

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
DEC 21 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
PETITION FOR REHEARING**

Appellant ("Russell") respectfully submits this petition for rehearing pursuant to Rules 221 and 240 SCACR, alleging the Court overlooked or misapprehended certain portions of her argument in opposition to Respondents' ("Wal-Mart") motion to dismiss. Specifically, Russell first posits the Court overlooked the exception in section 1-23-380, which provides for circumstances in which a final decision is not needed for immediate review. Second, Russell alleges the Court misapprehended the fact or degree to which the Commission's disregard for this Court's prior decision will leave her functionally incapable of subsequently attaining an adequate remedy. Lastly, Russell believes the Court misapprehended or overlooked the similarities in this

case and *Hilton v. Flakeboard America Ltd.*, which held the Commission’s consideration of issues that were not properly appealed and its ordering of unexplained “do overs” deprived the appellant of an adequate remedy. 418 S.C. 245, 250–51, 791 S.E.2d 719, 722 (2016).

I. The Court Ostensibly Overlooked the Exception to the “Final Decision” Rule.

As indicated by the Order granting Wal-Mart’s motion to dismiss, the Court overlooked the exception to the “final decision” rule. S.C. Code Ann. § 1-23-380. While section 1-23-380 limits immediate appellate review to cases in which there is a final decision, it also provides 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.” *Id.* In its order dismissing this appeal, however, the court has only addressed the exhaustion of administrative remedies and final decision portions of section 1-23-380. Russell does not dispute that the order she seeks to appeal is not a final decision; she instead seeks to invoke the exception provided in section 1-23-380. Therefore, Russell respectfully requests this Court revisit its order and apply the section 1-23-380 exception to the facts of this case.

II. The Court Misapprehended how the Commission’s Disregard of this Court’s Decision Creates a Perpetual Cycle of Orders and Appeals, Thus Denying Russell an Adequate Remedy.

The Court misapprehended how the Commission’s willingness to ignore this Court’s decision will preclude Russell from being able to receive an adequate remedy upon review of a final decision. To recapitulate, this Court found in 2016 that the Commission committed legal error in requiring Russell prove her change of condition with purely objective evidence, it stated the appropriate standard was a preponderance of the evidence, and it remanded to the Commission to determine if Russell suffered a change of condition by applying the appropriate standard. *Russell v. Wal-Mart Stores Inc.*, 415 S.C. 395, 400-01, 782 S.E.2d 753, 756 (2016). 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. . . .”

From this point forward, any order of a single commissioner must comply with the 2017 order of the Commission and the 2016 decision of this Court. 18B Charles Alan Wright, et. al., Federal Practice and Procedure § 4478 (2nd ed. 2017) (“Principles of authority . . . do inhere in the ‘mandate rule’ that binds a lower court on remand to the law of the case established on appeal. The very structure of a hierarchical court system demands as much.”). The single commissioner, however, cannot do so; her orders will either be inconsistent with the law of the case as it was established by this Court or they will be inconsistent with the law of the case as it was established by the Commission. These inconsistent orders will then be appealed to the full commission, which will remand back to the single commissioner because of the inconsistencies. The perpetual nature of this cycle is akin to that in *Hilton v. Flakeboard America Ltd.*, where the Supreme Court explained that the possibility of repeated “do overs” before reaching a final decision deprives a claimant of an adequate remedy upon review. 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016). Without immediate review, Ms. Russell will wait many more years for surgery and compensation and will see an unknowing number of orders and appeals before a final decision will, if ever, be reached. Therefore, Ms. Russell will be deprived of an adequate remedy if she is not granted immediate review.

III. *The Court Misapprehended or Overlooked the Applicability of the Holdings from Hilton v. Flakeboard America Ltd. to the Facts of this Case.*

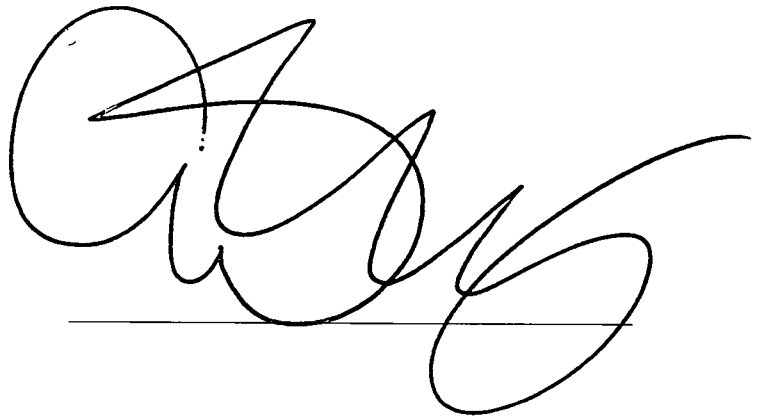
The Court overlooked or misapprehended the applicability of the holdings from *Hilton v. Flakeboard America Ltd.* to the facts of this case. 418 S.C. 245, 791 S.E.2d 719 (2016). In *Hilton*, the Supreme Court held review of a final agency decision does not provide an adequate remedy

when the Commission has ordered the relitigation of the case without regard to whether the matters it is considering are properly before it and when the Commission vacates an entire order without cause. *Id.* at 250–52, 791 S.E.2d at 722–23. The court reasoned that a Commission that is willing to hear and decide issues that are not properly before it is poised to order “repeated unexplained ‘do overs’” before reaching a final agency decision. *Id.* Importantly, the court did not allege that a final agency decision would never be reached or that Hilton would find himself in a worse situation upon a later appeal than he was in at the time of the present appeal. Instead, the court found review of the final decision would not provide an adequate remedy when the Commission has considered abandoned issues and ordered the relitigation of the entire claim, for the Commission was setting up the “*possibility* of repeated unexplained ‘do overs.’” *Id.* (emphasis added).

Likewise, in the current case, the Commission considered several issues, which were, as in *Hilton*, barred for consideration by the law of the case doctrine. *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). For example, the Commission found Commissioner Campbell erred in not conducting a full evidentiary hearing on the issue of Russell’s entitlement to medical treatment because not doing so infringed on Wal-Mart’s “due process” rights. However, Wal-Mart had previously been heard on the issue of medical benefits and choose not to appeal those findings. Therefore, the Commission should not have considered that issue, for it was not properly before the Commission. Further, instead of simply remanding for a hearing on Russell’s entitlement to benefits, leaving open the possibility the Single Commissioner would find Ms. Russell was entitled

to benefits, it vacated the single commissioner's order. Thus, the Commission ordered both parties begin anew, regardless of the ultimate decision on benefits. The Commission's willingness to order the relitigation of issues not properly raised for its consideration shows that Ms. Russell, like Hilton, could "face the possibility of repeated unexplained 'do overs.'" *Id.* The facts of this case—where the Commission has in effect ordered a new trial without regard to the law of the case and without any explanation why such an extreme remedy is appropriate—confirms that requiring Ms. Russell to wait to appeal until the final agency decision would not provide her an adequate remedy.

WHEREFORE Russell asserts the Court overlooked or misapprehended several vital aspects of her argument, particularly those concerning the exception to the final decision rule and the applicability of *Hilton*, she respectfully requests this Court reconsider its order granting Wal-Mart's motion to dismiss.

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

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**Attorney for Paula Russell,
Appellant**

December 21, 2017

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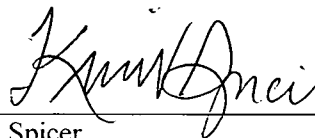
Illinois National Insurance Company,

Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on December 21, 2017, addressed to attorney of record Johnnie W. Baxley, III, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, South Carolina 29464.

December 21, 2017



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December 21, 2017

VIA HAND DELIVERY

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

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SC Court of Appeals

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

Dear Ms. Kitchings:

Enclosed please find the following documents (and original and six copies) for filing regarding the above referenced matter:

1. Appellant's Petition for Rehearing
2. Filing fee of \$25.00
3. Proof of Service

Thank you for your assistance in this matter.

Very Truly Yours,

C. Daniel Vega

CDV/ks
Enclosures
cc: Johnnie W. Baxley, III, Esquire