

RECEIVED

APR 09 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

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
Appellate Case No. 2018-000354

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company,

Respondents.

**REPLY TO RETURN TO THE
PETITION FOR A WRIT OF CERTIORARI**

Other Counsel of Record:

Johnnie W. Baxley
Willson Jones Carter & Baxley, P.A.
421 Wando Park Boulevard, Suite 100
Mount Pleasant, South Carolina 29464
PH: (843) 284-1080
Attorney for Respondents

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,
Petitioner/ Appellant**

INDEX

Table of Authorities.....	ii
Arguments.....	1
I. The issue of compensability should be addressed before the issue of benefits, but all issues must be properly appealed and briefed to remain preserved.....	1
II. The parties have previously presented evidence, have cross examined witnesses, and have been heard on the issue of Petitioner’s change of condition for the worse and entitlement to benefits.....	4
III. The Commission’s decision to allow for the alteration of the law of the case with regard to Petitioner’s entitlement to benefits is inconsistent with the Court of Appeals’ decision.....	5
IV. <i>Hilton</i> is directly applicable to these facts.....	6
V. Bone is not applicable to the posture of this case.....	7
Conclusion.....	7

TABLE OF AUTHORITIES

South Carolina Cases

<i>Bone v. U.S. Food Service</i> , 404 S.C. 67, 744 S.E.2d 552 (2013).....	7
<i>Hilton v. Flakeboard Am. Ltd.</i> , 418 S.C. 245, 791 S.E.2d 719 (2016).....	<i>Passim</i>
<i>R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.</i> , 343 S.C. 424, 540 S.E.2d 113 (Ct. App. 2000).....	2, 3
<i>Russell v. Wal-Mart Stores Inc.</i> , 415 S.C. 395, 782 S.E.2d 753 (Ct. App. 2016).....	<i>Passim</i>

South Carolina Statutes and Regulations

	14
S.C. Code Ann. § 1-23-380.....	7
S.C. Code Ann. § 1-23-390.....	7
S.C. Code Ann. § 14-3-330.....	7
S.C. Code Ann. § 42-17-90.....	2
S.C. Code Ann. Regs. 67-701(3)(a)	2, 3

ARGUMENTS

I. The issue of compensability should be addressed before the issue of benefits, but all issues must be properly appealed and briefed to remain preserved.

The issue of compensability should be addressed before the issue of benefits, but all issues must be properly appealed and briefed to remain preserved. Judicial economy is best served, as Respondents (“Wal-Mart”) states on page two of its Return, when the issue of compensability is decided before other issues are decided. However, this was not done in the Workers’ Compensation Commission’s Appellate Panel’s (the Commission) 2017 Decision and Order. (App. p. 212). The Commission, instead, stated,

[Walmart] also asserted that the preponderance of the record, including the medical records, the diagnostic testing, and [sic] the medical testimony, and the testimony of [Russell] do not support the finding of [Commission Campbell] 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.*

(App. p. 212 (emphasis added)). Then, the Commission went on to order in 2017, “at the remand 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 [Petitioner] has had a change of condition for the worse.” (App. p. 213). The Commission’s decision in this case to reverse Commissioner Campbell on the issue of compensability was done so with no explanation. Similarly, this Court noted in *Hilton* that the Commission errs and deprives claimants of an adequate remedy if it vacates an entire order without explanation when the other portions of the order could be allowed to stand pending the Commissioner’s subsequent decision. *Hilton v. Flakeboard Am. Lmt.*, 418 S.C. 245, 251, 791 S.E.2d 719, 721 (2016).

Nevertheless, the fact that judicial economy is best served by addressing the issue of compensability before addressing issues of benefits does not mean the other issues need not be properly appealed if a threshold issue is also objected to. The Commission specifically requires that grounds for appeal be stated in detail and that they be presented in the form of questions presented. S.C. Code Ann. Regs. 67-701(3)(a) (2012). Respondent's September 9, 2013, Form 30 only states "It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. [sic] 42-17-90 as a result of her original November 3, 2009 accident at work, . . ." ¹ (App. p. 18). Wal-Mart made no further reference to Commissioner Roche's findings on the award of benefits.

Correspondingly, Wal-Mart's October 17, 2013, Brief to the Commission lacks any reference of an objection to Commissioner Roche's findings on Compensability. (App. pp. 18–25). Wal-Mart's failure to adequately brief the issues of Petitioner's entitlement to benefits, notwithstanding the fact that compensability needed to be addressed first, is an abandonment of those issues. *R & G Constr. Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). To assert that the issues of compensability and benefits should have been bifurcated on appeal is illogical and contrary to the basic rules of appellate procedure.

Therefore, Walmart's argument that Russell is mischaracterizing the evidence is erroneous. The evidence is simply this: Wal-Mart's only note of an exception to Commissioner Roche's

¹ With the parenthetical information removed from this statement, it reads "It is respectfully submitted that the Hearing Commissioner erred in finding . . . that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. [sic] 42-17-90 as a result of her original November 3, 2009 accident at work, . . ." (App. p. 18). Therefore, Wal-Mart's 2013 Form 30 reads as if it only objects to the listed findings and conclusions to the extent they relate to the finding that "that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. [sic] 42-17-90 as a result of her original November 3, 2009 accident at work, . . ." (App. p. 18).

findings on Ms. Russell's entitlement to benefits is a reference by number. (See App. pp. 18-25). When Wal-Mart quoted the language of Commissioner Roche's findings of fact numbers twelve and sixteen on page nine of its Return, it is not quoting its 2013 Form 30 but rather the Order from Commissioner Roche. The only thing Wal-Mart can quote from its Form 30 or Brief is "12" and "16." (App. p. 18). This does not comply with the regulations promulgated by the Commission or the rules of appellate practice promulgated by this state's appellate courts. See S.C. Code ann. Regs. 67-701(3)(a) (2012); *R & G Constr.*, 343 S.C. at 437, 540 S.E.2d at 120. Wal-Mart notes it attached over five pages delineating the Grounds of Review in 2017. Wal-Mart's preservation of issues in 2017 is not in question here; Russell asserts that Wal-Mart abandoned the issues in 2013. Wal-Mart cannot cure the deficiencies from 2013 by delineating grounds for appeal in 2017.

Ms. Russell has fully and accurately explained the evidence surrounding the 2013 issue preservation dispute, and the evidence shows Wal-Mart abandoned its objections to Commissioner Roche's findings on benefits. Because the issues were abandoned and not properly appealed before the Commission, the Commission's decision to hear on and rule on those issues deprives Petitioner of an adequate remedy. The hearing of issues not preserved for review was prejudicial in *Hilton* and is prejudicial here. See *Hilton v. Flakeboard Am. Lmt.*, 418 S.C. 245, 249-51, 791 S.E.2d 719, 721-22 (2016). The fact the Commission raised the issues *sua sponte* in *Hilton* and on Respondents' request in this case is not sufficient to distinguish the cases. A violation of the rules of issue preservation is prejudicial in both cases. While the notice issue in *Hilton* is possibly stronger than on these facts (*but see, supra* note 1), that is not the pivotal issue; if the *Hilton* Commission had asked the parties to brief the competency issue, the notice deficiencies would have been resolved, but the law of the case violation would remain. That is the operative issue here: Petitioner's entitlement to benefits was the law of the case and could not be altered on appeal.

When the Commission tries to order the relitigation of Russell's entitlement to benefits, it violates the law of the case doctrine, which, like in *Hilton*, deprives Russell of an adequate remedy.

II. The parties have previously presented evidence, have cross examined witnesses, and have been heard on the issue of Petitioner's change of condition for the worse and entitlement to benefits.

Wal-Mart appears to argue on page three of its Return that it was error for Commissioner Campbell to find Russell suffered a change of condition for the worse without allowing the parties to submit new evidence. While the Commission's 2017 Decision and Order on this point is rather confusing with regard to the procedure, rationale, and logic, no argument has been posited previously that the parties should be allowed to submit new subjective evidence on the change of condition issue. Wal-Mart's point that Commissioner Campbell did not allow new evidence on the issue of the change of condition for the worse is completely irrelevant and inconsistent with Wal-Mart's arguments thus far. Moreover, Wal-Mart misquotes the Court of Appeals' 2016 opinion on page three of its Return. The Court of Appeals did not hold the "Commissioner" erred, but rather found that the "Commission" erred.² (App. p. 112) This, procedurally, is logical, as the Court of Appeals was reviewing the order of the Commission, not the order of Commissioner Roche, but the import remains, nonetheless.

In 2013, the parties presented evidence and cross examined witnesses; the parties were heard to the extent they wished to be heard; and they were both afforded their due process rights. (See App. pp. 11-17). The Court of Appeals did not find Commissioner Roche erred, only that the Commission erred. (App. p. 112). The argument that new evidence should have been taken on the issue of benefits is erroneous due to problems with issue preclusions and failure to abide by

² The Court of Appeals did refer to Ms. Russell as "Stewart" on the final page of its opinion, but that is presumably insignificant.

the law of the case doctrine. The parties were given their due process rights in 2013; they do not get a do over just because they did not like the outcome or did not understand the law at that time. This is not bending the facts nor is it a far reaching argument in attempt to show the Ms. Russell has no adequate remedy; the Commission is willing to both reverse on threshold issues it has not considered and to reopen closed issues because it did not like the outcome. This is poised to continue in perpetuity.

III. The Commission's decision to allow for the alteration of the law of the case with regard to Petitioner's entitlement to benefits is inconsistent with the Court of Appeals' Decision

The Court of Appeals in 2016 remanded this matter to the Commission to determine if the subjective and objective evidence showed Petitioner had suffered a change of condition for the worse. (App. p. 112). Commissioner Campbell reviewed the entirety of the evidence and issued an opinion finding Russell had a compensable change of condition for the worse and outlined her entitlement to benefits.³ (App. pp. 132, 141–42). What Commissioner Campbell did was proper. The Commission, however, is commanding the Single Commissioner on remand to reopen and take new evidence. (App. p. 213). This is inconsistent with the Court of Appeals 2016 order, which remanded for a determination of compensability. (App. p. 112).

Wal-Mart asserts that Ms. Russell is claiming the Commission's order compelling the Single Commissioner to review the evidence presented in 2013 and determine if a change of

³ Respondents repeatedly assert that Commissioner Campbell simply reinstated the award of Commissioner Roche. Commissioner Roche's Order (App. pp. 11–17) included 18 findings of fact and 6 findings of law. Commissioner Campbell's Order (App. pp. 114–145) included 124 findings of fact and 12 conclusions of law. The fact Commissioner Campbell's findings and conclusions were consistent with Commissioner Roche's does not mean he reinstated her order; it simply shows they reached the same conclusions based on the evidence. Commissioner Campbell's order has a significant number of new findings he made based on the evidence. His Order is not a simple reiteration of Commissioner Roche's.

condition exists is inconsistent with the Court of Appeals' decision. This is a mischaracterization or Petitioner's argument. Her argument, noted above, is that the taking of new evidence after the Court of Appeals ruled on a legal error, is inconsistent. With regard to the compensability issue, Ms. Russell asserts that Commissioner Campbell properly followed the Court of Appeals' decision in that he reviewed the evidence on the record as of 2013 and made findings based on the preponderance of that evidence.⁴ (App. pp. 132, 141–42). The Commission has now ordered the Single Commissioner on remand to do over what Commissioner Campbell already properly did. (App. pp. 210–14). This is Ms. Russell's issue with that portion of the Commission's 2017 order. It was consistent with the Court of Appeals' decision when Commissioner Campbell did it, and, as Respondent asserts, doing it over is not inconsistent with the Court of Appeals' decision. That do over, however, is patently inappropriate. The Commission decided not to reach that threshold issue, but reversed and remanded on it nonetheless. This is clear error, is similar to one of the errors committed in *Hilton*, and shows that Petitioner may never have an adequate remedy.

IV. *Hilton* is directly applicable to these facts

In *Hilton*, the Commission considered issues that were not properly before it and reversed and remanded on issues with no explanation. *Hilton v. Flakeboard Am. Lmt.*, 418 S.C. 245, 249–51, 791 S.E.2d 719, 721–22 (2016). In this case, the Commission considered issues that were not properly before it for consideration and it reversed and vacated the entire Order of Commissioner Campbell without even considering threshold issues and with no explanation. (App. pp. 210–214). The errors that occurred in *Hilton* occurred in this case. The fact the Commission stated evidence from 2013 hearing should be the basis for the compensability determination does not mean that

⁴ Respondents, in fact, actually emailed Commissioner Campbell's administrative assistant on June 1, 2016, explaining that the parties should not get "a second bite of the apple" and requesting Commissioner Campbell issue an Order without a hearing. (App. p. 113).

the Commission did not order the relitigation of the entire dispute. The Commission reversed the entire order of Commissioner Campbell and that Order addressed all issues that were in dispute.

Wal-Mart asserts the remedy in *Hilton* is unhelpful for Petitioner, but this is erroneous. The *Hilton* Court did not simply remand, it reversed the Commission's Order and remanded with specific instructions for how the Commission should consider the appeal. This is what Ms. Russell was requesting of the Court of Appeals (or this Court) as well: A decision reversing the Order of the Commission with instructions to only consider issue properly preserved for appeal. This would then rectify the issue preclusion problem that plagues this case, and then the Commission would rule on Commissioner Campbell's compensability determination.

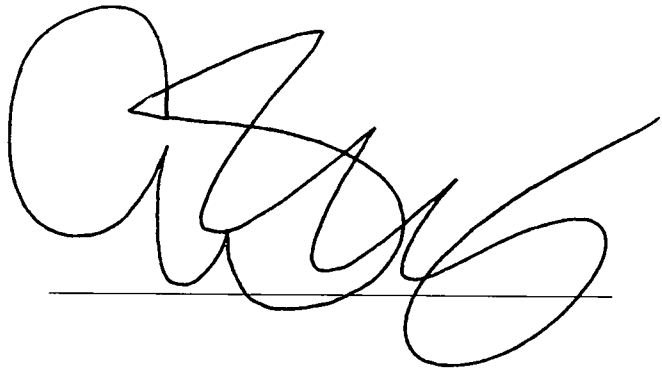
V. *Bone* is not applicable to the posture of the case

Bone, because of the procedural posture of that case and the particular statute at issue, is not applicable to the facts of this case. The issue in *Bone* was the interpretation of section 1-23-390, and the code section in dispute here is section 1-23-380. Petitioner is not failing to address the holding of *Bone*: That holding is not applicable because it was interpreting section 1-23-390, which does not contain an exception to final order rule. Petitioner is not making an argument that an exception should be written into that section nor is she claiming section 14-3-330 should apply on these facts. Section 1-23-380 does have an exception and that exception was interpreted by the *Hilton* Court. *Hilton* shows that this Court can review a Court of Appeals decision with regard to section 1-23-380, and that is what Respondent is asking this Court do. *Bone* is not a case that is bad for Petitioner that she is avoiding; it is simply inapplicable.

CONCLUSION

The thrust of Ms. Russell's argument is that she does not have an adequate remedy if she is forced to continue waiting to appeal and, therefore, the Court of Appeals should have denied

Respondent's motion to dismiss the appeal. Section 1-23-380 provides an exception to the general rule that an interlocutory appeal is not allowed; *Hilton* gives an example of a case that falls within the exception; and, as outlined in Russell's Petition, the facts of her case are similar to the operative facts of *Hilton*, and she has additional facts, above those presented in *Hilton*, that provide additional grounds showing she has no adequate remedy. Therefore, Petitioner Paula Russell respectfully requests this Court grant her petition for a writ of certiorari and review the Court of Appeals' dismissal of her appeal.

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

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,
Petitioner**

RECEIVED

APR 09 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

S.C. SUPREME COURT

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
Appellate Case No. 2018-000354

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company,

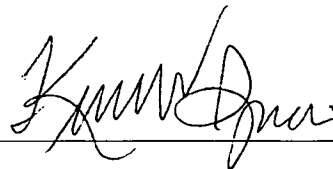
Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel of record with a copy of the *Reply to Return Petition for a Writ of Certiorari* by mailing copies of the same by United States mail with first class postage prepaid to the following address:

Johnnie W. Baxley, III
Willson, Jones, Carter, and Baxley
421 Wando Park Blvd., Suite 100
Mt. Pleasant, SC 29464

April 9, 2018



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