

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

RECEIVED
NOV 08 2017
SC Court of Appeals

WCC File No. 0917785

Paula Russell,

Claimant, Appellant,

v.

Wal-Mart Stores, Inc.,

Employer,

&

Illinois National Insurance Company,

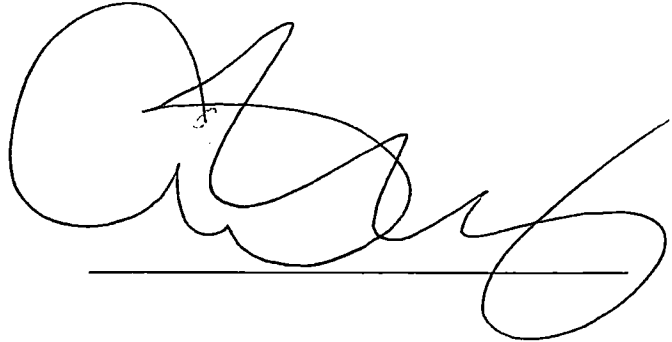
Carrier, Respondents.

APPELLANT'S RETURN TO MOTION

Paula Russell, by and through her undersigned attorney, respectfully opposes Johnnie W. Baxley, III's, attorney for the respondent, motion to dismiss the pending appeal, for this case is immediately appealable pursuant to S.C. Code Ann. § 1-23-380 (A). This Return is based on the following grounds:

1. The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2017 order, thereby denying Appellant of an adequate remedy.
2. The Commission ignored the Court of Appeals, but ordered an unexplained "do over" of the litigation, thus leaving Appellant without an adequate remedy.

3. The Commission acted upon issues not properly preserved for appeal, which leaves Russell without an adequate remedy.

A handwritten signature in black ink, appearing to read 'C. Vega', written over a horizontal line.

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**APPELLANT'S MEMORANDUM IN SUPPORT
OF ITS RETURN TO RESPONDENTS' MOTION**

Paula Russell ("Appellant"), by and through her undersigned attorney, respectfully submits this memorandum in opposition of Respondents' motion to dismiss.

FACTUAL AND PROCEDURAL BACKGROUND

This claim began in 2009 when Paula Russell (“Russell”) suffered work related injuries to her back and Pelvis. After initially adjudicating the claim, Russell developed new radicular symptoms and requested a review of her previous award on the ground of change of condition for the worse. Respondents (“Wal-Mart”) denied Russell’s claims, provided no medical treatment, and fired her instead of honoring her request for work modification. The parties were heard on February 11, 2013, by Commissioner Andrea C. Roche, who agreed Russell suffered a change of condition for the worse, found Russell disabled, and ordered she receive benefits.¹ Wal-Mart filed an appeal to the Appellate Panel of the South Carolina Workers’ Compensation Commission and continued to provide no benefits.

Before the Appellate Panel, Wal-Mart focused solely on the issue of compensability and relied solely on the argument Russell presented no “objective evidence.” The Commission’s appellate panel agreed and found Russell had not presented any “objective evidence” other than self-serving subjective complaints, found Russell was not credible, and found Russell had not suffered a change of condition for the worse. After receiving the Appellate Panel’s order, Russell properly filed an appeal with the Court of Appeals.

On January 20, 2016, the Court of Appeals found the Commission “erred as a matter of law by imposing a requirement to the statute mandating a claimant prove a change of condition by objective evidence.”² This Court further pointed out that the Commission ignored the fact that both of Russell’s authorized treating physicians testified she suffered a change of condition for the

¹ At points, Wal-Mart’s memorandum in support of its motion to dismiss this appeal inadvertently states an incorrect date of the hearing before Commissioner Roche and an incorrect date of the order that resulted from that hearing. The Correct date of the hearing is February 11, 2013, and the correct date of the order is August 5, 2013.

² Wal-Mart’s memorandum in support of its motion to dismiss this appeal inadvertently referred to the date the Court of Appeals decided *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016) as the date this court denied rehearing. *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016) was decided January 20, 2016.

worse. This Court ultimately reversed and remanded this matter to the Commission with specific instructions to use a preponderance of the evidence in its review of the record.

On remand Commissioner Michael R. Campbell reviewed the entire record and concluded Russell met her burden of proving a change of condition for the worse and found Russell was entitled medical care and temporary total disability benefits. Wal-Mart appealed and continued to provide no benefits or medical treatment.

On September 7, 2017, the Commission's Appellate Panel issued an order stating, "the Single Commissioner's March 20, 2017, Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing." The Order further stated the hearing should be a *de novo* hearing. The Order alleges the Commission did not—and did not need to—consider the threshold issue of compensability, but still reversed and remanded on that issue. The Order alleges Commissioner Campbell only reinstated Commissioner Roche's order and ignores the one hundred additional findings made by Commissioner Campbell. The Order cites no reversible error. The Order ignores the argument, briefed for the Commission by Russell, that many of Wal-Mart's issues were barred from relitigation by the doctrine of issue preclusion. As a result of the nature of that appellate panel order, the fact Russell has received no medical treatment during the entire litigation of the change of condition, the overall duration of the claim, and the ever growing procedural history of this claim, Russell filed this appeal.

DISCUSSION

This appeal is immediately appealable under section 1-23-380(A). Appeals from administrative agencies, including the Workers Compensation Commission, are governed by the Administrative Procedures Act. *Bone v. U.S. Food Service*, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Section 1-23-380(A) of the APA states 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.” The South Carolina Supreme Court has stated that whether a review of the final agency decision would or would not provide an adequate remedy is decided on a case-by-case basis. *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016) (citing *The Island Packet v. Kittrell*, 365 S.C. 332, 339, 617 S.E.2d 730, 734 (2005)). Under the extraordinary circumstances, the oddities, and the egregious errors in the Appellate Panel’s order, Russell submits to this Court that the standard set by section 1-23-380(A) has been met.³

I. The Court of Appeals Gave Specific Instructions on Remand, Which the Commission Ignored in its 2017 Order, Thereby Denying Russel an Adequate Remedy.

The Court of Appeals gave specific instructions on remand, which the Commission ignored in its 2017 order. This Court has stated “where a case that has been appealed is remanded by the court to the workers’ compensation commission with specific directions, the commission must proceed in accordance with those directions. *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen’s Compensation* § 790 at 37 (1958)). Further, this Court opined, “[i]n such a case, the order limits the authority of the commission.” *Id.* The Supreme Court of South Carolina has additionally held that an administrative body could not consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for further consideration. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

³ In this Return, Russell does not address every error or specific exception she claims arose from the Appellate Panel’s order, but rather addresses only those that are so extraordinary as to cause the appeal to meet the standard set out in 1-23-380(A).

In the case at bar, this Court found in 2016 that the Commission committed legal error in requiring Russel prove her change of condition with purely objective evidence, stated the appropriate standard was a preponderance of the evidence, and remanded to the Commission to determine if Russell suffered a change of condition by applying the appropriate standard. 415 S.C. at 400-01, 782 S.E.2d 756. The Commission, however, issued an order compelling the Single Commissioner to “conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence. . . .” In essence, the Commission has attempted to expunge the record with regard to all issues previously litigated.

The Commission was instructed, by the Court of Appeals, to consider whether or not Russell suffered a change of condition, but instead is forcing Russell to relitigate this entire claim. Because the Commission disregarded the directions of this Court in its 2017 order, any subsequent hearings held or orders drafted pursuant to and consistent with that order will inherently be contrary to the directions of the Court of Appeals. Therefore, Russell has no adequate remedy, as any final decision from the Commission will be inconsistent with this Court’s directives.

II. The Commission not only Ignored the Court of Appeals but also Ordered an Unexplained “Do Over” of the Litigation, thus Depriving Russell of an Adequate Remedy.

In its September 14, 2017 order the Commission vacated and remanded the claim for a hearing de novo of all issues including a change of condition and payment of benefits. The order states:

IT IS THEREFORE ORDERED that the Single Commissioner’s march 20, 2017 Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing. The remand hearing shall be a de novo hearing as to the issues of whether the claimant has sustained a compensable change of condition and whether she is entitled to any benefits as a result thereof.

And,

IT IS FURTHER ORDERED that at the 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 42-17-90. 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.

The Commission, in effect, is ordering a hearing de novo on the issue of change of condition, and, if, and only if, there is a change of condition, a hearing de novo to determine if claimant should be paid benefits. The order emphasizes, each de novo hearing shall be full evidentiary hearings. The order gives no legal explanation or basis in support of de novo proceeding requiring new evidence. Therefore the Commission effectively gives Wal-Mart a “unexplained do over” of the entire litigation of the claim.

This is grossly similar to what the Commission did in *Hilton v. Flakeboard*, 418 S.C. at 251, 791 S.E.2d at 722. In *Hilton*, the Commission gave no reason to support its command that additional medical evidence was needed. (Id.) The *Hilton* court therefore found the order was immediately appealable and permitted the alleged “interlocutory” appeal to proceed.

The issue of change of condition for the worse, essentially compensability, is the threshold issue discussed by the Court of Appeals in its *Russel* opinion. The Court specifically instructed the Commission to issue an order consistent with its own findings. No instruction can be found in the Court’s order, ordering new evidentiary proceedings. It is not an issue which needs be re-litigated. Additional appeals are certain and the parties will undoubtedly be before this Court again. Therefore, the Court should deny respondents motion and allow the appeal to continue meritoriously.

III. The Appellate Panel of the South Carolina Workers' Compensation Commission Acted upon Issues not Properly Preserved for Appeal, Which Leaves Russell Without an Adequate Remedy.

The Appellate Panel of the South Carolina Workers' Compensation Commission acted upon issues not properly preserved for appeal. Only issues raised to the Commission within the application for review of the Single Commissioner's order are preserved for review. *Id.* (Citing *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) (holding that all findings of fact and law by the Hearing Commissioner became and are the law of the case, unless within the scope of the appellant's exception to the Full Commission); *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) (holding that the findings of fact and law by the Single Commissioner become and are the law of the case unless excepted to by appellant) abrogated in part on other grounds by *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013); *Green v. City of Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685 (Ct. App. 1993) (holding the findings of fact and law by the Single Commissioner become the law of the case, unless within the scope of the appellant's exception to the single commissioner's order) abrogated in part on other grounds by *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). The Supreme Court has also held that general exceptions, such as "the commission erred in making an award," are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review. See *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944). Moreover, the Supreme Court has held issues raised on appeal must not simply be included in a form 30, but must also must be briefed with more than just conclusory statements. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and the argument in a brief is conclusory, the issue is deemed abandoned); *First Sav. Bank*

v. *McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (appellant was deemed to have abandoned the issue where he failed to provide any argument or supporting authority).

In *Hilton v. Flakeboard*, the Supreme Court explained that the Commission's raising of issues not appealed by either party was an error sufficient to justify a direct appeal of an interlocutory order to the appellate courts. 418 S.C. at 251-52, 791 S.E.2d at 722-23. The court reasoned that when the Commission ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, the claimant effectively would not receive an adequate remedy if he waited for a final order from the Commission. Indeed, the case at bar has uncanny similarities with *Hilton v. Flakeboard* in that the Commission considered and reacted to issues not properly before it. While the Commission did not act *sua sponte* like in *Hilton v. Flakeboard*, the impact on Russell is the same. Reopening issues such as Claimant's need for medical treatment, medical benefits, and temporary benefits, despite the fact these have been properly adjudicated and not appealed or not properly appealed, is error sufficient to justify a direct appeal.

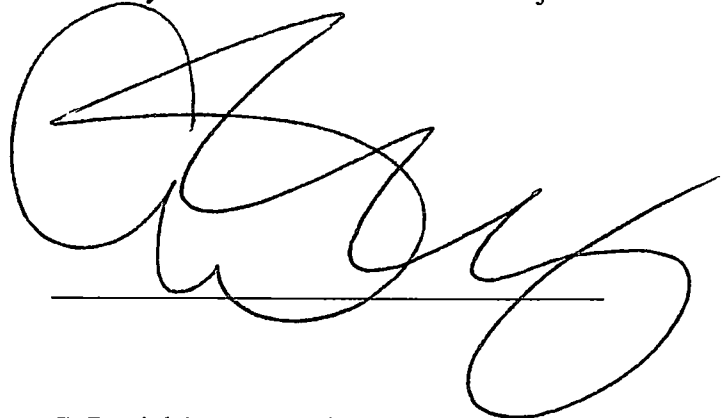
Russell's need for medical treatment, for example, was not appealed in Wal-Mart's 2013 appeal to the Commission. Wal-Mart did not list Commissioner Roche's Finding of Fact number eleven, "I find [Russell] is in need of additional medical treatment," on its Form 30 request for commission review and did not brief that issue. Nevertheless, the Commission found Commissioner Campbell erred in not conducting a full evidentiary hearing on the issue of medical treatment and stated that Wal-Mart's "due process" rights were violated, for Wal-Mart did not have "the opportunity to challenge [Russell's] entitlement to [medical treatment]." However, Wal-Mart had the opportunity to challenge her need for medical treatment, but choose not to appeal that issue in its 2013 request for commission review.

Nevertheless, the Commission repeatedly asserts that there is a need for additional fact finding regarding benefits. This, however, is erroneous, for those issues have already been decided. When Wal-Mart choose not to appeal and/or brief its objections to Commissioner Roche's findings of Russell's entitlement to and need for benefits, it consented to those findings becoming the law of the case. Then, when the 2013 appellate panel of the Commission concluded Russell did not suffer a change of condition, it did not, and could not, address Russell's need for benefits. Functionally, Russell was then no longer entitled to benefits, for the law of the case, at that time, was that she had not met the threshold step of proving a change of condition. However, after the remand from this Court and after Commissioner Campbell's finding based on a review of the record that Russell had suffered a change of condition, the unappealed findings of Commissioner Roche again became relevant and controlled the case. Commissioner Campbell had no choice but to issue findings consistent with Commissioner Roche's unappealed findings. Wal-Mart repeatedly acknowledges this fact and stated in its memorandum in support of its pending motion that "any award of benefits was outside the scope of remand from the Court of Appeals."

Therefore, the prejudicial impact of the Commission's order is nearly identical to that of Hilton's in *Hilton v. Flakeboard*. Requiring Russell wait until a final decision to appeal would not provide her with an adequate remedy. The Commission has ordered that the parties begin anew and completely relitigate the issue previously litigated in 2013 of whether or not Russell is entitled to benefits. This would be patently unfair to Russell, for any inconsistent findings would require this Court's intervention, years down the road. She has already waited many years for the surgery for which her authorized treating physicians assert she has a medical need.

CONCLUSION

Therefore, Russell, by and through her undersigned attorney, respectfully requests that the Court deny Wal-Mart's motion to dismiss her appeal. Russell further requests an award of costs and attorney's fees associated with this motion and any other relief this Court deems just and proper.

A handwritten signature in black ink, appearing to read 'C. Vega', written over a horizontal line.

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Appellant**

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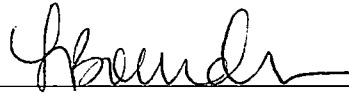
Illinois National Insurance Company,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Memorandum in Support of its Return to Respondents Motion by depositing a copy of it in the United States Mail, postage prepaid, on November 2, 2017, addressed to attorney of record Johnnie W. Baxley, III, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464.

November 8, 2017



Liliana Bourdon
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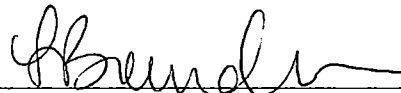
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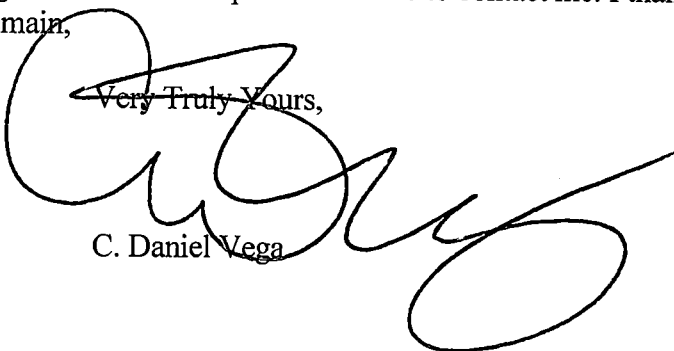
RE: Paula Russell, Claimant, Appellant vs. Wal-Mart Stores, Inc., Employer and Illinois
National Insurance Company, Carrier, Respondent
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

Pursuant to your letter of November 3, 2017, in which you request we cure the deficient
proof of service, please find enclosed the following:

1. Appellant's Return to Motion
2. Proof of Service for Appellant's Return to Motion
3. Appellant's Memorandum in Support of its Return to Respondent's Motion
4. Proof of Service for Appellant's Memorandum in Support of its Return to Respondent's Motion.

We hope you find these to be in compliance with proper format. Should you have further
questions or concerns regarding these documents please feel free to contact me. I thank you for your
assistance in this matter, and remain,

~~Very Truly Yours,~~

C. Daniel Vega

CDV/ks

Enclosures

cc: Johnnie W. Baxley, III, Esquire