

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2018-000354

Paula Russell,

Petitioner,

v.

Wal-Mart Stores, Inc., Employer, and Illinois
National Insurance Company, Carrier,

Respondents.

RECEIVED

MAY 14 2019

S.C. SUPREME COURT

RETURN TO PETITIONER'S MOTION FOR COSTS

Respondents, by and through their undersigned counsel, hereby file this Return to Petitioner's Motion for Costs on Appeal. Respondents assert that an award of fees and costs against them per Rule 222 is improper and inequitable in this particular matter.

ARGUMENT

The Court should deny the Petitioner's Motion for Costs.

Rule 222 provides, "when a judgment is reversed in part or is vacated, costs shall be taxed against the responded *unless the court orders otherwise.*" Rule 222, SCRAP (emphasis added). Under this rule, the appellate court has discretionary authority as to whether costs shall be taxed against a losing party.

In the case at hand, the Supreme Court specifically did not reach the specific legal issue concerning the merits of the claim. The ultimate legal issue in this case is whether the claimant suffered a change of condition for the worse pursuant to 42-17-90. The Supreme Court specifically did not reach that issue because of the reversal and remand on a procedural issue. Specifically, the Court found that the commission erred procedurally in remanding the case to a Single Commissioner, and Court remanded this matter to the appellate panel of the commission for an immediate and final review of the original commissioner's decision. The Supreme Court has required the commission to address the procedural issues before the other legal issues concerning the merits can be properly addressed.

In this matter, assessing costs and fees against Respondents would be inequitable. Respondents did not do anything wrong or improper, nor did they take a position that was reversed on appeal. The Court noted on page 6 of the decision that it was "the commission's unnecessary delays and repeated remands over the almost eight years since Russell filed her change of condition claim that frustrated the goals of the Workers' Compensation Act." Respondents do not control how the commission reviews evidence or when they order a remand. In fact, the procedural steps taken by the commission were in contradiction to the request of Respondents. The Supreme Court noted on pages 6-7 of the order that counsel for Wal-Mart wrote an email to the Commission and specifically argued for the proper procedural process. Quoting with favor the email written by counsel for Wal-Mart, the Court stated, "[c]ounsel for Wal-Mart continued, specifically raising the concern we foresaw in *Hilton* and upon which we now reverse" The grounds for reversal, remand by the commission for a de novo hearing, were done in direct contradiction to the process advocated by Respondents. It is inherently unfair for Respondents to be taxed with costs when the reversal in this matter was based upon a

procedural error made by the commission that directly contradicts the request made by Respondents.

Essentially, the Respondents argued for a certain procedure and this Court has noted that the procedure asserted by the Respondents was proper; the commission ignored or disregarded that request and made other procedural decisions which have now been reversed. Respondents advocated for the proper procedure in this matter. Awarding costs and fees against the Respondents when they advocated for the proper procedure is unjust and prejudicial.

In fact, the Respondents are aggrieved just as much as the Petitioner by the procedural decisions of the commission. As the Court noted on page 8 of the Order, both parties in this matter have been denied a prompt decision: "If Russell is entitled to benefits, she was entitled to receive them many years ago. If she is not entitled to additional benefits, Wal-Mart was entitled to have her claim denied many years ago." The actions of the commission in this matter, which were reversed by this Court, have the effect of denying a prompt and timely decision for both parties. Both parties have been forced to incur appellate costs and fees. However, those costs and fees were not incurred as a result of a position taken by one party or the other, but instead by procedural decisions made by the commission independent of the parties.

The reversal in this matter was a decision by the Supreme Court against the procedural process of the commission; it was not a decision against either party or any position advocated by either party. Under these unique circumstances, an award of costs and fees against either party would be inequitable.

Rule 222 exists to award costs and fees to the party which prevailed regarding the merits of the claim. Rule 222 does not exist to award costs and fees against one party when that party took the correct position as to procedural issues but was ignored by the tribunal which then made

procedural errors. The Order of the Court in this case notes that all of the procedural mistakes made in this matter were made by the commission, not by either party. The Court also notes that Respondents advocated for the proper procedure in this matter but were either ignored or disregarded; it would be unfair to now award costs and fees against the Respondents under these circumstances.

Simply stated, assessing costs and fees against the party that advocated for the proper procedural process but was ignored by the tribunal is inequitable and seems contradictory to the purpose behind Rule 222.

Further, case law favors denying the motion for costs when an appeal is disposed of on procedural grounds. In *Johnson v. Paraplane Corp.*, 321 S.C. 316, 468 S.E.2d 620 (1996), the Supreme Court dismissed an appeal based on procedural grounds and further indicated that “no costs or attorneys’ fees pursuant to Rule 222, SCACR, shall be assessed.” The Court made a similar ruling in *Chambers v. Smith’s Drywall*, 324 S.C. 122, 478 S.E.2d 253 (S.C. 1996) (refusing to assess Rule 222 costs and fees when the appeal was brought on procedural grounds).

It is clear from *Johnson* and *Chambers* that our courts disfavor taxing costs and fees when a decision is based on a procedural argument as opposed to the underlying legal merits of the case. Stated otherwise, when our higher courts reverse and remand to correct some procedural action taken by a lower tribunal, our courts disfavor assessing costs and fees on any one party. Although these facts are unique and do not directly fall under *Johnson* and *Chambers*, the reasoning behind the Court’s refusal to assess attorney’s fees and costs in those cases applies.

CONCLUSION

For the foregoing reasons, the Supreme Court should deny Petitioner's Motion for Costs.

Respectfully submitted,



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May 8, 2019

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In the Supreme Court

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WCC File No. 0917785
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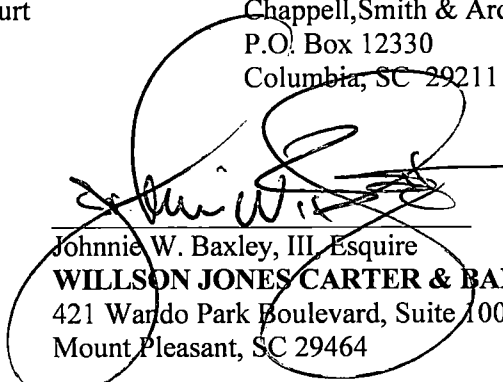
Respondents.

CERTIFICATE OF SERVICE

I, Johnnie W. Baxley, III, with **WILLSON JONES CARTER & BAXLEY, P.A.** in Mt. Pleasant, South Carolina do hereby certify that I am attorney for the Respondents, and that on the 8th day of May, 2019, I mailed the foregoing **RETURN TO PETITIONER'S MOTION FOR COSTS** to the following by placing a copy thereof in the United States mail, first class, proper postage affixed thereto:

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