

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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

JUN 12 2015

S.C. SUPREME COURT

Appellate Case No. 2015-001024

Denica Powell Petitioner

vs.

Petsmart, Inc. and Phoenix Insurance Co Respondents

RETURN TO PETITION FOR WRIT OF
CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing an appeal from the Workers' Compensation Appellate Panel as interlocutory when the order for a remand to the single Commissioner had no findings of facts or conclusions of law in violation of S.C. Code Ann. § 1-23-350 (2005)?
2. Are the remedies requested by Petitioner appropriate at this stage of litigation?

ARGUMENT

1. The Court of Appeals Erred in Dismissing the Appeal from the Full Commission Appellate Panel as Interlocutory.

This matter was initially appealed by both parties to the Full Commission Appellate Panel. The Full Commission issued an Order remanding the matter to the Single Commissioner that failed to state specific findings of facts or conclusions of law. Both parties appealed the Order of the Full Commission as this order violated the requirements set forth in S.C. Code Ann. §1-23-350 (2005). The Court of Appeals dismissed the appeal as interlocutory. The determination of whether or not the Appellate Court erred in dismissing the Appeal because the appeal was interlocutory is the only issue that should be addressed as this is the only issue before this Court.

It is clear that the current case law states that an order of an appellate court remanding a case for additional proceedings before an administrative agency is not directly appealable. *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (S.C. 2013) citing *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983). However, none of these cases dealt with the appealability of an order that violated S.C. Code Ann. §1-23-350 (2005).

Respondents argue that when an order fails to state findings of facts or conclusions

of law, the order is illegal and does not properly remand a case for additional proceedings. On the contrary, the order itself violates a statute and is immediately appealable under the Administrative Procedures Act. While it is clear that there was no “final judgement” in this case as required by recent case law, S.C. Code Ann. §1-23-380 also states that “[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” Respondents argue that the Appeal from the Full Commission Appellate Panel falls within this exception, and therefore the Court of Appeals erred in dismissing the Appeal as interlocutory. In the case at hand, a review of the final agency decision would not provide an adequate remedy to either the employer or employee, as both have the right to due process and both are forced to blindly retry the same case. Additionally, Respondents are prejudiced by this decision as payments are still being issued and the appeal has not been properly ruled upon. The review of the final agency decision would be impossible as well, as the Commission did not make any findings of facts or conclusions of law.

The Court of Appeals’ reliance on *Price v. Peachtree Elec. Servs., Inc.* and *Bone v. U.S. Food Service* is misplaced. In *Price v. Peachtree*, the Appellate Panel issued an order finding Bob Wire Electric was responsible for an injury incurred by the claimant that was originally attributed to Peachtree, and remanded the case to the single commissioner for further determination of benefits. *Price v. Peachtree Elec. Servs., Inc.*, 405 S.C. 455, 748 S.E.2d 229 (2013). The Supreme Court of South Carolina granted a petition for writ of certiorari for the Petitioner’s questions regarding the appealability of the first appellate panel order. *Price v. Peachtree*

(2013). The Supreme Court cited the recent decision of *Bone v. U.S. Food Service*, which clarified that the Administrative Procedures Act establishes the standard for judicial review of decisions of the Workers' Compensation Commission. *Id.* The Supreme Court ruled that under S.C. Code Ann. §1-23-380, the order of the appellate panel was not immediately appealable and the Court of Appeals properly found Bob Wire's failure to file an immediate appeal from the order did not render the findings of fact and conclusions of law therein the law of the case. *Id.* In the matter before this Court now, there was no finding of fact or conclusion of law at all in the Appellate Panel's order remanding the matter back to the Single Commissioner. This is a procedural agency ruling that is immediately reviewable under S.C. Code Ann. §1-23-380.

The Court of Appeals also erred in relying on *Bone v. U.S. Food Service*. In *Bone*, both the Single Commissioner and the Appellate Panel of the South Carolina Workers' Compensation Commission issued orders denying the claim. *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (S.C. 2013). *Bone* then appealed to the Circuit Court, which ruled that the evidence of record shows Claimant sustained a compensable injury, and remanded the matter to the Commission for proceedings consistent with the order. *Bone v. U.S. Food*, (S.C. 2013). This order for remand was appealed to the Court of Appeals, which dismissed the appeal, finding the order remanding the matter to the Commission for further proceeding did not constitute a "final judgement" and thus was not immediately appealable. *Id. citing Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52 (1994). The Supreme Court affirmed the Court of Appeal's order dismissing the appeal, finding that the order remanding the matter

to the Commission for further proceedings does not constitute a final judgement as required by S.C. Code Ann. §1-23-390 and, therefore, is not immediately appealable. In the Supreme Court's analysis, the Supreme Court found that the order was not immediately appealable as a preliminary, procedural or intermediate agency action or ruling under S.C. Code Ann. §1-23-380(a) because the Petitioners had an adequate remedy in that they could raise the issue of compensability on appeal of a final award. *Id.* The facts of *Bone* differ greatly from the case at hand because in *Bone*, the order remanding the matter had findings of facts and conclusions of law, and did not violate S.C. Code Ann. §1-23-350. Here, there are no findings of facts or conclusions of law, which is a procedural agency ruling that violates S.C. Code Ann. §1-23-350 and is immediately reviewable under S.C. Code Ann. §1-23-380.

Both parties agree that the Full Commission Appellate Panel violated S.C. Code Ann. §1-23-350 (2005) by failing to include findings of fact and conclusions of law in the order remanding the Hearing to the Single Commissioner. In *Drake v. Raybestos-Manhattan Inc.*, the Supreme Court rationalized the importance of findings of facts and conclusions of law:

The duty to determine the factual issues is placed solely on the Commission, and neither this Court, nor the Circuit Court, has authority to determine factual issues, except in jurisdictional matters. This duty on the part of the Commission requires that, not only must findings of fact be made upon the essential factual issues, but that they be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings. 58 Am.Jur. 878, Section 472. And 'where there is a noncompliance by a compensation tribunal with the

requirement of express findings of fact in support of its award, the award will be reversed by the courts, and the cause remanded to the tribunal, in order that it may conform to the requirement, either with or without a new hearing of the parties, as the exigencies of a case may be.' 58 Am.Jur. 879, Section 476. Annotation: 146 A.L.R. 123, 197.

Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (S.C., 1962)

overruled by Hunt v. Whitt, 279 S.C. 343, 306 S.E.2d 621 (1983).¹ The Court in *Drake* further stated that a remand to find further findings of facts is proper where the Commission has failed make essential finding of fact, and “[t]o hold otherwise would in such cases make the determination of the rights of the parties turn upon the neglect of the Commission to make essential findings of fact, or require the appellate court to make the omitted findings of fact which our statute forbids.” *Id.* In the case at hand, the Commission issued an order that neither told what was found or how the conclusion was made, nor did it really come to a conclusion at all. The only thing the Appellate Panel accomplished by issuing this order was to tell the Single Commissioner to try again, which is not compliant with S.C. Code Ann. §1-23-350 (2005).

¹ In *Hunt v. Whitt*, the Supreme Court decided that a remand to the Hearing Commissioner for the purpose of taking additional medical testimony from the claimant was an interlocutory order of the circuit court and did not involve the merits of the action, and it was not reviewable by this Court for lack of finality. The Court further stated “[t]o the extent that the following cases and any others not cited can be construed to authorize appeals under the *present circumstances*, those cases are overruled. *Couch v. Greenville County*, 249 S.C. 186, 153 S.E.2d 394 (1967); *Amick v. City of Columbia*, 247 S.C. 254, 146 S.E.2d 860 (1966); *Drake v. Raybestos-Manhattan, Inc.*, 241 S.C. 116, 127 S.E.2d 288 (1962).” (emphasis added). Respondents argue that this is not an overruling of the facts of *Drake*, as the Court in *Drake* was dealing with a violation of S.C. Code Ann. §1-23-350. Regardless, Respondents believe that the rationale in *Drake* is still relevant and controlling as to the importance of the Commission’s compliance with S.C. Code Ann. §1-23-350.

Without these findings of facts and conclusions of law, or any explanation as to why the Hearing was remanded, both Petitioner and Respondent will be forced to have the same Hearing again, leaving both parties with no reason to believe that this sequence of events will not take place again. With no indication of why the Hearing was remanded, both parties have no guidance as to what went wrong in the initial hearing. Additionally, without knowing why the matter was remanded, the Single Commissioner cannot provide an adequate remedy by rehearing the matter.

2. The remedies requested by Petitioner are improper.

Respondents believe that the only remedy available is to remand this matter back to the Appellate Panel, instructing them to make specific findings of facts and Rulings of Law. *See Bobo v. Marshane Corporation*, 302 S.C. 86, 394 S.E.2d 2 (S.C. App., 1990) (in which procedurally the case was remanded back to the full commission following a remand of the case to the full commission for it to state separately findings of facts and conclusions of law in accordance with S.C. Code Ann. §1-23-350); *Baldwin v. James River Corp.*, 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (wherein the court of appeals remanded the case to the workers' compensation commission because the commission made insufficient findings of fact so as to permit appellate review of the commission's decision denying an award); *See also Gray v. Laurens Mill et al.*, 231 S.C. 488, 99 S.E.2d 36 (S.C. 1957); *Harpe v. Kline Iron & Metal Works et al.*, 219 S.C. 527, 66 S.E.2d 30 (S.C. 1951); *Dameron v. Spartan Mills et al.*, 211 S.C. 217, 44 S.E.2d 465 (S.C. 1947); *Shillinglaw v. Springs Cotton Mills et al.*, 209 S.C. 379, 40 S.E.2d 502 (S.C. 1946).

Respondents maintain their position that *Shealy v. Algernon Blair Inc.*, 250 S.C. 106, 156 S.E.2d 646 (S.C. 1967) is inapplicable to the case at hand and that a review of the record before the single commissioner is improper before this court. However, if this Court finds that Shealy is applicable and a review of the record before the single commissioner is proper, it is clear that there is evidence in the record that would allow a reasonable mind to conclude that the Claimant did not sustain her burden in proving that she was permanently disabled. Therefore, even if Shealy is applicable, the proper action for this Court would be to remand the case back to the Appellate Panel with instructions to specify findings of fact and rulings of law. To affirm the single Commissioner's ruling would destroy the defendant's substantial right to have a proper appeal before the Appellate Panel.

CONCLUSION

Respondents agree with the Petitioner that the Order on April 1, 2014 vacating and remanding this matter to the single Commissioner without addressing any of the findings of fact or questions of law cited by the single Commissioner was an error of law. Respondents also agree with the Appellant that an Order remanding the matter for 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 the *de novo* hearing. The purpose of an order is to explain what the Commission found and how the Commission came to that conclusion, which was clearly not done in this case.

As for the Petitioner's request to affirm the single Commissioner's original Order, there is plenty of evidence in the record that would allow a reasonable mind

to conclude that the Claimant did not sustain her burden in proving that she was permanently disabled. Respondents maintain the position that the Commissioner erred in determining that the Claimant is permanently and totally disabled, as the greater weight of the evidence in the record shows that the Claimant can return to work in some capacity and is not permanently and totally disabled. The Single Commissioner should have restricted the Claimant's award to a single scheduled body part under S.C. Code Ann. § 42-9-30 or a permanent partial disability running award under S.C. Code Ann. § 42-9-20. Granting the Petitioner's request to affirm the Single Commissioner's ruling would be outside the scope of review of this Court, and would also violate Respondent's due process by extinguishing our appeal.

Respondents request that the Supreme Court grant the Petition for Certiorari to determine if an Order from an administrative agency that clearly violates S.C. Code Ann. §1-23-350 is immediately appealable under S.C. Code Ann. §1-23-380. Respondents are not aware of any cases that have addressed this issue that have been ruled upon after the decisions of *Bone v. U.S. Food* and *Price v. Peachtree Elec. Servs., Inc.* Respondents believe that it would jeopardize judicial economy and due process to affirm the opinion of the Court of Appeals in this matter.

For the reasons above, Respondents respectfully request this court grant the Petition for Certiorari, reverse the opinion of the Court of Appeals and remand this matter to the Full Commission with instructions to state specific findings of facts and rulings of law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Stroud", written over a horizontal line.

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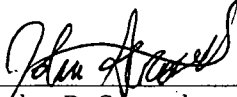
Denica Powell Petitioner

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Motion to Accept Filing as Timely as well as Respondent's Return to Petitioner's Petition for Writ of Certiorari were both served on the 11th day of June, 2015 on Petitioner by depositing a copy of both in the United States Postal Service, first class to Petitioner's attorney of record: Gene M. Connell, Jr., Post Office Drawer 14547, Surfside Beach, South Carolina 29587-4547.



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