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

WCC File No. 0917785

Paula Russell,	Claimant, Appellant,
v.	
Wal-Mart Stores, Inc.,	Employer,
&	
Illinois National Insurance Company,	Carrier, Respondents.

APPELLANT'S REPLY TO RESPONDENTS' RETURN TO PEITION FOR REHEARING (MOTION TO REINSTATE)

Appellant, ("Russell") respectfully submits this reply to Respondents' ("Wal-Mart") return to Ms. Russell's Motion to Reinstate. Ms. Russell asserts the exception to the final judgment rule provided in S.C. Code Ann. § 1-23-380 applies to the facts of this case, for without immediate appellate review, she will be denied an adequate remedy. Therefore, she respectfully requests this Court reconsider its Order dismissing this appeal and requests that her appeal be reinstated in light of the exception provided at section 1-23-380.

I. The Order of the Appellate Panel is Inconsistent with the 2016 Decision of this Court.

The Order of the Appellate Panel is inconsistent with the 2016 Decision of this Court, which, as explained in her motion to reinstate, will lead to a perpetual cycle of appeals that will deprive Ms. Russell of an adequate remedy. This Court reversed and remanded on a *legal error* and remanded to the Commission to apply the appropriate standard to the facts of this case. *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 400–01, 782 S.E.2d 753, 756 (2016). However, the Commission, on appeal of the Order from the Single Commissioner who applied the standard espoused by this Court, ordered two things in the "Order" section of its decision and order: "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 "the Commissioner shall review the evidence submitted at the hearing on February 11, 2013, and issue findings of fact and conclusions of law . . . ." Therefore the Order of the Commission, as quoted by Wal-Mart, is itself inconsistent, as well as inconsistent with the Decision of the Court.

A hearing de novo, as used in this context is defined as "A new hearing of a matter, conducted as if the original hearing had not taken place."[1] *Hearing De Novo*, Black's Law Dictionary (10th ed. 2014). The order of the Commission is patently contradictory and inconsistent with the Decision of this Court. The Commission cannot both conduct a hearing as if the first never occurred and also apply the appropriate remand standard as stated by this Court. This argument is clear and accurate and is supported by explicit evidence. Any subsequent Order on remand from the Commission cannot be consistent with the Order of the Commission and the Decision of this Court. Thus, repeated and unending appeals will proceed, which will deny Ms. Russell an adequate remedy.

[1] The other definition of a "hearing de novo" provided by Black's Law Dictionary applies to an appellate review and is inapplicable as used by the Commission. *Hearing De Novo*, Black's Law Dictionary (10th ed. 2014).

II. *Hilton v. Flakebaord America Ltd. is Directly Applicable to this Case.*

First, *Hilton v. Flakeboard America Ltd.*, 418 S.C 245, 791 S.E.2d 719 (2016) is directly applicable to the facts of this case. Conversely, *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013) is not at all applicable to the this case due to the differences in procedural postures and the different arguments advanced by the parties. *Bone* concerned further appellate review of an agency decision after an initial judicial review, which is governed by S.C. Code Ann. § 1-23-390, while the case at bar concerns initial judicial review of an agency decision, which is governed by section 1-23-380. *Bone*, at 74, 791 S.E.2d at 556 ("Section 1-23-390 of the APA, governing *further* appellate review . . . ." "At issue here is the meaning of a "final judgment" under section 1-23-390."); *Hilton*, at 249, n. 1, 791 S.E.2d at 721, n. 1 ("These two statutes . . . govern appealability in two different situations. Section 1-23-390 . . . govern[s] this Court's review of a final decision by an intermediate judicial tribunal, while § 1-23-380 defines the circumstances under which a judicial body may review an agency decision."). Moreover, *Bone* concerned the definition of a final judgement, but Ms. Russell does not claim to have a final judgement or a final agency decision.[2] Ms. Russell argues the exception to the final decision rule provided at section 1-23-380 should apply, for review of the final agency decision would not provide her an adequate remedy.

Furthermore, the pertinent facts of this case are nearly parallel to those in *Hilton*. In *Hilton,* the Commission considered issues improperly before it and reversed an entire order despite only identifying certain, specific errors with the Single Commissioner's Order. The *Hilton* Commission raised issues *sua sponte*, and the Commission here considered issues barred from further appellate review by the doctrine of issue preclusion. The distinction between considering an unappealed

[2] As explained, *supra*, section 1-23-390 does not apply to the procedural posture of this case. Therefore, Ms. Russell would not argue she has received a final judgment but would instead argue there was a final agency decision. However, that is not her argument, so the reasons why *Bone* does not apply are twofold.

issue *sua sponte* and considering one on petition by an appellant is of no weight; the prejudice suffered by the appellee is the same. Essentially, the Commission has given Wal-Mart a "do over" of this litigation just as it did in *Hilton*.

Despite Wal-Mart's repeated and ardent arguments to the contrary, it did in fact abandon its appeal of Ms. Russell's entitlement to medical treatment and temporary benefits by failing to brief those issues in its 2013 brief to the Commission. *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). Contrary to Wal-Mart's arguments, noting an exception in a form 30 is not sufficient to preserve the issue for appeal nor is arguing an issue in oral arguments; the issue must be briefed or the issue is abandoned. *South Carolina Dep't of Social Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2011) (*Citing In the Interest of Bruce O.*, 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993)); *Bochette v. Bochette*, 300 S.C. 109. 386 S.E.2d 475 (Ct. App. 1989) (all issues must be presented and argued in the brief); *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (an issue is deemed abandoned on appeal and, therefore, not presented for review if it is argued in a short conclusory statement without supporting authority). Therefore, the Commission considered and reversed on issues not properly before it; the distinction between improper issues raised *sua sponte* and those raised by an appellant is of no consequence, for the prejudice is the same.

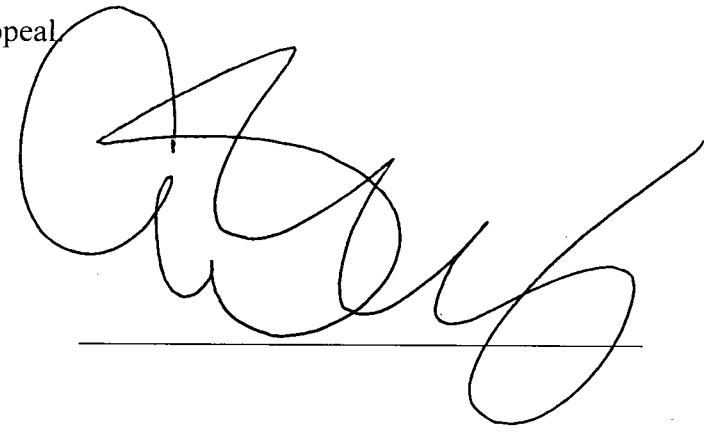
Furthermore, the Commission here, like the Commission in *Hilton*, reversed the entire Order of the Single Commissioner despite failing to articulate or address any reason for reversing. The Order of the Commission states,

> "[Wal-Mart] also asserted that the preponderance of the evidence . . . do [sic] not support the finding of the Single Commissioner that [Russell] sustained a physical worsening of condition after the original award. However, based upon our decision that the Single Commissioner erred in not conducting a full evidentiary hearing on any award of benefits and our subsequent decision to vacate the order of Commissioner Campbell and remand the case, *there is no need for us to address this issue*.

The Commission, therefore, by its own account, did not address whether Commissioner Campbell erred when he applied the facts of this case to the legal standard espoused by this Court. This is exactly the same as what the Commission did in *Hilton* when it raised the issue of competency, but "instead of simply remanding for a competency determination leaving open the possibility the single commissioner would find Hilton competent, it vacated the single commissioner's order; thus ordering the parties begin anew." *Hilton* at 251, 791 S.E.2d at 722. This is an extreme remedy, which, like in *Hilton*, was "ordered without any explanation of the Commission." *Id.* The Commission's remanding the entire case because of what it identified, albeit erroneously, as an error in the award of benefits, is akin to reversing the findings on all elements in a civil negligence case because of an error in damages calculations. This is grossly similar to what happened in *Hilton* and leads to circular appeals that will, thus, deprive Ms. Russell of an adequate remedy.

Therefore, Ms. Russell respectfully requests this Court reinstate her appeal in this matter, for the exception to the "final decision" rule provided at 1-23-380 applies. As explained above the Commission's Order is inconsistent with the Decision of this Court and the facts of this case are extremely similar to those in *Hilton* in which the South Carolina Supreme Court held

immediate appellate review was proper, which indicate Ms. Russell will be deprived of an adequate remedy if she cannot immediately appeal.



C. Danial Vega, Esquire, Bar. No. 71639
Chappell Smith & Arden, P.A.
2801 Devine Street, Suite 300
Columbia, South Carolina 29205
PH: (803) 929-3600
dvega@csa-law.com
Attorney for Paula Russell, Appellant

December 21, 2017

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

WCC File No. 0917785

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Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

PROOF OF SERVICE

I certify that I have served Appellant's Reply to Respondent's Return to Petition for Rehearing (Motion to Reinstate) by depositing a copy of it in the United States Mail, postage prepaid, on January 4, 2018, addressed to attorney of record Johnnie W. Baxley, III, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, South Carolina 29464.

January 4, 2018

Kim Spicer
Chappell, Smith & Arden
PO Box 12330, Columbia, SC, 29211
803-929-3600

Part of the CSA-LAW NETWORK

CHAPPELL, SMITH & ARDEN
ATTORNEYS AT LAW

Licensed to practice
in South Carolina,
North Carolina,
Georgia and the
District of Columbia

PO Box 12330
Columbia, SC 29211
803.929.3600
Fax 803.929.3604
800.531.9780
www.CSA-LAW.com

January 4, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appels
1015 Sumter Street
P.O. Box 11629
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
Appellate Case No.: 2017-002122

Dear Ms. Kitchings:

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

1. Appellant's Reply to Respondent's Return to Petition for Rehearing (Motion to Reinstate)
2. Proof of Service

Thank you for your assistance in this matter.

Very Truly Yours,

C. Daniel Vega

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