

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

Appellate Case No. 2023-000403

Paula Russell, Claimant,

Petitioner,

v.

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

Respondents.

REPLY TO RETURN TO PETITION FOR REHEARING

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Wal-Mart Stores, Inc., and American Home Insurance (hereinafter “Petitioners”), by and through their undersigned attorney, respectfully submit this Reply to Return to Petition for Rehearing. Petitioners wish to preserve the arguments from their Brief for further review respectfully request that this Court grant its Petition for Rehearing.

I. The findings and awards made in Commissioner Roche’s 2013 Decision and Order do not constitute the law of the case.

In her Return to Petition for Rehearing, Paula Russell (hereinafter “Respondent”) argues that the “the benefits the [C]ourt ordered the [C]ommission to award are not in question” because the 2013 award of causally related medical treatment and temporary total disability benefits were never challenged by Petitioners and not preserved for review (Return to Petition for Rehearing, p. 1). Thus, Respondent alleges, the findings made by former-Commissioner Roche in her August 5, 2013, Decision and Order are the law of the case and should be “reinstated.” This is incorrect.

To request Appellate Panel review of a single commissioner’s decision, “the grounds for appeal must be set out in detail on the Form 30 in the form of questions presented” and “each question must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error”. S.C. Regulation 67-701(3). The purpose of the notice of appeal is just that – to provide notice to the opposing party of what questions are raised on appeal. Jones v. Anderson Cotton Mills, 205 S.C. 247, 256, 31 S.E.2d 447, 450 (1944). As such, the Supreme Court has held that “general exceptions, such as ‘the commission erred in making an award,’ are too ambiguous... and do not preserve an issue for review”. Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 250, 791 S.E.2d 719, 722 (2016). Notably, however, this Court has long held that an issue is preserved for appeal where the issue to be raised by the exceptions was reasonably clear, timely raised, and ruled on by the single commissioner. See Holston v. Allied Corp., 300 S.C. 174,

386 S.E.2d 793 (Ct.App. 1989); c.f. Rummage v. BGF Indus., 434 S.C. 441, 865 S.E.2d 380 (Ct.App. 2021) (finding an issue is not preserved for review when the argument was first raised *during* the hearing before the Appellate Panel). A finding of fact by the single commissioner does not become the law of the case when those findings are within the scope of the exception(s). Id.

Indeed, the language of Petitioners' Form 30, which was included in the Full Commission's 2014 Decision, takes exception to Commissioner Roche's conclusion that Respondent sustained a change of condition for the worse. (R. 72). This inherently challenges the award of any benefits on the basis that the claim is not compensable. In fact, the Form 30 explicitly raises as issues to be reviewed a number of Commissioner Roche's "Findings of Law," which include the conclusions that Respondent suffered a change of condition for the worse, was entitled to additional medical care and attention, and was entitled to temporary total disability benefits. Id. (c.f. R. p. 89). Consequently, it was clear from Petitioners' exceptions that the Commissioner's award of medical care and temporary total disability benefits "from December 1, 2011 through the present date and continuing" as an issue to be raised on appeal. (R. p. 89). Respondent's many briefs and arguments made therein are inarguable proof that the issues to be raised by Petitioners' exceptions were exceptionally clear.¹ The argument that the award made by Commissioner Roche twelve (12) years ago, and which was reversed by the Full Appellate Panel and has been subject to countless appeals, should now be reinstated and is the law of the case is nonsensical and without merit.

¹ c.f. Holston, 300 S.C. at 176 (holding an issue was preserved for appellate review where "the issue to be raised was reasonably clear from the arguments and was ruled on by the single commissioner...[i]n indeed, a review of the record shows both parties understood [the issue] to be the basic point of contention")

II. The Court determined in 2019 that an evidentiary hearing was unnecessary and inappropriate solely as relates to the issue of compensability.

Respondent incorrectly contends that this case has the same procedural posture as it did when it was before the Court in 2019 wherein the Court concluded that an evidentiary hearing was unnecessary and remanded the case to the Full Commission for review of Commissioner Roche's 2013 Order in accordance with the 2016 holding of the Court of Appeals. Russell v. Wal-Mart, 426 S.C. 281, 826 S.E.2d 863 (2019). In 2019, the Court remanded this case to the Full Commission for review with clarification of the law and standard; the issue at that time was the threshold question of compensability of the change of condition claim. That decision needed to be made based upon the existing record. Now that this Court has found as a matter of law that there is a compensable change of condition claim, the inquiry turns to what benefits Claimant may be entitled to; it will be impossible for the Commission to determine what benefits Claimant is entitled to under the South Carolina Workers' Compensation Act when no evidence has been taken in the form of testimony or other submissions since 2013.

Respondent quotes prior e-mails from Counsel for Petitioners related to this Court's 2019 determination in order to manufacture some appearance that Petitioners agree that an evidentiary hearing is not necessary. (Return to Petition for Rehearing, p. 6). This is a mischaracterization. As discussed, Petitioners (and this Court) agreed that additional evidence would not be necessary only as pertains to the issue of compensability; to do so would have been a waste of time and resources. At no time did Petitioners ever contend or agree that an evidentiary hearing would not be necessary to determine the extent of Respondent's entitlement to benefits should the claim be found compensable.

III. While Respondent is entitled to benefits under the Workers' Compensation Act for her compensable work injury, the extent of her entitlement is a question that must be answered by the Commission via an evidentiary hearing.

As stated in the Petition for Rehearing, the Court's directive "remand[ing] [the] case to the commission for an immediate order granting benefits" is unclear and can be grossly misinterpreted as ordering a general "award of benefits" not based on any evidence. Now that this Court has found that Respondent has suffered a compensable change of condition for the worse, the Commission must take up the secondary task of determining the extent of her entitlement to benefits. Again, compensability of the claim and a claimant's entitlement to benefits are two separate and distinct inquiries. Compensability of the claim has been adjudicated and settled by this Court. Now the inquiry turns to which benefits, and to what extent, Claimant is entitled. "Granting benefits" is nondescript and impossible for the Commission to properly implement without an evidentiary hearing.

The last evidence on this claim is from February 2013. Neither Petitioner, nor the Court, nor the Commission, knows what has transpired in Respondent's life these last twelve (12) years. To argue that the Commission's role is "administrative" at this point is preposterous. (Return to Petition for Rehearing). Now that the threshold question of compensability has been answered by this Court, the metaphorical baton is now passed to the Commission to determine the extent to which Respondent is entitled to benefits for her compensable claim; this cannot be accomplished without an evidentiary hearing.

For example, the 2013 Decision and Order that Respondent wishes the Court to reinstate, in part, awards temporary total disability benefits from "December 1, 2011 through the present date and continuing". (R. p. 89). Has Respondent been working these last 12 years? If so, she would *not* be entitled to temporary total disability benefits for the entire duration of

time provided for in the award, but she certainly could be entitled to some period or periods of temporary total disability compensation and could be entitled to temporary partial disability compensation. If she has not been working, was this due to her work injury or related to some other life or health circumstance? This could also significantly impact her entitlement to temporary compensation. These determinations cannot be made in the absence of any evidentiary basis to do so. This Court has found that the claim is compensable, and now the burden shifts to the Commission to make factual determinations as to what benefits she is entitled to receive; the commission will necessarily have to examine updated evidence and testimony to make an award which is fair to both parties. Blindly awarding temporary total disability benefits “from December 1, 2011, to the present and continuing” would entitle Respondent to the equivalent of an award of permanent and total disability, the maximum number of weeks of benefits allowed under the Workers’ Compensation Act, without any evidentiary basis for doing so. Surely, this is not what the Court intended.

The Commission must likewise hear evidence to determine what causally related medical treatment Respondent is entitled to at this point, which necessarily requires the parties to collect, and the Commission to hear, updated evidence regarding the medical treatment she has had over the last twelve (12) years as well as her current medical condition. This information is necessary to decipher what medical treatment would be causally related to her work accident and medically necessary to lessen her period of disability, as the Act requires.

This Court has remanded the claim for an immediate order granting benefits. The Commission must now determine Claimant's entitlement to specific benefits for her compensable claim. It is very clear that this Court means for the Commission to enter an order finding the change of condition claim compensable and finding that Claimant is entitled to

some benefits therefor. The inquiry will be which benefits during what periods of time and to what extent; those questions can only be answered with evidence regarding Claimant's injuries since 2011. Following an evidentiary hearing, a commissioner can award specific benefits, if warranted.²

Contrary to Respondent's argument in her Return to Petition for Rehearing, an evidentiary hearing to determine the extent of her entitlement to benefits would not function as a hearing *de novo*. (Return to Petition for Rehearing, p. 5). In 2019, the Court found the Full Commission's remand to a single commissioner for a full evidentiary hearing improper because the claim was being remanded to adjudicate an "award of benefits *if the change of condition is compensable*". Russell, 426 S.C. at 288, 826 S.E.2d at 866. Notably, this was before the issue of compensability was adjudicated, and the Court properly found that there was no need for this sort of contingent evidentiary hearing. The current posture is not contingent – the claim has been found compensable, and the Commission must now hear updated evidence in order to make a tangible award. The current posture of this case is not remotely similar to the situation the Court was faced with in 2019.

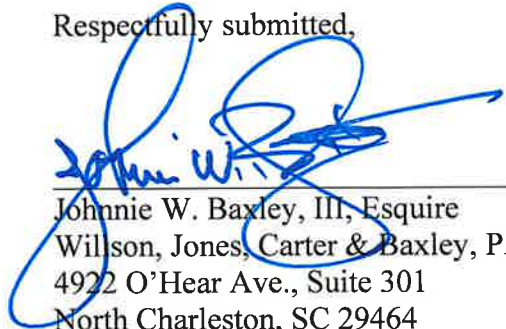
As stated in the Petition for Rehearing, "an immediate order granting benefits" is improper and impractical. The Record on Appeal is insufficient for this Court to make findings regarding the extent of Respondent's entitlement to benefits as it was not an issue before this Court, only the threshold issue of compensability. The Commission is now charged with determining the extent to which Respondent is entitled to benefits for her compensable injury.

² This is not to imply that Respondent is not entitled to any benefits, as Respondent asserts; rather, it is a realistic assertion that not every claimant is entitled to every type of benefit under the Act (e.g. not every claimant misses compensable time from work to entitle them to temporary total disability benefits). Petitioners only contend that the Commission must hear additional evidence to determine the extent of her entitlement to benefits now that the claim has been found to be compensable by this Court.

Petitioners contend that the last line of this Court's order should instead read, "we remand her case to the Commission for an immediate order finding that she has sustained a compensable change of condition for the worse and is eligible for benefits under the South Carolina Workers' Compensation Act and for an evidentiary hearing to determine Russell's entitlement to those benefits." Petitioners continue to maintain this Court came to the incorrect conclusion based on the evidence and standard of review. However, Petitioners respectfully request that the Court clarify its Order in this regard should the Court decline to rehear or reconsider this matter.

For the foregoing reasons, Petitioners respectfully request that its Petition for Rehearing be granted by This Honorable Court.

Respectfully submitted,



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