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**Jun 04 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal from the South Carolina  
Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2024-000038

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Debra Wilson, Claimant,

Appellant,

v.

NHC Homecare Midlands, Employer and  
Premier Group Insurance Company, Carrier,

Respondents.

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MOTION TO DISMISS  
INTERLOCUTORY APPEAL

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Clarke W. McCants, III  
Clarke W. McCants, IV  
Nance & McCants  
Post Office Box 2881  
Aiken, S.C. 29802  
Attorneys for Respondents

## RESPONDENTS' MOTION TO DISMISS

The Respondents respectfully move before this Court to dismiss the appeal filed by the Appellant in this matter. The basis for this motion is that the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission dated June 9, 2023, and attached hereto as "Exhibit A", is not a final judgment in this case and is, therefore, interlocutory and not immediately appealable.

In its Decision and Order dated June 9, 2023 the Appellate Panel set forth the following order:

IT IS ORDERED that the Panel vacates the determination of disability to the Claimant's back, and remands this matter to the Hearing Commissioner for an analysis and determination of disability to the back as a result of the Claimant's admitted lower back injury.

This Court, as well as the South Carolina Supreme Court, has consistently held that an order of the Commission which remands a matter to a jurisdictional Hearing Commissioner for further proceedings is not a final judgment and is not immediately appealable. Bone v. U.S. Food Serv., Long v. Sealed Air Corp., 391 S.C. 483, 485-86, 706 S.E.2d 34, 35-36 (Ct. App. 2011) (holding that S.C. Code Ann. § 1-23-390 (Supp. 2011), which is part of the Administrative Procedures Act, applies to appeals from the Workers' Compensation Commission and limits appellate review to "a final decision..."). These decisions further provide that the order may only be appealed after a final judgment is entered. Hudson v. Caregivers of South Carolina, LLC, 2012-UP-569 (S.C. App. Oct 24, 2012).

The Decision and Order of the Appellate Panel of the Commission, from which the Appellant initiated the current appeal before this Court, specifically provides that this matter should be remanded for purposes of conducting further proceedings before Commissioner Michael Campbell, who issued the initial Decision and Order which was vacated by the Appellate Panel.

The Respondents agree that if this Court does order that this matter should be remanded to the Workers' Compensation Commission for further proceedings, such an order is without prejudice to the right of any party herein to file an appeal once a final judgment is entered. The Respondents further agree that the Appellant may also then present for review the issue set forth in her Initial Brief for this case.

The Respondents have contemporaneously filed with this motion their Initial Respondents' Brief for this case and their proposed Designation of Matter to Be Included on the Record on Appeal.

For these reasons the Respondents respectfully submit that this matter should be remanded to the Commission for further proceedings consistent with the Decision and Order of the Appellate Panel dated June 9, 2023.

s/ Clarke W. McCants, III  
Clarke W. McCants, III  
Clarke W. McCants, IV  
Nance & McCants  
Post Office Box 2881  
Aiken, S.C. 29802  
Attorneys for Respondents

Dated: June 4, 2024

**State of South Carolina  
Workers' Compensation Commission**

**APPELLATE PANEL DECISION AND ORDER**

**COMMISSION PANEL: Gene McCaskill, Melody James, and Avery B. Wilkerson, Jr.**

SCWCC File No.: 1614988

Debra Wilson, Deceased,

Claimant,

v.

NHC Homecare Midlands,

Employer,

and

Premier Group Insurance Co.,

Carrier, Defendants.

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**VACATED IN PART AND REMANDED**

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Hearing held via Zoom in Richland County, South Carolina, on January 23, 2023,

Per notice timely and properly served upon all Parties of Interest.

Appearances: Preston F. McDaniel, Esquire, of The McDaniel Law Firm,  
appeared on behalf of the Claimant / Respondent

Clarke W. McCants, III and Clarke W. McCants, IV,  
Nance & McCants, Attorneys at Law, appeared  
on behalf of the Defendants / Appellants.

Court Reporter: Katherine Boone, Creel Court Reporting, 1230 Richland St.,  
Columbia, SC 29201, 803-252-3445

Filed: June 9, 2023.

## **I. STATEMENT OF THE CASE**

The Parties were heard by Commissioner R. Michael Campbell, II, on October 20, 2021 in Columbia, South Carolina. Within the statutory period, Counsel for the Appellant filed an Application for Review in this case setting forth its reasons, a copy of which was furnished to all interested Parties prior to oral argument presented before an Appellate Panel on January 23, 2023, and comprised of Commissioner Avery B. Wilkerson, Jr., Commissioner Melody L. James and Commissioner Gene McCaskill, Chairman. All proffered testimony had been taken. Such, together with all documentary evidence, was delivered by oral argument to the individual members of the Appellate Panel convened on the aforesaid date.

## **II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW**

By way of the Decision and Order, filed on December 24, 2021, Commissioner Campbell found as a matter of fact the following particulars:

1. Notice of Hearing was timely and properly served on all parties of interest.
2. Venue is proper in Richland County, South Carolina.
3. Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon an alleged injury occurring while in the employment of the Defendant Employer, and therefore, the South Carolina Workers' Compensation Commission has jurisdiction over this matter.
4. Claimant's average weekly wage is \$933.70 and the corresponding compensation rate is \$622.50.
5. The parties stipulated to the results of the dependency investigation and that her husband, Mr. Timothy Wilson, is Claimant's next of kin dependent upon her for support.
6. Claimant, an office manager for Defendant NHC Healthcare, sustained admitted injuries by accident arising out of and in the course of employment on April 27, 2016 when she fell on her bottom rushing around a corner at work.

7. Defendants initially provided treatment with Stacy Galloway, an occupational therapy provider, from the day after her accident until the end of May 2016. Thereafter, Defendants provided treatment with Dr. Fowble for Claimant's lumbar spine and carpal tunnel syndrome (Claimant's APA 7). He provided referrals to additional providers as he deemed appropriate.

8. An MRI dated July 25, 2016, returned findings of facet arthritis at L4-5 and L5-S1. There was no significant cord compression. Dr. Fowble noted "nothing terrible." He ordered a course of physical therapy and medication (Claimant's APA 7, p. 141-143).

9. When physical therapy failed to relieve Claimant's symptoms, Dr. Fowble ordered a lumbar epidural steroid injection, performed on October 25, 2016, followed by a facet injection, which also failed to relieve her symptoms. (Claimant's APA 7, p. 104, 125-134, 138).

10. He also ordered an EMG study to investigate the origin of Claimant's carpal tunnel symptoms and referred her to Dr. LaMotta to evaluate her L4-5 stenosis (Claimant's 7, p. 125-128; Defendants' APA 1, p. 5-8).

11. Dr. Lamotta evaluated Claimant on March 23, 2017. In his opinion, she reached maximum medical improvement for her lumbar spine, did not require any additional treatment and was not a surgical candidate, did not sustain any loss of function, and could perform light duty work. Accordingly, he assigned a 0% impairment rating. (Claimant's APA 7, p. 111-114).

12. A repeat MRI on Claimant's lumbar spine, dated October 17, 2017, revealed degenerative changes, no acute injury to the lumbar spine, and a chronic disc herniation at L-2. (Claimant's APA 4, p. 55, 58; Claimant APA 6, p. 64).

13. A repeat MRI on Claimant's cervical spine, also dated October 17, 2017, revealed mild degenerative disc change, no herniation, no stenosis, and no acute bony or soft tissue injury (Claimant's APA 4, p. 56-57; Claimant's APA 6, p. 64).

14. Claimant's EMG study indicated moderate bilateral carpal tunnel syndrome. Her left wrist worse than her right. The test was negative for cervical radiculopathy. (Claimant's APA 7, p. 105-106, 121). Based upon the results of the EMG, Dr. Fowble recommended conservative treatment for her wrists and ordered splints. (Claimant's APA, p. 114-117).

15. When conservative treatment failed, Claimant sought surgical treatment with Dr. Ugino who performed a bilateral carpal tunnel release. (Claimant's APA 6; Defendants' APA 4, p. 124).

16. Claimant also alleged psychological injuries as a result of her work-related accident. She was treated by Dr. Lind who opined, to a reasonable degree of medical certainty, that Claimant's work accident aggravated her pre-existing anxiety and depression. According to Dr. Lind, Claimant reached MMI for her psychological injury on October 22, 2018, and sustained a 9% impairment to the brain. She required additional psychological treatment which will tend to lessen her disability. (Claimant's APA3, p. 44).

17. Dr. Fowble opined that Claimant did not have any problems with her back prior to the work accident. (Claimant's APA 7, p. 101).

18. Mr. Wilson also testified that Claimant did not have any problems with her back prior to the work accident. (Hr. Tr. p. 33-34).

19. According to Mr. Wilson, after the accident, but before her cancer diagnosis, Claimant as unable to pick up her grandchildren, unable to cook and host large family dinners unassisted and without frequent breaks, unable to carry the laundry downstairs to the washing machine, and unable to ride her motorcycle as much as she did prior to her accident because of her injuries. (Hr. Tr. p. 21-23; 26-28; 30).

20. His testimony is corroborated by Claimant's deposition testimony. During her deposition in 2018 she testified that after the accident she experienced difficulties vacuuming, was "in pain constantly with the low back," and did not think she would be able to work a full 8-hour shift bending, stooping, and lifting as her job required. (Defendant's APA No. 5, p. 198, 204).

21. Though Claimant sustained injuries to her bilateral hands/arms, and psyche because of the accident, her husband, Mr. Wilson, testified at the hearing that Claimant's back injury caused most of her problems functioning normally. (Hr. T. p. 53).

22. After Claimant's right carpal tunnel release in July 2019, she was diagnosed with Stage IV Metastatic Lung Cancer that had spread to her brain. (Defendants' APA 2). The condition was discovered after Claimant was admitted to the emergency room on August 1, 2019 for persistent stroke symptoms. (Defendants' APA 2, p. 18).

23. Claimant also treated with Dr. Holbrook for lumbar spine injury. He did not believe that Claimant would benefit from a spinal surgery. In his January 9, 2019 treatment note, he indicates that Claimant neck pain has improved, but her low back pain remained the same. He referred her to pain management. (Claimant's APA 4, p. 49).

24. Claimant was treated by Dr. Eugene Mironer for pain management for her lumbar spine and received an injection. (Claimant APA 5).

25. No physician opined that Claimant was candidate for spinal surgery.

26. “No. 26. Claimant completed a Functional Capacity Evaluation with Tracy Hill at Columbia Rehabilitation Clinic on September 3, 2019. Ms. Hill determined that Claimant could work in the limited sedentary to limited light work. She ‘[did] not meet the full requirements necessary for sedentary or light work.’ In addition, she noted her poor aerobic capacity and limited cervical and lumbar range of motion. (Claimant’s APA 2, p. 5). She opined that claimant sustained 3% permanent impairment to the right hand, 5% permanent impairment to the left hand, 23% permanent regional impairment to the cervical spine, and 11% permanent regional impairment to the lumbar spine. (Claimant’s APA 2, p. 33-34).”

27. Claimant presented for IME with Dr. Forrest on September 9, 2019. He opined to a reasonable degree of medical certainty that the Claimant’s fall at work on April 27, 2016 aggravated a previously dormant lumbar spine condition. He also opined that Claimant reached maximum medical improvement and sustained a 23% regional impairment to her cervical spine and 11% regional impairment to her lumbar spine. He deferred to Tracy Hill’s impairment rating for Claimant’s carpal tunnel injuries and Dr. Lind for Claimant’s psychological injuries. (Claimant’s APA 1, p. 3).”

28. In Dr. Forrest’s opinion, Claimant is totally disabled. She has permanently lost greater than 50% use of her spine. He recommended continued pain management. Her cancer diagnosis is unrelated to her neck and back symptoms since the accident or her disability. (Claimant’s APA 1, p. 4; Defendants APA 3, p. 96, In. 14-18; p. 102-103, In. 1-9; p. 107, In. 10-23).”

29. However, during his deposition, he testified that he heavily relied upon Tracy Hill’s Functional Capacity Evaluation and Claimant’s subjective complaints. (Defendants’ APA 3, p. 96, In. 21-25; p. 101, In. 19-25). He also testified that Claimant did not have any limitations for completing her duties at home, but her job at NHC Homecare was demanding. (Defendants’ APA 3, p. 105, In. 11-19). Based upon the lifting restrictions in the FCE, Claimant was unable to perform all types of sedentary jobs but could perform some jobs in that category. (Claimant’s AP 2, p. 114, In. 11-18). He admitted that he was not sure what her job functions were beyond her subjective description. (Claimant’s APA 3, p. 118).

30. A vocational evaluation performed by Ms. Harriet Fowler on November 15, 2019, states that there are no jobs within Claimant’s current transferable abilities. She tested at the 4<sup>th</sup> grade level for math, 6<sup>th</sup> grade level for spelling, and read at a post-high school level. She is a high school graduate. (Claimant’s APA 8, p. 147, 149; Defendants’ APA 5, p. 181). Her former position as an office manager for NHC Homecare is classified as a “sedentary” job but because Claimant was

working in the medical field, an office manager is considered a light physical demand level. In her opinion, to a reasonable degree of vocational certainty, Claimant was not able to maintain gainful employment. (Claimant's APA 8, p. 148, 166).

31. Claimant testified during her deposition that her prior employment experience consisted primarily of medical office manager positions. (Defendants' APA, p. 182-184).

32. Claimant received 187 weeks of temporary total disability. (Commission File).

33. Claimant succumbed to cancer on February 23, 2021; three days prior to the original hearing.

Additionally, Commissioner Campbell concluded as a matter of law, the following particulars:

1. Notice of Hearing was timely and properly served on all parties of interest.
2. Venue is proper in Richland County, South Carolina.
3. South Carolina Code Ann. § 42-15-10 (2021) confers jurisdiction upon the South Carolina Workers' Compensation Commission to hear and dispose of this claim. The Claimant was hired by a South Carolina employer, was injured in South Carolina, and worked in South Carolina. As the Claimant seeks an award under the Workers' Compensation Laws of this State for injuries he sustained while employed by the Defendant, jurisdiction is proper.
4. Under S.C. Code Ann. § 42-1-130 Claimant is a covered employee.
5. Under S.C. Code Ann. § 42-1-140 Defendant is a covered employer.
6. Under S.C. Code Ann. § 42-9-280, the parties stipulated that Claimant's husband, Mr. Timothy Wilson, is entitled to receive payment of the unpaid balance of compensation as Claimant's next of kin dependent upon her for support.
7. Claimant sustained 50% or more loss of use of her back and is presumed permanently and totally disabled under S.C. Code Ann. § 42-9-30(21)(2021). The back is a scheduled injury under the Act. In cases where a claimant sustains 50% or more loss of use of the back, the injured employee is presumed permanently and totally disabled and is entitled to a maximum of 500 weeks of compensation and lifetime medical benefits. S.C. Code Ann. §

42-9-30(21)(2021); S.C. Code Ann. § 42-9-10 (2021); S.C. Code Ann. § 42-15-60 (C)(2021). “South Carolina courts have repeatedly considered regional impairment ratings when determining awards under 42-9-30(21).” Clemmons v. Lowe’s Home Centers, Inc. 420 S.C. 282, 289 (2017)(internal citations omitted). In Clemmons our Supreme Court awarded permanent and total disability benefits for a back injury where all impairment ratings, after conversion to regional values for the spine, were greater than 50%. Id. at 284-86. *See also* McMahan v. S. Carolina Dep’t of Educ.-Transp., 417 S.C. 481, 491 (Ct. App. 2016) (agreeing with the treating physician’s determination that the claimant sustained a 54% impairment to the whole person and was permanently and totally disabled from serious thoracic spinal injuries he sustained when a bus fell on top of him.). However, in both McMahon and Clemmons the Claimant received impairment ratings greater than 50% to the spine when converted to a regional rating.

8. Although regional impairment ratings may be a valuable consideration when determining awards under 42-9-30(21), South Carolina courts have repeatedly made clear that such a determination is not bound by impairment ratings, but that the Commission “may find a degree of disability different from that suggested by expert testimony” Sanders v. MeadWestvaco Corp. 371 S.C. 284, 292, 638 S.E.2d 66, 70 (Ct. App. 2006; *See also* Linen v. Ruscon Constr. Co., 286 S.C. 67, 68-69, 332 S.E.2d 211, 212 (1985)(finding that although expert testimony found claimant suffered from a 20-30% impairment to his back, testimony of vocational expert and claimant provided substantial evidence to affirm Appellate Panel’s decision finding claimant’s impairment exceeded 50%); Lyles v. Quantum Chem. Co., 315 S.C. 440, 445-46, 434 S.E. 2d 292, 294-95 (Ct. App. 1993)(finding, pursuant to section 42-9-30, that while expert testimony suggested claimant suffered only a 35% impairment to his back, testimony of claimant and others provided substantial evidence that claimant’s impairment exceeded 50%).

9. In this case, Dr. Lamotta assigned a 0% impairment rating in 2017. However, Claimant continued treating for her back receiving pain management and injections. This rating is stale. The most current ratings for her back injuries are provided by Tracy Hill and confirmed by Dr. Forest; 23% regional impairment to her cervical spine and 11% regional impairment to her lumbar spine for a total of 33% to the back. However, considering Claimant’s education level, her physical limitations defined by the FCE, the results of the vocational evaluation, Dr. Forest’s medical opinion, and relevant testimony regarding her physical limitations after the accident, Claimant has met her burden to prove that she lost greater than 50% use of her back. Because Claimant sustained a scheduled member injury under § 42-9-30, she is not required to prove lost earnings. The vocational report in this claim is not considered as proof of lost earnings but as additional support for the effects of loss of use of her back.

10. Therefore, pursuant to S.C. Code Ann. § 42-9-280; § 42-9-30(21); and § 42-9-10(B) Claimant’s dependent is entitled to receive the remaining 313 weeks

of benefits in a lump sum. The calculation is as follows: 500 (max compensation) - 187 (weeks of TTD paid) = 313 weeks due. The commuted value of weeks due is 295.7265. Therefore, 295.7265 (weeks) x \$622.50 (Compensation Rate) = \$184,089.75 (amount due).

Finally, Commissioner Campbell issued the following order:

“IT IS ORDERED that according to the results of a good faith dependency investigation, Mr. Tim Wilson is Claimant’s next of kin dependent upon her for support.

IT IS ORDERED that Claimant sustained greater than 50% disability to her back and is permanently and totally disabled.

IT IS ORDERED that Claimant is entitled to and Defendants shall pay \$184,089.75 permanent and total benefits.

IT IS FURTHERMORE ORDERED that Defendants will make timely payment of the aforementioned benefits to Mr. Timothy Wilson, Claimant’s next of kin dependent upon her for support.”

Appellants timely appealed the Decision and Order of Commissioner Campbell.

### **III. ISSUES ON APPEAL**

By appeal, the Appellants respectfully submitted the following issues:

1. Did the Single Commissioner err in failing to set forth adequate findings of fact and conclusions of law as part of the Decision and Order for this matter?
2. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that, “[I]n Dr. Forrest’s opinion, the claimant is totally disabled. She has permanently lost greater than 50% use of her spine...Her cancer diagnosis is unrelated to her neck and back symptoms since the accident or her disability.”?
3. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that there were no jobs within Claimant’s transferrable abilities, and that the Claimant was not able to maintain gainful employment?
4. Did the Single Commissioner err in misapprehending the existing statutory and case law regarding the application of regional impairments and values to the back, under the Act and other applicable law and regulation?
5. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that the authorized treating physician’s opinions in this case were

stale?

6. Did the Single Commissioner err by virtually ignoring and giving no weight to the authorized treating physician's impairment ratings in this case?

7. Did the Single Commissioner err in giving great weight to the medical opinions given by Dr. Forrest and the opinions of Ms. Hill?

8. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that Claimant was permanently and totally disabled before her death?

9. Did the Single Commissioner err in finding as a fact and in concluding as a matter of law that the Claimant is entitled to compensation and other benefits for permanent-total disability under the Act?

10. Did the Single Commissioner err by not concluding as a matter of law that the Claimant's claim for compensation and other benefits abated due to her death?

11. The Defendants reserve the right to further review any calculation of any award as part of this matter.

#### **IV. DECISION OF THE APPELLATE PANEL**

In an Appellate Review, the Appellate Panel shall, pursuant to S. C. Code Ann. § 42-17-50 (1976), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

The Claimant's neck has not been found to be compensable in this matter. There is mention in the findings of ratings and other information, such as function, with regard to the Claimant's neck.

From our review of the Hearing Commissioner's decision, this Panel cannot determine whether or not the Single Commissioner used facts from the neck in his determination of disability under S.C. Code Ann. § 42-9-30(21) (1976).

We therefore vacate the determination of disability to the Claimant's back and remand this matter to the Hearing Commissioner for an analysis and determination of disability to the back.

#### CONCLUSIONS OF LAW

1. Pursuant to S.C. Code Ann. § 42-1-130(1976), and other applicable law and regulation, the Claimant is a covered employee.
2. Pursuant to S.C. Code Ann. § 2-1-140(1976), and other applicable law and regulation, the Defendant Employer is a covered employer and the Defendant Carrier is a covered carrier.
3. The South Carolina Workers' Compensation Commission has jurisdiction over this matter.
4. Pursuant to S.C. Code Ann. § 42-9-280(1976), and other applicable law and regulation, Timothy Wilson, is the Claimant's next of kin dependent upon her for support.
5. Pursuant to S.C. Code Ann. § 42-1-160(1976), and other applicable law and regulation, the Claimant sustained an injury to her lower back, her arms and her psyche as a result of an accident arising out of and in the course of her employment with the Employer.
6. Pursuant to S.C. Code Ann. § 42-1-160(1976), and other applicable law and regulation, the Claimant's neck has not been found to be compensable as part of this matter.

#### **ORDER**


IT IS ORDERED that the Panel vacates the determination of disability to the Claimant's back, and remands this matter to the Hearing Commissioner for an analysis and determination of disability to the back as a result of the Claimant's admitted lower back injury.


AND SO IT IS ORDERED.

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Columbia, South Carolina

  
Melody L. James, Commissioner

  
Gene McCaskill, Commissioner, Chair

  
Avery B. Wilkerson, Jr., Commissioner

**Order Served via email:**

<p>Preston F. McDaniel McDaniel Law Firm <a href="mailto:preston@pfmcdlaw.com">preston@pfmcdlaw.com</a></p>	<p>Clarke W. McCants, III Clarke W. McCants, IV Nance &amp; McCants <a href="mailto:mccants3rd@aol.com">mccants3rd@aol.com</a> <a href="mailto:clarkemccnats4@gmail.com">clarkemccnats4@gmail.com</a></p>
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**CERTIFICATE OF SERVICE**

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

***By Eugenia Hollmon on June 9, 2023***