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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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MAR 25 2015

APPEAL FROM COMMISSION PANEL
OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

W.C.C. NO. 0800718

Denica PowellAppellant

vs.

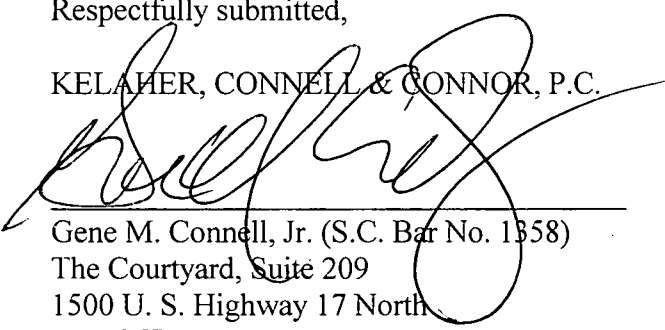
Petsmart, Inc. and Phoenix Insurance Co.Respondents

PETITION FOR REHEARING

The Appellant, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for an order reconsidering its Opinion No. 2015-UP-119 submitted February 1, 2015 and filed March 11, 2015. The basis of this Petition is the attached Memorandum of Law.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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Attorney for Appellant

March 24, 2015

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IN THE COURT OF APPEALS

APPEAL FROM COMMISSION PANEL
OF THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. NO. 0800718

Denica PowellAppellant

vs.

Petsmart, Inc. and Phoenix Insurance Co.Respondents

**MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR REHEARING**

The Appellant, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for an order reconsidering its Opinion No. 2015-UP-119 submitted February 1, 2015 and filed March 11, 2015. The basis of this Petition is as follows.

The full Commission reversed the single Commissioner and remanded the case to him (or her) without any reason for the remand and without specific direction. This case is about Appellant's rights after she has prevailed before the single Commissioner and an Order of Remand was issued by the full Commission without direction and with no reason for the remand.

The Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission in this case is found in the Record on Appeal at pages 3-7.¹ The

¹ The full Commission Order is attached for easy reference.

Order of the full Commission does not take issue with the Order of the single Commissioner nor does it explain any error he committed. It just orders the matter vacated and remanded. Appellant asks for what purpose is it remanded and why? In order to have a remand the single Commissioner must be given some direction on remand. A do over of the single Commissioner is not allowed without a specific reason.

Appellant prevailed before the single Commissioner and the full Commission gives no reason, either in fact or law, why this case should be reversed. This Court cites *Bone v. U.S. Food Service*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013) for the proposition that this is an interlocutory order. However, Appellant only seeks the same remedy which was awarded in *Bone*. In that case, the method of appeal was to the circuit court. The law has changed and this Court stands in the shoes of the circuit court on all workers' compensation appeals. See S.C. Code Ann. § 42-17-60 (Supp. 2012) and *Pee Dee Regional Transportation v. S.C. Second Injury Fund*, 375 S.C. 60, 650 S.E. 464 (2007). Thus, in *Bone*, the circuit court was acting as the appellate court. The circuit court in *Bone* did not refuse to hear the case. Instead the circuit court in *Bone* concluded:

The evidence of record shows Claimant sustained a compensable injury. There is absolutely no evidence to the contrary. When the evidence is susceptible of only one inference, then the question is one of law for the Court. See *Bone*, 404 S.C. at 68.²

In this case, this Court rather than hearing the appeal as the circuit court did in *Bone* simply holds that this is an interlocutory order. However, Appellant believes that this Court ought to consider that the full Order of the full Commission does not take issue in any respect with the Order of the single Commissioner. Accordingly, for what reason has the Appellate Panel of the South Carolina Workers' Compensation Commission concluded the

² This is similar to this case and explains why the Commission gave no instructions on remand.

single Commissioner must yet again hear this case? If the Appellate Panel of the South Carolina Worker's Compensation Commission had stated in its Order the reason for the remand, it would be different. In this case there is no reason for the remand. Both Appellant's counsel and Respondent's counsel agree in their briefs that the South Carolina Workers' Compensation Commission must give a specific reason to vacate and remand an award. To hold otherwise simply means that Appellant would have to try this case over and over again at the whim of the full Commission. This is not the law and is unfair to the Claimant as she has a right to know the reason.

Both Appellant and Respondent are left in a quandary as to the remand which they ask this court to consider in this appeal. In fact, in Respondent's brief in the Conclusion Respondent notes:

Respondents agree with the Appellant that the Order on April 1, 2014 vacating and remanding this matter to the single Commissioner without addressing any of the findings of facts or questions of law cited by the single Commissioner was an error of law. Respondents also agree with the Appellant that remand ordering a de novo hearing should be accompanied by guidance or specific instructions to ensure that the single Commissioner does not hear evidence outside the scope of a de novo hearing.

Thus, the Order of this Court dismissing this case is of no help to the parties nor does it give the parties any guidance about why the case was vacated and remanded to begin with by the full Commission.

Finally, Appellant believes that this court should follow *Shealy v. Algernon Blair Inc.*, 250 S.C. 106, 156 S.E.2d 646 (S.C. 1967). In that case the Supreme Court held that when there is only one reasonable inference from the record the case should not be remanded but should be affirmed by this Court as matter of law the claimant is entitled to the benefits requested. The Appellate Panel of the South Carolina Workers' Compensation

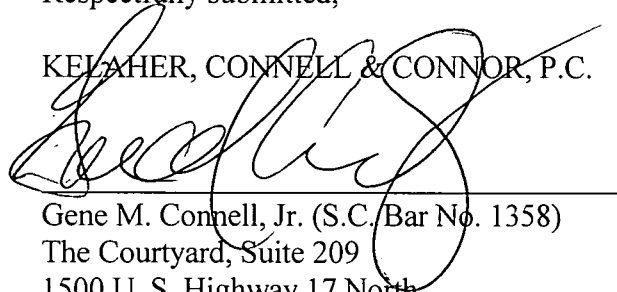
Commission gives no cogent or clear reason why the case should be tried de novo nor does it point to any error before the single Commissioner. While the Appellate Panel of the Commission may not like a decision, an order of remand without any reason affects the employee's due process rights to a reason for the vacating of an order. Further, the Order of the Commission remanding the case does not state the underlying facts to support the findings and thus it violates S.C. Code Ann. § 1-23-350.

Thus, Appellant believes that this Court has two possible solutions: (1) Either affirm the single Commissioner based upon the fact that the full Commission has not issued any finding which is contrary to the single Commissioner as a matter of law; or (2) issue an order requiring that the full Commission give a specific reason why this matter should be vacated. To do otherwise means that Appellant has to retry the entire case not knowing what it is that was wrong with the first trial. This procedure violates Appellant's due process rights since the South Carolina Worker's Compensation Commission must give specific reasons either affirming or reversing an order of the single Commissioner. *Able Communications, Inc. v. South Carolina Public Service Commission*, 290 S.C. 409, 351 S.E.2d 151 (1986 (an order of the Public Service Commission with no other findings of fact violates S.C. Code Ann. § 1-23-350.)). See also, *Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E.2d 869 (S.C. 2007) (the APA requires the full Commission to fully set forth the underlying facts upon which it relied to support its conclusion and a failure to do so mandates reversal.) Appellant maintains her constitutional rights have been denied and the Appellate Panel of the Workers' Compensation Commission has given no reason why an award to Appellant should be vacated and a second trial occur before the jurisdictional Commissioner. Accordingly, Appellant requests that the Court reconsider its opinion in

light of the Order of the full Commission of the South Carolina Workers Compensation Commission which does not give any reason for the vacating of the single Commissioner's order nor does it give any directions on remand. Under the present Order of the full Commission the Appellant will have to go through a new trial without knowing why the first jurisdictional Commissioner's Order was reversed. This violates due process and Appellant respectfully requests this Court reconsider its Order of dismissal dated March 11, 2015.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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gconnell@classactlaw.net
Attorney for Appellant

March 24, 2015

DECISION AND ORDER
OF THE
APPELLATE PANEL
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

COMMISSION PANEL: THE HONORABLE MELODY L. JAMES, CHAIR; THE
HONORABLE GENE MCCASKILL; THE HONORABLE AVERY B.
WILKERSON, JR.

SCWCC FILE NO.: 0800718

Denica Powell,

Claimant

v.

Petsmart, Inc.

Employer, and

Phoenix Insurance Co.,

Carrier, Defendants.

Hearing held in Conway,
South Carolina on June 12, 2012
Per notice timely and properly served upon all Parties of Interest.

Appearances: for Claimant/ Appellant
 Defendants/ Respondents

Filed:

April 1, 2014

STATEMENT OF THE CASE

The instant proceeding was initiated by Claimant's Form 50 Request for Hearing dated March 26, 2012 and by Defendant's Form 21 Employer's Request for Hearing dated April 5, 2012. At issue in the pleadings was Claimant's entitlement to a finding of total and permanent disability and entitlement to lifetime medicals, a lump sum and Utica Mohawk language.

Defendant timely filed a responsive pleading to the Form 50. Defendant/Employer admitted that the claim was compensable, but denied that the Claimant was totally and permanently disabled. Furthermore, Defendant asserted that the Claimant reached maximum medical improvement (MMI). Defendant requested that the Commission determine if employer/carrier may stop payment, and if so, to determine if Claimant was entitled to any further benefits. Defendant also requested credit for temporary total benefits paid in excess of award.

On August 11, 2012, the single Commissioner issued his Decision and Order containing the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Claimant, Denica Powell, was an employee of Petsmart, Inc.
2. Claimant suffered an injury by accident on January 3, 2008 while employed a dog groomer.
3. Employer, Petsmart, Inc., is subject to the Workers' Compensation Act.
4. Claimant was assigned the task of stocking and dog grooming.
5. Claimant's detailed testimony is credible.
6. The treating doctors' records are convincing that Claimant is totally and permanently disabled.
7. Claimant is entitled to lifetime medical care per the Form 14(B) report of the treating physician, Dr. Kang.
8. The medical evidence presented by the Claimant establishes by a preponderance of the evidence, and Claimant is entitled to compensation.

9. Claimant's severe depression and psychological disorder is directly caused by the severe upper extremity injury and the resultant pain.
10. The treating doctor finds that the Claimant has a 70% permanent impairment to the upper extremity.
11. Claimant is totally and permanently disabled and entitled to lifetime medical care.
12. By preponderance of the evidence, the Claimant is entitled to all benefits as provided for under the Workers' Compensation Act.
13. Claimant is entitled to a lump sum payment of the commuted balance of: 500 weeks less the credit for the weeks she has been paid compensation.
14. Claimant is entitled to the following Utica-Mohawk language:

The commuted value of this claim on the date of the hearing, June 12, 2012, is \$159,684.35. This lump sum is compensation for permanent impairment that will affect the Claimant for the remainder of her life. The Claimant's remaining life expectancy is 2,431 weeks. Therefore, even though paid in a lump sum, the Claimant's benefits after attorney's fees for the prosecution of this action shall be considered to be \$43.81 a week for 2,431 weeks beginning as of June 12, 2012; pursuant to Section 42-3-180 of the South Carolina Workers' Compensation Act, 1976, as amended, and as interpreted by the South Carolina Supreme Court decision in Utica-Mohawk Mills v. Orr, 227, S.C. 226, 87 S.E.2d 589 and James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (S.C.2010).

RULINGS OF LAW

1. Claimant and Employer are subject to the Workers' Compensation Act.
2. Claimant suffered an injury by accident while employed with Petsmart, Inc.
3. Claimant is entitled to permanent and total disability for the injuries she suffered on January 3, 2008.
4. Claimant was in the course and scope of employment when she suffered this injury.
5. The record in this case is closed.
6. Claimant is entitled to continuing medical treatment pursuant to the Workers' Compensation Act.
7. Claimant is entitled to lifetime medical care and ongoing treatment from Dr. Kang and Dr. Simon.
8. Claimant is to continue to receive all medications and other treatment to lessen her disability.

ORDER AND AWARD

Claimant/Employee is permanently and totally disabled, entitled to lifetime medical care, a lump sum payment, Utica-Mohawk language, and continuous medical treatment from Dr. Simon and Dr. Kang.

ISSUES ON APPEAL

Defendant filed a Form 30 Request for Commission Review on August 27, 2012. Defendant requested the Commission review the single Commissioner's Decision and Order to address 15 questions of law or fact regarding the Commissioner's findings. The Form 30 with attachment is contained in the Commission's file.

FINDINGS OF THE FULL COMMISSION

This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **Vacated and Remanded** the matter to the Jurisdictional Commissioner for a hearing de novo.

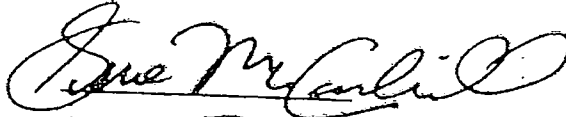
ORDER

IT IS THEREFORE ORDERED that this matter is **Remanded** to the Jurisdictional Commissioner for a hearing de novo. The Full Commission retains jurisdiction over all other issues in contention and will hear oral arguments prior to rendering its final decision on the matter after the Jurisdictional Commissioner makes his or her decision. The matter shall be set for oral arguments during the next available term of Review following the issuance of the single Commissioner's decision on Remand and thirty-days notice to the parties.

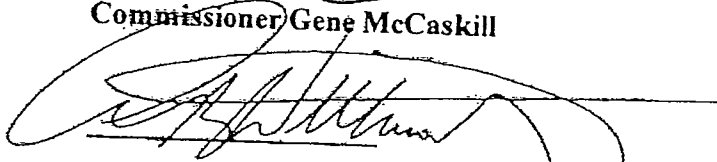
AND SO IT IS ORDERED!



Commissioner Melody L. James, Chair



Commissioner Gene McCaskill



Commissioner Avery B. Wilkerson, Jr.

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 April 1, 2014

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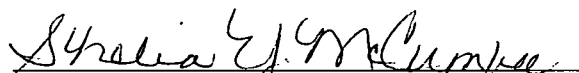
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PROOF OF SERVICE

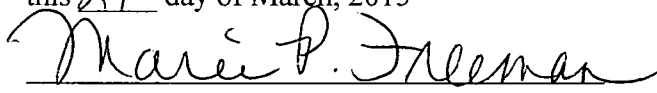
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondents, through counsel of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

F. Reid Warder, Jr., Esquire
John D. Stroud, Esquire
Warder Law Firm, LLC
P. O. Box 31057
Charleston, SC 29417

DATE OF MAILING: March 24, 2015


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 24~~th~~ day of March, 2015


Notary Public for South Carolina
My Commission Expires: 6/11/24

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW
SUITE 209
THE COURTYARD
1500 U.S. HIGHWAY 17 NORTH
P.O. DRAWER 14547
SURFSIDE BEACH, SOUTH CAROLINA 29587

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EDWARD T. KELAHER*
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L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

March 24, 2015

VIA FEDERAL EXPRESS

Jenny A. Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Appellate Case No. 2014-000930
Denica Powell v. Petsmart, Inc. and The Phoenix Insurance Company.
W.C.C. File No. 0800718
Our File No. 2008-0158C

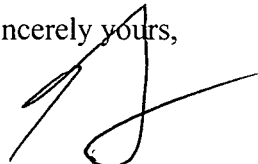
Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellant's **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing and Proof of Service** of same in the above-captioned matter. I enclose our check for \$25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Respondent through counsel of record.

With best regards, I am

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures
cc w/enc.:

F. Reid Warder, Esquire
John D. Stroud, Esquire