THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2019-001380

Paula Russell,	Claimant, Appellant,
v.	
Wal-Mart Stores, Inc.,	Employer,
&	
American Home Assurance,	Carrier, Respondents.

Reply Brief of Appellant

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Table of Contents

Table of Authorities

South Carolina Cases

Statutes

Other Authorities

Argument

This appeal concerns essentially three matters: Whether the Workers' Compensation Commission ("the Commission") applied the wrong standard to a change of condition claim after receiving guidance from the appellate courts, whether the Commission erred in finding as fact Appellant, Paula Russell's, testimony was conclusory and self-serving, and whether the Commissioned erred in determining as a matter of fact that Appellant did not sustain a change of condition for the worse. Appellant, Paula Russell, argues the answers to these questions are "yes" for the reasons set out herein and set out in the brief of the Appellant.

I. The Order of the Commission indicates it again applied an incorrect legal standard to the facts of this case.

Appellant Paula Russell argued after the Commission's 2014 Order that the Commission applied the wrong legal standard to the facts of this case. This Court agreed. The Court determined from the record presented before it, that despite the fact "the Commission's order did not expressly and unequivocally state it was relying solely on objective evidence [and stated it] 'reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior orders'" the Commission had actually "exclusively relied on the MRIs in finding Russell failed to objectively prove her claim." *Russell v. Wal-Mart Stores, Inc.* 415 S.C. 395, 401, 782 S.E.2d 753, 756 (Ct. App. 2016). Respondents now make two arguments on this point: First, they attempt to argue against the law of the case and argue the Court of Appeals erred in its 2016 decision, and second, they attempt to show that the Commission's 2019 analysis is sufficiently different from its 2014 analysis.

As a threshold matter, it is improper for Respondents to state "[they] never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard." The law of this case, as stated by the Court in 2016, is that "the Commission relied exclusively on

objective evidence." Russell, at 401, 782 S.E.2d at 756. Respondents petitioned for rehearing at that time, arguing the Court overlooked evidence demonstrating the Commission considered all the evidence and weighed it properly. (Pt. Rehearing Ct. App. 2016). The Court of Appeals disagreed, ordering there was no basis for granting a rehearing. (Ct. App. Order March 24, 2016). Respondents did not petition for a writ of certiorari, thus the case was remanded. (Ct. App. Remittitur, May 3, 2016).

Once an issue is decided, the law of the case becomes the law of the case for all subsequent proceedings in the same matter. The doctrine of the law of the case is the law of the case in which it was made. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999) (law of the case doctrine "applies . . . to subsequent proceedings in the same litigation following an appellate decision"); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015) (law of case doctrine prohibits matters decided on appeal from being relitigated in the trial court in the same case). *See also Messenger v. Anderson*, 225 U.S. 436, 444 (1912) ("[T]he phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."); Wright & Miller, Fed. Prac. & Proc. § 4478 (2d. ed.) (law of the case rules "do not apply between separate actions"). While the doctrine has been referenced as discretionary, it is recognized that 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." Wright & Miller, Fed. Prac. & Proc. § 4478 (2d. ed.). Thus, it is legally incorrect for Respondents to seek to relitigate the issues adjudicated by this Court in 2016.

Furthermore, Respondents now inexplicably argue that Appellant and this Court somehow created the argument that is assigned to them and the Commission, contending: "Respondents never argued that Appellant had to meet an objective standard, nor did the Commission apply such a standard." (Respondents' Brief p. 3). In support of this argument, Respondents quote Justice Kittredge's comments from the oral arguments of this matter when it was before the Supreme Court. Justice Kittredge, however, only reviewed the appendix as it appeared before him, and he could not have seen the arguments made by Respondents, for not every document that was a part of the record on appeal for the 2016 dispute was a part of the appendix when this matter was pending before the Supreme Court. *See* Rule 209 (b), SCACR ("a party shall not include any matter in his Designation which is not relevant to the appeal"); Rule 210 (h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal"). The matter taken before the Supreme Court was a procedural one, thus certain evidence, relevant to this appeal and relevant to the appeal decided by this Court in 2016, was excluded.

As a result, Justice Kittredge was concerned the Court attributed arguments to Respondents that they did not make and counsel for Respondents affirmed that belief during the oral arguments. (Sup. Ct. Oral Arguments, pp. 20-21). The facts, however, as reflected in the record on appeal show Respondents actively argued for an objective evidence requirement. In 2012, Counsel for Respondents asked Dr. James Merritt, "Can you say to a reasonable degree of medical certainty that there has been a change in the objective status of her low back condition"? (Merritt, Dep. p. 16). Counsel for Respondents asked Dr. Edwards "in your opinion, there's no objective difference between those three scans"? (Edwards Dep. p. 17). Imperatively, before this case was tried before Commissioner Roche in 2013, Counsel for Respondents reiterated their position to Commissioner Roche stating, "we would contend there needs to be objective physical evidence of a change of

condition." (2-11-2013 Hr. Tr. p. 6). In Respondents' 2013 brief to the Commission on appeal, their only argument was "The Hearing Commissioner erred in finding [Appellant] 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 to her physical condition." (Respondents' 2013 Comm. Brief, p. 3 (emphasis added)). Likewise, before the appellate panel of the Commission in 2013, counsel for Respondents stated, "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 Hr. Tr. p. 4). After this Court issued its 2016 opinion, the Commission reaffirmed it was under the impression that "physical was synonymous with objective," to which counsel for Respondents replied "So was I." (06-19-2017 Hr. Tr. p. 6).

The observations made by Justice Kitteridge were a result of his having, and being restricted to, a limited version of the record from this case. Appellant has not created a "strawman's argument," Appellant is not substituting the Commission's actual findings, and this Court did not incorrectly attribute a position to Respondents. Respondents argued for an objective evidence requirement, that standard was accepted by the Commission, and this Court correctly rejected that standard.

While Respondents argue the Commission did not err in its 2014 Order, they also seek to show that the 2019 Order of the Commission complies with the remand instructions of this Court. Those arguments are inextricably intertwined and show the Commission did not sufficiently review the evidence presented before it in light of the correct legal standard. In 2016, this Court stated the following to show the Commission applied the incorrect legal standard:

> 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.

Russell, at 400, 782 S.E.2d at 756 (alterations in original).

In the 2019 Order, the Commission again stated that it 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." (Order Comm. 2019 p. 7). The 2019 Order again concluded, "[t]he preponderance of the evidence indicates that there was no objective difference between" the MRIs. (Order Comm. 2019 p. 7). 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." (Order Comm. 2019 p. 7). Respondent here believes the Commission's analysis is sufficient to support its order denying a change of condition. However, the 2019 Order again also ignores that both doctors concluded, to a reasonable degree of medical certainty, that Russell suffered a change of condition. (Order Comm. 2019). Dr. Merritt testified to a reasonable degree of medical certainty there was a change even if it was not an obvious, objective change. (Merritt Dep. pp. 8-9). He based his opinion on the MRIs and "in part on her subjective complaints." (Merritt Dep. p. 23). 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. (Edwards Dep. pp. 11-13). Each quote the Court cited from the 2014 Order to support its decision is also present in the 2019 Order.

Respondents additionally appear to assert that the Commission did not need to actually review the evidence but instead only claim to have reviewed the subjective evidence by quoting Justice Hearn's comments at oral arguments.[1] The suggestion that a Justice would expect a lower court to correct an erroneous order on its face without making a legitimate review of the evidence in light of the proper legal standard should not be persuasive to this Court. Regardless of the language in the order, it is evident the Commission did not follow its remand instructions.

Furthermore, the Commission continues to place undue or improper emphasis on the word "physical," which has an admittedly unclear pattern of adoption. *See Cromer v. Newberry Cotton Mills*, 201 S.C. 349, ___, 23 S.E.2d 19, 23 (1942) (stating "it is clear that a change in condition means a change in the physical condition of the claimant as a result of the original injury."); (*Keeter v. Clifton Mfg. Co.*, 255 S.C. 389, 393, 82 S.E.2d 520, 522 (1954) (stating twelve years later "Whether the phrase 'change in condition' therein mentioned contemplates only a change in physical condition need not now be decided. There is a conflict in the authorities on this question."). The Court, however, did clarify in 2016 that "physical" did not mean "objective," which was contrary to the opinion of the Commission. (06-19-2017 Hr. Tr. p. 6 ("physical was synonymous with objective")). Nevertheless, the Commission still fixated on the word physical. (06-19-2017 Hr. Tr. p. 6 ("[but] we still have the word physical. That has not been changed. We still have physical.")). Correspondingly, the Commission's 2019 Order overemphasized that "a change in condition occurs when a claimant experiences a change in 'physical condition.'" (Order, Comm. 2019 p. 4 (emphasis in original)). However, the facts here are clear that Appellant's claim

[1] Justice Hearn, like Justice Kittredge, was also restricted to the limited record that was before the Supreme Court when it decided a procedural issue.

is based on a changed of her physical condition. Dr. Edwards stated plainly, "I don't have any doubt that her – the radiographic abnormalities . . . is what's causing her symptoms." (Edwards Dep. p. 9). He further stated, "That's part of an objective physical finding, though it does have a subjective component to it." (Edwards Dep. p. 18).

For these reasons, Appellant asserts the Commission failed to apply the correct standard of law in contravention of the guidance provided by this Court and inserted an objective evidence standard into the statute. Appellant therefore requests the Court reverse the order of the Commission for this reason and provide the Commission with specific instructions for remand.

II. The Commission erred in its factual determinations it uses to discredit the Appellant's testimony.

While it is certainly true the Commission is the fact finder and is empowered to determine witness credibility, its determinations are not immune from appellate review. *See e.g., Able Communications, Inv. V. SCPSC*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). Simply detailing the "flaws" the Commission found in Appellant's testimony does not amount to substantial evidence to support the Commission's credibility findings, if the underlying factual determinations are erroneous. Here, the Commission cites three reasons why it stated it did not give more weight to her testimony, claiming she was unable to establish she had new complaints that were not present at the time of the original award; she was unable to establish when she thought her condition worsened; she was unable to establish that her need for surgery was new. As a result of those findings, the Commission concluded Appellant's testimony was conclusory and self-serving. Appellant disputes the legitimacy of these findings from a legal perspective as noted in her brief, but would reiterate today that the specific findings used to support the Commission's ultimate conclusions are factually erroneous and not supported by substantial evidence.

First, the Order claims she was unable to establish she had new complaints that were not present at the time of the original award. (2019 Comm. Order. P. 7). The evidence here is simple. Appellant did not allege any additional pain other than back and abdomen pain. (Form 50 December 9, 2011). Commissioner Wilkerson did not make any findings of any additional conditions affecting Appellant at that time. (Wilkerson Order). The conditions that plagued Claimant at the time of the original award are those found in Commissioner Wilkerson's Order. Then, after the claim was first adjudicated, Appellant began to suffer from radicular symptoms. The Commission in its Order correctly compares her symptoms to those at the time of the original award, but reaches the inexplicable conclusion that her radicular symptoms were present at that time. (2019 Comm. Order p. 7). The facts here are simple and clear. Appellant had no radicular symptoms at the time of the original award but did within a few months of that award. When Respondents argue the Commission reached the correct conclusion on this point, they cannot and do not cite to records from the time of the hearing or the award. Instead, they cite to old medical records.[2] There is not substantial evidence to support the Commission's findings on this point and those findings must be overturned for that reason.

Second, the Commission found Appellant was unable to establish when she thought her condition worsened. This is again an erroneous finding, and there is not substantial evidence to support this finding or to support the Commission's using this finding to discredit Appellant. Appellant was asked before Commissioner Roche "how long—about how long had you had [radicular symptoms] when you were complaining in November . . . ."? She replied, "Probably September, October." (2/11/13 Hr. Tr. p. 9). This statement is corroborated by physician

[2] Appellant also testified as to how the nature of the discomfort was different during her pregnancy and after the original award. Appellant's discomfort during her pregnancy resolved with giving birth.

testimony. (Merritt Dep. p. 7). The Commission offered no details as to why it found her statement was not sufficient to prove when she thought her condition worsened. Respondent therefore presumes that either the Commission did not find her answer sufficiently specific, or took issue with the confusion regarding the year during which the symptoms manifested themselves.[3] Neither of those reasons are sufficient to find she could not state when her symptoms began and do not amount to substantial evidence sufficient to support the Commission's finding.

Finally, the Commission found Appellant's testimony was conclusory and self-serving because she could not establish that her need for surgery was new. This, similar to the prior points, is a simple matter. In 2011, Commissioner Wilkerson did not award surgery, he only awarded ongoing NSAIDs, Appellant did not ask for surgery, and the treating physician did not offer or recommend surgery. (Order, Wilkerson, pp. 3-6). Thus, her need for surgery was not present at the time of the prior award and developed after that award. Respondents argue she could have been a candidate for surgery while she was pregnant.[4] This argument, as posited in Appellant's brief, is speculative and an improper basis for refusing to give weight to her testimony. Moreover, the proper comparison for a change of condition is the condition as it existed after the initial award compared to how it existed at the time of that award. Even if she was truly a candidate for surgery immediately after the accident, which she disputes, she was not a candidate when her claim was first decided. For these reasons, Appellant asserts the Commission's findings regarding the credibility are unsupported by substantial evidence and must be overturned.

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[3] The question posed to Appellant incorrectly presupposed that the symptoms began in 2012. This mistake was present in several questions. Appellant herself corrected that mistake later in the deposition, asserting that the pertinent events of her treatment, symptoms, and termination had taken place in 2011, not 2012.

[4] Appellant was three months pregnant when she was injured.

III. The Commission's findings of fact that Appellant did not suffer change of condition for the worse is not supported by substantial evidence.

There is not substantial evidence in the record to support the order of the Commission. The Commission paints this case as one of lay evidence versus medical evidence. That is not the case. Appellant testified with specificity how her condition worsened and the Respondent-selected physicians stated her condition had worsened. The Commission's Order therefore, relies only on the fact that there were not significant, objective differences in the MRIs.

Substantial evidence must be substantial. Prior to the passage of the Administrative Procedures Act ("APA"), the rule governing appellate review of the factual determinations of boards and commissions was "any evidence." *Lark v. Bi-lo, Inc.*, 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). The APA, however, establishes the substantial evidence rule, which "is a grant of greater appellate authority to the courts." *Id.* Substantial evidence, as defined by the United States Supreme Court and quoted by the supreme court of this state, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* (quoting *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966)).

Here, the evidence relied upon by the Commission and by Respondents in support of the Commission's findings is only the MRIs. That evidence itself is even disputed. Dr. Merritt, a board certified orthopedic surgeon selected by the Respondents to treat and examine Appellant was asked on cross examination "can you say there's been an objective change to a reasonable degree of medial certainty"? (Merritt Dep. p. 17). Dr. Merritt replied "I would say there's been a change." Dr. Edwards also brought up an interesting point regarding the comparison of MRIs when evaluating changes, noting "unless both MRIs are done [with the same magnet and machine] it's often hard for me to compare both of them." (Merritt Dep. pp. 15; 8). Dr. Edwards admittedly reached the opposite conclusion, only regarding his interpretation of the MRIs, stating

"radiographically, there's not a significant difference to be noted in those scans." (Edwards Dep. p. 7). Of note, Dr. Edwards clarified after stating he saw no differences in MRIs that "it's clear that the patient's symptoms are now worse. I don't have any – I don't have any doubt about that."

Once again, the evidence here is simply Appellant's testimony that her condition changed, Dr. Merritt's testimony that her condition changed, Dr. Merritt's testimony that the MRIs reflect a change, and Dr. Edwards testimony that her condition changed versus Dr. Edwards opinion that the change is not shown on the MRIs.

Respondents essentially point to two things in the record they believe provide substantial evidence to support the Commission's award: That Appellant had complaints of leg pain while pregnant and Dr. Edwards's opinion that there was no "objective or significant radiographical difference" in the MRIs. The prior complaints of leg pain cannot be used to support the order. While pregnant, Appellant had some leg symptoms. Those symptoms were of a different nature and were not present for many months leading up to the adjudication of this claim. (Merritt Dep. p. 8). There is no requirement in the Act that a claimant alleging a change of condition for the worse have never experienced a symptom before. It is simply that her condition changed after the last payment of compensation and that the change is causally related to the original accident. S.C. Code Ann. § 42-17-90.

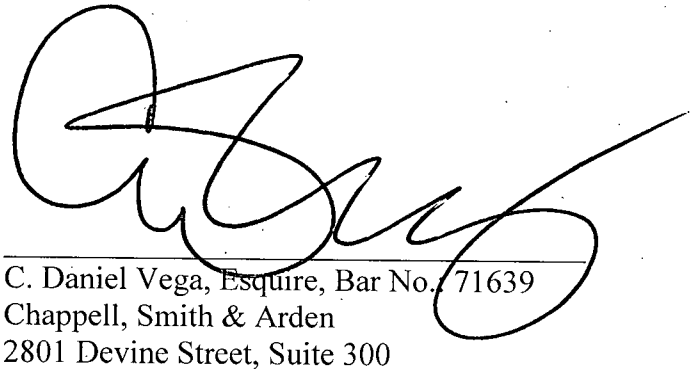
Likewise, the opinion of Dr. Edwards regarding what is shown on the MRIs is not sufficient evidence to justify the decision of the Commission, because that opinion is disputed by Dr. Merritt, the MRIs were not performed on the same machine, and Dr. Edwards did not find the lack of objective differences in the MRI conclusive of whether Appellant suffered a change of condition. In fact, based on his clinical findings, Dr. Edwards still believed she sustained a change of condition, notwithstanding the fact he did not identify objective changes in the MRIs, stating she

had a chronic, long-standing condition, and his physical examination demonstrated the change of condition, even if his examination contained a subjective component. (Edwards Dep. p. 18 ("So it's difficult to answer the question with a simple yes or no.")).

This is the essence of the evidence in this case. The Commission repeats Dr. Edwards's opinions regarding the lack of objective changes he saw in the MRIs in an effort to make it appear that significant evidence supports their conclusion. Instead, it is simply a reiteration of his statement that he does not see objective changes and his further attempts to state his opinions in a manner that was consistent with the "objective evidence" requirement that was erroneously proposed as law. Thus, there is not substantial evidence to support the finding of the Commission that Appellant did not sustain a change of condition for the worse and the Order of the Commission must be reversed for that reason.

Conclusion

Based upon the foregoing, Appellant asserts the Order of the Commission must be reversed. The Commission continued to apply an objective evidence standard and erred in its fact finding regarding credibility and the ultimate change of condition question. Therefore, the Appellant respectfully asks this Court reverse the Order of the Commission and award benefits for a change of condition.



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PROOF OF SERVICE

I certify that I have served *Appellant's Initial Reply* and *Additional Designation of Matters to be Included in the Record on Appeal* on Wal-Mart Stores and Illinois National Insurance Co., Defendants, Respondents, by depositing a copy of it in the United States Mail, postage pre-paid, on December 16, 2019, 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.

December 16, 2019

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December 16, 2019

The Honorable Jenny Abbott Kitchings
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RE: Paula Russell, Claimant, Appellant, v. Wal-Mart Stores, Inc., Employer, and American Home Assurance, Carrier, Respondents.
Appellate Case No.: 2019-001380

Dear Ms. Kitchings:

Enclosed please find the following documents for filing regarding the above referenced matter:

1. Initial Reply Brief of Appellant
2. Appellant's Additional Designation of Matters to be Included in the Record on Appeal
3. Proof of Service

Thank you for your assistance in this matter.

Very truly yours,

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JDG/
Enclosures
cc: Johnnie W. Baxley, III, Esquire