THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

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S.C. SUPREME COURT

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

Paula Russell, Petitioner,

v.

Wal-Mart Stores, Inc.,

&

Illinois National Insurance Company, Respondents.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON APPEAL

Whether the Court of Appeals erred in dismissing the Petitioner Paula Russell's appeal under S.C. Code Ann. § 1-23-380.

STATEMENT OF THE CASE

Petitioner Paula Russell (hereinafter "Russell") filed a workers' compensation claim against Respondents Wal-Mart and Illinois National Insurance Company (hereinafter "Wal-Mart," collectively) on February 2, 2010, alleging she suffered compensable injuries by accident arising from a 2009 workplace injury in the course of her employment with Wal-Mart. (App. p. 1). The parties thereafter appeared before Commissioner Avery B. Wilkerson, Jr. on April 3, 2011, and he issued an order dated June 8, 2011, in which he found Russell was entitled to benefits and outlined her entitlement. (App. pp. 3–8). Thereafter, Ms. Russell developed new radicular symptoms and requested a review of her previous award of benefits on the ground of change of condition for the worse pursuant to S.C. Code Ann. section 42-17-90. (App. p. 12). Wal-Mart denied Ms. Russell's claims, so the parties were heard on February 11, 2013, by Commissioner Andrea C. Roche who agreed Russell had suffered a change of condition for the worse, and by order dated August 5, 2013, found Russell was credible, found she was temporarily disabled, and ordered she was to receive benefits. (App. pp. 15–17).

Wal-Mart then filed an appeal to the appellate panel of the South Carolina Workers' Compensation Commission (hereinafter "commission") alleging Commissioner Roche erred in not relying solely upon objective evidence in her determination that Russell's change of condition for the worse was compensable. That appellate panel agreed and issued an order on January 30, 2014, finding Russell had failed to demonstrate by objective evidence that she sustained a compensable change of condition. (App. pp. 37–41). Russell then properly instituted an appeal with the Court of Appeals arguing the commission applied the wrong legal standard in determining she had not suffered a change of condition for the worse. (App. pp. 42–43). The parties were then heard by the Court of Appeals on October 20, 2015. The Court of Appeals issued a decision on January 20,

2016, stating the commission erred as a matter of law in requiring Russell rely solely on objective evidence and remanding to the commission with instructions to issue an order with review by the proper evidentiary standard. (App. p. 112).

On remand from the Court of Appeals, the commission assigned the case to a single commissioner, Commissioner Michael R. Campbell. (App. p. 140). Commissioner Campbell reviewed the entire record on remand and concluded Russell sustained a compensable change of condition for the worse and awarded benefits. (App. pp. 132, 144). Wal-Mart then again appealed the order of the Commissioner. (App. pp. 146–51). The parties were again heard by an appellate panel of the Workers' Compensation Commission and the panel issued an order reversing the order of Commissioner Campbell in its entirety, vacating the evidence of the record with regard to benefits, and remanding for a hearing de novo. (App. pp. 211–13).

Ms. Russell then timely filed an appeal with the South Carolina Court of Appeals. (App. pp. 216–17). Upon receipt of Russell's Notice of Appeal, Wal-Mart filed a motion to dismiss claiming the appeal was interlocutory. (App. pp. 219–32). Russell appropriately and timely replied to Wal-Mart's motion, arguing the appeal was a permissible interlocutory appeal, but the Court of Appeals issued an order dismissing her appeal on December 8, 2017. (App. p. 248). Russell therefore timely filed a motion to reconsider, which the Court of Appeals denied on February 1, 2018. (App. p. 275). Ms. Russell then submitted a petition for a Writ of Certiorari on March 1, 2018, asserting one proposed issue for review. The Court issued an order on May 25, 2018, granting review of Ms. Russell's proposed issue.

STATEMENT OF THE FACTS

This case has a complicated history going back to 2009; however, given the current posture of this case, a full recitation of the facts is not necessary.[1] This claim began in 2009 when Ms. Russell suffered work related injuries to her back and pelvis. (App. p. 7). After initially receiving a permanent partial disability award, Russell developed new radicular symptoms in 2012 that required surgery. Russell, therefore, requested a review of her previous award on the ground of change of condition for the worse. (App. pp. 12, 173–76). Wal-Mart denied Ms. Russell's claims, provided no medical treatment, and fired her instead of honoring her request to return to work at a location that did not require she make a difficult, hours-long drive. (App. pp. 15–16). The parties were heard on February 11, 2013, by Commissioner Andrea C. Roche, who agreed Russell had suffered a change of condition for the worse, found Russell was temporarily disabled, found Russell was credible, and ordered Russell receive benefits, including surgery of the lumbar spine. (App. pp. 15–17). Wal-Mart then filed an appeal to the appellate panel of the South Carolina Workers' Compensation Commission and continued to provide no benefits or medical treatment. (App. p. 18).

In Wal-Mart's 2013 Form 30, request for Commission Review, it argued Commissioner Roche erred in finding Ms. Russell sustained a change of condition for the worse. (App. p. 18). Wal-Mart, likewise, in its 2013 brief to the commission, focused solely on the issue of compensability and did not address the award of benefits. (App. pp. 19–25). Wal-Mart's compensability argument specifically relied on the claim that Russell had not presented "objective evidence" to prove she suffered a change of condition for the worse. (App. p. 21). The commission

[1] A full recitation of the facts from the date of injury until the case was presented before the appellate panel of the commission in 2017 can be found at appendix pages 168-84.

agreed, essentially stating that objective evidence is required to prove a physical change of condition. Since the commission found Russell had not presented any objective testimony other than self-serving complaints, it found Russell was not credible, and it found Russell had not suffered a change of condition for the worse. (App. pp. 37–41). After receiving the commission's order, Russell properly filed an appeal with the Court of Appeals. (App. pp. 42–43).

On January 20, 2016, the Court of Appeals found the commission "erred as a matter of law by imposing a requirement to the statute mandating that a claimant prove a change of condition for the worse with objective evidence."[2] (App. p. 112). The court stated that the commission ignored the fact that both of Russell's authorized treating physicians testified to a reasonable degree of medical certainty that Russell suffered a change of condition for the worse. (App. p. 112). In fact, no physician had testified or opined Russell did not suffer a change of condition. (*See* App. p. 112). The Court of Appeals stated that despite the contentions of the commission that the Commissioners considered the record as a whole, it was evident from the transcript that the commission relied solely on the MRI's and was requiring objective evidence to prove a change of condition. (App. p. 112). The court, therefore, found the commission erred as a matter of law and remanded to the commission with instructions to use a preponderance of the evidence standard in its review of the record. (App. p. 112).

After remand, the commission assigned the case to a single commissioner, Commissioner Michael R. Campbell. (App. p. 140). Commissioner Campbell reviewed the entire record and concluded Russell met her burden of proving a change of condition for the worse and found Russell was entitled to medical care and temporary total disability benefits, for she was not at maximum

[2] The court noted that the commission specifically found "the preponderance of the evidence indicates that there was no objective difference between [Russell's] MRI scan after the award and the MRI scan before the original award."

medical improvement. (App. pp. 132, 144). Commissioner Campbell's 2017 order included a detailed summary of the record and 124 Findings of Fact. (App. pp. 114–44).

Wal-Mart again appealed the order of the Commissioner and continued to provide no benefits or medical treatment. (App. pp. 146–51). In its 2017 Form 30 Request for Commission Review, Wal-Mart alleged 32 errors, covering all aspects of the claim, including Russell's change of condition for the worse, the compensability of that change, her entitlement to medical benefits, and her entitlement to temporary benefits. (App. pp. 146–51). Russell, on the other hand, argued the preponderance of the evidence supported Commissioner Campbell's finding of a change of condition for the worse; she argued the panel could not properly hear arguments with regard to her entitlement to benefits for those issues had been abandoned when Wal-Mart failed to properly raise and brief those issues in its 2013 appeal to the commission; and she argued that a *de novo* hearing would be improper. (App. pp. 185–197).

On September 7, 2017, the commission's appellate panel issued an order stating Commissioner Campbell "simply reinstated the 2013 award of Commissioner Roche and erred by not conducting a full evidentiary hearing." (App. p. 211). The order further stated that "a full evidentiary hearing on the issue of benefits" should have been held and that a failure to hold a second evidentiary hearing amounted to a due process violation.[3] (App. p. 211). The commission then ordered "the Single Commissioner's March 20, 2017, Order is hereby VACATED and REMANDED to the Single Commissioner to conduct a full evidentiary hearing." (App. p. 213). Additionally, the commission ordered that the hearing should be a *de novo* hearing. (App. p. 213). The order also states the commission did not—and did not need to—consider the *threshold* issue

[3] See App. p. 113 wherein counsel for Wal-Mart objected to the holding of an evidentiary hearing, noting accurately that doing so would be "improper from a legal and procedural perspective."

of compensability, but the commission still reversed Commissioner Campbell's findings on that issue. (App. p. 212). The order of the commission cited no error in Commissioner Campbell's order with regard to his findings on compensability; it only asserts that he should have conducted an evidentiary hearing on benefits. On that point, the order also completely ignores Ms. Russell's argument, which she briefed for the commission, that the doctrine of issue preclusion or the law of case doctrine precluded many of Wal-Mart's issues from reconsideration, for they were not properly preserved. (*See* App. pp. 167–97). As a result of the nature of the commission's order, the fact Ms. Russell has received no medical treatment during the entire litigation of the change of condition, the overall duration of the claim, the ever-growing procedural history of the claim, and the fact she will not have an adequate remedy after remand, she properly and timely filed an appeal with the South Carolina Court of Appeals. (App. pp. 216–18)

Upon receipt of Russell's Notice of Appeal, Wal-Mart filed a motion to dismiss and supporting memorandum. (App. pp. 219–32). Wal-Mart essentially argued that Russell's appeal was interlocutory and thus not immediately appealable. (App. pp. 223–24). Russell, however, did not dispute that the order was not a final order, but instead relied upon the exception to the final order requirement that is provided in S.C. Code Ann. section 1-23-380. (App. pp. 237–38). The crux of Russell's argument was that her case is very similar to *Hilton v. Flakeboard Am. Ltd.*, in which this Court stated the Court of Appeals erred in dismissing Hilton's appeal. 418 S.C. 245, 791 S.E.2d 719 (2016). Specifically, Russell argued that in both her case and in *Hilton*, the commission ordered a new trial without regard to the law of the case and without citing an error to justify why such an extreme remedy was appropriate, and in both the commission considered and ruled upon issues that should have been precluded from reconsideration by the doctrine of issue preclusion or the law of the case doctrine. (App. pp. 250–53).

The Court of Appeals, however, dismissed Russell's appeal, stating that the underlying order was not immediately appealable. (App. pp. 248). In support of its decision, the court cited section 1-23-380, but only referenced the language requiring an exhaustion of administrative remedies and did not address the applicability of the exception provided in section 1-23-380. (App. pp. 248). Russell, therefore, filed a motion for rehearing or reconsideration, asserting the Court of Appeals overlooked the exception provided in section 1-23-380, that the court misapprehended how the commission has created a perpetual cycle of orders and appeals that denies Ms. Russell an adequate remedy, and that the court overlooked the similarities between this case and *Hilton*. (App. pp. 250–253). The Court of Appeals, nevertheless, asserted that it had not overlooked or misapprehended any material fact or principle of law and denied Russell's motion for reinstatement on February 1, 2018. (App. p. 275). Ms. Russell then submitted a petition for a Writ of Certiorari on March 1, 2018, asserting one proposed issue for review. The Court issued an order on May 25, 2018, granting review of Ms. Russell's proposed issue.

STANDARD OF REVIEW

Appeals from administrative agencies are governed by the Administrative Procedures Act (APA). *Hilton v. Flakeboard Am. Ltd.*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016) (citing *Bone v. U.S. Food Service,* 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Section 1-23-380(A) of the APA states 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." This Court has held that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy. *The Island Packet v. Kittrell*, 365 S.C. 332, 339, 617 S.E.2d 730, 734 (2005) (interpreting identical language in a previous version of section 1-23-380). In *Hilton*, this Court

further permitted immediate Supreme Court review of a Court of Appeals' dismissal of an appeal of an interlocutory order of the Workers' Compensation Commission. 418 S.C. 245, 791 S.E.2d 719. Consequently, *Hilton* reflects this Court's power to review a Court of Appeal's decision to dismiss an interlocutory appeal and *Hilton* should control this Court's analysis of this case.

ARGUMENT

THE COURT OF APPEALS ERRED IN DISMISSING THE PETITIONER PAULA RUSSELL'S APPEAL UNDER S.C. CODE ANN. § 1-23-380.

This appeal was immediately appealable under section 1-23-380 of the South Carolina Code. The Court of Appeals, therefore, ostensibly overlooked or failed to give adequate consideration to the exceptions upon which Russell premised her appeal. In the court's order dismissing her appeal, the court only addressed the exhaustion of administrative remedies and final decision portions of section 1-23-380. (App. p. 248). Likewise, the court again appeared to have failed to adequately consider the applicability of that exception to this appeal in its denial of Russell's motion for reinstatement. (*See* App. p. 275). Therefore, Russell requests this Court remand this matter to the Court of Appeals so that it may adjudicate this appeal, for a failure to do so will deprive Russell of an adequate remedy.

I. The Court of Appeals should have heard Russell's appeal pursuant to *Hilton*, for the errors of the commission in this case are parallel to the errors the commission committed in *Hilton*.

The Court of Appeals should have heard Russell's appeal pursuant to *Hilton*, for the errors of the commission in this case are parallel to the errors the commission committed in *Hilton* where it was found the claimant would not have an adequate remedy if he waited to appeal. In *Hilton*, this Court essentially found that the commission erred in two ways: First, the commission considered issues that were not properly before it, which this Court held was an error. *Hilton*, 418 S.C. at 249–51, 791 S.E.2d at 721–22. Second, this Court held the commission erred for, "instead

of simply remanding . . . , it vacated the single commissioner's order, thus ordering both parties begin anew, regardless of the ultimate . . . determination. *Id.* at 252, 791 S.E.2d at 722. The *Hilton* Court ultimately held that when "the commission has in effect ordered a new trial without regard to the matters raised by the appealing party and without any explanation why such an extreme remedy is appropriate," the aggrieved party is without an adequate remedy if required to wait until the final agency decision. *Id.* at 251–52, 791 S.E.2d at 722–23. If the commission's order in *Hilton* was allowed to stand, this Court believed, "a party could face the possibility of repeated unexplained 'do overs' before a final decision of the commission." *Id.* at 252, 791 S.E.2d at 723.

The two pivotal errors identified by this Court in *Hilton* that made the underlying order immediately appealable are present in this case: The commission considered issues that were barred from reconsideration by the doctrine of issue preclusion and the law of the case doctrine, and the commission, instead of simply remanding on those issues, vacated the single commissioner's order. (App. pp. 14–16).

A. The commission disregarded the rules of issue preservation

The commission blatantly disregarded the rules of issue preservation. In South Carolina, it is axiomatic that if no authority is cited in support of a proposition or if an argument is conclusory, the issue is abandoned. *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000). Furthermore, "this Court has also held that general exceptions, . . . are too ambiguous to fulfil the notice requirements of due process and do not preserve an issue for review." *Hilton*, 418 S.C. at 250, 791 S.E.2d at 722 (citing *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 31 S.E.2d 447 (1944)). The commission itself has further, by regulation, expanded the requirements for issue preservation on appeals from the single commissioner to the appellate panel of the commission and the commission actually includes

relevant language from the regulation on the Form 30 it provides. (See App. p. 18 for an example of the Form 30). Specifically, the commission requires that the grounds for appeal be set out in detail and also that they be presented in the form of questions presented. S.C. Code Ann. Regs. 67-701(3)(a) (2012). If a raised issue does not meet the requirements espoused by this state's appellate courts and by the commission, the related findings of fact and law by the single commissioner become the law of the case. *See Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005) *abrogated on other grounds by Bone v. U.S. Food Service*, 404 S.C. 67, 80, 427 S.E.2d 552 (2013).

Here, in 2017 the commission remanded to the single commissioner on the issue of benefits, but that issue was not briefed to the commission when this case first went before it in 2013 nor were the issues adequately noted on Wal-Mart's 2013 Form 30. (App. pp. 21–24). While Wal-Mart did summarily note exceptions to some of the findings regarding Russell's entitlement to benefits in the 2013 order of Commissioner Roche, those are insufficient. Wal-Mart must rely only on the following statement in support of its claim that it adequately preserved any issue other than the issue of compensability, for it makes no other mention of its exception to the findings at issue: "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, . . ."[4] (App. p. 18). That statement, itself

[4] 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.

insufficient to satisfy S.C. Code Ann. Regs. 67-701(3)(a) (2012),[5] goes on to limit its scope to the portions of the findings of fact and conclusions of law that relate to the finding that "Claimant sustained a change of condition for the worse." (App. p. 18). Therefore, Wal-Mart did not properly preserve its objections to Commissioner Roche's findings on benefits in 2013. Moreover, Wal-Mart did not even object by number to Commissioner Roche's findings of fact 3, 11, 13, 14,[6] and those findings also became the law of the case and, right or wrong, cannot be altered. (App. pp. 14–18). *See Ham v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1952) ("[A]ll findings of fact and law by the Hearing Commissioner became and are the law of this case, except only those within the scope of the exception of defendant and the notice given to the parties by the Commission.").

Correspondingly, Wal-Mart's October 17, 2013, brief to the commission lacks any reference of an objection to Commissioner Roche's findings on benefits. (App. pp. 18–25). In that brief, Wal-Mart argued solely that Commissioner Roche erred in finding Russell suffered a

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Sec. [sic] 42-17-90 as a result of her original November 3, 2009 accident at work, . . ." (App. p. 18).

[5] S.C. Code Ann. Regs. § 67-701(3)(A) (2012) states:

> (3) The grounds for appeal must be set out in detail on the Form 30 in the form of questions presented.
>
> (A) Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error.

[6] Those findings of fact read,

3) I find Claimant attempted to comply with the restrictions placed on her by her physicians. . . .
11) I find Claimant is in need of additional medical treatment. . . .
13) I find defendants required Claimant to turn in her keys December 1, 2011.
14) I find defendants have not provided claimant work hours since December 1, 2011.

change of condition for the worse. (App. pp. 21–24). In essence, Wal-Mart did not cite any authority in support of its putative exceptions and did not present an argument in support of them. (App. pp. 21–24). Therefore, 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 by the commission, 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.

Wal-Mart has repeatedly argued throughout this litigation that Russell is mischaracterizing evidence with regard to issue preservation; however, that argument is erroneous. The evidence is simply this: Wal-Mart's only note of an exception to Commissioner Roche's findings on Ms. Russell's entitlement to benefits is a reference by number. (See App. pp. 18–25). All Wal-Mart can quote from its 2013 Form 30 or 2013 brief to support its claim that it adequately preserved the issue of benefits 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 R & G Constr.*, 343 S.C. at 437, 540 S.E.2d at 120; S.C. Code Ann. Regs. 67-701(3)(a) (2012). Furthermore, Wal-Mart's preservation of issues in 2017 is not in question here; Russell asserts that Wal-Mart abandoned the issues in 2013; therefore, Wal-Mart cannot cure the deficiencies from 2013 by delineating grounds for appeal in 2017.

Hence, it was error for the commission in 2017 to consider the issues of Russell's entitlement to benefits, for those issues had been adjudicated and subsequently not appealed. The unappealed findings of fact of Commissioner Roche are the law of the case and cannot be relitigated or reappealed. Jean Hoefer Toal et. al., *Appellate Practice in South Carolina* 214 (3rd

ed. 2016) ("An unappealed order, right or wrong, is considered the law of the case." "An issue not raised in an intermediate appeal cannot be considered in a subsequent appeal.").

Because all issues except compensability 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*, 418 S.C. at 249–51, 791 S.E.2d at 721–22. The fact the commission raised the issues *sua sponte* in *Hilton* and on Wal-Mart's 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 4), 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.

B. The commission vacated the single commissioner's entire order with no explanation

The commission, because it found a full evidentiary hearing was needed on benefits, vacated the entire order of Commissioner Campbell. Commissioner Campbell's order, despite its length, essentially addressed two issues: Whether Russell suffered a change of condition for the worse and to what benefits she was entitled. (App. pp. 114–45). The first issue, essentially one of compensability, is the threshold consideration; if the claim is compensable, then it is necessary

to address an award of benefits; if the claim is not compensable, then the second step is never reached.[7]

The commission, however, decided the second issue first, and then reversed the entire order without articulating any reason for doing so. 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*.

(App. p. 212 (emphasis added)). 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 the Court of Appeals in 2016. However, the commission ordered that "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 [Russell] has had a change of condition for the worse per [section] 42-17-90." (App. p. 213).

Respondents have argued that Commissioner Campbell simply reinstated the award of Commissioner Roche and this is why remand on compensability is needed. However, Commissioner Campbell expressly stated that he reviewed the entire record. (App. p. 132). He then issued an order finding Russell had suffered a compensable change of condition for the worse and outlined her entitlement to benefits. (App. pp. 141–142). While Commissioner Campbell reached the same conclusion as Commissioner Roche, his order did not simply reinstate Commissioner Roche's order; Commissioner Roche's order contained eighteen findings of fact and six conclusions of law while Commissioner Campbell's order contained 124 findings of fact

[7] Ms. Russel's position, explained *supra*, is that she is entitled to the benefits as outline by Commissioner Roche, for that is the law of the case.

and 12 conclusions of law. (App. pp. 14–16, 132–144). Moreover, Commissioner Campbell's actions were consistent with the remand instructions from the Court of Appeals, which reversed and remanded for reconsideration of the compensability issue based upon the correct burden of proof. (App. p. 112). Nevertheless, the commission in 2017, without providing an explanation, reversed Commissioner Campbell's findings on compensability.

This is exactly what the commission in *Hilton* did when it raised the issue of competency, and "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*, 418 S.C. at 251, 791 S.E.2d at 722. As in *Hilton*, this is an extreme remedy, which was "ordered without any explanation from the commission." *Id.* The commission's reversing and remanding of 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 the damages calculation. Further, this is grossly similar to what happened in *Hilton* and leads to the deprivation of Ms. Russell's remedy.

Overall, the commission's willingness to order the relitigation of issues not properly raised for its consideration and its vacation of the entirety of Commissioner Campbell's order show 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 a final agency decision would not provide her with an adequate remedy. The commission is in essence trying to give Wal-Mart a third chance to argue that the evidence presented at the 2013 hearing does not support a finding of change of

condition and offers no support for giving Wal-Mart that opportunity.[8] The commission is likewise trying to give Wal-Mart the option to relitigate the issue of benefits after it failed to properly appeal those issues in 2013. In principle, the commission is giving Wal-Mart an unexplained do over of the entire litigation. These errors were sufficient for the *Hilton* Court to hold the immediate appeal was necessary, and this Court should so hold in this case and remand this case to the Court of Appeals for consideration of the errors.

II. The commission committed additional errors that further result in a deprivation of Russell's remedy.

While the commission in the case at bar committed essentially the same errors this Court identified in *Hilton*, the commission also committed additional errors that further show requiring Ms. Russell wait to appeal until the final agency decision would not provide an adequate remedy. In essence, Russell additionally asserts that the order of the commission is inconsistent with the 2016 opinion of the Court of Appeals, that the Court of Appeals gave clear instructions that the commission ignored, and that those inconsistencies and the willingness to ignore the Court of Appeals' opinion creates a cycle of orders and appeals such that Russell will be deprived of an adequate remedy.

To recapitulate, the Court of Appeals 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). Commissioner Campbell did so on remand, and found Russell sustained a change of condition for

[8] Both Commissioner Campbell and Commissioner Roche previously found by a preponderance of the evidence that Russell suffered a change of condition for the worse.

the worse and was entitled to benefits. (*See* App. pp. 114–45). On appeal, however, the commission issued an order that compels the single commissioner to "conduct a full evidentiary hearing and allow both parties to submit testimony, medical records, and other additional evidence. . . " on the issue of benefits and says that the hearing shall be a de novo hearing.[9] (App. p. 213).

The Court of Appeals has stated "where a case that has been appealed is remanded by the court to the workers' compensation commission with specific directions, the commission must proceed in accordance with those directions." *Bobo v. Marshane Corp.*, 302 S.C. 86, 88, 394 S.E.2d 2, 4 (Ct. App. 1990) (citing 101 C.J.S. *Workmen's Compensation* § 790 at 37 (1958)). Further, that court opined, "[i]n such a case, the order limits the authority of the commission." *Id.* This Court has additionally held that an administrative body could not consider additional evidence where the court had reversed a judgment and remanded the issues to the administrative body for further consideration. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986); *See also In re Doherty*, 109 N.E. 887 (Mass. 1915) (where a remand order did not authorize the commission to expunge the old record and to make a new one, the commission lacked authority to make a new record).

Ultimately, from this point forward, any order of a single commissioner must comply with the 2017 order of the commission and the 2016 decision of the Court of Appeals. 18B Charles Alan Wright, et. al., Federal Practice and Procedure § 4478 (2nd ed. 2017) ("Principles of

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[9] In the interest of clarity, Russell notes that she is not arguing that the remand to Commissioner Campbell to reconsider the issue of compensability based on the evidence presented in 2013 is inconsistent with the Court of Appeals' decision. This part of the commission's order is erroneous because it reversed and remanded on this point without explanation. Technically, that portion of the order is not inconsistent with the Court of Appeals' order, but supports Russell's position for other reasons. Russell is instead arguing that the portion of the order allowing for the taking of additional evidence is erroneous.

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 the Court of Appeals or they will be inconsistent with the law of the case as it was established by the commission. These defective orders will then be appealed to the 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*, 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. at 252, 791 S.E.2d at 723. Justice Hearn astutely stated the problem that is facing Russell when she stated in *Bone*:

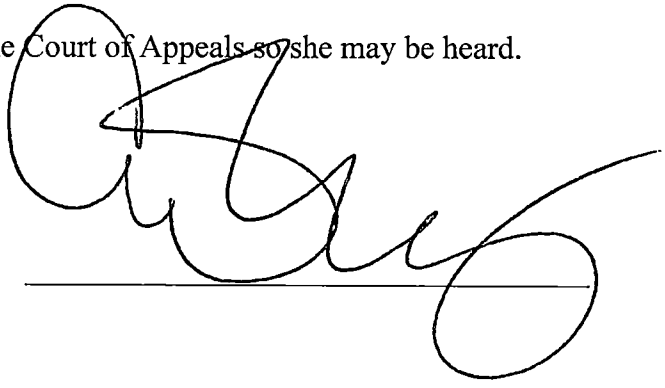
> Taken to its logical conclusion, [this case could be] trapped in a cycle of remands for years. [After remand], the parties will return again to [the commission and] the court of appeals. In doing so, [the parties] run the risk that the [commission or the] court of appeals will again remand the case, at which point [they] will have to start the process all over again.

Bone v. U.S. Food Service, 404 S.C. 67, 92, 744 S.E.2d 552, 566 (2013) (Hearn, J. dissenting). 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.

CONCLUSION

For the reasons stated above, Petitioner respectfully asks the Court reverse the order of the Court of Appeals dismissing her appeal and remand to the Court of Appeals for consideration of the errors Ms. Russell alleges. Ms. Russell is in a position where a final agency decision would

not provide her an adequate remedy and is, consequently, entitled to immediate appeal. Therefore, Petitioner requests this court remand her case to the Court of Appeals so she may be heard.



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June 22, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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

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 *Brief of Petitioner* by mailing copies of the same by United States mail with first class postage prepaid to the following address:

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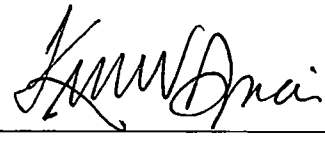
June 22, 2018



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