

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2015-UP-119 (S.C. Ct. App. filed March 11, 2015)

RECEIVED
MAY 12 2015
SC Court of Appeals

Denica PowellPetitioner

vs.

Petsmart, Inc. and Phoenix Insurance Co.Respondents

PETITION FOR WRIT OF CERTIORARI

Gene M. Connell, Jr., S.C. Bar No. 1358
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U. S. Highway 17 North
Post Office Drawer 14547
Surfside Beach, South Carolina 29587-4547
(843) 238-5648 (phone)
(843) 238-5050 (facsimile)
gconnell@classactlaw.net
Attorney for Petitioner

Other Counsel of Record

F. Reid Warder, Jr. (S.C. Bar No. 70218)
John D. Stroud (S.C. Bar No. 78062)
Warder Law Firm, LLC
Post Office Box 31057
Charleston, South Carolina 29417
(843) 556-4400
reid@warderlawfirm.com
Attorney for Respondents

INDEX

Certificate of Counsel..... 1

Questions Presented 1

Statement of the Case..... 1

Reasons for Granting Certiorari 2

Arguments 3

I. The Court of Appeals Opinion violates S.C. Code Ann. § 1-23-350 (2005) and
due process of law. 3

Conclusion..... 8

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals April 13, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the Full Commission of the Workers' Compensation Commission which ordered a remand to the single Commissioner of his Order without instructions in violation of S.C. Code Ann. § 1-23-350 (2005)?

STATEMENT OF THE CASE

This matter is before this Court because the Court of Appeals erred in affirming an Order of the Full Commission of the South Carolina Workers' Compensation Commission which remanded this case to the hearing Commissioner without specific findings of fact and conclusions of law in violation of S.C. Code Ann. § 1-23-350 (2005).

The Full Commission of the Workers' Compensation Commission remanded the case to the single Commissioner for "hearing de novo." The single Commissioner had issued an Order on August 11, 2012 with fourteen findings of fact and eight conclusions of law. (R. pp. 8-13). The Appellate Panel of the Workers' Compensation Commission issued its Order on April 1, 2014 remanding this matter to the single Commissioner without addressing a single question of law or fact cited by the single Commissioner in his written ruling in violation of S.C. Code Ann. § 1-23-350 (2005). (R. pp. 3-6).

The pertinent part of the Full Commission Order is as follows and is found on page 6 of the Record on Appeal:

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 Commission 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 all parties.

REASONS FOR GRANTING CERTIORARI

Petitioner asserts that this case has issues of statewide importance in regard to whether the Full Commission can reverse a single Commissioner of the South Carolina Workers' Compensation Commission and order a new hearing without giving specific reasons for the remand. The Court of Appeals allowed this procedure without oral argument and in violation of S.C. Code Ann. § 1-23-350 (2005). That particular code section establishes the standard of review for decisions by the Appellate Panel of the South Carolina Workers' Compensation Commission. See *Carolinas Recycling Group v. S.C. Second Injury Fund*, 398 S.C. 480, 730 S.E.2d 324, 326 (Ct.App. 2012). Under the scope of review established in the APA, the Court of Appeals may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or

modify the Appellate Panel's decision if substantial rights have been prejudiced or the decision is affected by an error law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Petitioner asserts that the Appellate Panel of the Workers' Compensation Commission included no findings of fact and conclusions of law and thus did not comport with S.C. Code Ann. § 1-23-350 or due process which provides that the agency's findings must be supported by "substantial evidence." See *Martinez v. Spartanburg County*, 394 S.C. 224, 230, 715 S.E.2d 339 (Ct.App. 2011).

Petitioner also asserts that the procedure affirmed by the Court of Appeals in this case which gives no reason as to reversal means that a hearing commissioner may be reversed without cause and opens the Commission's rulings to charges of bias, prejudice and politics in its rulings. In this unusual case, both the employee and the employer asked the Court of Appeals to order the South Carolina Workers' Compensation Commission's Appellate Panel to give specific reasons for its decision and remand. The Court of Appeals erred in not requiring the South Carolina Workers' Compensation Commission's Appellate Panel to give such specific reasons which is required under due process and under South Carolina's Administrative Procedure Act.

ARGUMENT

I. The Court of Appeals Opinion violates S.C. Code Ann. §1-23-350 (2005) and due process of law.

The Court of Appeals' Opinion raises serious questions about the South Carolina Workers' Compensation Commission's right to reverse the single Commissioner without rhyme or reason. 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. The Order of the Full Commission does not take issue with the Order of the single Commissioner, nor does it explain any error committed by him. It simply orders the matter vacated and remanded without reason. Petitioner in its Petition for Reconsideration to the South Carolina Court of Appeals asked for what purpose it was being remanded and why? This question remains unanswered since the South Carolina Court of Appeals refused to provide such an answers. Petitioner believes that a “do over” of the single Commissioner’s Order is not allowed without a specific reason by the Appellate Panel of the South Carolina Workers’ Compensation Commission.

Petitioner prevailed before the single Commissioner and the Full Commission and the Court of Appeals has been offered no reason why this case should be reversed and remanded. The Court of Appeals in its decision cited *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, Petitioner 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 now changed and the Court of Appeals 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 Court of Appeals acted in this case. The circuit court in *Bone* did not refuse to rehear 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 68.¹

¹ This is similar to this case and explains why the Commission gave no instructions on remand.

In this case, the Court of Appeals, rather than hearing the appeal as the circuit court did in *Bone*, simply holds that this is an interlocutory order. Petitioner asserts this is error and this Court ought to consider whether the Full Commission may reverse and remand a single Commissioner without giving a specific reason in its opinion. Petitioner also believes that if such a ruling is allowed to stand, then Petitioner will have no guidance as to what she should do on retrial before the single Commissioner.

As was stated previously, both Petitioner's counsel and the employer's counsel agreed in their briefs before the South Carolina Court of Appeals that the South Carolina Workers' Compensation Commission must give a specific reason to vacate and remand a case. This agreement by the parties is the seminal issue in this case. It is startling because the Court of Appeals refused to consider this argument in its opinion. Simply stated, it is not the law and is unfair to both the employee and the employer to have the case remanded to the single Workers' Compensation Commissioner without giving instructions to enlighten either counsel or the Commissioner as to what should be tried the second time.

Both Petitioner and Respondent are left in a quandary as to the remand which Petitioner asks this Court to correct on Certiorari. In fact, in Respondent's brief in its Conclusion section, 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 the Court of Appeals dismissing this case is of no help to the parties nor does it give the parties any guidance as to why the case was vacated and remanded in the first place.²

Petitioner 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 this 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 and that the claimant is entitled to the requested relief. This is especially true when the Full Commission gives no clear or cogent 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 take issue with a single fact or conclusion of law and violates S.C. Code Ann. § 1-23-350.

Thus, Petitioner believes that this Court should grant Certiorari and give the Court of Appeals and the South Carolina Workers' Compensation Commission specific instructions on how to review and remand a case to the single Commissioner. Petitioner believes there are two possible solutions both of which require action by this Court. Those solutions are as follows:

(1) Either affirm the single Commissioner based upon the fact that the Full Commission has not issued any fact which is contrary to the single Commissioner as a matter of law; or

² This is not a case of "sour grapes." Petitioner and Respondent have no idea how to retry this case without specific instructions.

(2) Issue an order requiring that the Full Commission give a specific reason why this matter should be vacated so that all parties will know on remand what their responsibilities are in this case. To do otherwise means that Petitioner has to retry the entire case not knowing what it is that was wrong with the first trial and further not knowing whether or not this case will be remanded again. This procedure violates Petitioner's due process rights since the South Carolina Worker's Compensation Commission must and is required to give specific reasons either affirming or reversing an order of a 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.)

Petitioner maintains that the current Order of the South Carolina Workers' Compensation Commission violates her constitutional rights to know the reason why her award was vacated prior to a second trial occurring before the single Commissioner.

It is without question at a minimum that both the employee and the employer should be given a written order and given the reason for the remand so that they can understand how the case should be tried again. Such is required by South Carolina law and is also required by due process and the United States and South Carolina Constitutions. All of which require reasons for a remand. To allow this process to stand violates due process; and, accordingly, Petitioner requests that this Court grant a Writ of Certiorari to the South Carolina Court of Appeals to consider the South Carolina Court of Appeals order of

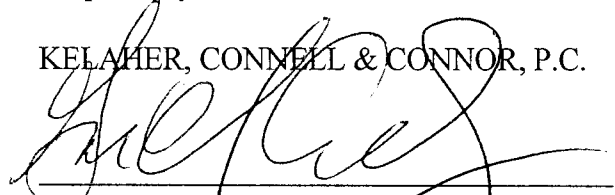
dismissal dated March 11, 2015 and to consider the statewide implications of its opinion which allows a summary reversal of any opinion on a whim of the South Carolina Workers Compensation Commission without rhyme or reason.

CONCLUSION

In summary, a remand without a specific reason is neither legal nor is it fair to the parties. It gives the impression that the Commission can reverse an order of a hearing Commissioner because it does not like the decision. Such an order by the Commission deserves the scrutiny of this Court for there will surely be more opinions to follow that give no reasons for reversing the hearing Commissioner.

Respectfully submitted,

KELAHYER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr. (S.C. Bar No. 1358)

The Courtyard, Suite 209

1500 U. S. Highway 17 North

Post Office Drawer 14547

Surfside Beach, South Carolina 29587-4547

(843) 238-5648 (phone)

(843) 238-5050 (facsimile)

gconnell@classactlaw.net

Attorney for Petitioner

May 8, 2015

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 12 2015

SC Court of Appeals

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

Opinion No. 2015-UP-119 (S.C. Ct. App. filed March 11, 2015)

Denica PowellPetitioner

vs.

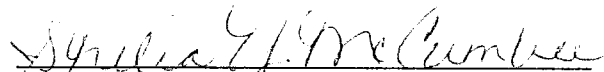
Petsmart, Inc. and Phoenix Insurance Co.Respondents

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 Writ of Certiorari** 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: May 3, 2015


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 8th day of May, 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

EDWARD T. KELAHER*
GENE M. CONNELL, JR.
L. SIDNEY CONNOR, IV
LISA POE DAVIS

* OF COUNSEL

May 8, 2015

AREA CODE 843
238-5648
FAX: 238-5050

Daniel E. Shearouse, Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RECEIVED

MAY 12 2015

SC Court of Appeals

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

Dear Mr. Shearouse:

Enclosed please find the following in the above-captioned matter:

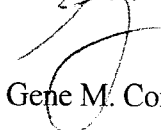
- (1) Original and seven (7) copies of our Petition for Writ of Certiorari and Proof of Service;
- (2) Two (2) copies of the Appendix (one of which is unbound).
- (3) Our check for \$100.00 for the filing fee;
- (4) A self-addressed, stamped envelope for return of one filed copy of the Petition for Writ of Certiorari to this office.

By copy of this letter, I am hereby filing the Petition for Writ of Certiorari with the South Carolina Court of Appeals.

Further, by copy of this letter, I hereby serve attorneys for Respondents with the Petition for Writ of Certiorari.

Thank you for your kind assistance in this matter.

Sincerely yours,



Gene M. Connell, Jr.

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

The Honorable Jenny A. Kitchings, South Carolina Court of Appeals
F. Reid Warder, Esquire
John D. Stroud, Esquire

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

P. O. DRAWER 14547

SURFSIDE BEACH, SOUTH CAROLINA 29587

COLUMBIA
SOUTH CAROLINA
MAY 12 2015



The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

MAY 12 2015

SC Court of Appeals

29211162929

