support of Appellant's Return to Motion; and
3. Certificates of Service

Thank you for your assistance in this matter.

Very Truly Yours,

C. Daniel Vega

CDV/lb

Enclosures (as stated)

cc: Johnnie W. Baxley, III, Esquire (w/ encl.)

The South Carolina Court of Appeals

Paula Russell, Claimant, Appellant,

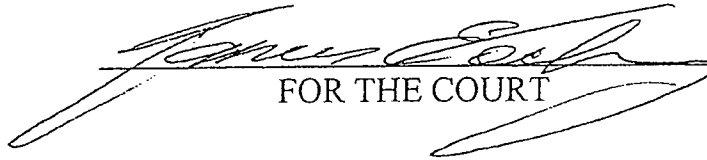
v.

Wal-Mart Stores, Inc., Employer, and Illinois National
Insurance Company, Carrier, Respondents.

Appellate Case No. 2017-002122

ORDER

After careful consideration, the motion to dismiss is granted because the underlying order is not immediately appealable. *See* S.C. Code Ann. § 1-23-380 (2005) ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a *final* decision in a contested case is entitled to judicial review." (emphasis added)). The remittitur will be sent as required by Rule 221(b), SCACR.


FOR THE COURT C. J.

Columbia, South Carolina

cc:

C. Daniel Vega, Esquire

Johnnie W. Baxley, III, Esquire

FILED

Dec. 8, 2017

85473

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

RECEIVED
DEC 21 2017
SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

**APPELLANT'S
PETITION FOR REHEARING**

Appellant ("Russell") respectfully submits this petition for rehearing pursuant to Rules 221 and 240 SCACR, alleging the Court overlooked or misapprehended certain portions of her argument in opposition to Respondents' ("Wal-Mart") motion to dismiss. Specifically, Russell first posits the Court overlooked the exception in section 1-23-380, which provides for circumstances in which a final decision is not needed for immediate review. Second, Russell alleges the Court misapprehended the fact or degree to which the Commission's disregard for this Court's prior decision will leave her functionally incapable of subsequently attaining an adequate remedy. Lastly, Russell believes the Court misapprehended or overlooked the similarities in this

case and *Hilton v. Flakeboard America Ltd.*, which held the Commission's consideration of issues that were not properly appealed and its ordering of unexplained "do overs" deprived the appellant of an adequate remedy. 418 S.C. 245, 250–51, 791 S.E.2d 719, 722 (2016):

I. The Court Ostensibly Overlooked the Exception to the "Final Decision" Rule.

As indicated by the Order granting Wal-Mart's motion to dismiss, the Court overlooked the exception to the "final decision" rule. S.C. Code Ann. § 1-23-380. While section 1-23-380 limits immediate appellate review to cases in which there is a final decision, it also provides that "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." *Id.* In its order dismissing this appeal, however, the court has only addressed the exhaustion of administrative remedies and final decision portions of section 1-23-380. Russell does not dispute that the order she seeks to appeal is not a final decision; she instead seeks to invoke the exception provided in section 1-23-380. Therefore, Russell respectfully requests this Court revisit its order and apply the section 1-23-380 exception to the facts of this case.

II. The Court Misapprehended how the Commission's Disregard of this Court's Decision Creates a Perpetual Cycle of Orders and Appeals, Thus Denying Russell an Adequate Remedy.

The Court misapprehended how the Commission's willingness to ignore this Court's decision will preclude Russell from being able to receive an adequate remedy upon review of a final decision. To recapitulate, this Court found in 2016 that the Commission committed legal error in requiring Russell prove her change of condition with purely objective evidence, it stated the appropriate standard was a preponderance of the evidence, and it remanded to the Commission to determine if Russell suffered a change of condition by applying the appropriate standard. *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 400-01, 782 S.E.2d 753, 756 (2016). The

Commission, however, issued an order compelling the Single Commissioner to “conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence. . . .”

From this point forward, any order of a single commissioner must comply with the 2017 order of the Commission and the 2016 decision of this Court. 18B Charles Alan Wright, et. al., Federal Practice and Procedure § 4478 (2nd ed. 2017) (“Principles of authority . . . do inhere in the ‘mandate rule’ that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much.”). The single commissioner, however, cannot do so; her orders will either be inconsistent with the law of the case as it was established by this Court or they will be inconsistent with the law of the case as it was established by the Commission. These inconsistent orders will then be appealed to the full commission, which will remand back to the single commissioner because of the inconsistencies. The perpetual nature of this cycle is akin to that in *Hilton v. Flakeboard America Ltd.*, where the Supreme Court explained that the possibility of repeated “do overs” before reaching a final decision deprives a claimant of an adequate remedy upon review. 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016). Without immediate review, Ms. Russell will wait many more years for surgery and compensation and will see an unknowing number of orders and appeals before a final decision will, if ever, be reached. Therefore, Ms. Russell will be deprived of an adequate remedy if she is not granted immediate review.

III. The Court Misapprehended or Overlooked the Applicability of the Holdings from Hilton v. Flakeboard America Ltd. to the Facts of this Case.

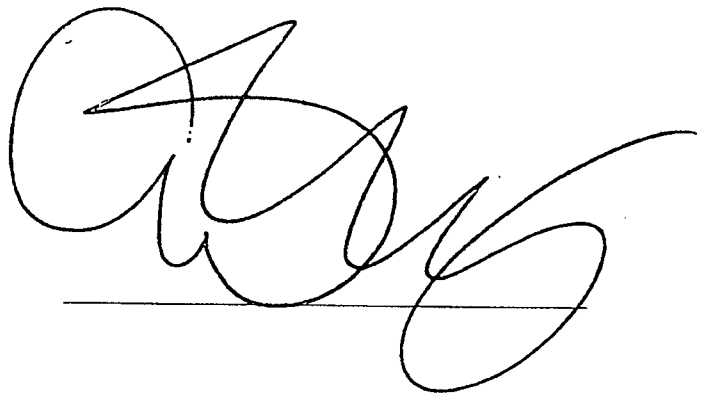
The Court overlooked or misapprehended the applicability of the holdings from *Hilton v. Flakeboard America Ltd.* to the facts of this case. 418 S.C. 245, 791 S.E.2d 719 (2016). In *Hilton*, the Supreme Court held review of a final agency decision does not provide an adequate remedy

when the Commission has ordered the relitigation of the case without regard to whether the matters it is considering are properly before it and when the Commission vacates an entire order without cause. *Id.* at 250–52, 791 S.E.2d at 722–23. The court reasoned that a Commission that is willing to hear and decide issues that are not properly before it is poised to order “repeated unexplained ‘do overs.’” before reaching a final agency decision. *Id.* Importantly, the court did not allege that a final agency decision would never be reached or that Hilton would find himself in a worse situation upon a later appeal than he was in at the time of the present appeal. Instead, the court found review of the final decision would not provide an adequate remedy when the Commission has considered abandoned issues and ordered the relitigation of the entire claim, for the Commission was setting up the “possibility of repeated unexplained ‘do overs.’” *Id.* (emphasis added).

Likewise, in the current case, the Commission considered several issues, which were, as in *Hilton*, barred for consideration by the law of the case doctrine. *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the Single Commissioner become and are the law of the case unless excepted to by appellant) *abrogated in part on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). For example, the Commission found Commissioner Campbell erred in not conducting a full evidentiary hearing on the issue of Russell’s entitlement to medical treatment because not doing so infringed on Wal-Mart’s “due process” rights. However, Wal-Mart had previously been heard on the issue of medical benefits and choose not to appeal those findings. Therefore, the Commission should not have considered that issue, for it was not properly before the Commission. Further, instead of simply remanding for a hearing on Russell’s entitlement to benefits, leaving open the possibility the Single Commissioner would find Ms. Russell was entitled

to benefits, it vacated the single commissioner's order. Thus, the Commission ordered both parties begin anew, regardless of the ultimate decision on benefits. The Commission's willingness to order the relitigation of issues not properly raised for its consideration shows that Ms. Russell, like Hilton, could "face the possibility of repeated unexplained 'do overs.'" *Id.* The facts of this case—where the Commission has in effect ordered a new trial without regard to the law of the case and without any explanation why such an extreme remedy is appropriate—confirms that requiring Ms. Russell to wait to appeal until the final agency decision would not provide her an adequate remedy.

WHEREFORE Russell asserts the Court overlooked or misapprehended several vital aspects of her argument, particularly those concerning the exception to the final decision rule and the applicability of *Hilton*, she respectfully requests this Court reconsider its order granting Wal-Mart's motion to dismiss.

A handwritten signature in black ink, appearing to read 'C. Vega', written over a horizontal line.

C. Danial Vega, Esquire, Bar. No. 71639
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dvega@csa-law.com
**Attorney for Paula Russell,
Appellant**

December 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

RECEIVED
DEC 21 2017
SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

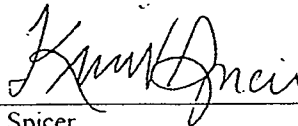
Illinois National Insurance Company,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2017, addressed to attorney of record Johnnie W. Baxley, III, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, South Carolina 29464.

December 21, 2017



Kim Spicer
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December 21, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED

DEC 21 2017

SC Court of Appeals

RE: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company – Claim No.: 5943261
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Enclosed please find the following documents (and original and six copies) for filing regarding the above referenced matter:

1. Appellant's Petition for Rehearing
2. Filing fee of \$25.00
3. Proof of Service

Thank you for your assistance in this matter.

~~Very Truly Yours,~~

C. Daniel Vega

CDV/ks

Enclosures

cc: Johnnie W. Baxley, III, Esquire

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 02 2018
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

American Home Insurance,

Respondents.

RETURN TO PETITION FOR REHEARING

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully submit this Return to Appellant's Petition for Rehearing. Respondents assert that the Court of Appeals properly granted the Respondents' Motion to Dismiss by order dated December 8, 2017. Respondents respectfully request that Appellant's Petition for Rehearing be denied.

I. The Court properly granted Respondents' Motion to Dismiss per S. C. Codee Ann. § 1-23-380.

Appellant argues that the Court overlooked the exception to the "final decision" rule, specifically that the reversal and remand by the Full Commission should be immediately reviewable because review of the final agency decision would not provide an adequate remedy. There is simply no basis for this assertion. In this case, the Full Commission vacated and remanded the Single Commissioner's March 20, 2017 Order. The Full Commission stated that the remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof. Further, the Full Commission stated that at the remand hearing, the hearing Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90. At the remand hearing, the Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable. There has been no showing by Appellant that review of a final agency decision coming from said remand hearing would not provide an adequate remedy. Once the remand hearing is conducted and a final agency decision is issued on both the issue of compensability of the change of condition and Appellant's entitlement to benefits under the South Carolina Workers' Compensation Act, meaningful review can be conducted by the appellate courts.

II. Appellant has mischaracterized the Commission's remand as inconsistent with this Court's previous decision.

Appellant's basic argument is that this matter was remanded to the Commission to determine if Russell sustained a change of condition by applying the appropriate standard as set forth by the Court in *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016). Appellant argues that these instructions are inconsistent with the remand from the Commission, and thus Appellant cannot get an adequate remedy. In order to make that argument, Appellant mischaracterizes the nature of the remand from the Commission.

The remand from the Commission states as follows:

Based upon the foregoing Findings of Fact and Conclusions of Law,
IT IS, THEREFORE, ORDERED that the Single Commissioner's March 20, 2017 Order is hereby VACATED and REMANDED. The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof.
IT IS FURTHER ORDERED that at the remand hearing, the Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90. At the remand hearing, the Commissioner shall conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration as to the issue of any award of benefits under the Act if the change of condition claim is found to be compensable.
AND IT IS SO ORDERED!

There is no inconsistency between the remand from the Commission and the remand instructions from this Court. This Court stated, "There is no requirement in the Act requiring the Claimant to prove the change of condition by objective evidence. Thus, we reverse and remand to the Commission." *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016). As can be seen from the exact language from the Commission above, there is no inconsistency between their remand and the remand of this Court. The Commission has remanded this matter to a hearing Commissioner specifically to review the evidence submitted at the original evidentiary hearing on February 11, 2013, and issue findings of fact and conclusions of law

concerning the issue as to whether the claimant has had a change of condition for the worse per 42-17-90 as interpreted by this Court in its previous decision. There is no inconsistency between the remand by the Commission and the remand by this Court.

The Commission has also directed that at the remand hearing, both parties shall be allowed to submit testimony, medical records, and additional evidence for consideration as to the award of benefits if the change of condition claim is found to be compensable. This affords due process to both parties regarding an award of benefits and any final award, or denial of such award, will be subject to meaningful review by the appellate court.

The remand orders by the Commission and this Court are not inconsistent and will not result in perpetual appeals. The assertion by Appellant that these remands are inconsistent is a factually incorrect and specious assertion made for the purpose of manufacturing evidence of an inadequate appellate remedy.

III. The Court of Appeals did not misapprehend or overlook *Hilton*.

Appellant asks this Court to blindly rely upon the holding of *Hilton v. Flakeboard America Ltd.*, 418 S.C. 245, 791 S.E.2d 719 (2016) without considering the underlying facts and whether or not the holding is applicable to factual scenario this claim. As fully argued in Respondents' Memorandum in Support of Motion to Dismiss, the *Hilton* narrow exception does not apply to this case. In fact, the decisions in *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, 399 S.C. 566, 733 S.E.2d 200 (2012) and *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010) are much more applicable to the facts on this claim.

In *Hilton*, the Full Commission decided an issue sua sponte. The Court stated, " Under these unique circumstances where the Commission has ordered the relitigation of the entire

dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him with an adequate remedy. *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722. Indeed, the court in *Hilton* warned, “We caution that circumstances such as these that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) ‘are about as rare as the proverbial hens’ teeth.” *Id.* at 251, 791 S.E.2d at 723 (citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

In the current case, the Commission did not raise any issues sua sponte. The only issues for determination in the case at bar are whether the Appellant’s change of condition claim is compensable and, if so, what benefits she is entitled to. Those are the exact issues that have been appealed and have been in controversy during the entirety of this claim.

In attempting to argue that the Commission considered issues which were not properly raised, Appellant argues that Respondents “had previously been heard on the issue of medical benefits and chose not to appeal those findings.” That argument is factually incorrect. The only evidentiary hearing in this case was conducted by Commissioner Andrea Roche on February 11, 2013. On August 5, 2013, Commissioner Roche found that the Appellant sustained a change of condition for the worse and ordered Respondents to provide medical treatment and temporary total disability benefits. Respondents appealed the order to the Full Commission. In the Form 30 appeal that was filed on August 9, 2013, Respondents specifically appealed the findings that Claimant sustained a compensable change of condition for the worse and the award of benefits, specifically including Finding #12 (The defendant shall provide medical care and attention pursuant to Claimant’s change of condition) and Finding #16 (The defendant shall provide temporary total disability benefits from December 1, 2011 through the present date and

continuing). Respondents specifically appealed the award of medical treatment and the award of temporary benefits based upon the finding of a compensable change of condition. On January 30, 2014, The Full Commission found that the Appellant failed to prove that she sustained a compensable change of condition for the worse and found that Appellant was not entitled to any benefits under the Act. The Respondents clearly appealed the award of medical care and temporary compensation, as well as the finding of a compensable change of condition, after the first evidentiary hearing in 2013.

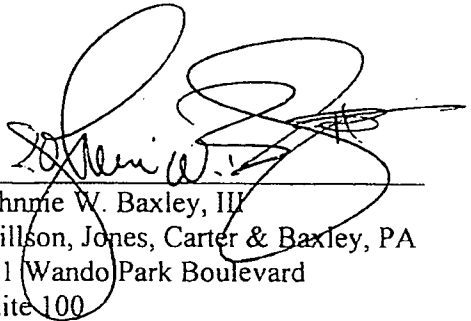
Likewise, after Commissioner Campbell issued an order on March 20, 2017, without an evidentiary hearing, Respondents again appealed and asserted that the award of medical treatment and temporary compensation was an error and asserted that they had been denied their due process rights by reinstatement of a previously reversed award as opposed to having a new evidentiary hearing. Again, the award of medical care and temporary compensation were specifically appealed.

Therefore, the factual assertion by Appellant on page 4 of her Petition that Respondents "chose not to appeal those findings" regarding an award of medical benefits, and that the Commission should not have considered that issue, is factually incorrect and a misstatement of the procedural history of this claim. The Appellant states on page 5 of her Petition that the "Commission's willingness to order the relitigation of issues not properly raised for its consideration" shows that Appellant cannot get an adequate remedy. Again, that statement is factually incorrect and the argument is disingenuous. The award of medical benefits has been properly raised as an issue on appeal at every opportunity.

The Commission did not raise any issues sua sponte, but instead ruled upon issues that were properly presented for appeal. As such, the very narrow exception in *Hilton* does not apply.

WHEREFORE, Respondents respectfully request that the Court dismiss the Appellant's
Petition for Rehearing.

December 27, 2017



Johnnie W. Baxley, III
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Attorneys for Defendants/Respondents

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JAN 02 2018
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

and

American Home Assurance,

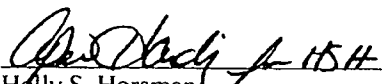
Respondents.

CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 27th day of December, 2017, I mailed the foregoing **RESPONDENTS' RETURN TO PETITION FOR REHEARING** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

C. Daniel Vega, Esq.
Chappell, Smith & Arden, P.A.
P.O. Box 12330
Columbia, SC 29211


Holly S. Horsman

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RECEIVED
JAN 02 2018
SC Court of Appeals

December 27, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

Re: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company - Claim No.: 5943261
WJC&B File No.: 0170.01754
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Please find enclosed the following documents (an original and six copies) for filing in regards to the above-referenced case.

1. Respondents' Return to Petition for Rehearing (original and six copies); and
2. Respondents' Certificate of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Johnnie W. Baxley, III

JWB/hsh
Enclosures

cc: Daniel C. Vega, Esq.
Jared Drown (via e-mail)

adh

WILLSON JONES CARTER & BAXLEY, P.A.
ATTORNEYS AT LAW
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JAN 02 2018

SC Court of Appeals

JENNY ABBOTT KITCHINGS,
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 0917785

RECEIVED
JAN 04 2018
SC Court of Appeals

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

**APPELLANT'S REPLY TO
RESPONDENTS' RETURN TO PETITION
FOR REHEARING (MOTION TO REINSTATE)**

Appellant, ("Russell") respectfully submits this reply to Respondents' ("Wal-Mart") return to Ms. Russell's Motion to Reinstate. Ms. Russell asserts the exception to the final judgment rule provided in S.C. Code Ann. § 1-23-380 applies to the facts of this case, for without immediate appellate review, she will be denied an adequate remedy. Therefore, she respectfully requests this Court reconsider its Order dismissing this appeal and requests that her appeal be reinstated in light of the exception provided at section 1-23-380.

I. The Order of the Appellate Panel is Inconsistent with the 2016 Decision of this Court.

The Order of the Appellate Panel is inconsistent with the 2016 Decision of this Court, which, as explained in her motion to reinstate, will lead to a perpetual cycle of appeals that will deprive Ms. Russell of an adequate remedy. This Court reversed and remanded on a *legal error* and remanded to the Commission to apply the appropriate standard to the facts of this case. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 400–01, 782 S.E.2d 753, 756 (2016). However, the Commission, on appeal of the Order from the Single Commissioner who applied the standard espoused by this Court, ordered two things in the “Order” section of its decision and order: “The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition . . .” and “the Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law” Therefore the Order of the Commission, as quoted by Wal-Mart, is itself inconsistent, as well as inconsistent with the Decision of the Court.

A hearing de novo, as used in this context is defined as “A new hearing of a matter, conducted as if the original hearing had not taken place.”¹ *Hearing De Novo*, Black’s Law Dictionary (10th ed. 2014). The order of the Commission is patently contradictory and inconsistent with the Decision of this Court. The Commission cannot both conduct a hearing as if the first never occurred and also apply the appropriate remand standard as stated by this Court. This argument is clear and accurate and is supported by explicit evidence. Any subsequent Order on remand from the Commission cannot be consistent with the Order of the Commission and the Decision of this Court. Thus, repeated and unending appeals will proceed, which will deny Ms. Russell an adequate remedy.

¹ The other definition of a “hearing de novo” provided by Black’s Law Dictionary applies to an appellate review and is inapplicable as used by the Commission. *Hearing De Novo*, Black’s Law Dictionary (10th ed. 2014).

II. *Hilton v. Flakeboard America Ltd. is Directly Applicable to this Case.*

First, *Hilton v. Flakeboard America Ltd.*, 418 S.C. 245, 791 S.E.2d 719 (2016) is directly applicable to the facts of this case. Conversely, *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) is not at all applicable to the this case due to the differences in procedural postures and the different arguments advanced by the parties. *Bone* concerned further appellate review of an agency decision after an initial judicial review, which is governed by S.C. Code Ann. § 1-23-390, while the case at bar concerns initial judicial review of an agency decision, which is governed by section 1-23-380. *Bone*, at 74, 791 S.E.2d at 556 (“Section 1-23-390 of the APA, governing *further* appellate review” “At issue here is the meaning of a “final judgment” under section 1-23-390.”); *Hilton*, at 249, n. 1, 791 S.E.2d at 721, n. 1 (“These two statutes . . . govern appealability in two different situations. Section 1-23-390 . . . govern[s] this Court's review of a final decision by an intermediate judicial tribunal, while § 1-23-380 defines the circumstances under which a judicial body may review an agency decision.”). Moreover, *Bone* concerned the definition of a final judgement, but Ms. Russell does not claim to have a final judgement or a final agency decision.² Ms. Russell argues the exception to the final decision rule provided at section 1-23-380 should apply, for review of the final agency decision would not provide her an adequate remedy.

Furthermore, the pertinent facts of this case are nearly parallel to those in *Hilton*. In *Hilton*, the Commission considered issues improperly before it and reversed an entire order despite only identifying certain, specific errors with the Single Commissioner's Order. The *Hilton* Commission raised issues *sua sponte*, and the Commission here considered issues barred from further appellate review by the doctrine of issue preclusion. The distinction between considering an unappealed

² As explained, *supra*, section 1-23-390 does not apply to the procedural posture of this case. Therefore, Ms. Russell would not argue she has received a final judgment but would instead argue there was a final agency decision. However, that is not her argument, so the reasons why *Bone* does not apply are twofold.

issue *sua sponte* and considering one on petition by an appellant is of no weight; the prejudice suffered by the appellee is the same. Essentially, the Commission has given Wal-Mart a “do over” of this litigation just as it did in *Hilton*.

Despite Wal-Mart’s repeated and ardent arguments to the contrary, it did in fact abandon its appeal of Ms. Russell’s entitlement to medical treatment and temporary benefits by failing to brief those issues in its 2013 brief to the Commission. *R & G Constr., Inc. v. Lowcountry Reg’l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and the argument in a brief is conclusory, the issue is deemed abandoned); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (appellant was deemed to have abandoned the issue where he failed to provide any argument or supporting authority). Contrary to Wal-Mart’s arguments, noting an exception in a form 30 is not sufficient to preserve the issue for appeal nor is arguing an issue in oral arguments; the issue must be briefed or the issue is abandoned. *South Carolina Dep’t of Social Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2011) (Citing *In the Interest of Bruce O.*, 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993)); *Bochette v. Bochette*, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) (all issues must be presented and argued in the brief); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (an issue is deemed abandoned on appeal and, therefore, not presented for review if it is argued in a short conclusory statement without supporting authority). Therefore, the Commission considered and reversed on issues not properly before it; the distinction between improper issues raised *sua sponte* and those raised by an appellant is of no consequence, for the prejudice is the same.

Furthermore, the Commission here, like the Commission in *Hilton*, reversed the entire Order of the Single Commissioner despite failing to articulate or address any reason for reversing.

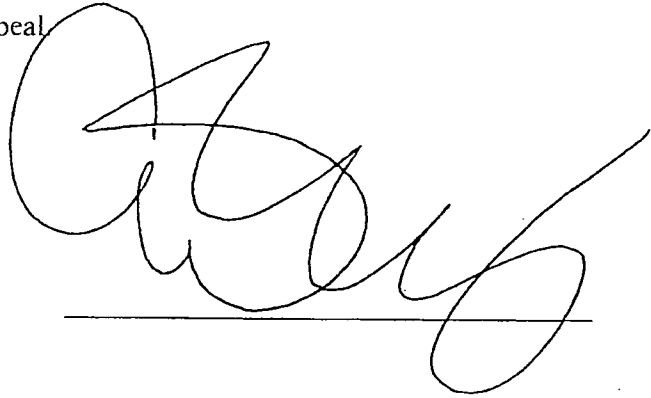
The Order of the Commission states,

“[Wal-Mart] also asserted that the preponderance of the evidence . . . do [sic] not support the finding of the Single Commissioner that [Russell] sustained a physical worsening of condition after the original award. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, *there is no need for us to address this issue.*”

The Commission, therefore, by its own account, did not address whether Commissioner Campbell erred when he applied the facts of this case to the legal standard espoused by this Court. This is exactly the same as what the Commission did in *Hilton* when it raised the issue of competency, but “instead of simply remanding for a competency determination leaving open the possibility the single commissioner would find Hilton competent, it vacated the single commissioner’s order; thus ordering the parties begin anew.” *Hilton* at 251, 791 S.E.2d at 722. This is an extreme remedy, which, like in *Hilton*, was “ordered without any explanation of the Commission.” *Id.* The Commission’s remanding the entire case because of what it identified, albeit erroneously, as an error in the award of benefits, is akin to reversing the findings on all elements in a civil negligence case because of an error in damages calculations. This is grossly similar to what happened in *Hilton* and leads to circular appeals that will, thus, deprive Ms. Russell of an adequate remedy.

Therefore, Ms. Russell respectfully requests this Court reinstate her appeal in this matter, for the exception to the “final decision” rule provided at 1-23-380 applies. As explained above the Commission’s Order is inconsistent with the Decision of this Court and the facts of this case are extremely similar to those in *Hilton* in which the South Carolina Supreme Court held

immediate appellate review was proper, which indicate Ms. Russell will be deprived of an adequate remedy if she cannot immediately appeal.

A handwritten signature in black ink, appearing to read 'C. Vega', written over a horizontal line.

C. Danial Vega, Esquire, Bar. No. 71639
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dvega@csa-law.com
**Attorney for Paula Russell,
Appellant**

December 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha Taylor, Commissioner
Susan S. Barden, Chair/Commissioner
Avery B. Wilkerson, Jr., Commissioner

RECEIVED
JAN 04 2018
SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

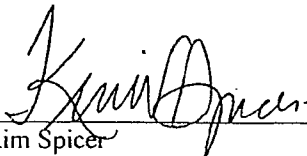
Illinois National Insurance Company,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Reply to Respondent's Return to Petition for Rehearing (Motion to Reinstate) by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2018, addressed to attorney of record Johnnie W. Baxley, III, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, South Carolina 29464.

January 4, 2018



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January 4, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JAN 04 2018
SC Court of Appeals

RE: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company – Claim No.: 5943261
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Enclosed please find the following documents (an original and six copies) for filing
regarding the above referenced matter:

1. Appellant's Reply to Respondent's Return to Petition for Rehearing (Motion to Reinstate)
2. Proof of Service

Thank you for your assistance in this matter.

Very Truly Yours,

C. Daniel Vega

CDV/JDG
Enclosures

cc: Johnnie W. Baxley, III, Esquire

The South Carolina Court of Appeals

Paula Russell, Claimant, Appellant,

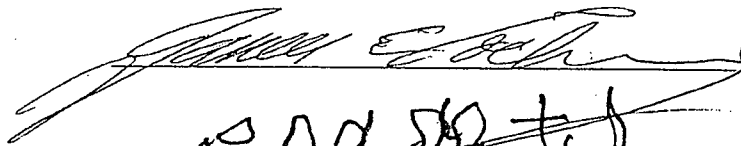
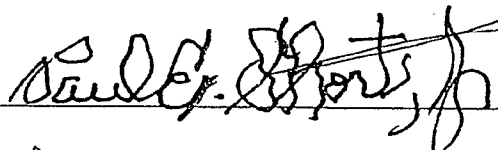
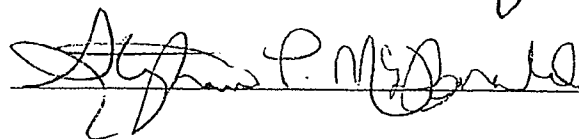
v.

Wal-Mart Stores, Inc., Employer, and Illinois National
Insurance Company, Carrier, Respondents.

Appellate Case No. 2017-002122

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

FILED

February 1, 2018

cc:

C. Daniel Vega, Esquire

Johnnie W. Baxley, III, Esquire