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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Supreme Court Appellate Case No. 2023-000403

Paula Russell,

Claimant, Petitioner,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

Carrier, Respondents.

RETURN

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Pursuant to the Court’s request, Petitioner Paula Russell (hereinafter, “Russell”) files this Return in response to the petition for rehearing filed by Respondents Wal-Mart Store, Inc. and American Home Insurance (hereinafter, collectively, “Wal-Mart”). As instructed in the Court’s April 3, 2025, email, Russell limits her Return to Wal-Mart’s argument the opinion of the Court should be modified to include a remand for an evidentiary hearing to determine “the extent of [Russell’s] entitlement to benefits, *if any*.” Wal-Mart Petition for Rehearing p. 10 (emphasis added). For the reasons stated herein, no evidentiary hearing is needed and any modification to the opinion of the Court is unnecessary. Alternatively, should the Court determine prudence dictates providing explicit, detailed instructions to the workers’ compensation commission (hereinafter “commission”), Russell requests the Court modify its opinion to detail the specific benefits it is ordering the commission grant in an immediate order.

I. The Court’s Opinion Need Not be Altered or Amended because the Benefits the Court Ordered the Commission Award are not in Question.

The benefits the court ordered the commission award are not in question, thus an evidentiary hearing is unnecessary and would not aid the commission in ordering benefits. Contrary to the assertions of Wal-Mart, there can be no dispute as to what benefits the commission must award Russell, as she has already established her entitlement to specific benefits. Before Commissioner Roche, the original hearing commissioner on the change of condition claim, Russell sought “an order from the [c]ommission ordering Defendants to pay for causally related medical care and treatment and temporary total disability benefits.” R. p. 84. Commissioner Roche awarded those benefits in her order dated August 5, 2013. R. p. 89. Those findings are the law of the case, as they were never challenged. R. pp. 72, 277-82; *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 517, 466 S.E.2d 357, 358 (1996) (stating arguments not raised to the workers’

compensation commission are not preserved for appeal); *Creech v. Ducane Co.*, 320 S.C. 559, 564, 467 S.E.2d 114, 117 (Ct .App.1995) (stating only issues within the application for review are preserved for appeal to the commission); *Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993) (holding a failure to challenge a ruling is an abandonment of the issue and precludes consideration on appeal); S.C. Code Ann. Regs. 67-701(A) (2012) (“the grounds for appeal must be set out in detail . . . each question presented concise and concern one finding of fact, conclusion of law.”). The only issue preserved on appeal was the compensability of the change of condition. The court has now answered, confirming Russell sustained a change of condition for the worse. The benefits stemming therefrom are no longer in dispute, nor are they difficult to determine.

The commission will have no difficulty comprehending the Court’s opinion, as its intent is patently clear. The commission is to enter an order awarding benefits. The benefits to be awarded are those she established “she was entitled to receive . . . many years ago.” *Russell*, 426 S.C. at 290, 826 S.E.2d at 867. In her order, Commissioner Roche found Russell was entitled to medical care and temporary total disability benefits. R. p. 89. Those findings were unchallenged, are the law of the case, and are the benefits to which Russell is entitled at this juncture. Wal-Mart’s argument the Court’s opinion “can be grossly misinterpreted” is patently without merit. There is no mechanism by which the commission could conceivably enter a “general ‘award of benefits,’” as Wal-Mart asserts.

The Court’s opinion and directive is well drafted, intelligible, and in no need of modification. Wal-Mart’s arguments to the contrary are predicated upon an inapplicable descriptions of how workers’ compensation claims proceed, and speciously reach incongruent conclusions therefrom. To wit, workers compensation benefits cannot be awarded without an evidentiary hearing as Wal-Mart posits. Wal-Mart’s argument fails, however, to acknowledge that

an evidentiary hearing took place before Commissioner Roche. At the time of the hearing, Commissioner Roche found Russell entitled to medical treatment and temporary total disability benefits. Those findings were unchallenged and are the law of the case. With the court's directive that the commission enter an order finding Russell sustained a change of condition, there is nothing more for the commission to do than enter such order. No procedural mechanism exists by which the commission can do anything more. When the commission enters an order finding Russell sustained a change of condition, the unchallenged findings of fact and conclusions of law—including the award of medical benefits and temporary total disability benefits—take effect.

Wal-Mart's arguments that a permanent disability award cannot be awarded without an evidentiary hearing or that a hearing may be necessary to determine whether Russell is entitled to reimbursement for causally related medical treatment are technically correct but disregard this case's procedural history. Wal-Mart fails to mention Russell has yet to request said benefits. For the commission to blindly award those benefits at this juncture would be preposterous; the Court's opinion cannot be interpreted to order the commission to do so.

Generally, the workers' compensation system establishes *permanent* disability benefits are awarded after the injured employee reaches maximum medical improvement. In other words, a claimant can establish their entitlement to a permanency award once they reach a plateau in their recovery and no further medical treatment will reduce their disability. Wal-Mart has denied Russell medical treatment for twelve years. The Court's opinion orders the commission award the medical treatment and the accrued temporary disability benefits ordered by Commissioner Roche. It cannot conceivably be interpreted to compel an award of permanent benefits because benefits, in order to be awarded, must arise from the cause of action brought before the commission. After Russell is finally afforded medical treatment and reaches maximum medical improvement, she can

file a Form 50 requesting the commission conduct a hearing to determine her entitlement to permanent benefits. Wal-Mart, likewise, can file a Form 21 to determine the same. Wal-Mart's arguments are without merit.

The Court's opinion plainly orders the commission enter an order finding Russell proved her change of condition and is entitled to the benefits awarded by Commissioner Roche following an evidentiary hearing. Those findings were unchallenged and cannot be challenged now. The opinion of the Court cannot be interpreted to compel anything but that result. Thus, the Court's well-reasoned and intelligible directives need not be altered. Russell respectfully requests the Court deny Wal-Mart's petition for rehearing and its request that the opinion be altered or amended. Alternatively, the extent the Court finds prudence dictates providing the commission with a more explicit directive, Russell proposes the Court amend its directive to read "we remand to the commission for an immediate order granting benefits *as outlined in the 2013 order of Commissioner Roche.*"

II. The Court Determined in 2019 that an Evidentiary Hearing was Unnecessary and Inappropriate.

The Court addressed the question of an evidentiary hearing conclusively in its 2019 opinion. *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019). While the procedural history of this case nears on preposterous, dating back to 2009, the case is in essentially the same posture as it was following the Court's 2019 opinion, with one consequential amendment. In 2019, the Court remanded this case to the commission "for immediate and final review of the original commissioner's August 5, 2013, order in accordance with the 2016 holding of the court of appeals." *Russell*, 426 S.C. at 291, 826 S.E.2d at 868. Now, the Court has remanded to the commission, but it answered, as a matter of law, the question it ordered the commission consider.

As discussed, *supra*, Wal-Mart abandoned any argument as to Russell's entitlement to the benefits ordered by Commissioner Roche. Thus, the only task assigned to the commission in 2019 was to address the question of a change of condition in light of the court of appeals holding from 2016. Because this Court has now answered that singular question for the commission, its next steps are purely administrative; it has no determination to make, which precludes the need for any evidentiary hearing. Benefits or issues beyond those addressed by Commissioner Roche will necessitate further evidentiary hearings, like any other workers' compensation case with an intermediate finding of compensability and award of temporary benefits and medical treatment. Russell's entitlement to medical treatment and temporary disability benefits as ordered by Commissioner Roche, however, have fully accrued and will vest upon the entry of an order from the commission. No evidentiary hearing is necessary.

Wal-Mart's demand for an evidentiary hearing at this juncture is a surreptitious attempt to obtain a hearing *a de novo*. The Court plainly explained why that was inappropriate in 2019; the same is true today. In 2019, the Court addressed the commission's September 15, 2017, remand order in which the commission remanded to a single commissioner for "a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence for consideration *as to the issue of any award of benefits* if the change of condition is found compensable." *Russell*, 426 S.C. at 285, 826 S.E.2d at 864 (emphasis added). The Court, however, reversed, finding "[i]n all but rare cases, the appellate panel should proceed promptly to make a final decision without the necessity of any remand." *Id.* at 288, 826 S.E.2d at 866.

In reversing the commission, the Court directly rejected the argument posited by Wal-Mart today. The Court clarified the court of appeals in 2016 reversed the appellate panel, not Commissioner Roche, explaining the error identified by the court of appeals was "only in the

appellate panel’s review of the first commissioner’s decision. . . . the commission should have been able to determine that its error was in the appellate panels’ review of the commissioner—not in the work of the commissioner.” *Id.* at 288-89, 826 S.E. 2d at 866. Further, the Court stated, “the only task for the commission after the court of appeals’ decision was to complete a renewed review of the original commissioner’s order under proper principles of law.” *Id.* at 289, 826 S.E.2d at 867. Because Wal-Mart only challenged the compensability of the claim, only those findings were subject to review.

Interestingly, in criticizing the commission’s decision to remand for a full evidentiary hearing on “the issue of any award of benefits,” the court relied heavily upon emails from Wal-Mart to the commission in which “counsel for Wal-Mart specifically argued there should be no new hearing.” *Id.* The Court cited Wal-Mart’s counsel, stating:

[C]ounsel for Wal-Mart wrote, ‘Based upon the hearing notice that I have received, it appears as though this matter has been set for a de novo hearing before the single commissioner. I believe this to be in error based upon the remand from the . . . court of appeals . . . There is nothing in the remand . . . which indicates that a new hearing should be held and that new evidence should be taken on the claim; instead, the commission is simply supposed to reconsider the existing evidence and issue new factual findings in accordance with the legal issues raised by the court of appeals. I believe having a new hearing . . . is improper from a legal and procedural perspective.’

Id. The Court went further, continuing to cite Wal-Mart’s counsel’s email, quoting:

‘I am surprised that this matter was not considered by the full commission and that new factual findings were not issued in accordance with the directives of the court of appeals. Any new factual findings coming from a single commissioner will simply necessitate more appeals and more litigation. . . . I certainly do not see any basis for a de novo hearing or consideration new evidence; the remand from the court of appeals simply directs the commission to reconsider the existing evidence in light of [the court of appeals] legal determination.’

Id. at 289-90, 826 S.E.2d at 867. Nevertheless, Wal-Mart now requests a new evidentiary hearing to address the issue of benefits, de novo.

Despite the fact almost thirteen years have elapsed since Russell’s claim for a change of condition was filed, despite the existence of two detailed single commissioner orders awarding Russell additional benefits, one of which is the law of case, Wal-Mart requests an additional hearing on the same issues, specifically requesting the very thing it (Wal-Mart) had specifically asked not to have—a new hearing. *See Id.* at 290, 826 S.E.2d at 867 (finding error in the commission’s ordering an evidentiary hearing “despite the fact almost six years had elapsed since Russell’s claim for a change of condition was filed, despite the existence of two detailed single commissioner orders awarding Russell additional benefits, the appellate panel remanded to a third commissioner for a third hearing, specially requiring the very thing the party appealing to it (Wal-Mart) had specifically asked not to have—a new hearing”).

Wal-Mart’s intent in making such a demand, a demand contrary to its own prior assertions, is evident from its petition: It seeks to deny Russell’s entitlement to benefits, benefits which have accrued, and benefits which she was entitled to receive many years ago. *See Wal-Mart Petition for Rehearing* pp. 10 (demanding an evidentiary hearing and stating that after the hearing a commissioner can award benefits “*if warranted*” and claiming a hearing is necessary to determine “Claimant’s entitlement to benefits, *if any*”) (emphasis added). Wal-Mart seeks to relitigate this case, persisting in its search for ways to continue its nearly twelve-year-long denial of Russell’s medical treatment and temporary benefits.

The reasons doing so was erroneous in 2019 are even more compelling today. *See generally, Id.* (“One primary goal of the Workers’ Compensation Act is to provide quick and efficient resolution of worker-related injury claims so neither employers nor employees become bogged down in complicated and protracted litigation.” “If Russell was entitled to additional benefits, she was entitled to receive them many years ago.” “In all but rare cases, the appellate

panel should proceed promptly to make a final decision without the necessity of any remand.” “[T]he commission’s unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim frustrated the goals of the Workers’ Compensation Act.” “It was completely unnecessary . . . for the commissioner to require the case be reheard by a second commissioner.” “The court of appeals’ 2016 opinion required only a new review, not a new hearing.” “As of the writing of [the 2019] opinion—nearly eight years after Russell filed her claim—Russell has not received any additional benefits, despite two commissioners finding she was entitled to them.”). As an additional six years have passed—for a total of nearly fourteen years—since Russell filed her claim, conducting an evidentiary hearing on benefits Russell has established her entitlement to receive would be patently erroneous.

Conclusion

For the foregoing reasons, the reasons set forth in her previous briefs, and the reasons elucidated by the Court in its 2019 and 2025 opinions on this case, the Court should deny Wal-Mart’s petition for rehearing and should decline to alter or amend its 2025 opinion.

s/ James D. George, Jr.
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