

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. SUPREME COURT

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

WCC File No. 0917785
Appellate Case No. 2018-000354

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc.,

&

American Home Insurance,

Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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

Petitioner's request for rehearing dated February 1, 2018, was proper. Respondents, therefore, respectfully request that Appellant's Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

Petitioner suffered a compensable injury by accident and was awarded 7% permanent partial disability in an Order from Commissioner Wilkerson dated June 8, 2011. (App. p. 9). After receiving her award, Petitioner alleged that in 2012 she developed new symptoms and argued that she suffered a change of condition for the worse. (App. p. 12). Believing in good faith that the totality of the evidence did not support such a finding, Respondents denied that the Petitioner suffered a change of condition for the worse. (Id). The parties appeared for a hearing in front of Commissioner Roche for adjudication of this issue, and in an Order dated August 5, 2013, Commissioner Roche found that Petitioner suffered a change of condition for the worse under S.C. Code Ann. § 42-17-90. (App. p. 16). Respondents filed an appeal to the appellate panel of the South Carolina Workers' Compensation Commission ("the Commission") arguing that Petitioner failed to establish, by a preponderance of the evidence, she suffered a change of condition. (App. p. 18).

Because compensability of Petitioner's change of condition was the umbrella under which the remaining issues fell—namely the Petitioner's entitlement to an award of temporary total disability, additional medical treatment, and an additional award of permanent partial disability—Respondents argued that compensability was the threshold issue for adjudication, it being unnecessary and a hindrance to judicial economy to adjudicate the other issues before a finding of compensability. (App p. 21 – 24). The Commission agreed with Respondents, and in an Order dated January 30, 2014, the Commission unanimously reversed the Order of

Commissioner Roche and found that the Petitioner failed to meet her burden of proof. (App. p. 37 – 41).

Petitioner appealed the decision to the South Carolina Court of Appeals. (App. p. 42 – 43). On January 20, 2016, the Court of Appeals found the Commission erred as a matter of law by relying exclusively on objective medical evidence in deciding whether Petitioner suffered a change of condition. (App. p. 112). Specifically, the court posited that the correct standard is by a preponderance of the evidence, which includes subjective evidence. (Id). The Court of Appeals, finding it unnecessary to reach the underlying merits, stated, “[b]ecause we find the Commissioner erred in requiring a change of condition be established by objective evidence and reverse and remand on that issue, the court need not consider Stewart’s remaining issues.” (Id).

On remand, Commissioner Campbell, without holding a new evidentiary hearing allowing both parties to cross-examine witnesses and present evidence, both objective and subjective, simply reinstated Commissioner Roche’s January 30, 2014 Order and found that Claimant suffered a change of condition for the worse. (App. p. 132 – 144). In Commissioner Campbell’s Order dated March 20, 2017, more than three years after the initial presentation of evidence, Commissioner Campbell ordered Respondents to commence payment of temporary total disability benefits and provide medical care. (App. p. 144 – 45). Respondents appealed the Order of Commissioner Campbell, providing detailed Grounds for Review. (App. p. 146 – 151).

On appeal, and in an Order dated September 7, 2017, the Commission found that Commissioner Campbell erred by simply reinstating the 2013 award of benefits without conducting a full evidentiary hearing allowing the parties to present updated evidence on the issues of benefits and erred by simply restating the old findings as to compensability of the change of condition claim. (App. p. 210 – 213). The Commission further found that

Commissioner Campbell issued an award of benefits without any factual or evidentiary basis for such award, which denied the Respondents the opportunity to challenge the Petitioner's entitlement to any benefits, which now needs to be adjudicated using the correct standard as set forth by the Court of Appeals. (App. p. 211). The Commission vacated and remanded Commissioner Campbell's March 20, 2017, Order and ordered that the remand hearing should be *de novo*. (App. p. 213). Specifically, the Commission remanded this matter to a hearing Commissioner to review the evidence submitted at the hearing on February 11, 2013 and issue findings of fact and conclusions of law as to whether the claimant has sustained a compensable change of condition for the worse under the standard as set forth in the remand decision from the Court of Appeals. The Commission also remanded this matter for a full evidentiary hearing on the limited issue of benefits to which the claimant may be entitled if the change of condition claim is compensable.

Before the remand hearing could be held and before a final decision was rendered, Petitioner filed a Notice of Appeal with the South Carolina Court of Appeals. (App. p. 216 – 17). Respondents filed a Motion to Dismiss, citing applicable statutory and case law, based on the fact that the appeal was interlocutory and not immediately reviewable. (App. p. 219 – 220). Petitioner conceded that the Order was not final, but instead argued that certain issues were not preserved on appeal and that an exception applies, specifically that a final agency decision would not provide an adequate remedy. (App. p. 238). The South Carolina Court of Appeals, agreeing with Respondents, issued an Order dated December 8, 2017, granting Respondents Motion to Dismiss. Petitioner then filed a Petition for Rehearing, which was subsequently denied in an Order from the Court of Appeals dated February 1, 2018. (App. p. 275). This petition followed.

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

Petitioner's appeal is not immediately appealable under S.C. Code. Ann § 1-23-380. Petitioner is correct in noting that appeals from administrative agencies are governed by the Administrative Procedures Act ("APA"). Petitioner, however, argues that the Court of Appeals overlooked the narrow 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. Petitioner contends the Court of Appeals "overlooked" or "failed to give adequate consideration" to the above-mentioned exception. Petitioner attempts to expand upon the narrow exception—an exception this Court has used when confronted only with "unusual facts"—in a manner that is unsupported by existing statutory and case law.

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 should be conducted very specifically to accomplish two tasks: first, a consideration of the evidence submitted at the hearing on February 11, 2013, and issuance of 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; second, a full evidentiary hearing which allows both parties to submit testimony, medical records, and other additional evidence for consideration as to the narrow issue of any award of benefits under the Act if the change of condition claim is found to be compensable. Contrary to Petitioner's argument, a hearing which includes the consideration of evidence, both objective and subjective, is in strict compliance with the Order from the Court of Appeals. Petitioner has not shown, apart from conclusory assertions and far-reaching arguments premised on case law bent to Petitioner's perception of the facts, 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 and Petitioner's entitlement to benefits under the South Carolina Workers' Compensation Act, meaningful review can be conducted by the appellate courts.

II. Petitioner has mischaracterized the Commission's remand as inconsistent with the Court of Appeals' previous decision.

Petitioner'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 (Ct. App. 2016). Petitioner argues that these instructions are inconsistent with the remand from the Commission, and thus Petitioner cannot get an adequate remedy. In order to make that argument, Petitioner 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 the Court of Appeals. The Court of Appeals 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 (Ct. App. 2016). As can be seen from the exact language from the Commission above, there is no inconsistency between its remand and the remand of the Court of Appeals. 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 S.C. Code Ann. § 42-17-90 as interpreted by the Court of Appeals. 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. In fact, the Commissioner's Order is squarely in line with the reasoning of the Court of Appeals. To allow an appeal in the current matter would in fact serve to exact an opposite outcome, namely perpetual appeals. The assertion by Petitioner 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*.

Petitioner 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)). Nonetheless, the Court in *Hilton* vacated and remanded the Court of Appeals’ order and remanded the matter to the Commission for consideration of the issues. For Petitioner to use *Hilton* as the foundation of his argument, when the Court in that case likewise vacated and remanded the matter to the Commission, is more harmful than helpful to his position.

In the current case, and in contrast to the facts in *Hilton*, the Commission did not raise any issues sua sponte. The only issues for determination in the case at bar are whether the Petitioner’s change of condition claim is compensable and, if so, to what benefits she is entitled. Those are the exact issues that have been appealed and have been in controversy throughout the duration of this claim. Moreover, in the Commission’s Order vacating and remanding the matter to a single Commissioner, it is expressly ordered that the Single Commissioner “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.” This language is in direct contravention to the issue in *Hilton*, where this Court stated “[u]nder these unique circumstances where the Commission has ordered 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.” (emphasis added). The facts in *Hilton*, therefore, are exceedingly dissimilar to the facts in this case, and Respondents request the Court to render its decision with consideration of the rarity in which appeals of this sort are permitted.

In attempting to argue that the Commission considered issues which were not properly raised, Petitioner 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 Petitioner 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 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 Petitioner failed to prove that she sustained a compensable change of condition for the worse and found that Petitioner 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. Respondents also attached over five pages delineating the Grounds for Review. To recapitulate, the award of medical care and temporary compensation were specifically and unequivocally appealed.

Therefore, the factual assertion by Petitioner on page 8 and 9 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 Petitioner states that the “Commission’s willingness to order the relitigation of issues not properly raised for its consideration shows that [Petitioner] 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. Moreover, 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.

IV. Petitioner fails to address the holding set forth in *Bone v. U.S. Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012).

Petitioner fails to address the decision this Court rendered in *Bone v. U.S. Food Serv.*, 399 S.C. 566, 733 S.E.2d 200 (2012). In that case, the claimant filed a workers' compensation claim alleging injury to her back as a result of lifting two pallets at work. The claimant failed to immediately report her injury, and the employer was not put on notice of the injury until a week later when the claimant advised the employer shortly after arriving at work. The same morning she reported her injury, she also informed the employer that she had a flat tire on the way to work, which necessitated replacement. The employer, ostensibly believing the injury to be the result of changing the tire, denied the claim. At a hearing, the hearing commissioner concluded the claimant failed to meet her burden, which was subsequently affirmed by an Appellate Panel of the Commission.

The claimant appealed the decision to the circuit court, which found that the claimant sustained a compensable injury by accident and reversed and remanded the matter to the Commission for further proceedings. The employer appealed this decision, and the Court of Appeals dismissed the appeal on the basis that it was interlocutory and did not dispose of the entirety of the case. The circuit court held the general appealability statute allowing appeals from interlocutory orders was not applicable in matters before the South Carolina Workers' Compensation Commission and relied heavily upon *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health and Envl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), and *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994).

The South Carolina Supreme Court granted the employer's petition for certiorari. Because of continued confusion in this area after the passage of the Administrative Procedures

Act (“APA”), the Court agreed to review existing precedent “to provide clarification and a unified approach to appeals involving administrative agencies.” *Bone v. U.S. Food Serv.*, 399 S.C. 566, 570, 733 S.E.2d 200, 202 (2012). The Court first reviewed its holding in *Montjoy* and noted, in that case, the Court granted the respondent’s motion to dismiss based on the fact that the appeal was interlocutory. The Court stated, “[i]n doing so, 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 (citing *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994)).

The Court then turned its attention to the APA’s overshadowing of the general appealability statute of Section 14-3-330. The Court held that where a specialized statute regarding appeals is applicable, section 14-3-330 does not govern the right to review. *Bone*, 399 S.C. at 572, 733 S.E.2d at 203 (citing *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 expounded upon the definition of “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. ... 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 by to enforce by execution what has already been determined.” *Id.*

Turning to the facts contained in *Bone*, the Court reiterated the standard above and found that the Employer’s argument—the main thrust of which was that that compensability had already been decided and, thus, it was immediately appealable—still centered on the incorrect, general appealability statute that is superseded when a case is governed by the APA. The Court

held that the order did not dispose of the entire action because a ruling as to compensability, standing alone, was not enforceable as it stood. The Court continued, “Further a circuit court order remanding a matter to an agency is not a final judgment and it is not immediately appealable.” Notably, the Court pointed out that “[t]he ruling in *Montjoy* did not elaborate on the purpose of the remand to the Commission because the holding was not dependent on the nature of the remand.” *Bone*, 399 S.C. at 575, 733 S.E.2d at 205 (emphasis added).

The Court did not stop there. Concerned that an appeal from an interlocutory order would result in additional appeals after a final agency decision, the Court stated a different holding would result in “piecemeal appeals in agency cases that would adversely affect judicial economy and compromise informed appellate review.” *Id* at 576, 733 S.E.2d at 205. The Court proceeded to call attention to the purpose behind the APA, which is “(1) to protect the administrative agency’s authority and (2) to promote efficiency. ...” *Id*. The Court then held that the employer’s appeal was interlocutory and not immediately appealable.

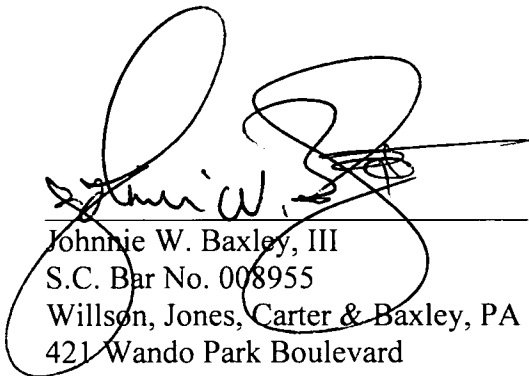
The facts and circumstances that warranted dismissal in *Bone* are inordinately similar to the current case. Here, the Commission issued an Order vacating and remanding the case to the single commissioner for additional agency action. Though potentially unfavorable and frustrating to Petitioner, the current facts do not warrant an interlocutory appeal under the auspices of *Hilton*. Instead, just as the Court voiced in *Bone*, allowing an appeal in the current matter would result in numerous appeals that would stifle judicial economy and unnecessarily prolong a single case, which would open the proverbial flood gates for future cases in which a change of condition is alleged. Additionally, and notwithstanding Petitioner’s argument to the contrary, allowing an appeal in the current matter would serve to delay any potential additional medical treatment to which the Petitioner alleges she is entitled. See also *Good v. Hartford Accident and*

Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (holding that “the rule in restriction of piecemeal appellate procedure, dating back to the common law, is based upon sound reason and practical utility. If it were otherwise, endless delays would be encountered—delays which are unnecessary in cases...which can be decided upon an appeal from final judgment...”). The appeal in the current matter interlocutory. Petitioner continues to assert baseless and conclusory statements that a final agency decision would not provide her with an adequate remedy. Therefore, and in accordance with controlling statutory and case law, Respondents respectfully request this honorable Court affirm the decision of the Court of Appeals.

CONCLUSION

Respondents respectfully request that the Court dismiss Petitioner’s Petition for Writ of Certiorari.

March 29, 2018



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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 Respondents with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina, and that on the 29th day of March, 2018, I mailed the foregoing **RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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