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.

Final Brief of Appellant

C. Daniel Vega, Esquire, Bar No.: 103634
James D. George, Jr, Esquire, Bar No.: 103634
Chappell, Smith & Arden, PA
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 929-3600
dvega@csa-law.com
Attorneys for Appellant

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Statement of the Case

The present appeal comes before the Court of Appeals from a lengthy procedural history, beginning with Appellant Paula Russell's (hereinafter "Appellant") admitted work-related accident. On November 3, 2009, Appellant injured her back while working as an assistant manager for Wal-Mart ("Employer") at a Wal-Mart store. Employer's carrier is American Home Assurance ("Carrier") (collectively, "Respondents"). Following an April 13, 2011 hearing, Commissioner Wilkerson submitted an Order dated June 8, 2011, which ordered Appellant reached Maximum Medical Improvement ("MMI") and was entitled to compensation for a 7% back impairment disability rating, and was entitled to ongoing pain medication.

However, within a few months Appellant started experiencing new and increased symptoms from her existing injury. Appellant reported to her doctors she was experiencing increased pain in her back as well as new radicular pain in her legs and buttocks. Appellant then filed a Form 50 on December 9, 2011, alleging a change of condition for the worse and requesting a review of her previous benefits award pursuant to S.C. Code Ann. § 42-17-90. A hearing was held on this matter on February 11, 2013. In an Order dated August 5, 2013, Commissioner Andrea Roche ruled Appellant suffered a change of condition for the worse, ruled Appellant was credible, ruled Appellant was disabled, and ruled Appellant was thus entitled to ongoing causally related medical care in addition to temporary total disability benefits from December 11, 2011, through the present and continuing.

Respondents appealed this Order to the Appellate Panel of the Workers' Compensation Commission (hereinafter "Commission") with a Form 30 submitted on August 9, 2013. The Form 30 alleged twenty points of error. A hearing was held on December 16, 2013, to determine whether Commissioner Roche erred in awarding a change of condition when the objective evidence of

record did not purportedly reflect a change of condition. The Appellate Panel overturned Commissioner Roche's Order and found in an Order dated January 30, 2014, that Appellant had not satisfied her burden of proof with objective evidence demonstrating she had suffered a compensable change of condition for the worse. Appellant responded with a proper and timely appeal to the Court of Appeals alleging the Appellate Panel should not have used an objective evidence standard over the proper preponderance of the evidence standard in making its determination on her claim. After oral arguments in front of the Court of Appeals on October 20, 2015, the Court of Appeals issued a January 20, 2016, decision, finding that the Appellate Panel erred as a matter of law by using an objective evidence standard. The Court remanded the case to the Commission with instructions to issue an Order to determine whether Appellant suffered a change of condition as demonstrated by the preponderance of the evidence.

The case was then assigned on remand to single Commissioner Michael R. Campbell, who reviewed the entire record, found Appellant suffered a compensable change of condition for the worse, and accordingly awarded benefits. Respondent submitted a Form 30 notice of appeal in response. The case was heard by another Appellate Panel of the Commission. In an Order dated September 15, 2017, the panel reversed Commissioner Campbell's Order in its entirety, which vacated the evidence of the record and remanded the case for a hearing de novo.

Appellant again responded with a timely appeal to the South Carolina Court of Appeals, and Respondent promptly responded with a Motion to Dismiss, alleging the appeal was interlocutory pursuant to the Administrative Procedures Act. Appellant opposed that motion arguing the appeal was a permissible interlocutory appeal. The Court of Appeals dismissed her appeal in an Order dated December 8, 2017. Appellant subsequently submitted a petition for a Writ of Certiorari on March 1, 2018, seeking a determination as to the appealability of the

Commission's Order. The South Carolina Supreme Court granted certiorari in an Order issued May 25, 2018. The parties appeared before the Supreme Court on February 21, 2019. In an opinion filed April 3, 2019, the Court reversed the Court of Appeals' dismissal, reversed the Commission's Order remanding the case to a single commissioner, and remanded the case to any appellate panel for immediate and final review of the original commissioner's August 5, 2013, Order in accordance with the Court of Appeals' 2016 holding. In an Order dated July 18, 2019, the Appellate Panel found the Appellant did not suffer a change of condition for the worse and found the Appellant's lay testimony to be "conclusory and self-serving." Appellant now appeals the Appellate Panel's July 18, 2019, Order.

Statement of Facts

This case has a complicated history going back to 2009; therefore, a lengthy recitation of the facts is necessary. Appellant was first injured on November 3, 2009, while lifting at work. (R. p. 92, line 18). At this point, Appellant had been working at Wal-Mart for thirteen years, the preceding four as an assistant store manager. (R. p. 92, lines 15 – 16). Appellant started in the receiving department, ultimately working her way up to a Support Manager and then Assistant Manager. (R. pp. 200 – 01, lines 2 – 25; 1 – 19). Wal-Mart recognized her skills, and she moved to North Carolina for two years to work at a store that was having personnel problems. (R. pp. 200 – 01, lines 19 – 25; 1 – 5). Eventually, she moved back to South Carolina and was promoted to a Co-Manager or Shift Manager position, working one level below the store manager. (R. p. 201, lines 6 – 14). This position placed her in charge of forecasting, supervision of employees, merchandise, and store finances. During her shifts, she was responsible for the operation of the entire store. (R. pp. 201 – 02, lines 24 – 25; 1 – 2).

Appellant was three months pregnant at the time of her injury and was treated conservatively for the remainder of her pregnancy term. (R. p. 92 – 93). 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. (R. p. 93). Appellant 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. (R. p. 93). She hoped to return to her job and eventually become a full store manager. (R. p. 93). While she experienced pelvic pain occasionally immediately after the accident, that problem had resolved by the time of the hearing, and her primary diagnosis was a "back strain." (R. p. 93).

There was no mention of any leg or buttock pain in the Order. (R. pp. 90 – 97). Commissioner Wilkerson's two primary findings were: (1) Appellant 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. (R. pp. 94 – 95). This Order was not appealed.

In September or October of 2011, Appellant 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 Appellant for an MRI in October. At that MRI appointment, Appellant gave a history of "[p]ersistent pain radiating to right leg, worse with driving." (R. p. 270). 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." (R. p. 270). In a November 21, 2011, letter, Dr. Merritt stated:

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

(R. p. 258 (emphasis added)).

A December 5, 2011, report from Dr. Merritt indicates Appellant was "continuing to have pain in her back and right leg, with buttock pain radiating down the leg into the calf." (R. p. 259). He reviewed her 2011 MRI and concluded she had a disc protrusion at L5-S1 with contact on the nerve root. (R. p. 259). His assessment was a "[l]ow back strain with ruptured disc L5-S1 and

continued symptoms in her right leg." (R. p. 259). He ordered she stay out of work if Wal-Mart had no light duty for her. (R. p. 259).

In the meantime, Appellant filed an accommodation request with Wal-Mart in early October 2011, which, if accepted, would have allowed her to move to a store location closer to her home. (R. pp. 185 – 86). Appellant thought having a shorter commute might help her back and leg pain, and allow her to work more hours. (R. pp. 185 – 86). Appellant continued to work until December 1, 2011, when she was told Wal-Mart could not accommodate her request, and that she must leave the premises immediately. (R. p. 186). She had previously been told Wal-Mart would attempt to meet her accommodations, but the company never did, and she never worked there again. (R. pp. 186 – 87). Appellant ultimately filed her Form 50 alleging a change of condition on December 9, 2011. (R. p. 98).

She was next seen by Dr. William Edwards of Pee Dee Orthopedics Associates for an IME. (R. p. 261). In the history, Dr. Edwards stated that Appellant's previous pain involved central low back pain "without any radicular discomfort at that time." (R. p. 261). 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." (R. p. 261). He noted that since a 2010 MRI performed at his office there were "more significant radicular symptoms in the right buttock and leg." (R. p. 261). 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.

(R. p. 262).

By March of 2012, Dr. Merritt diagnosed her right leg radiculopathy as "chronic," and stated that if it worsened "within the year [surgery] would be something reasonable and we will need to have the Workers' Compensation's company get her back to Dr. Edwards to discuss it but from my standpoint there is not much else I can offer and her impairment and work restrictions are as previously dictated." (R. p. 260). 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. (R. pp. 264 – 66). Dr. Edwards recommended surgery at this point, because it would serve to provide a "measure of improvement" in her radicular pain. (R. p. 266).

Dr. Merritt was deposed on May 23, 2012, and he was asked to compare the 2011 MRI to the one taken in 2010. He stated there is "a slightly increased sized protrusion on the second one." (R. p. 237, lines 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 . . . ." (R. p. 238, lines 4 – 12). "I think if there was contact of the transiting nerve roots I would have probably mentioned that in my dictation. So I'm assuming that that was not there and that this disk protrusion is slightly larger than it was previously." (R. p. 244, lines 19 – 24). He further felt the "little bit" of disc protrusion constituted an anatomical difference in Appellant's condition. (R. p. 238, lines 10 – 12). "If you're talking a couple millimeters, larger protrusion on the second one versus the first, that may be a little hard to discern. A small difference, you know." (R. p. 245, lines 9 – 12).

Dr. Merritt did ultimately defer to Dr. Edwards, but only in regard to evaluating whether the 2011 MRI was different from the 2010 MRI. (R. p. 247, lines 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 Appellant's condition had worsened.

When Dr. Merritt saw Appellant in September of 2011, she had "new complaints of pain more down in the legs . . . . In my first visit it was really mostly back pain. She said in September that she was having increasing pain down her legs and into the buttock area." (R. p. 236, lines 9 –10; 12 – 15). "The leg stuff was relatively new. It was never the main problem." (R. p. 251, lines 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." (R. p. 236, lines 18 – 21).

When asked directly about a change in Appellant's condition, he testified that "I would say there was a change. I mean, she was pretty clear during the first few visits that it was mainly just her back . . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort." (R. p. 240, lines 8 –10; 13 – 15). 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." (R. p. 252, lines 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. (R. p. 242 – 43, 248, 250). Dr. Merritt did recommend conservative treatment as a pain control measure, and opined that epidural steroid injections could be revisited; he stated his recommendation "is not really on the knew [sic] MRI as much as she's now having right leg radicular pain." (R. p. 248 – 49).

Dr. Edwards was deposed on September 13, 2012. (R. p. 206). 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.

(R. p. 211, lines 2 – 7). When asked if there was a difference between the MRIs, he stated,

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

(R. p. 212, lines 2 – 10). He stated that all three MRI's are fairly consistent, and they all appear to show a "nerve root compression." (R. p. 214, lines 21 – 24).

He stated that Appellant's symptoms had progressively worsened and her pain complaints had increased since her initial claim was resolved in 2011. (R. pp. 209 – 210). When asked about the cause of Appellant's symptoms, Dr. Edwards stated that as early as September of 2010 he believed there was a disc pathology that was compressing the nerve root, and that 'compression' over an extended period of time, is most likely what's causing her worsening. (R. pp. 213 – 214). Dr. Edwards even stated that Appellant's "fairly significant radiculopathy" could be caused "without having pressure on…that nerve." (R. p 216, lines 22 – 25). Instead, prolonged chemical irritation to the nerve could be the cause of the increase in symptoms. (R. p. 215, lines 15 – 25).

Dr. Edwards further 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." (R. p. 217, lines 11 – 16). Dr. Edwards did not doubt that the condition has worsened, stating that in Appellant's "opinion it seems to be worsening, and I have no reason to doubt that, then it is reasonable to offer surgical intervention." (R. p. 218, lines 5 – 24).

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

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

(R. pp. 222 – 23, lines 16 – 25; 1).

Dr. Edwards answered:

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

(R. p. 223, lines 2 – 13).

Dr. Edwards also opined Appellant was not considered a candidate for surgery in 2010 "because she was pregnant at the time. We certainly try not to operate on pregnant people if we can get by without it." (R. pp. 225 – 26, lines 25; 1 – 2). 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." (R. p. 226, lines 7 – 11).

The case ultimately proceeded to a hearing on February 11, 2013, in front of Commissioner Andrea C. Roche. (R. p. 173). Respondents 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." (R. p. 176, lines 15 – 19). Counsel for the Respondents argued first that the "case law of the Statute is pretty clear there has to be a physical

change of condition," but then stated the standard actually requires "objective physical evidence of a change of condition." (R. p. 178, lines 10 – 11; 12 – 13). No legal authority was cited for the use of this "objective" standard.

Appellant 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." (R. p. 177 – 78).

Appellant 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." (R. p. 180, lines 22–24). She began feeling pain in "especially the leg - - the tingling in my leg," and indicated unequivocally that these were "new symptoms." (R. p. 181, lines 2–3; 13–16). She remembered beginning to experience these new symptoms in either September or October of 2011, and this is what led to her returning to Dr. Edwards's care. (R. pp. 181 – 82, lines 19–21; 19–22). When asked if her condition had changed since the initial disability determination, she said, "Yes, it has." (R. p. 187, line 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." (R. p. 188, lines 7–9).

When asked about the location of her pain prior to the 2011 hearing, she stated that the pain centered on her lower back and pelvic area, and that she did not experience major symptoms in her leg. (R. p. 189, lines 6 – 9). To the extent she experienced any symptoms in her right leg prior to the 2011 hearing, she indicated feeling "numbness," but she now describes the pain as "a sharp - - the pain that I'm having now is like a - - a - - electrical - - electrical pain down my leg."

(R. pp. 189 – 190). She testified that she is having "pain into [her] left leg now as well." (R. p. 191, lines 13–14). Any pain she had indicated previously was,

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

(R. p. 192, lines 8–14).

Until October 2011, Appellant 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. Appellant was having symptoms because the long drive was difficult on her back. (R. p. 193 – 95). Wal-Mart refused to honor the accommodation and placed her out of work in December 2011. Appellant has not worked for Wal-Mart since that time. (R. p. 196). Appellant was ultimately forced to cash out her 401K with the company just to pay her bills. (R. p. 203, lines 1 – 6).

Commissioner Roche issued her Decision and Order on August 5, 2013. (R. pp. 83 – 96). Commissioner Roche found that after the 2011 decision of the Commission, Appellant "experienced an increase in symptoms, which she testified worsened with work and activity. Appellant testified that these symptoms were new symptoms and included pain radiating down into her legs and would sometimes cause them to shake." (R. p. 85). Commissioner Roche further found that since "December 1, 2011, Wal-Mart has failed to provide her with work that complied with her treating physicians' work restrictions." (R. p. 85). She also found "Appellant's testimony, stating that she suffered a worsening of symptoms, to be credible." (R. p. 86). She further found that both Dr. Merritt and Dr. Edwards testified that the Appellant suffered a change of condition for the worse, and that this change was a physical, anatomical change. (R. p. 87). Her findings of law included that Appellant "suffered a change of condition for the worse," that "[p]ursuant to 42–

1–120, Appellant is 'disabled,'" and that "[p]ursuant to section 42–9–10, Appellant is entitled to temporary total disability benefits." (R. p. 88).

Respondents filed a timely appeal to the Full Commission. In their brief, Respondents 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. (R. p. 278). Respondents also focused on one statement in particular from Dr. Edwards, that "any worsening was predominantly subjective." (R. p. 279). Finally, Respondents also relied on the fact that Dr. Edwards indicated that Appellant may have been a candidate for a discectomy in 2010 but that it was not considered because of her pregnancy. (R. p. 279).

In the brief's argument section, the Respondents relied most heavily on the fact 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." (R. p. 280). Respondents also contended that "any alleged worsening in this case is solely based on [appellant'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 [Appellant's] condition is worse." (R. p. 282).

At the hearing before the Full Commission, counsel for the Respondents attempted to frame the issue in the following way: "This is really an issue over the doctors' testimony and whether or not there's been an objective physical change of condition for the worse." (R. p. 162, lines 15–18). As to Dr. Merritt's opinion, Respondents' counsel contended that "when you look under the surface about what he bases [his change of condition opinion] on, frankly, I think that it doesn't meet the standard, the legal standard." (R. p. 163, lines 3 – 6). Respondents' counsel also

contended that Dr. Edwards said "that he does not believe that there's been a change of condition for the worse," despite Dr. Edwards's clear opinion to the contrary. (R. p. 163, lines 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 Appellant's prior indication of leg pain means that Dr. Merritt was unable to make a "new finding" on this issue. (R. pp. 163 – 64).

The most crucial exchange came on the issue of Appellant's credibility. The Commission pointed out that an important factor in the change of condition was the history given by Appellant, "which Commissioner Roche found was credible." (R. p. 165, lines 22 – 24). Counsel for the Respondents stated, "I would agree with Commissioner Roche that there was certainly a change in the subjective complaints. *I'd also agree with Commissioner Roche that Ms. Russell comes across really well."* (R. p. 166, lines 5 – 9 (emphasis added)). He went on to say that "[n]ow, is she having some continued complaints, yeah. Have those complaints even gotten worse? Dr. Edwards actually testified in his deposition that, you know, frankly *the chronic nature of this is that she's going to have those continued complaints and they could even worsen over time.*" (R. p. 166, lines 12 – 19 (emphasis added)). Further, he stated, "in these sorts of cases the absolute most important factor is the doctor's testimony about the actual physical condition of the back." (R. pp. 167 – 68).

The Full Commission issued its order on January 30, 2014, reversing the ruling of the Single Commissioner. (R. p. 71). 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 clear that it did not believe there was a difference between them. (R. pp. 74 – 75). When going through the deposition of Dr. Merritt, the Order left out his opinion, made to a

reasonable degree of medical certainty, that a change of condition had occurred, and instead cited him as saying that he "could not say for sure whether there was an obvious objective change or not." (R. p. 75). The Commission similarly omitted Dr. Edwards's opinion, made to a reasonable degree of medical certainty, that a change of condition had occurred, and instead cited his statement that "there was no objective or significant radiographical difference to be noted in the scans." (R. p. 75).

Crucially, the Commission next found 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." (R. p. 76). Despite the Single Commissioner's finding that Appellant was credible, as well as Respondents' stipulation that the Appellant was credible, the Commission found that she lacked credibility simply because she had reported different right leg problems in 2010. (R. p. 76). The Commission found "[i]n sum, [Appellant']s radiographic condition has not worsened; any alleged worsening in this case is solely based on Appellant'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 Appellant's condition is worse." (R. p. 77).

In its Findings of Fact, the Commission stated:

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

(R. p. 79). 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." (R. p. 79).

The Commission also found, the "preponderance of the evidence indicates that there was no *objective difference* between the Appellant's MRI scan after the original award and the MRI scan before the original award." (R. p. 79 (emphasis added)). The Commission also made the statement that "[w]e are cognizant of the fact that testimony from both doctors and statements out of medical reports can be cherry-picked to support either position on this change of condition dispute," but that the preponderance of the evidence did not indicate a change of condition had occurred. (R. pp. 79 – 80). The Commission ultimately ordered that the Appellant had failed to prove a change of condition and was not entitled to any additional benefits under the Workers' Compensation Act. (R. pp. 81 – 82). 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, Appellant 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 Appellant'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 Appellant failed to objectively prove her claim. *Russell* at 400, 782 S.E.2d 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 [Appellant] 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 [Appellant'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 Appellant prove her claim by a preponderance of the evidence, and remanded the remaining issues—whether Appellant suffered a change of condition and whether the statements were self-serving and conclusory—to the Commission. *Id.*

On remand from the Court of Appeals, the Commission assigned this matter to Single Commissioner Michael R. Campbell who 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 Appellant suffered a change of condition for the worse. (R. p. 61). He further found Appellant was terminated from her employment with Wal-Mart on December 1, 2011, and that she has a present need for surgery. (R. p. 61). Therefore, Commissioner Campbell Ordered Respondents pay for causally related medical treatment and pay back owed temporary total disability benefits from December 1, 2011, to the present and continuing. (R. p. 62).

That Decision and Order was subsequently appealed to an appellate panel of the Commission, which reversed the entire Order of Commissioner Campbell and remanded for a hearing de novo. That Order was ultimately appealed to the Supreme Court as an appealable interlocutory Order.

The South Carolina Supreme Court heard oral arguments on this matter on February 21, 2019 and a decision was issued on April 3, 2019. In its decision, the Supreme Court held the Commission's unreasonable delay, caused by a series of remands, left Appellant without an adequate remedy. *Russell v. Wal-Mart*, 426 S.C. 281, 826 S.E.2d 863 (2019). Therefore, the court reversed the Order of the Commission remanding to a single commissioner and remanded to the an appellate panel for immediate and final review of Commissioner Roches' August 5, 2013, Order in accordance with the 2016 holdings of this Court. After remand from the Supreme Court, the same appellate panel of the Commission issued a new Order denying Appellant suffered a change of condition for the worse, denying her claim for benefits, and reversing the 2013 Order of Commissioner Roche. (R. p. 10). The Commission issued this decision and order without

additional briefing and without oral arguments. The second decision and order of the Commission nearly mirrors the first with few alterations. Appellant believes the Commission again erred, for the reasons set forth below, and thus instituted this appeal.

Standard of Review

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions made by the Workers' Compensation Commission ("the Commission"). *Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The substantial evidence standard of review permits this Court to reverse the Commission's findings when those findings are unsupported by substantial evidence. S.C. Code Ann. § 1–23–380(A)(5)(e). The Appellate Panel of the Commission is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). While an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, it may reverse where the decision is affected by an error of law or is unsupported by substantial evidence. *Grant v. Grant Textiles*, 372 S.C. 196, 200 – 01, 641 S.E.2d 869, 871 (2007).

Review of a prior compensation award is permitted "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) (2015). There is a change of condition when the claimant sustains a change in physical condition resulting from the original injury, occurring after the original award. *Gattis v. Murrells Inlet VFW No. 10420,* 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003). "Review for a change of condition is concerned with conditions that have arisen thereafter." *Id.* at 107, 576 S.E.2d at 194. A claimant is not required under the Act to prove a change of condition by objective evidence. *Russell v. Wal-Mart Stores, Inc.,* 415 S.C. 395, 401, 782 S.E.2d 753, 756 (Ct. App. 2016). The Commission has the discretion as factfinder to weigh and consider all evidence, both lay and expert. *Tiller v. Nat'l Health Care Ctr. Of Sumter,* 334 S.C. 333, 339-40, 513 S.E.2d 843, 846 (1999). South Carolina appellate courts

have affirmed awards based solely on objective evidence and awards based solely on subjective evidence. See *Gattis v. Murrells Inlet VFW No. 10420,* 353 S.C. at 110, 576 S.E.2d at 196.

"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.

Argument

I. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred as a Matter of Law in Finding Appellant Failed to Establish a Change of Condition Because No "Objective" Evidence Supports a Finding of a Change of Condition.

The Commission erred as a matter of law in finding Appellant failed to establish a change of condition because no "objective" evidence supports a finding of a change of condition. The South Carolina Workers' Compensation Act ("the Act") allows an injured employee to submit her claim to the Commission for further review if her condition worsens within one year from the last date compensation was paid. S.C. Code Ann. § 42-17-90 ("The Commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation."). A change of 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 and Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967).

"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 v. Rental Uniform Services of Florence, Inc.*, 383 S.C. 270, 279, 678 S.E.2d 825, 830 (Ct. App. 2009) (citing *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 107, 576 S.E.2d 191, 194 (Ct. App. 2003)). "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 when making a determination about an alleged change of condition." *Id.* The *Mungo* Court further stated,

> "[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)).

"To justify a modification of an award based on a change of condition, the claimant must show the change of condition and its causal connection to the original compensable accident." *Gattis*, at 109, 576 S.E2d at 195. Generally, if a condition is not causally related to the original compensable accident or it is a separate claim that was not required to be brought and was in fact not brought as part of the original claim, then the claimant has not suffered a change of condition for purposes of the Act. *Estridge*, at 537-38, 482 S.E.2d 580. However, if the condition is "causally connected and is a newly manifested symptom of the [the claimant's] original injury which has caused a worsening of his condition, then it is properly considered. To be causally related to the original physical injury, the condition need only be induced by said physical 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 change of condition claim at hand was denied for a single reason: The MRIs of Appellant's lower back performed before and after the adjudication of the claim before Commissioner Wilkerson show no objective, significant differences. While there were minor differences in these studies, Dr. Edwards, ultimately concluded that he could not identify significant changes between them. This left the Appellant without objective evidence according to the Commission. (R. p. 8, ¶11). The Commission is therefore requiring the Appellant to prove

her case with more than the opinion of the medical providers, who were selected by Respondents, and her own testimony.

The Appellant does have the burden of proving a change of condition, and this burden is clearly spelled out in S.C. Code Ann. § 42-17-90 and by this Court. The Appellant must only show that it is more likely than not that her original injury was the cause of her change of condition. She has met that burden. The only reservations Dr. Merritt and Dr. Edwards had about concluding that Appellant suffered a change of condition were around the confusing "objective" standard put before them by counsel for Respondents. Even then, both that a change in her condition had occurred. Appellant submits there is only one reason that the Commission discounted the opinions in her doctors' testimony: The Commission wants radiographical evidence to support a change of condition claim.

For example, the Commission stated in its 2019 Order "[Appellant] has not presented any objective testimony other than self-serving subjective complaints" and further stated "We find the lack of objective evidence persuasive." (R. p. 6). Moreover, the Commission stated "we give great weight to the fact the objective medical testimony and medical testing certainly does not support [Appellant's] assertion." (R. p. 6). Once again, the Commission stated "Appellant's *radiographic* condition has not worsened; . . . Dr. Edwards admits there is nothing he could look at that does not have a subjective component to it to show Appellant's condition is worse." (R. p. 7 (emphasis added)). The Commission made a specific finding of fact that "the preponderance of the evidence indicates that there was no *objective* difference between the Appellant's [MRIs]." (R. p. 8, ¶9). The Commission further found as fact "Both Dr. Merritt and Dr. Edwards ultimately testified that [sic] was no objective or significant radiographical difference to be noted in the MRI

scans." (R. p. 8, ¶ 11). Additionally, the Commission found as fact "the preponderance of the evidence shows [Appellant's] radiographic condition has not worsened. (R. p. 9, ¶13).

Therefore, Appellant respectfully asks this Court reverse the Order and Decision of the Commission on the basis that it applied an incorrect legal standard; and, rule that Appellant experienced a change of condition for the worse, is entitled to causally related medical care, and is entitled to temporary total disability benefits as outlined in Commissioner Roche's 2013 Order.

II. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in again Requiring Appellant Prove She Suffered a Change of Condition for the Worse with Objective Evidence in Contravention of the 2016 Opinion of this Court and the 2019 Opinion of the Supreme Court.

The Commission erred in again requiring Appellant prove she suffered a change of condition for the worse with objective evidence in contravention of the 2016 Opinion of this Court and 2019 Opinion of the Supreme Court. The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2019 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.*

In 2016, this Court addressed the same issue Appellant asks this Court to consider today: The Commission's repeated insertion of a requirement into the Act that Appellant prove her change of condition for the worse with objective evidence. When this Court reviewed this matter in 2016, it stated,

> We find the Commission relied exclusively on objective evidence, MRIs, in denying [Appellant'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.

Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016). Consequently, this Court further stated, "there is no requirement in the Act that a claimant prove the change of condition by objective evidence," and therefore, the court "reverse[d] and remand[ed] to the Commission."

This Court was cognizant of both what the Commission actually considered and what it claimed it considered in deciding Appellant's case, stating,

> 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 [Appellant] failed to objectively prove her claim.

Id. Here, the Commission decided this case without briefing or oral argument, but the Commission's Order once again makes clear it relied exclusively on the MRIs and refused Appellant's claim for benefits based upon a lack of objective evidence.

After the Commission first reviewed this claim, this Court took issue with the fact the opinions of the physicians were not considered by the Commission because they included subjective evidence in their medical conclusion, stating,

> 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. The Commission in its 2019 Order, however, made no findings tending to show it actually contemplated the opinions of the physicians as directed by the Court. Instead, it once again made findings as to what the "objective" differences were in the MRIs and again only found there "was no objective or significant radiographical difference to be noted in the MRI scans." (R. p. 8). This is patently erroneous and shows the Commission failed to follow the instruction of this Court.

In support of its Decision in 2016, this Court stated,

> 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 . . . Commission's order make[s] it clear the Commission exclusively relied on the MRIs in finding Russell failed to objectively prove her claim. . . . 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, "the 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 "the 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. This Court could easily insert that same paragraph into its Decision on the current appeal, and the statements asserted therein would be equally true as to the 2019 Order of the Commission. The Commission again claims it considered all the evidence of record and expressly claims it considered the subjective evidence of record. However it is still evident the Commission exclusively relied upon the MRIs in finding Russell failed to prove her

claim. The Commission again stated it gave more weight to the medical evidence, found that evidence does not support a change of condition finding, and found by preponderance that there is no objective difference in the MRIs. (R. p. 8). The Commission in 2019 again found both doctors testified there is no objective difference in the MRIs and found there was no radiographical difference in the MRIs. (R. p. 8). The Commission again ignored that both doctors stated to a reasonable degree of medical certainty that a change occurred. (R. p. 8). Therefore the Commission failed to comply with instructions of this Court, for the same issues are present in the 2019 Order that this Court found in the 2014 Order.

The Commission was instructed to consider all the evidence presented in this case, but it failed to make any additional, substantive findings of fact with regard to the subjective evidence it considered. It failed to make any new findings of fact with regard to the lay testimony. It further, and imperatively, failed to make any findings of fact with regard to the findings of the physicians that included subjective components. Instead, it choose to only claim the statements of the physicians could be "cherry-picked" to support either position. Dr. Merritt testified unequivocally Appellant suffered a change of condition and Dr. Edwards reached the same conclusion despite being presented with an erroneous standard. (See argument IV, infra).

The Commission, instead of following the instructions of this Court, simply added to its findings that "the lay testimony simply did not carry the burden of proving a compensable change of condition claim. That is not say that lay testimony could not meet the burden of proof in any instance, but in this particular instance, lay testimony did not outweigh the medical evidence." (R. p. 8). This finding is factually wrong as discussed below but also shows the Commission did not follow the instructions of this Court. It further added a finding of fact that a negative MRI is not dispositive, but its order on the whole, taken in conjunction with its factual errors, shows the

Commission only added those words to the Order and failed to actually revisit the evidence of this case in light of this Court's decision. Furthermore, the Commission added a finding of fact that objective evidence is not required to prove a change of condition case, but again, its order makes clear it did not alter its reasoning; the Commission only added sentences saying it finds objective evidence defeats Appellant's subjective complaints. Just as the Commission's statement that it considered all evidence in its 2014 Order was insufficient to convince this Court it actually did so, its statements that it weighed the subjective evidence is also disingenuous in light of its findings.

The Commission, despite its statements to the contrary, again required Appellant to prove her change of condition with objective evidence or radiographical studies. Neither is a requirement under the Act. A plain reading of the Order of the Commission evidences the fact the Commission did not follow the instructions of this Court or the Supreme Court. The findings of the Commission and the discussion section of the Order show the Commission's analysis has not changed from its analyses in 2014. The Commission, instead, inserted the words "objective" and "subjective" into the order, added to certain findings of fact, and added one additional finding of fact. This, when read in conjunction with the remainder of the Order, shows the Commission once again required proof of a change of condition be demonstrated with objective evidence in contravention of the instructions of this Court.

Therefore, Appellant respectfully requests this Court reverse the Order of the Commission for its failure to follow the instructions of this Court's 2016 Decision.

III. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding Appellant Failed to Establish a Change of Condition Because Her Testimony Concerning Her Symptoms were "Conclusory" and "Self-serving."

The Commission erred as a matter of law and as a matter of fact in finding Appellant failed to establish a change of condition because her testimony concerning her symptoms was "conclusory" and "self-serving." Appellant spent many years devoted to her career at Wal-Mart. She worked hard, and she was rewarded for her diligence 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 utilized her there for thirteen years, promoting her from an entry level position to a management post with major responsibilities. (R. pp. 92; 199-200). She handled multiple roles, and Wal-Mart trusted her to supervise employees, to control merchandise, and to control the money that moved through a fully-operational Wal-Mart store. (R. pp. 200 – 202). Had her employer questioned her trustworthiness and credibility, she certainly would not have had control over and responsibility for the cash and operations of a Wal-Mart store.

Now that Appellant's health is at issue, it appears her credibility is called into question. The Commission stated that Appellant "has not presented any objective testimony other than her self-serving subjective complaints to demonstrate her condition is 'different' from her condition at the time the original Decision and Order was filed in June 2011." (R. p. 6). The Commission also gave "limited weight to the testimony of the [Appellant] as it is conclusory and self-serving." (R. p. 8, ¶ 7).

The Commission's findings as to what are essentially credibility are confusing. Initially, the findings of the Commission with regard to Appellant's credibility must be sufficiently detailed to allow for review by an appellate court. *Able Communications, Inc. v. SCPSC,* 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). In support of its conclusion that the Appellant was not credible,

or only presented "conclusory" and "self-serving" testimony, the Commission only cites its perception that she "was unable to establish that she had any new complaints," was unable "to establish when her conditioned worsened," and was "unable to establish that her need for surgery was new or occurred after the original award." (R. p. 8, ¶7).

There is no requirement, either in the change of condition statute or the case law interpreting that statute that requires a claimant pin down precisely when she began to experience a change of condition. The only requirements are that the change in condition occurs after the time she receives last payment of compensation and within one year from that date. S.C. Code Ann. § 42-17-90. Here, Appellant stated her increased and new symptoms began in either September or October of 2011, prior to her return to Dr. Merritt's office.[1] (R. p. 181, lines 17 – 21). Therefore, not only is there no requirement that Russell precisely state when her new symptoms appeared, she also was able to provide a fairly specific range as to when her new symptoms developed. (R. p. 181, lines 17 – 21). Moreover, this testimony is supported by her medical records.

Furthermore, the way in which the Commission found she was not credible, stating her testimony was "conclusory" and "self-serving" is also confusing. First, this does not give a reviewing court any clear indication as to why the Commission decided Appellant's testimony should be mistrusted. The Supreme Court has held,

> 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 those findings. Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make specific, express findings of fact. No particular format is required. However, a recital of conflicting testimony followed by a

[1] While Appellant refers to the 2012 in this portion of the transcript, the medical records indicate it actually occurred in 2011. Appellant also corrected the year later in her testimony. (R. p. 187, lines 18 – 20).

> general conclusion is patently insufficient to enable a reviewing court to address the issues.

Able Communications, Inc. v. SCPSC, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) (internal citations omitted). The Commission's order offers no clarity as to why it found Appellant's testimony was incredible other than that it was "self-serving" and "conclusory." The Commission only states, erroneously in Appellant's opinion, that Appellant was unable to establish she had new complaints, unable to establish when those new complaints began, and was unable to establish her need for surgery was new. (R. p. 8, ¶7). But even if true, these opinions of the Commission do not in any way affect Appellant's credibility and do not aid this Court or any reviewing court in its evaluation of how the Commission reached the conclusion that Appellant was incredible based upon her "conclusory" and "self-serving" testimony.

Appellant further asserts it is legal error to base, to any degree, its denial of Appellant's claim based upon the fact that her testimony is "conclusory" and "self-serving." First, Appellant answered the questions asked of her; she did not stand before Commissioner Roche and answer every question with a legal conclusion. Appellant certainly concludes ultimately that she suffered a change of condition for the worse, for otherwise she would not have brought the claim. However, that fact in no way discredits her or means that she cannot be believed. Second, it is a foregone conclusion that her testimony is self-serving. If not, she would not have testified in her case-in-chief, and she would not have brought this claim. If the Commission found Appellant lied for her own benefit, then it could make a valid finding that she presented false, self-serving testimony. However, absent a finding that Appellant is not truthful, the fact that her testimony is self-serving is of no relevance. Therefore, Appellant asserts the findings of the Commission are based upon legal error, surmise and conjecture, are arbitrary and capricious, and are made upon unlawful procedure.

Lastly, Appellant asserts the Commission erred in finding as fact that she was not credible, for such a finding is clearly erroneous in the view of the reliable, probative, substantial evidence on the whole record. As discussed above, Appellant did testify as to when her new symptoms began. Further, the testimony is clear that Dr. Merritt opined well after Appellant's pregnancy that she was not a surgical candidate before her condition worsened. (R. p. 38). Dr. Edwards stated he had no reason to doubt Russell's statements that her condition was worsening. (R. p. 218, lines 21 – 24). Dr. Edwards further stated that the physical examination he performed led him to his finding that Appellant's condition had worsened. (R. p. 223, lines 2 – 13). The evidence of record shows Appellant is credible.

In sum, Appellant's employer trusted her to run a store and to handle the store's money, merchandise, and personnel, and her doctors never doubted her veracity or questioned her as a historian as to her pain. Her initial injury was fully admitted and that she sustained an injury was not contested. Furthermore, counsel for the Respondents at the 2014 hearing before the Commission stated "I would agree with Commissioner Roche that [Appellant] comes across really well." (R. p. 166). In essence, the Respondents have agreed, both with their conduct and their stipulation, that Appellant is credible and can be trusted to relay her symptoms. Therefore, there is not substantial evidence to support the Commission's finding that Appellant's testimony was only "conclusory" and "self-serving."

This Court should overturn the Commission's decision on the basis that there is not substantial evidence of record to conclude Appellant's testimony was only conclusory and self-serving. Moreover, the Commission's finding as to Appellant's credibility is unexplained and impossible to review on appeal due to a lack of factual findings to support that decision. Finally, the Commission's finding should be reversed, for its finding that her testimony was "self-serving"

and "conclusory" amounts to an error of law. For each of these reasons, Appellant requests this Court reverse the findings of the Commission, rule that she is credible and suffered a change of condition for the worse, award benefits for medical care causally related to this change of condition, and award temporary total disability benefits.

IV. The Appellate Panel of the South Carolina Workers' Compensation Commission Erred in Finding as Fact that Appellant Did Not Suffer a Change of Condition for the Worse.

The Appellate Panel of the Commission erred in finding as fact that Appellant did not suffer a change of condition for the worse. While the Commission is the fact-finder in workers' compensation cases, its findings are still subject to review by the appellate courts and may be overturned if the findings are not supported by substantial evidence. S.C. Code Ann. § 1-23-380; *Fishburne v. ATI Systems Intern.*, 384 S.C. 76, 85, 681 S.E.2d 595, 599-600 (Ct. App. 2009); *Hamilton v. Martin Color-fi, Inc.*, 405 S.C. 478, 483, 748 S.E.2d 76, 79 (Ct. App. 2013).

The evidence of record with regard to this issue is simple, which is why two single commissioners have found Appellant sustained a change of condition on two separate occasions. Appellant testified she began experiencing radicular symptoms in September or October of 2011. (R. pp. 181, 187). Appellant's permanent disability was adjudicated prior to that date. The physicians testified in accord.

The Commission's 2019 Order contains factual errors. First, the Commission found Appellant had no new symptoms. Appellant testified her symptoms were new as of September or October of 2011, as verified by her medical records. Appellant specified that the nature of her radicular symptoms changed from those she initially experienced in 2009 to those she began experiencing in 2011, stating the symptom she experienced in 2009 was numbness and that after the final adjudication of her claim, she began experiencing a "pinching," "sharp," "electrical" pain

in her leg. (R. p. 190). However, the symptoms she experienced in 2009 are of no relevance for they had resolved far before the time she was deemed to have reached maximum medical improvement, before the time of the hearing before Commissioner Wilkerson, and before the time of Commissioner Wilkerson's Order. During that entire span, Appellant suffered no radicular symptoms.

To wit, Dr. Edwards found that Appellant had reached maximum medical improvement and listed her only body part affected as her lumbar spine. Likewise, Commissioner Wilkerson's 2011 Order made no mention of radicular symptoms and only made a finding of an injury to her lumbar spine. (R. pp. 90 – 97). If Appellant was suffering from radicular symptoms, that would have been mentioned when she was released by Dr. Merritt in 2011 and in Commissioner Wilkerson's 2011 Order. The fact that Commissioner Wilkerson did not find or mention radicular symptoms, of any type, is telling. Moreover, Appellant testified her radicular type symptoms began in September or October of 2011. Correspondingly, she treated with Dr. Merritt in October of 2011, and noted she was beginning to experience pain down her left leg.

The above is the evidence related to when Appellant's condition worsened and whether or not she experienced new symptoms. The Commission's conclusion that her condition did not worsen and she did not experience new symptoms is not supported by substantial evidence. Specifically, the Commission found "[Appellant] was unable to establish that she had any new symptoms that were not present at the time of the original award." (R. p. 8, ¶7). The simple truth here is Appellant had no radicular symptoms when she was found to have reached maximum medical improvement and had no radicular symptoms at the time of Commissioner Wilkerson's original award. *See generally, Mungo v. Rental Unif. Serv. of Florence*, 383 S.C. 270, 687 S.E.2d 825 (2009); *Clark v. Aiken County Gov't*, 366 S.C. 102, 620 S.E.2d 99 (2005); *Gattis v. Murrells*

Inlet VFW No. 10420, 353 S.C. 100, 576 S.E.2d 191 (Ct. App. 2003). Later in 2011, Appellant developed radicular symptoms. Russell's testimony is that any symptoms she reported were likely related to her pregnancy. (R. p. 192). Both doctors further agree those symptoms had resolved by the time she reached maximum medical improvement, and both agree she never had major complaints of leg or buttock pain until late in 2011. They were aware of the minor complaints she had while pregnant, but both were still of the opinion that her condition had changed. The Commission's finding is not supported by substantial evidence and must be reversed.

Furthermore, the Commission erred in finding Appellant could not establish that her need for surgery was new or occurred after her original award. The facts here are simple. On the date of Appellant's accident, November 3, 2009, she was three months pregnant. No radiographical studies were performed during the course of her pregnancy and she was treated conservatively. After she carried her child to term, an MRI was performed. Dr. Merritt did not think surgery was indicated at that time. Later in 2011 Dr. Merritt again did not think surgery was indicated. After this claim was initially adjudicated, Dr. Merritt decided Appellant's condition and symptoms may warrant surgical intervention. (R. p. 259). Most importantly, for purposes here, Dr. Edwards who found Appellant at maximum medical improvement and stated her probable future medical care, only provided for ongoing NSAIDs with no mention of surgery before the hearing with Commissioner Wilkerson. Thus, Appellant did not need surgery at the time Commissioner Wilkerson adjudicated this claim in 2011, but surgery was soon thereafter recommended once her new symptoms presented.

Nevertheless, the Commission found Appellant was unable to establish that her need for surgery was new or occurred after the original award. (R. p. 8, ¶7). In support of this finding, the Commission stated "it is clear that Dr. Edwards opined [Appellant] could have been a candidate

for discectomy back in 2010 for her November 2009 accident, but was probably not considered at that time because she was pregnant." (R. p. 7). This finding is arbitrary and relies upon surmise and conjecture, in addition to being factually incorrect. Dr. Edwards did not treat Appellant regularly until after the issuance of Commissioner Wilkerson's 2011 Order. His testimony itself shows that he is speculating, as he stated "I think, initially, it was *probably*, not considered because she was pregnant at the time. We certainly try not to operate on pregnant people if we can get by with it." (R. pp. 225 – 26). The Commission, therefore, based its finding on the speculations of a physician who was not treating the Appellant during the time in question.

Had Appellant reached maximum medical improvement while she was pregnant, and received an opinion from her treating physician on surgery at that time, this could be a different analysis. However, the reality is Appellant's pregnancy had only a minor impact on the treatment she received, and had zero impact on the opinion of Dr. Merritt as to maximum medical improvement, 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 clear from the record that Appellant was not a surgical candidate at the time she reached maximum medical improvement in 2011, and therefore had no chance to seek that medical treatment through the workers' compensation system prior to the assertion of a change of condition. The opinion of the Commission with regard to when Appellant developed a need for surgery is not supported by substantial evidence and is an arbitrary and speculative finding that must be reversed.

The Commission further erred in its findings with regard to the physician testimony. This Court stated in its 2016 opinion that "both doctors concluded, to a reasonable degree of medical certainty, that [Appellant] suffered a change of condition." *Russell v. Wal-Mart Stores, Inc.*, 415

S.C. 395, 400, 782 S.E.2d 753, 756 (Ct. App. 2016). Indeed, Dr. Merritt testified "there was a change . . . Certainly there appears to be a change of more radicular-type discomfort, nerve-related discomfort." (R. p. 240). Dr. Merritt immediately thereafter confirmed that opinion was within a reasonable degree of medical certainty. (R. p. 240). Likewise, Dr. Edwards testified to within a degree of reasonable certainty that Appellant's condition had worsened stating "I think clinically her symptoms are more significant now than they were when I first saw her. So you could – you make that conclusion"; "its predominantly a subjective or symptomatic worsening"; "but the worsening of her symptoms, anatomically, could be that there is a chronic change in that nerve." (R. pp. 217 – 18). The Commission nevertheless, found that testimony from both doctors could be "cherry picked" to support either position, and decided the preponderance of the evidence does not support a finding of change of condition.

Furthermore, to the extent that Commission could "cherry-pick" statements from both doctors in support of its own conclusions, the testimony garnered at the time was tainted by the erroneous "objective evidence" standard nullified by this Court. For example, counsel for Respondents asked Dr. Merritt, "can you say to reasonable degree of medical certainty that there has been a change in the *objective* status of her low back condition"? (R. p. 245) (emphasis added). He later asked "[i]s it your understanding that Dr. Edwards . . . has opined there is no *objective* change in the MRIs." (R. p. 247). At the end of the deposition, he finally asked Dr. Merritt "as far as your opinion is concerned and her change of condition, you testified that you're basing that in part on her subjective complaints as far as the development of leg pain"? (R. p. 252). Likewise, in Dr. Edward's deposition, he was asked "And in your opinion, there's no objective difference between those three scans"? (R. p. 222).

Dr. Edwards, however, was astutely aware of the framing of the questions asked by counsel for respondents. In response to an ultimate change of condition question, Dr. Edwards stated,

> So it would imply [sic] 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 is, no. But if you—if you rely on the physical examination and the demonstration of these paresthesias that we're describing into the nerve distribution, that's part of an objective physical finding, though it does have a subjective component to it. So it's difficult to answer the question with a simple yes or no.

(R. p. 223). Dr. Edwards, who the Respondents have contended is the primary expert in this case, even found a change when the incorrect standard for a change of condition was asserted.[2] Nevertheless, the claim was denied.

The essence of the Appellant's argument here is that the questions presented by counsel for Respondents were posed in order to assert a standard this Court deemed inappropriate and the doctor testimony the Commission relies upon is tainted by that standard. However, despite the erroneous standard, both doctors still ultimately testified Appellant suffered a change of condition.

Of note, both doctors were authorized treating physicians selected by the Respondents to treat Appellant's injuries. Dr. Merritt, an orthopedic surgeon, provided the majority of Appellant's care prior the adjudication of this claim before Commissioner Wilkerson and for several months after. After Dr. Merritt opined Appellant sustained a change of condition for the worse, Respondents sent Appellant to Dr. Edwards, a spine surgeon, for a second opinion, and he ultimately testified she experienced a change, despite the incorrect standard posed to him. The

[2] Dr. Merritt is an orthopedic surgeon, selected by Respondents to provide treatment for Appellant. The deference granted to Dr. Edwards was with regard to his reading of spine MRIs. The issue of the objective findings in this case has been adjudicated as not controlling by this Court. Thus, his opinions with regard to anything except the differences in the MRIs is equally as valid as Dr. Edwards, for the Commission cited no reason to dispute his expertise.

only thing stopping the full Commission from adopting these opinions is the lack of change in MRIs.

The Commission in 2016 ignored the opinions of the physician's because they included subjective evidence in reaching their conclusions. *Russell,* at 400, 782 S.E.2d 753 ("the order ignores that both doctors concluded, to a reasonable degree of medical certainty, that [Appellant] suffered a change of condition."). The Commission continues to ignore those findings now. The Commission made no new findings with regard to the physician's testimony, instead opting to only once again find their statements can be "cherry picked" to support either position. This is clear factual error and the lack of findings with regard to the physician testimony evidences how the Commission reaches the opinion that the medical testimony and opinions do not support Appellant's claim.

Curiously, the Commission also states "Dr. Edwards' testimony and opinion is more persuasive than [Appellant's] testimony." (R. p. 8). Appellant, as explained above, disputes that her testimony was only conclusory and self-serving; however, even if it was, this finding is odd. Appellant's testimony and Dr. Edwards' testimony are congruent; she suffered a change of condition for the worse and developed significant radicular symptoms that were not present at the initial adjudication of this claim. Dr. Edwards testified "its clear that the patient's symptoms are now worse. I don't have any—doubt about that . . . clinically. (R. p. 212). To find Dr. Edward's testimony does not support Appellant's claim, is factually erroneous and is not supported by substantial evidence sufficient to sustain the findings of the Commission.

On the whole, the Commission presents this as a case of Appellant's testimony versus all the other evidence of the record. (R. p. 8). This structuring and, as explained above, the findings related to it are erroneous. First, it was error for the Commission to find Appellant's testimony

was only conclusory and self-serving, and it should have given adequate weight to her testimony. However, the most problematic finding is finding of fact number nine that "the medical records, diagnostic test, 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 Appellant's MRI scan[s]." (R. p. 8). This finding shows the Commission again did not consider the subjective portions of the physician's findings, but also is factually incorrect, for the medical records and medical opinions do, by a preponderance, support a finding of a change of condition for the worse. This case has evidence from three sources: the Appellant, Dr. Merritt, and Dr. Edwards. Appellant testified her symptoms worsened from the time the claim was originally adjudicated, Dr. Merritt testified clearly she experienced a change, and Dr. Edwards ultimately testified to the same as well, despite the incorrect standard presented to him as law. The Commission misaligns the facts in its weighing of the evidence and its opinion that the evidence does not support a finding of a change of condition is not supported by substantial evidence.

Furthermore, Respondents attempt to disprove Appellant's claim with a negative. Upon the standard proposed in 2013, requiring objective evidence, the lack of objective evidence could have arguably been persuasive if the Commission agreed with Respondents' interpretation of the doctors' testimony. Now, with clarity from this Court, the evidence the Respondents now must rely upon is of little consequence. The negative finding on the MRIs cannot alone be used to find by a preponderance of the evidence that there is no change of condition and does not amount to substantial evidence sufficient for this Court to sustain the Commission's finding of no change of condition for the worse. Furthermore, as explained in Argument I, above, sustaining the Commission's finding based upon a negative MRI finding,[3] in the face of the other credible

[3] Appellant's MRIs were not negative in that there was no abnormality. She undisputedly has a herniated disc.

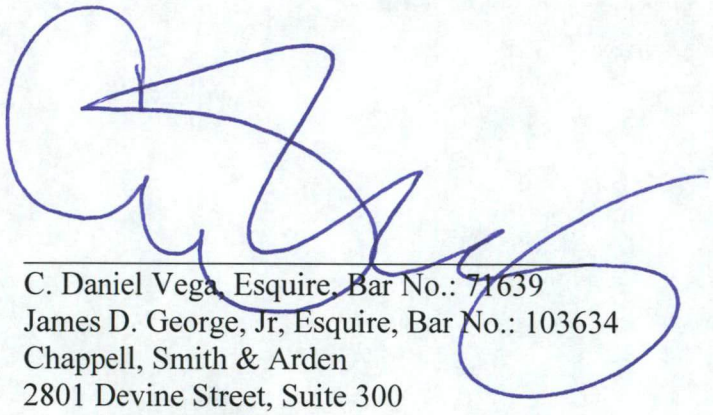
evidence of the case, allows the Commission to continue asserting its erroneous objective evidence standard. If the Commission can deny a change of condition claim when all other and substantial evidence of the record supports a finding of a change of condition except the radiographical studies, the Commission is ruling as a matter of law that radiographical evidence is required.

Therefore, the Commission made multiple errors in its findings of fact including its ultimate factual conclusions. There is not substantial evidence to support the Commission's finding by a preponderance that Appellant did not prove her symptoms were present at the time of the original award. There is not substantial evidence to support its finding that her need for surgery was not new. The Commission's findings regarding the physicians' testimonies are not supported by substantial evidence. And, the Commission's ultimate findings of fact as to whether Appellant experienced a change of condition for the worse, which are predicated upon the above errors, is further error and cannot be sustained. For these reasons, Appellant respectfully requests this Court reverse the findings of fact of the Commission and find Appellant suffered a change of condition for the worse and is entitled to the benefits attenuate to that finding.

Conclusion

For these reasons, Appellant respectfully requests this Court hold (1) the Commission committed reversible error in its failure to follow the 2016 instructions of this Court; (2) the Commission committed reversible error of law in requiring Appellant prove her change of condition with objective evidence; (3) the Commission committed reversible error in finding as fact a change of condition for the worse did not occur, and (4) that Commission committed reversible error in finding the Appellant was not a credible witness, where the other evidence of record, conduct of the employer, and the stipulation by counsel for Respondents indicates otherwise.

Further, Appellant respectfully requests this Court issue an Order finding that Appellant experienced a change of condition for the worse pursuant to S.C. Code Ann. § 42-17-90, that Appellant 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.



C. Daniel Vega, Esquire, Bar No.: 71639
James D. George, Jr, Esquire, Bar No.: 103634
Chappell, Smith & Arden
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 929-3600
dvega@csa-law.com
Attorneys for Appellant

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.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant and Reply Brief comply with Rule 211(b), SCACR

January 28, 2020

C. Daniel Vega, Esquire, Bar No.: 103634
James D. George, Jr, Esquire, Bar No.: 103634
Chappell, Smith & Arden, PA
2801 Devine Street, Suite 300
Columbia, SC 29205
PH: (803) 929-3600
dvega@csa-law.com
Attorneys for Appellant