

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.,

&

American Home Insurance,

Respondents.

RETURN TO PETITION FOR REHEARING

Wal-Mart Stores, Inc., and American Home Insurance ("Respondents"), by and through their undersigned attorney, respectfully submit this Return to Appellant's Petition for Rehearing. Respondents assert that the Court of Appeals properly granted the Respondents' Motion to Dismiss by order dated December 8, 2017. Respondents respectfully request that Appellant's Petition for Rehearing be denied.

I. The Court properly granted Respondents' Motion to Dismiss per S. C. Codee Ann. § 1-23-380.

Appellant argues that the Court overlooked the exception to the "final decision" rule, specifically that the reversal and remand by the Full Commission should be immediately reviewable because review of the final agency decision would not provide an adequate remedy. There is simply no basis for this assertion. In this case, the Full Commission vacated and remanded the Single Commissioner's March 20, 2017 Order. The Full Commission stated that 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. Further, the Full Commission stated that at the remand hearing, the hearing 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 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. There has been no showing by Appellant that review of a final agency decision coming from said remand hearing would not provide an adequate remedy. Once the remand hearing is conducted and a final agency decision is issued on both the issue of compensability of the change of condition and Appellant's entitlement to benefits under the South Carolina Workers' Compensation Act, meaningful review can be conducted by the appellate courts.

II. Appellant has mischaracterized the Commission's remand as inconsistent with this Court's previous decision.

Appellant's basic argument is that this matter was remanded to the Commission to determine if Russell sustained a change of condition by applying the appropriate standard as set forth by the Court in *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E.2d 753 (2016). Appellant argues that these instructions are inconsistent with the remand from the Commission, and thus Appellant cannot get an adequate remedy. In order to make that argument, Appellant mischaracterizes the nature of the remand from the Commission.

The remand from the Commission states as follows:

Based upon the foregoing Findings of Fact and Conclusions of Law,
IT IS, THEREFORE, ORDERED that the Single Commissioner's March 20, 2017 Order is hereby VACATED and REMANDED. 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.
IT IS FURTHER ORDERED that at the remand hearing, the 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 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.
AND IT IS SO ORDERED!

There is no inconsistency between the remand from the Commission and the remand instructions from this Court. 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). As can be seen from the exact language from the Commission above, there is no inconsistency between their remand and the remand of this Court. The Commission has remanded this matter to a hearing Commissioner specifically to review the evidence submitted at the original evidentiary 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 as interpreted by this Court in its previous decision. There is no inconsistency between the remand by the Commission and the remand by this Court.

The Commission has also directed that at the remand hearing, both parties shall be allowed to submit testimony, medical records, and additional evidence for consideration as to the award of benefits if the change of condition claim is found to be compensable. This affords due process to both parties regarding an award of benefits and any final award, or denial of such award, will be subject to meaningful review by the appellate court.

The remand orders by the Commission and this Court are not inconsistent and will not result in perpetual appeals. The assertion by Appellant that these remands are inconsistent is a factually incorrect and specious assertion made for the purpose of manufacturing evidence of an inadequate appellate remedy.

III. The Court of Appeals did not misapprehend or overlook *Hilton*.

Appellant asks this Court to blindly rely upon the holding of *Hilton v. Flakeboard America Ltd.*, 418 S.C. 245, 791 S.E.2d 719 (2016) without considering the underlying facts and whether or not the holding is applicable to factual scenario this claim. As fully argued in Respondents' Memorandum in Support of Motion to Dismiss, the *Hilton* narrow exception does not apply to this case. In fact, the decisions 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) are much more applicable to the facts on this claim.

In *Hilton*, the Full Commission decided an issue sua sponte. 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. 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 current case, the Commission did not raise any issues sua sponte. 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. Those are the exact issues that have been appealed and have been in controversy during the entirety of this claim.

In attempting to argue that the Commission considered issues which were not properly raised, Appellant argues that Respondents “had previously been heard on the issue of medical benefits and chose not to appeal those findings.” That argument is factually incorrect. The only evidentiary hearing in this case was conducted by Commissioner Andrea Roche on February 11, 2013. 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 benefits. Respondents appealed the order to the Full Commission. In the Form 30 appeal that was filed on August 9, 2013, Respondents specifically appealed the findings that Claimant sustained a compensable change of condition for the worse and the award of benefits, specifically including Finding #12 (The defendant shall provide medical care and attention pursuant to Claimant’s change of condition) and Finding #16 (The defendant shall provide temporary total disability benefits from December 1, 2011 through the present date and

continuing). Respondents specifically appealed the award of medical treatment and the award of temporary benefits based upon the finding of a compensable change of condition. On January 30, 2014, The Full Commission found that the Appellant failed to prove that she sustained a compensable change of condition for the worse and found that Appellant was not entitled to any benefits under the Act. The Respondents clearly appealed the award of medical care and temporary compensation, as well as the finding of a compensable change of condition, after the first evidentiary hearing in 2013.

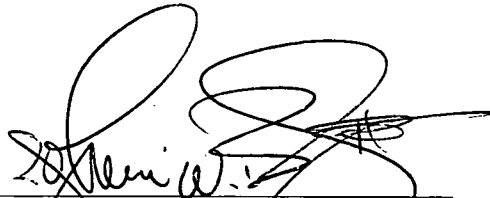
Likewise, after Commissioner Campbell issued an order on March 20, 2017, without an evidentiary hearing, Respondents again appealed and asserted that the award of medical treatment and temporary compensation was an error and asserted that they had been denied their due process rights by reinstatement of a previously reversed award as opposed to having a new evidentiary hearing. Again, the award of medical care and temporary compensation were specifically appealed.

Therefore, the factual assertion by Appellant on page 4 of her Petition that Respondents “chose not to appeal those findings” regarding an award of medical benefits, and that the Commission should not have considered that issue, is factually incorrect and a misstatement of the procedural history of this claim. The Appellant states on page 5 of her Petition that the “Commission’s willingness to order the relitigation of issues not properly raised for its consideration” shows that Appellant cannot get an adequate remedy. Again, that statement is factually incorrect and the argument is disingenuous. The award of medical benefits has been properly raised as an issue on appeal at every opportunity.

The Commission did not raise any issues sua sponte, but instead ruled upon issues that were properly presented for appeal. As such, the very narrow exception in *Hilton* does not apply.

WHEREFORE, Respondents respectfully request that the Court dismiss the Appellant's
Petition for Rehearing.

December 27, 2017



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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 27th day of December, 2017, I mailed the foregoing **RESPONDENTS' RETURN TO PETITION FOR REHEARING** 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
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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, SC 29211

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' Return to Petition for Rehearing (original and six copies); and
2. Respondents' Certificate of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.


Johnnie W. Baxley, III

JWB/hsh

Enclosures

cc: Daniel C. Vega, Esq.
Jared Drown (via e-mail)

adh

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SC Court of Appeals

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