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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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OCT 27 2017

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2017-002122

Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

and

American Home Assurance,

Respondents.

RESPONDENTS' MOTION TO DISMISS

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully move to dismiss the appeal of C. Daniel Vega, attorney for Appellant, on the ground that the appeal is interlocutory and not subject to review under S.C. Code Ann. §1-23-380. This motion is based on the following grounds:

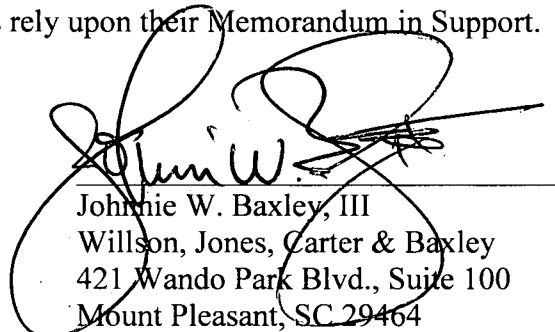
1. Appellant prematurely filed an appeal after the South Carolina Workers' Compensation Commission vacated and remanded an order by the Single Commissioner. The Full Commission remanded this matter to a Single Commissioner to hold a hearing on the existing record to determine if the Claimant sustained a change of condition for the worse and, if so, to conduct an evidentiary hearing with updated evidence as to Claimant's entitlement to benefits under the Act.

2. As there has not been a final agency decision in this matter, Appellant is not permitted to appeal this order vacating and remanding the matter for further adjudication. S.C. Code Ann. §1-23-380(1).

WHEREFORE, Respondents respectfully request that the Court grant its Motion to Dismiss and enter an order dismissing, without prejudice, Appellant's appeal. Respondents further requests an award of costs and attorney's fees associated with this Motion and any other relief this Court deems just and proper.

In support of this Motion, Respondents rely upon their Memorandum in Support.

October 24, 2017



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Paula Russell,

Appellant,

v.

Wal-Mart Stores, Inc.,

&

American Home Insurance,

Respondents.

**RESPONDENTS' MEMORANDUM IN SUPPORT
OF ITS MOTION TO DIMISS**

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully submit this memorandum in support of their motion to dismiss.

I. FACTUAL AND PROCEDURAL BACKGROUND

This claim has a lengthy and factually involved procedural posture, starting when the Appellant was injured on November 3, 2009. The Appellant was pulling a wooden pallet when she sustained a strain to her abdomen and middle of her back. Respondents accepted the claim as compensable, and medical treatment was promptly provided. The Appellant was released at Maximum Medical Improvement (“MMI”) on February 2, 2011, and was ultimately provided with a 7% impairment rating to the spine. The parties appeared for a hearing in front of Commissioner Avery Wilkerson. On June 8, 2011, Commissioner Wilkerson, in accordance with the Form 14B releasing the Appellant at MMI with a 7% impairment rating to the spine, awarded the Appellant 21 weeks of Permanent Partial Disability, which amounted to \$14,308.56. A Form 19 was then filed with the Commission to close the file.

Appellant’s attorney filed a Form 50 alleging that the Appellant was entitled to further medical treatment because she sustained a change of condition for the worse under S.C. Code Ann. §42-17-90. On August 5, 2013, Commissioner Roche found that the Appellant sustained a change of condition for the worse and ordered Respondents to provide medical treatment and temporary total disability (“TTD”) benefits. Respondents appealed the order to the Full Commission. On January 30, 2014, The Full Commission reversed and found that the Appellant failed to prove that she sustained a compensable change of condition for the worse. Appellant then appealed to the Court of Appeals.

On March 24, 2016, this Court found that the Commission erred by relying on objective evidence only and by discounting the Appellants subjective complaints. Citing S.C. Code Ann. §42-17-90(A), this Court stated, “There is no requirement in the Act requiring the Claimant to

prove the change of condition by objective evidence. Thus, we reverse and remand to the Commission.” *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016).

On March 20, 2017, on remand and without a hearing, Commission Campbell concluded that the Appellant met her burden of proving a change of condition for the worse. Moreover, Commissioner Campbell reinstated the original award of Commissioner Roche, dated February 2, 2011, which awarded causally related medical care and treatment as well as TTD benefits commencing December 1, 2011, to the present and continuing. Based on this order, Respondents again appealed to the Appellate Panel.

On September 14, 2017, the Full Commission found that the Single Commissioner erred by simply reinstating the prior award of benefits Commissioner Roche issued in 2011. The Full Commission noted that the previous findings and award had already been overturned by the Full Commission, and by operation of law, those findings and conclusions, including the final award, could not be reinstated. The Full Commission found that it was improper and prejudicial to both parties to simply reinstate findings and awards that are over four years old. The Full Commission vacated the order of Commissioner Campbell and remanded the claim for a new hearing. This appeal followed.

II. DISCUSSION

A. Appellant’s appeal constitutes an interlocutory appeal not permitted under S.C.

Code Ann. § 1-23-380.

S.C. Code Ann. § 1-23-380(A) provides, “A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review...” Specifically, S.C. Code Ann. § 1-23-380(A)(1) provides that “[p]roceedings for review are instituted by serving and filing a notice of appeal as provided in

the South Carolina Appellate Court Rules within thirty days after the final decision of the agency....”

In this case, Appellant has not “exhausted all remedies available within the agency, and thus there is not a “final decision” from which an appeal may be taken. As stated in the facts above, the Full Commission remanded the case for a full hearing on the merits and, as such, a final decision as to both compensability and entitlement to benefits has not yet been rendered. The Appellant’s notice of appeal stems from an intermediate remand and offers no basis providing this court with subject matter jurisdiction.

B. The Supreme Court of South Carolina has addressed this issue in *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, 399 S.C. 566, 733 S.E.2d 200 (2012) and *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The South Carolina Supreme Court addressed the current issue in another workers’ compensation case. In that case, the claimant filed a workers’ compensation claim after injuring her back at work. A hearing Commissioner found that the claimant had failed to meet her burden of proving an injury by accident arising out of and in the course of her employment. The Appellate Panel subsequently affirmed the Single Commissioner’s findings, and the claimant then appealed. The circuit court reversed and remanded the decision for further adjudication by the Commission. However, the employer and its workers’ compensation carrier immediately appealed. The Court of Appeals dismissed the appeal on the basis that the appeal was interlocutory. The employer then filed a petition for a writ of certiorari, which was granted. See generally *Bone v. U.S. Food Serv.* 399 S.C. 566, 733 S.E.2d 200 (2012) (holding that

appealability of an administrative order is governed by S.C. Code Ann. § 1-23-380 and that a “final order” is required).

The South Carolina Supreme Court, noting that there had been “lingering confusion” in this area of law after passage of the APA, decided to clarify the issue. The court first averred that interlocutory orders are not directly appealable. The court stated, citing earlier precedent, “We granted the respondent’s motion to dismiss the appeal . . . In so doing, we relied upon the final judgment rule articulated in section 1-23-390 of the APA and observed that ‘we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.’” *Bone*, 399 S.C. at 571, 733 S.E.2d at 202 (quoting *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994)).

The court then outlined the difference between the “general appealability” statute of Section 14-3-330 and the appeals controlled by Section 1-23-380 of the APA. While recognizing that some interlocutory orders, at least those from the circuit court, are suitable for immediate appeal, the court reiterated that appeals in administrative agency matters are handled differently. The court stated, “Thus, while appeals from the circuit court in other cases are subject to the general appealability statute of section 14-3-330, which allows appeals from interlocutory orders in certain instances (such as where the interlocutory order involves the merits), this provision and its concepts are inapplicable in matters subject to the APA.” *Bone*, 399 S.C. at 574, 733 S.E.2d at 204; see also *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep’t of Health and Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010).

The court declined to analyze the appealability of an order under the strictures of Section 14-3-330, which involves deciding whether the order “involves the merits.” In fact, the court overruled any precedent that had the effect of analyzing appeals from administrative agencies

under that standard. The court has clarified the correct standard—the “final judgment standard”—by stating, “We considered the meaning of a ‘final decision’ and stated, ‘If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. Rather, ‘a final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.’” *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895 (citing *Good v. Hartford Accident and Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)).

The court in *Bone* then reaffirmed this standard and stated, “A ‘final judgment’ is defined in this context as was stated in *Charlotte-Mecklenburg* i.e., the order must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done by to enforce what has already been determined. *Bone* 399 S.C. at 575, 733 S.E.2d at 204; *Charlotte-Mecklenburg Hosp. Auth.*, 387 S.C. at 267, 692 S.E.2d at 895. Lastly, the court noted that allowing an appeal under circumstances where a final order has not been rendered would result in numerous appeals—namely an appeal from an interlocutory order and then again after the final order—and would stifle judicial economy. The court also noted that allowing such appeals creates “piecemeal appeals” in agency cases, which would compromise informed appellate review. *Bone*, 399 S.C. at 575, 733 S.E.2d at 205.

The current case has a procedural history and facts almost identical to the case discussed above. Here, the Full Commission vacated and remanded the final order Commissioner Campbell issued. The Full Commission remanded the case for a full evidentiary hearing, where compensability and benefits will ultimately be adjudicated. Specifically, the Full Commission

ordered that at the remand hearing, the single Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law concerning the issue as to whether the Claimant has had a change of condition for the worse per Section 42-17-90. This is directly in response to the remand instructions from the Court of Appeals. Additionally, the Full Commission ordered that at the remand hearing, the single Commissioner shall conduct 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 under the Act if the change of condition claim is found to be compensable. This hearing has not been scheduled or conducted, and no further orders have been issued from the Commission. Therefore, there is no final judgment from the Workers' Compensation Commission upon which to base an appeal.

Appellants will likely rely on the narrow exception contained in S.C. Code Ann. §1-23-380(A), which states, in relevant part, 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.” Appellants will likely argue that a final agency decision will not provide an “adequate remedy” and therefore are permitted to appeal the Full Commission’s decision. S.C. Code Ann. §1-23-380(A); see also *Hilton v. Flakeboard America Ltd.*, 418 S.C. 245, 791 S.E.2d 719 (2016). In that case, the claimant appealed an interlocutory decision of the Workers’ Compensation Appellate Panel. The interlocutory decision vacated and remanded the single commissioner’s order, which found that the claimant had not reached MMI. The Court of Appeals dismissed the appeal, and the claimant petitioned for a writ of certiorari. The court agreed, “under [those] unusual facts” that review of the final agency decision would not provide the claimant with an adequate remedy.

The *Hilton* case involved a claimant who suffered an admittedly compensable injury as the result of an insect or spider bite. The single commissioner agreed with Hilton that he had not reached MMI, and further agreed that any misrepresentations he made during the course of the claim were the result of a cognitive deficiency from a previous injury. “The defendant appealed to the Commission, raising four ‘General Exceptions’ and 102 specific exceptions to the single commissioner’s order. The four ‘General Exceptions’ raised the issues of MMI, temporary disability, Hilton’s entitlement to further medical treatment, and Hilton’s credibility. Neither the four general exceptions nor the 102 specific exceptions raised issues of competency, the appointment of a Guardian ad Litem, or any claim that [defendant] had been denied its right to have Hilton evaluated by a physician of its choice.” *Hilton*, 418 S.C. at 247, 791 S.E.2d at 720.

The crux in that case revolved around the preservation of issues for appeal via the Form 30. The Full Commission—notably without observing Hilton—issued an order vacating and remanding the Decision and Order of the single commissioner to determine whether or not Hilton was competent to testify and whether or not he needed a Guardian ad Litem. *Id* at 248, 791 S.E.2d at 721. The court noted that “[o]nly issues raised to the Commission within the application for review of the single commissioner’s order are preserved for review. *Id* at 249, 791 S.E.2d at 721 (citing *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952)). Because neither the claimant nor the defendant had ever raised the issue of competency, the court found it was in error to consider the issue for the first time on appeal. The court stated, “ Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him with an adequate remedy. *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722. The court took particular concern that the

Commission raised the issue of competency *sua sponte*, “without the benefit of personally observing Hilton.” *Id.*

In the current case, there is no dispute regarding the Commission’s *sua sponte* raising of issues for the first time on appeal. In fact, the only issues for determination in the case at bar are whether the Appellant’s change of condition claim is compensable and, if so, what benefits she is entitled to. Compensability and benefits are the most commonly litigated issues in workers’ compensation cases, and to allow appeals in such matters would overburden the court’s docket and create needless litigation expenses. Indeed, the court in *Hilton* warned, “We caution that circumstances such as these that will permit the immediate appeal of an interlocutory administrative decision under section 1-23-380(A) ‘are about as rare as the proverbial hens’ teeth.’” *Id.* at 251, 791 S.E.2d at 723 (citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1957)).

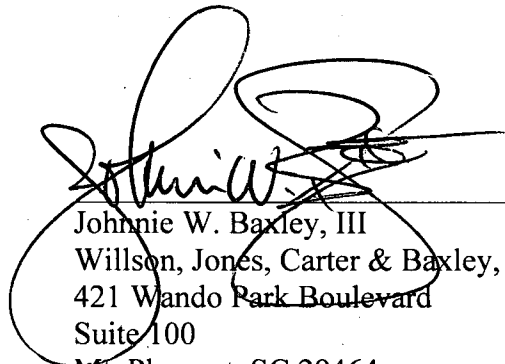
In the instant matter, the Form 30 appeal filed by Defendants on March 31, 2017, asserted 32 exceptions, which can be fairly summarized into two general exceptions: (1) the Hearing Commissioner erred in finding Claimant/Respondent sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original injury on November 3, 2009; and (2) the Hearing Commissioner erred in failing to review the evidence *de novo* and instead just reinstated a 2013 award of benefits. Specifically, Respondents asserted that any award of benefits was outside the scope of remand from the Court of Appeals. They further asserted that even if the Commissioner properly awarded benefits after finding a compensable change of condition, such benefits should have only been awarded after an evidentiary hearing on the issues of medical treatment, medical benefits, temporary benefits, and permanent benefits. It was improper and an error of law for the Hearing Commissioner to simply reinstate the prior

Decision and Order of Commissioner Roche dated August 5, 2013, because those previous findings and the award had already been overturned by the Full Commission, and as an operation of law, the findings, conclusions, and award of Commissioner Roche no longer existed and cannot be reinstated. Further, Defendants asserted that it was improper and prejudicial to both parties to simply reinstate findings that are almost 4 years old; if benefits are going to be awarded, there must be an evidentiary hearing so that accurate and up-to-date findings and awards can be made.

Based upon the appeal by Defendants, the Full Commission found that Commissioner Campbell's simple reinstatement of the order from 2011 was in error. The Full Commission vacated and remanded the case based on the exceptions set forth by the Defendants in a properly filed appeal. The current facts are exceedingly distinguishable from those in *Hilton*, and are instead almost identical to those found in *Bone*. Thus, the interlocutory appeal in this matter is not proper.

WHEREFORE, Respondents respectfully request that the Court grant their Motion to Dismiss and enter an order dismissing, without prejudice, the Appellant's appeal. Respondent further requests an award of costs and attorney's fees associated with this Motion and any other relief this Court deems just and proper.

October 24, 2017



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Attorneys for Defendants/Respondents

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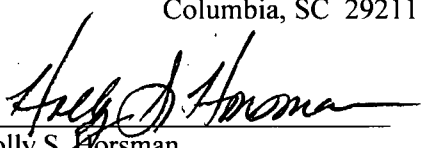
Respondents.

CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 24th day of October, 2017, I mailed the foregoing **RESPONDENTS' MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

C. Daniel Vega, Esq.
Chappell, Smith & Arden, P.A.
P.O. Box 12330
Columbia, SC 29211


Holly S. Horsman

Legal Assistant to Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY, P.A.
421 Wando Park Boulevard, Suite 100
Mount Pleasant, SC 29464

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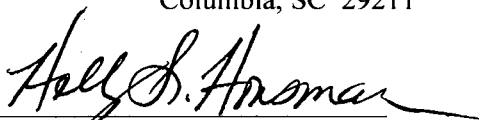
Respondents.

CERTIFICATE OF SERVICE

I, Holly S. Horsman, do hereby certify that I am the Legal Assistant for Johnnie W. Baxley, III, Esquire, attorney for the defendants with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 24th day of October, 2017, I mailed the foregoing **RESPONDENTS' MOTION TO DISMISS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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Columbia, SC 29211



Holly S. Horsman
Legal Assistant to Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY, P.A.
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October 24, 2017

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
P.O. Box 11629
Columbia, SC 29211

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Re: Paula Russell vs. Wal-Mart Stores, Inc.
WCC File No.: 0917785 DOI: 11/3/2009
Carrier: Illinois National Insurance Company - Claim No.: 5943261
WJC&B File No.: 0170.01754
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Please find enclosed the following documents (an original and six copies) for filing in regards to the above-referenced case.

1. Respondents' Memorandum in Support of its Motion to Dismiss; Proof of Service
2. Respondents' Motion to Dismiss; Proof of Service; and
3. \$25.00 Filing Fee

With kindest regards,

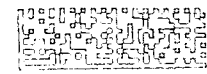
WILLSON JONES CARTER & BAXLEY, P.A.


Johnnie W. Baxley, III

JWB/hsh
Enclosures
cc: Daniel C. Vega, Esq.
Jonathan Webster (via e-mail)

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THE HONORABLE JENNY ABBOTT KITCHINGS
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