

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

20212

Case No. 2012-212519

Charles B. DeForrest, Appellant,

v.

Walmart Stores, Inc., Employer,
and American Home Assurance, Carrier, Respondents.

RECORD ON APPEAL

Preston F. McDaniel
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Columbia, South Carolina 29201
(803) 771-7211
Attorney for Appellant

RECEIVED

FEB 06 2013

SC Court of Appeals

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ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0918195

Charles B. DeForrest,
Employee/Claimant,

v.

Wal-Mart Stores, Inc.

Employer,

and

American Home Assurance,

Carrier,

Defendant(s).

HEARING: Date: November 9, 2011
Location: Columbia, South Carolina

APPEARANCES: Claimant represented by
Preston F. McDaniel, Esquire

Defendant(s) represented by
Johnnie W. Baxley, III

PURPOSE OF HEARING: This matter came before the Commissioner
on a Form 21

COMMISSIONER: Commissioner Andrea C. Roche

FILED: April 6, 2012

STIPULATIONS

The parties have stipulated to jurisdiction and venue and to an average weekly wage of \$337.81 with a resulting compensation rate of \$225.22.

The Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record.

STATEMENT OF THE CASE

At the time for the Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, records and reports from the following were made a part of the Record: Dr. Craig Burnworth, M.D., Moore Orthopaedic Clinic; Dr. Kim J. Chillag, M.D., Moore Orthopaedic Clinic; Tracy Hill, RPT, Columbia Rehabilitation Clinic; Dr. Blake Moore, M.D., FACS, CIME, Columbia, SC. In addition to the APA Submissions, at the conclusion of the taking of testimony, this Commissioner requested to speak to the attorneys at which time this Commissioner advised the parties that the Defendants should have obtained an impairment rating from Dr. Kim Chillag and this Commissioner instructed the Defendants to obtain an impairment rating from Dr. Chillag. After a series of emails, the Claimant took the position that he objected to the Record being left open at the request of this Commissioner unless the Defendants were directed to send the Claimant back to see and to have an evaluation performed by Dr. Chillag in accordance with the AMA

Guidelines evaluation process so that Dr. Chillag could provide an AMA valid impairment evaluation. The Claimant took the position that Dr. Chillag has not seen the Claimant since July 12, 2011 at which time he did not see the Claimant for the purpose of performing an impairment evaluation and that therefore his opinion would be the subject of speculation and innuendo. After consideration of the arguments of the parties, this Commissioner signed an Order stating that this Commissioner believed that the information, that being an impairment rating by Dr. Kim Chillag, was necessary for her determination of the issues presented on this claim and that if Dr. Chillag felt it was necessary to see the Claimant in order to assign an impairment rating, then the Defendants should send the Claimant to Dr. Chillag for that purpose and that once a response was received from Dr. Chillag, this Commissioner would immediately close the Record and a decision would be entered. Without seeing the Claimant again, the Defendants submitted a handwritten response by Dr. Chillag which was written on a letter from Defense Counsel stating that using the Impairment Guides that he would assign a 6% impairment of the lower extremity. That handwritten response was followed up by a letter to that effect from Dr. Chillag on December 8, 2011. Upon submission of that document, the Record was closed and this Commissioner then reviewed the Record and made her Decision.

It should also be noted that the Claimant objected to going

forward on an Award of permanency based on an application for an Award filed by the Defendants and specifically where the request was being made on a WCC Form 21 that was filed only for an award of benefits without any type of stop payment request being made. The Claimant was not receiving benefits at the time that this request was made and again the Form 21 was limited specifically to the Defendants request for a determination as to whether or not the Claimant is entitled to an Award under the Workers' Compensation Act. The Claimant takes the position that the award of benefits is a property right of a claimant and that he should not be forced to prematurely go forward on such a determination until he is ready, prepared, and he makes that request for benefits. According to the Claimant's position, in this or any other case there is nothing to say that the Claimant would have made the request for benefits but again that issue should not be decided by this Commission until such time as the Claimant has made a request for an Award.

Testimony was taken from the Claimant as to his education, background and experience, and the physical facts of the injury and how he is doing currently with his problems related to the injury.

Based on that testimony, it appears that Mr. DeForrest at the time of the hearing is 80 years old. He is a college graduate and after college he served 10 years in the United States Navy during which time he became an avid swimmer.

Subsequent to the Navy, he has taught and has been either a teacher or an instructor until his retirement. After retirement, he had taken the job with Wal-Mart to make additional income where he worked as a door greeter which was his normal job which he held for three (3) years prior to his injury. Prior to the injury, Mr. DeForrest testified that he was an avid walker and loved to go on hikes and would actually walk to and from his residence to his employment and would walk many blocks at a time. He also testified that prior to the accident that he again was an avid swimmer and would swim many, many laps in a pool on a daily or regular basis.

Subsequent to the injury, Mr. DeForrest as is reflected in the medical reports walks with a cane. He has constant pain and has trouble with such activities as bending and stooping or squatting and problems with lifting and with standing or sitting for any length of time. He now limits his walking, which again is done with a cane, and has an altered gait and does little or no swimming and when he does swim he can only swim a lap or two and that is using strokes that require the use of the upper body versus the lower body. In his opinion he can not return to work at Wal-Mart on a full-time basis and he does not know of any job that he can do on a regular fulltime basis. He testified that he was applied for several jobs, all involving retail work and that about one week before the Hearing he had obtained a part-time job with Comfort Keeper where he would be working 12-18 hours per

week sitting with Seniors.

He also confirmed that at the time that he was dismissed from Wal-Mart that he was still under light duty restrictions and that Wal-Mart up until the time of his dismissal was making light duty work available in his position as a door greeter which he testified he would have continued to do had he not been dismissed. While it appears there was a disagreement over a time clock issue as to hours worked versus temporary partial on his last day, that was used by Wal-Mart for his dismissal and while Mr. DeForrest explained from his point of view as to what occurred, there is no question based on the testimony and the evidence before this Commissioner that at the time he was dismissed he was still under a light duty status and that up until that time Wal-Mart had made light duty work available and that after that time, light duty work was not made available to him. The records of the original treating orthopaedist, Dr. Craig Burnworth, establish that from his treatment note of March 9 through July 13, 2010, he had the Claimant on light duty and then on July 13th returned him to full duty without restriction and gave the Claimant a 0% impairment.

A review of the treatment records of Dr. Burnworth are particularly interesting in reference to his findings in July because in his May 6, 2010 note, he noted disappointment that physical therapy had not been provided and that after physical therapy, the next step would be, "referral to one of our hip

specialists such as Dr. Kim Chillag or Dr. Brad Presnal to consider surgical management of this issue." He also noted in that May 6th report that the Claimant was requiring the assistance of a cane. The MRI that had been performed prior to the Claimant coming under the care of Dr. Burnworth noted an abnormal signal consistent with tendonopathy and/or an acute injury of the gluteus medius tendon and muscle.

In contrast to Dr. Burnworth's release in July 2010, in Dr. Chillag's evaluation of July 12, 2011, he noted the abnormal findings from the MRI and that the Claimant had had this pain ongoing since the injury and in the patient's history, Dr. Chillag recorded that, "he says his pain is about the same as it has been for sometime and not getting any better and not getting significantly worse. It does not hurt him in his groin, it goes radiate into his thigh." Dr. Chillag's opinion was that the Claimant has a chronic tear of the abductor tendon at the greater trochanter which required surgery but at that point after discussion with Mr. DeForrest, he wanted to try to avoid surgery and live with it. Dr. Chillag's opinion was that the pain and problems would not change and that if the pain became worse that he would then discuss with Mr. DeForrest his recommendation to have surgery and would be glad to perform that surgery when Mr. DeForrest decided to have the surgery performed. He also stated the opinion that the Claimant would need the availability of pain medications and would need conservative follow-up management

including medications and other conservative management. It was his opinion that the Claimant's family nurse practitioner, Ms. Wendy Likes, in Newberry would be the appropriate medical practitioner to follow the Claimant for his conservative care and medication needs. At his evaluation, Dr. Chillag did not address any permanent impairment and the Defendants did not submit any additional evidence in reference to permanent impairment. In the report subsequently received from Dr. Chillag which he issued at the request of this Commissioner without seeing the Claimant further, he gave the Claimant a 6% impairment of the left lower extremity.

The Claimant had a functional capacity evaluation and an AMA valid impairment analysis performed by the registered physical therapist. According to the functional capacity evaluation, the Claimant from a lifting standpoint was placed in the limited light duty to limited medium duty category and did he not tolerate even occasional kneeling, squatting or bending. The Claimant could carry 16 lbs. with both hands and could push 0 lbs. in the sled and can pull 0 lbs. in a sled. The physical therapist stopped the activities of squatting and kneeling due to increased pain and in reference to stair climbing, the Claimant used a step over step gait pattern and required the use of hand rails and reported increased hip pain but was able to complete the tasks. Validity testing was done and the Claimant was found to give valid and consistent effort. Mr. DeForrest was noted to

ambulate with a straight cane with a slightly antalgic gait and received a 7% stand alone impairment for his chronic hip trochanteric bursitis with abnormal gait. Mr. DeForrest was also given a 14% impairment due to his hip injury.

An independent medical evaluation was performed by a certified independent medical examiner who performed the examination under the AMA Guides 6th Edition whereas the registered physical therapist had performed the evaluation under the 5th Edition. Based on his evaluation, the certified independent medical examiner determined that the Claimant had sustained a 25% lower extremity impairment due to the injury to the hip/leg. It was his opinion that Mr. DeForrest needed ongoing medical care for his problems related to his left hip and elbow.

Finally, in his response to the Form 21, the Claimant took the position that while he was released by Dr. Burnworth, the Defendants had agreed to a second opinion and that the Claimant should be entitled to temporary total disability benefits from the date that his work was terminated through the date of the second opinion and until such time as Dr. Chillag was of the opinion that the Claimant had reached maximum medical improvement. At a minimum he requested temporary total disability benefits from the date that the Claimant was terminated through the date that Dr. Burnworth returned him to return to work without restrictions as having reached maximum medical

improvement.

Therefore, after a review of the testimony and evidence submitted, I find that the Claimant has established by a preponderance of the evidence that he is entitled to an Award under the Workers' Compensation Act. It is my opinion that he is entitled to temporary total disability benefits for the period from the date that he was terminated after which light duty work was not made available through the date that Dr. Burnworth released him to return to work without restriction, that being from March 24, 2010 through July 13, 2010, a period of exactly 16 weeks, and that the Claimant has established that he is entitled to a 15% loss of use award to the left hip for the injury sustained. Further, he is entitled to the continuing and future medical care as found to be necessary pursuant to the opinion of Dr. Kim Chillag. Wherefore, based on the above I have made the following findings of salient fact:

FINDINGS OF FACT

1. That this is an accepted case and this matter is before this Commissioner at the request of the Defendants for a determination of residual disability or loss of use Award as a result of the work-related injury. The Claimant sustained an admitted injury to the left arm and left hip. The parties have stipulated to jurisdiction and venue and to an average weekly wage of \$337.81 with a resulting compensation rate of \$225.22.

2. That at the time for the hearing on November 9, 2011 at

the conclusion of evidence and the taking of testimony, this Commissioner directed and then issued an Interim Order to the effect that, "the undersigned Commissioner wants the parties to have Dr. Chillag assign an impairment rating for the Claimant's left hip. Dr. Chillag's report was submitted into evidence, but it did not specifically address the issue of permanent impairment. The undersigned Commissioner believes that this information is necessary for her determination of the issues presented on this claim." The Order further provided that Dr. Chillag did not have to see the Claimant back for the purpose of performing an impairment evaluation and assigning a rating to the left hip unless he felt it was necessary but if he did, the Defendants would be required to provide that evaluation by Dr. Chillag. Subsequent to that, Dr. Chillag issued an impairment opinion concerning the Claimant's left hip without seeing the Claimant and issued a 6% permanent partial impairment to the left lower extremity. There was no conversion of that impairment.

3. That as for the impairment ratings that are in the file including that of Dr. Blake H. Moore, Fellow of the American Academy of Surgeons and a certified independent medical examiner; Ms. Tracy Hill, RPT, with Columbia Rehabilitation Clinic, who performed an impairment evaluation as part of the functional capacity evaluation; and the impairment rating given by Dr. Kim Chillag after request without further examination, I give greater weight to the impairments of the treating physicians than the

physical therapist and Dr. Moore, although those ratings were considered.

4. That based upon a review of the Record, I find that the Claimant is entitled to the temporary total disability benefit from the date of his termination March 24th through the date of maximum medical improvement since the Claimant was terminated while on light duty, and that the Claimant did not refuse suitable work after he was terminated while in a light duty position and was not offered work thereafter and prior to maximum medical improvement, with maximum medical improvement being the date that he was released on July 13th by Dr. Burnworth. Wherefore, the Claimant is entitled to temporary total disability benefits at his compensation rate from March 24, 2010 through July 13, 2010, a period of 16 weeks of temporary total compensation due.

5. That I find that the Claimant reached maximum medical improvement on July 13, 2010 when he was released from care by Dr. Burnworth.

6. That based upon the medical records and testimony, I find that the Claimant has sustained a 15% disability to his hip for an award of 42 weeks of compensation for his injury.

7. That based on the temporary total due in the amount of 16 weeks and the award given in this matter of 42 weeks, the Claimant is entitled to an Award of 58 weeks of compensation for a total amount due based on the compensation rate of \$225.22, of

\$13,062.76.

8. That the Claimant is entitled to the future medical care as outlined by Dr. Chillag which currently includes treatment by his family nurse practitioner, Ms. Wendy Likes, with Newberry Family Practice to include all causally related medications and causally related conservative care with access to Dr. Kim Chillag for evaluation for the recommended surgery on his chronic tear of the abductor tendon at the greater trochanter. The defendants may select an alternate provider for the conservative care if they so choose. Dr. Chillag has determined that such surgery is necessary and that if and when the Claimant's pain is to the point that the Claimant desires to have that surgery performed, he will perform the recommended surgery at the Claimant's request.

CONCLUSIONS OF LAW

Pursuant to S.C. Code §42-17-40, the following Conclusions of Law apply in this matter:

1. Under §42-1-120, §42-9-10 and §42-9-30 the determination is made as to the Claimant's entitlement to compensation.
2. Under §42-15-60 the determination is made as to the Claimant's entitlement to medical care and to future medical care as is set out hereinabove.
3. Under the stipulation of the parties, jurisdiction and

venue are determined to be proper and the average weekly wage is \$337.81 with a resulting compensation rate of \$225.22.

ORDER AND AWARD

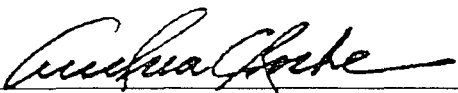
THEREFORE IT IS ORDERED that the Claimant is entitled to an award for 15% disability (loss of use) to his left hip in the amount of 42 weeks of compensation and to temporary total disability benefits from the point he was released from his job while he was in a light duty position through the date of maximum medical improvement in the amount of 16 weeks of compensation for a total amount due of 58 weeks of compensation which at the compensation rate of \$225.22 is a total amount of \$13,062.76. Said compensation having accrued and being less than 100 weeks shall be paid to the Claimant in a lump sum.

IT IS FURTHER ORDERED that the future medical care as determined to be necessary by Dr. Kim Chillag shall be provided by the Defendants. In addition, the Defendants shall provide such orthopaedic evaluation, care and testing as is necessary by Dr. Kim Chillag and to include at such time as the Claimant determines that he desires to have it performed, the surgery as recommended by Dr. Chillag. Per Dr. Kim Chillag's medical records, he has recommended that the Claimant have the surgery as set forth hereinabove and will perform such surgery when the Claimant determines that his pain is such that he does not want to live with it any longer and to have the recommended surgery. At that time again, the Defendants shall provide all necessary

medical care through Dr. Chillag which is necessary for performing the recommended surgery.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

April 6, 2012

By: Barbara Cheeseboro, Administrative
Assistant to Commissioner Roche

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



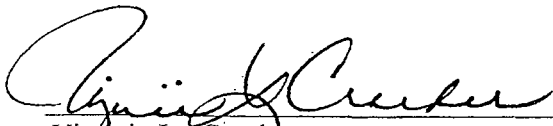
WCC File #: 0918195

Date of Injury: 11/13/2009

**ADMINISTRATIVE
ORDER**

CHARLES DEFORREST v. SAMS CLUB WALMART STORES INC
WCC File No: 0918195

The Request for Commission Review in the above captioned case is dismissed. It was not filed timely pursuant to R.67-701 and R.67-205 D.


Virginia L. Crocker
Judicial Director

Date: May 2, 2012

CERTIFICATE OF SERVICE

I hereby certify on May 2, 2012, I served this document on the parties listed below by electronic mail or depositing a copy hereof, postage prepaid, in the United States mail and addressed as follows:

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Ave.
Columbia, SC 29201

SAMS CLUB WALMART STORES INC
702 S.W. 8TH STREET
BENTONVILLE, AR 72716-0000

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

By: Valerie D. Deller, Judicial Department

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Charles B. DeForrest v WalMart Stores, Inc.
SCWCC: 0918195
Commissioner: Roche

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby

dismissed as Interlocutory. Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;

Granted. Denied. Dismissed Set for Hearing.

BEFORE THE;

Hearing Comm. Jurisdictional Comm. Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

Remand to Panel as indicated below.

Barden James Williams
 Beck Roche Wilkerson

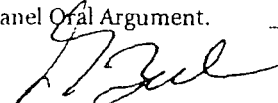
Remand for Order consistent with the Order of the Court.

Remand to the Hearing Commissioner.
 Remand to the Jurisdictional Commissioner.

Other: _____

Remand: Panel Oral Argument. En Banc Oral Argument.

AND IT IS SO ORDERED.



T. Scott Beck, Chair

Columbia, South Carolina

4/10 2012

CONCURRING:

Commissioner Susan S. Barden
 Commissioner Melody L. James
 Commissioner Derrick Williams
 Commissioner Avery Wilkerson
 Commissioner Andrea C. Roche
 Commissioner Gene McCaskill

NOT PARTICIPATING:

 _____ X _____

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL.

This 19 day of March, 2012.
 By: Kalene D. Della
 SCWCC Judicial Department

Johnnie W. Rofkey
Preston F. McDaniel



Claimant's Name: Charles B. DeForrest SSN: _____ Employer's Name: Wal-Mart Stores, Inc.
Address: _____ Address: 5426 Forest Drive
City: _____ State: SC Zip: _____ City: Columbia State: SC Zip: 29203
Home Phone: () - Work Phone: () - Insurance Carrier: American Home Assurance
Preparer's Name: Preston F. McDaniel Law Firm: McDaniel Law Firm Preparer's Phone #: (803) 771-7211

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by claimant employer (check one) Date of injury: 11-13-2009 (m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See Attachment.

(Check one) Oral argument is is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY, 421 Wando Park Blvd., Suite 100, Mt. Pleasant, SC 29464 Name

on the 30th day of April, 2012 by first class mail personal service certified mail.

Preston F. McDaniel (Signature) _____ Claimant's Attorney _____ April 30, 2012
Preparer's Signature Title Date

Check this box if you are not represented by an attorney.

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701B. Otherwise, file the original and four copies of this form with the Judicial Department. The appeal must be postmarked no later than days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

ATTACHMENT TO FORM 30

Charles B. DeForrest v. Wal-Mart Stores, Inc.
W.C.C. File No. 0918195

1. That pursuant to S.C. Code of Laws §42-17-40, the Claimant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commissioner at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That the Hearing Commissioner erred as a matter of law by ordering the Defendants following the hearing to obtain an impairment rating from the treating physician, Dr. Kim Chillag, wherein no request by either party was made and therefore this constitutes an arbitrary and capricious decision and an abuse of discretion on behalf of the Hearing Commissioner. The parties are charged with the responsibility of making all evidence available that they desire to have heard and where the parties do not request an adjournment, it is an error for a non-biased impartial hearing officer to require such additional information. In addition, the Hearing Commissioner erred by not ordering at the very minimum that the Claimant be sent back to Dr. Chillag for an evaluation performed pursuant to recognized medical authority including the American Medical Association's Guide to the Rating of Permanent Physical Impairment which makes the doctor's opinion the subject of surmise, speculation and innuendo.

3. That the Hearing Commissioner erred as a matter of law by not requiring a specific evaluation be performed by Dr. Chillag under accepted medical practices and procedures and in accordance with accepted medical standards. The AMA's Guides to the Rating of Permanent Physical Impairment, under which Dr. Chillag stated that his opinion concerning an impairment was provided, specifically states that: "an impairment evaluation is a medical evaluation performed by a physician, using a standard method as outlined in the Guides to determine permanent impairment associated with a medical condition." (AMA Guides, 5th Edition, p. 18, Sec. 2.1). All impairment evaluations much include, a narrative history; an assessment of, "current clinical status, including current symptoms, review of systems, physical examination, and a list of contemplated treatment

rehabilitation and any anticipated reevaluation,"; a list of diagnostic study results and outstanding pertinent diagnostic studies; a discussion of whether or not the Claimant has reached maximum medical improvement and if not, estimate and discuss the expected date of full or partial recovery; discuss diagnoses and impairments; and discuss impairment rating criteria, prognosis, residual function and limitations.

It was an error of law to simply obtain an impairment rating without an impairment evaluation being performed in this matter.

4. That the Hearing Commissioner erred as a matter of law in reference to the provision of future medical care where Dr. Chillag stated that the Claimant's family nurse practitioner, Ms. Wendy Likes, should provide all causally related medication and causally related conservative care. Where the Hearing Commissioner recognized this and stated this in Finding of Fact No. 8. She then erred by not including this specific recommendation by Dr. Chillag and by failing to include in her Order her Finding of Fact No. 8 that this nurse practitioner was to be authorized for medications and continuing medical care but that, "the Defendants may select an alternate provider for the conservative care if they so choose." There is no provision in the Order part that Ms. Wendy Likes is to be paid for her current care and that she is to provide that care until such time as the Defendants choose another physician. Pursuant to the Act the Commissioner erred as a matter of law by not simply designating this physician under her responsibility under S.C. Code §42-15-60. That Section specifically provides that the Commissioner is charged with the responsibility of setting forth, "with as much specificity as possible," as to the medical care that is to be provided and the physician who is, "an authorized physician". That Section further provides that while the Claimant is to accept a physician chosen by the Defendants that the Commission may order such care to be provided by a different physician for good cause shown. In this case the Defendants were not providing such medical care and the authorized treating physician stated which physician should be providing that care and that care should have been ordered pursuant to the authorized treating physician's, Dr. Kim Chillag's, recommendation especially where there is no reliable, probative or substantial evidence that the Defendants at the time of the hearing offered such medical care through any other medical provider.

5. That the Hearing Commissioner erred as a matter of law by considering and making a Decision and giving priority to the

rating of the treating physician, Dr. Kim Chillag where there is no reliable, probative and substantial evidence in the Record that Dr. Chillag ever saw the Claimant for that purpose and where the evidence does establish that he issued such impairment rating without seeing the Claimant in violation of the American Medical Association's Guides to the Rating of Permanent Physical Impairment under which it was allegedly made and it therefore is the subject of being based on surmise, speculation and innuendo. It does not constitute substantive evidence at all.

6. That the Hearing Commissioner erred as a matter of law based on the reliable, probative and substantial evidence in the Record and under the dictates of §42-9-10 by not finding that the Claimant was entitled to an Award for total and permanent disability. There is absolutely nothing in the Record to establish that the Claimant can return to any type of full-time employment and the Record specifically sets forth that the Claimant's injury is not limited to a single member but involves his hip, leg and also his arm, and involves the lower back. Again, there is absolutely no evidence in the Record that he can return to a full-time gainful employment in any capacity nor in addition thereto that based on his age, education, background and experience and the physical facts of the injury that there are jobs which he can perform on a full-time basis (there are none that he can) which are not so limited in quality, quantity or dependability that a reasonably stable job market for them exists.

7. That the Hearing Commissioner erred as a matter of law in her determination of the Award to be awarded to the Claimant for loss of use of the hip which as is set out in her Order is based upon the impairment evaluation of the treating physician. The Hearing Commissioner is charged with determining the amount of loss of use that the Claimant has to do work requiring the use of the injured member, in this case the hip, for which she made an award and is not charged with the responsibility nor is it appropriate to make an award based on impairment. The AMA Guides specifically state that the ratings provided in those Guides have nothing to do with loss of use or the inability of a Claimant to do work with the injured member, organ or bodily part but have to do with the impairment to perform the activities of daily living. The Guides specifically exclude the use of the Guides in determinations of the loss of use to do work.

8. That the Hearing Commissioner erred as a matter of law under her responsibility under S.C. Code §42-9-30 and her responsibility to make a loss of use award under that Section.

The law specifically requires her to make detailed Findings of Fact setting forth the evidence relied upon to make the Award for loss of use and there is absolutely no reference to any evidence in the Record whatsoever nor is there any Finding of Fact that complies with the dictates of our Appellate Court decisions and there is an absolute lack of Findings of Fact as to the basis for loss of use Award, and in fact no loss of use Award was made but in fact a disability award was made.

9. That the Hearing Commissioner erred as a matter of law for the reasons as set forth above and in violation of her responsibility to make detailed Findings of Fact that are sufficiently detailed enough to allow for judicial review in making Finding of Fact No. 6 and her disability Award of 15% to the Claimant's hip.

10. That the Hearing Commissioner erred as a matter of law by not providing the Claimant at a minimum with 100% loss of use of the hip Award where there is absolutely no evidence in the Record that the Claimant can use his hip to any degree to do full-time work with the hip. There is simply no reliable probative and substantial evidence in the Record that the Claimant can use his hip to do any full-time work and as such, the Commissioner erred as a matter of law by failing to award him 100% loss of use under the criteria that is to be applied under the Act.

11. That the Hearing Commissioner erred as a matter of law having found that there was involvement of the right arm by failing to address whether or not the Claimant was entitled to a permanent loss of use award to that injured member.

12. That the Hearing Commissioner erred as a matter of law in her determination that the Claimant reached maximum medical improvement on July 13, 2010 where the Defendants agreed to a second opinion by Dr. Kim Chillag and that evaluation resulted in Dr. Chillag's initial determination that the Claimant needed surgery which was not performed because of the Claimant's desire not to have surgery at that time and therefore there is no statement by Dr. Chillag prior to the Form 14B that he signed stating that the Claimant had reached maximum medical improvement and therefore the Commissioner erred as to the date of maximum medical improvement wherein her entire remaining Order is based upon the Findings of Dr. Chillag.

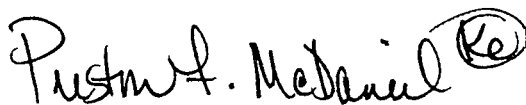
13. That the Hearing Commissioner erred as a matter of law by giving greater weight to impairment evaluations performed by Dr. Chillag who never saw the Claimant for such purpose as

... compared to a certified disability examiner who specifically saw the Claimant for an impairment evaluation and a registered physical therapist who also saw the Claimant for the purpose of impairment evaluation as to the loss of range of motion which that physical therapist documented as part of that functional capacity evaluation. That doctor and that physical therapist opinions were based upon their evaluations of the Claimant whereas Dr. Chillag's was not and his is based upon surmise, speculation and innuendo and does not constitute valid evidence.

14. That the Hearing Commissioner denied the Claimant due process of law by directing ex mari moto (on her own Motion) that the Defendants obtain an impairment evaluation; leaving the Record open for that purpose; and further by not requiring that the Claimant be sent back to Dr. Chillag for the purpose of such evaluation and by further denying the Claimant the right of cross-examination and allowing the report into evidence and considering that report without further hearing or under the right of cross-examination of that report. The Hearing Commissioner in essence became an advocate for the Defendants and not an impartial hearing officer.

The above-referenced Exceptions are subject to amendment upon receipt of the Transcript.

Respectfully submitted,



Preston F. McDaniel, Esquire
Attorney for the Claimant

April 30, 2012

ORDER AND AWARD

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0918195

Charles B. DeForrest,
Employee/Claimant,

v.

Wal-Mart Stores, Inc.

Employer,

and

American Home Assurance,

Carrier,

Defendant(s).

HEARING: Date: November 9, 2011
Location: Columbia, South Carolina

APPEARANCES: Claimant represented by
Preston F. McDaniel, Esquire

Defendant(s) represented by
Johnnie W. Baxley, III

PURPOSE OF HEARING: This matter came before the Commissioner
on a Form 21

COMMISSIONER: Commissioner Andrea C. Roche

FILED: April 6, 2012

STIPULATIONS

The parties have stipulated to jurisdiction and venue and to an average weekly wage of \$337.81 with a resulting compensation rate of \$225.22.

The Commission File with the exception of self-serving declarations and unstipulated medicals is made a part of the Record.

STATEMENT OF THE CASE

At the time for the Hearing, pursuant to the Administrative Procedures Act and the Rules of this Commission, records and reports from the following were made a part of the Record: Dr. Craig Burnworth, M.D., Moore Orthopaedic Clinic; Dr. Kim J. Chillag, M.D., Moore Orthopaedic Clinic; Tracy Hill, RPT, Columbia Rehabilitation Clinic; Dr. Blake Moore, M.D., FACS, CIME, Columbia, SC. In addition to the APA Submissions, at the conclusion of the taking of testimony, this Commissioner requested to speak to the attorneys at which time this Commissioner advised the parties that the Defendants should have obtained an impairment rating from Dr. Kim Chillag and this Commissioner instructed the Defendants to obtain an impairment rating from Dr. Chillag. After a series of emails, the Claimant took the position that he objected to the Record being left open at the request of this Commissioner unless the Defendants were directed to send the Claimant back to see and to have an evaluation performed by Dr. Chillag in accordance with the AMA

Guidelines evaluation process so that Dr. Chillag could provide an AMA valid impairment evaluation. The Claimant took the position that Dr. Chillag has not seen the Claimant since July 12, 2011 at which time he did not see the Claimant for the purpose of performing an impairment evaluation and that therefore his opinion would be the subject of speculation and innuendo. After consideration of the arguments of the parties, this Commissioner signed an Order stating that this Commissioner believed that the information, that being an impairment rating by Dr. Kim Chillag, was necessary for her determination of the issues presented on this claim and that if Dr. Chillag felt it was necessary to see the Claimant in order to assign an impairment rating, then the Defendants should send the Claimant to Dr. Chillag for that purpose and that once a response was received from Dr. Chillag, this Commissioner would immediately close the Record and a decision would be entered. Without seeing the Claimant again, the Defendants submitted a handwritten response by Dr. Chillag which was written on a letter from Defense Counsel stating that using the Impairment Guides that he would assign a 6% impairment of the lower extremity. That handwritten response was followed up by a letter to that effect from Dr. Chillag on December 8, 2011. Upon submission of that document, the Record was closed and this Commissioner then reviewed the Record and made her Decision.

It should also be noted that the Claimant objected to going

forward on an Award of permanency based on an application for an Award filed by the Defendants and specifically where the request was being made on a WCC Form 21 that was filed only for an award of benefits without any type of stop payment request being made. The Claimant was not receiving benefits at the time that this request was made and again the Form 21 was limited specifically to the Defendants request for a determination as to whether or not the Claimant is entitled to an Award under the Workers' Compensation Act. The Claimant takes the position that the award of benefits is a property right of a claimant and that he should not be forced to prematurely go forward on such a determination until he is ready, prepared, and he makes that request for benefits. According to the Claimant's position, in this or any other case there is nothing to say that the Claimant would have made the request for benefits but again that issue should not be decided by this Commission until such time as the Claimant has made a request for an Award.

Testimony was taken from the Claimant as to his education, background and experience, and the physical facts of the injury and how he is doing currently with his problems related to the injury.

Based on that testimony, it appears that Mr. DeForrest at the time of the hearing is 80 years old. He is a college graduate and after college he served 10 years in the United States Navy during which time he became an avid swimmer.

Subsequent to the Navy, he has taught and has been either a teacher or an instructor until his retirement. After retirement, he had taken the job with Wal-Mart to make additional income where he worked as a door greeter which was his normal job which he held for three (3) years prior to his injury. Prior to the injury, Mr. DeForrest testified that he was an avid walker and loved to go on hikes and would actually walk to and from his residence to his employment and would walk many blocks at a time. He also testified that prior to the accident that he again was an avid swimmer and would swim many, many laps in a pool on a daily or regular basis.

Subsequent to the injury, Mr. DeForrest as is reflected in the medical reports walks with a cane. He has constant pain and has trouble with such activities as bending and stooping or squatting and problems with lifting and with standing or sitting for any length of time. He now limits his walking, which again is done with a cane, and has an altered gait and does little or no swimming and when he does swim he can only swim a lap or two and that is using strokes that require the use of the upper body versus the lower body. In his opinion he can not return to work at Wal-Mart on a full-time basis and he does not know of any job that he can do on a regular fulltime basis. He testified that he was applied for several jobs, all involving retail work and that about one week before the Hearing he had obtained a part-time job with Comfort Keeper where he would be working 12-18 hours per

week sitting with Seniors.

He also confirmed that at the time that he was dismissed from Wal-Mart that he was still under light duty restrictions and that Wal-Mart up until the time of his dismissal was making light duty work available in his position as a door greeter which he testified he would have continued to do had he not been dismissed. While it appears there was a disagreement over a time clock issue as to hours worked versus temporary partial on his last day, that was used by Wal-Mart for his dismissal and while Mr. DeForrest explained from his point of view as to what occurred, there is no question based on the testimony and the evidence before this Commissioner that at the time he was dismissed he was still under a light duty status and that up until that time Wal-Mart had made light duty work available and that after that time, light duty work was not made available to him. The records of the original treating orthopaedist, Dr. Craig Burnworth, establish that from his treatment note of March 9 through July 13, 2010, he had the Claimant on light duty and then on July 13th returned him to full duty without restriction and gave the Claimant a 0% impairment.

A review of the treatment records of Dr. Burnworth are particularly interesting in reference to his findings in July because in his May 6, 2010 note, he noted disappointment that physical therapy had not been provided and that after physical therapy, the next step would be, "referral to one of our hip

specialists such as Dr. Kim Chillag or Dr. Brad Presnal to consider surgical management of this issue." He also noted in that May 6th report that the Claimant was requiring the assistance of a cane. The MRI that had been performed prior to the Claimant coming under the care of Dr. Burnworth noted an abnormal signal consistent with tendonopathy and/or an acute injury of the gluteus medius tendon and muscle.

In contrast to Dr. Burnworth's release in July 2010, in Dr. Chillag's evaluation of July 12, 2011, he noted the abnormal findings from the MRI and that the Claimant had had this pain ongoing since the injury and in the patient's history, Dr. Chillag recorded that, "he says his pain is about the same as it has been for sometime and not getting any better and not getting significantly worse. It does not hurt him in his groin, it goes radiate into his thigh." Dr. Chillag's opinion was that the Claimant has a chronic tear of the abductor tendon at the greater trochanter which required surgery but at that point after discussion with Mr. DeForrest, he wanted to try to avoid surgery and live with it. Dr. Chillag's opinion was that the pain and problems would not change and that if the pain became worse that he would then discuss with Mr. DeForrest his recommendation to have surgery and would be glad to perform that surgery when Mr. DeForrest decided to have the surgery performed. He also stated the opinion that the Claimant would need the availability of pain medications and would need conservative follow-up management

including medications and other conservative management. It was his opinion that the Claimant's family nurse practitioner, Ms. Wendy Likes, in Newberry would be the appropriate medical practitioner to follow the Claimant for his conservative care and medication needs. At his evaluation, Dr. Chillag did not address any permanent impairment and the Defendants did not submit any additional evidence in reference to permanent impairment. In the report subsequently received from Dr. Chillag which he issued at the request of this Commissioner without seeing the Claimant further, he gave the Claimant a 6% impairment of the left lower extremity.

The Claimant had a functional capacity evaluation and an AMA valid impairment analysis performed by the registered physical therapist. According to the functional capacity evaluation, the Claimant from a lifting standpoint was placed in the limited light duty to limited medium duty category and did he not tolerate even occasional kneeling, squatting or bending. The Claimant could carry 16 lbs. with both hands and could push 0 lbs. in the sled and can pull 0 lbs. in a sled. The physical therapist stopped the activities of squatting and kneeling due to increased pain and in reference to stair climbing, the Claimant used a step over step gait pattern and required the use of hand rails and reported increased hip pain but was able to complete the tasks. Validity testing was done and the Claimant was found to give valid and consistent effort. Mr. DeForrest was noted to

ambulate with a straight cane with a slightly antalgic gait and received a 7% stand alone impairment for his chronic hip trochanteric bursitis with abnormal gait. Mr. DeForrest was also given a 14% impairment due to his hip injury.

An independent medical evaluation was performed by a certified independent medical examiner who performed the examination under the AMA Guides 6th Edition whereas the registered physical therapist had performed the evaluation under the 5th Edition. Based on his evaluation, the certified independent medical examiner determined that the Claimant had sustained a 25% lower extremity impairment due to the injury to the hip/leg. It was his opinion that Mr. DeForrest needed ongoing medical care for his problems related to his left hip and elbow.

Finally, in his response to the Form 21, the Claimant took the position that while he was released by Dr. Burnworth, the Defendants had agreed to a second opinion and that the Claimant should be entitled to temporary total disability benefits from the date that his work was terminated through the date of the second opinion and until such time as Dr. Chillag was of the opinion that the Claimant had reached maximum medical improvement. At a minimum he requested temporary total disability benefits from the date that the Claimant was terminated through the date that Dr. Burnworth returned him to return to work without restrictions as having reached maximum medical

improvement.

Therefore, after a review of the testimony and evidence submitted, I find that the Claimant has established by a preponderance of the evidence that he is entitled to an Award under the Workers' Compensation Act. It is my opinion that he is entitled to temporary total disability benefits for the period from the date that he was terminated after which light duty work was not made available through the date that Dr. Burnworth released him to return to work without restriction, that being from March 24, 2010 through July 13, 2010, a period of exactly 16 weeks, and that the Claimant has established that he is entitled to a 15% loss of use award to the left hip for the injury sustained. Further, he is entitled to the continuing and future medical care as found to be necessary pursuant to the opinion of Dr. Kim Chillag. Wherefore, based on the above I have made the following findings of salient fact:

FINDINGS OF FACT

1. That this is an accepted case and this matter is before this Commissioner at the request of the Defendants for a determination of residual disability or loss of use Award as a result of the work-related injury. The Claimant sustained an admitted injury to the left arm and left hip. The parties have stipulated to jurisdiction and venue and to an average weekly wage of \$337.81 with a resulting compensation rate of \$225.22.
2. That at the time for the hearing on November 9, 2011 at

the conclusion of evidence and the taking of testimony, this Commissioner directed and then issued an Interim Order to the effect that, "the undersigned Commissioner wants the parties to have Dr. Chillag assign an impairment rating for the Claimant's left hip. Dr. Chillag's report was submitted into evidence, but it did not specifically address the issue of permanent impairment. The undersigned Commissioner believes that this information is necessary for her determination of the issues presented on this claim." The Order further provided that Dr. Chillag did not have to see the Claimant back for the purpose of performing an impairment evaluation and assigning a rating to the left hip unless he felt it was necessary but if he did, the Defendants would be required to provide that evaluation by Dr. Chillag. Subsequent to that, Dr. Chillag issued an impairment opinion concerning the Claimant's left hip without seeing the Claimant and issued a 6% permanent partial impairment to the left lower extremity. There was no conversion of that impairment.

3. That as for the impairment ratings that are in the file including that of Dr. Blake H. Moore, Fellow of the American Academy of Surgeons and a certified independent medical examiner; Ms. Tracy Hill, RPT, with Columbia Rehabilitation Clinic, who performed an impairment evaluation as part of the functional capacity evaluation; and the impairment rating given by Dr. Kim Chillag after request without further examination, I give greater weight to the impairments of the treating physicians than the

physical therapist and Dr. Moore, although those ratings were considered.

4. That based upon a review of the Record, I find that the Claimant is entitled to the temporary total disability benefit from the date of his termination March 24th through the date of maximum medical improvement since the Claimant was terminated while on light duty, and that the Claimant did not refuse suitable work after he was terminated while in a light duty position and was not offered work thereafter and prior to maximum medical improvement, with maximum medical improvement being the date that he was released on July 13th by Dr. Burnworth. Wherefore, the Claimant is entitled to temporary total disability benefits at his compensation rate from March 24, 2010 through July 13, 2010, a period of 16 weeks of temporary total compensation due.

5. That I find that the Claimant reached maximum medical improvement on July 13, 2010 when he was released from care by Dr. Burnworth.

6. That based upon the medical records and testimony, I find that the Claimant has sustained a 15% disability to his hip for an award of 42 weeks of compensation for his injury.

7. That based on the temporary total due in the amount of 16 weeks and the award given in this matter of 42 weeks, the Claimant is entitled to an Award of 58 weeks of compensation for a total amount due based on the compensation rate of \$225.22, of

\$13,062.76.

8. That the Claimant is entitled to the future medical care as outlined by Dr. Chillag which currently includes treatment by his family nurse practitioner, Ms. Wendy Likes, with Newberry Family Practice to include all causally related medications and causally related conservative care with access to Dr. Kim Chillag for evaluation for the recommended surgery on his chronic tear of the abductor tendon at the greater trochanter. The defendants may select an alternate provider for the conservative care if they so choose. Dr. Chillag has determined that such surgery is necessary and that if and when the Claimant's pain is to the point that the Claimant desires to have that surgery performed, he will perform the recommended surgery at the Claimant's request.

CONCLUSIONS OF LAW

Pursuant to S.C. Code §42-17-40, the following Conclusions of Law apply in this matter:

1. Under §42-1-120, §42-9-10 and §42-9-30 the determination is made as to the Claimant's entitlement to compensation.
2. Under §42-15-60 the determination is made as to the Claimant's entitlement to medical care and to future medical care as is set out hereinabove.
3. Under the stipulation of the parties, jurisdiction and

venue are determined to be proper and the average weekly wage is \$337.81 with a resulting compensation rate of \$225.22.

ORDER AND AWARD

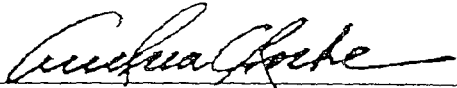
THEREFORE IT IS ORDERED that the Claimant is entitled to an award for 15% disability (loss of use) to his left hip in the amount of 42 weeks of compensation and to temporary total disability benefits from the point he was released from his job while he was in a light duty position through the date of maximum medical improvement in the amount of 16 weeks of compensation for a total amount due of 58 weeks of compensation which at the compensation rate of \$225.22 is a total amount of \$13,062.76. Said compensation having accrued and being less than 100 weeks shall be paid to the Claimant in a lump sum.

IT IS FURTHER ORDERED that the future medical care as determined to be necessary by Dr. Kim Chillag shall be provided by the Defendants. In addition, the Defendants shall provide such orthopaedic evaluation, care and testing as is necessary by Dr. Kim Chillag and to include at such time as the Claimant determines that he desires to have it performed, the surgery as recommended by Dr. Chillag. Per Dr. Kim Chillag's medical records, he has recommended that the Claimant have the surgery as set forth hereinabove and will perform such surgery when the Claimant determines that his pain is such that he does not want to live with it any longer and to have the recommended surgery. At that time again, the Defendants shall provide all necessary

medical care through Dr. Chillag which is necessary for performing the recommended surgery.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

April 6, 2012

By: Barbara Cheeseboro, Administrative
Assistant to Commissioner Roche

CERTIFICATE OF SERVICE BY MAIL

WCC FILE NO. 0918195

I hereby certify that I have on this day served the following in the matter of Charles DeForrest vs. Wal-Mart Stores, Inc. with a copy of the **FORM 30 - REQUEST FOR COMMISISON REVIEW** by depositing the same in the United States Mail with adequate postage thereon, addressed as follows:

Virginia L. Crocker, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY
421 Wando Park Blvd., Suite 100
Mt. Pleasant, South Carolina 29464



Kimberley I. Cashdollar

SWORN TO BEFORE ME this
30th day of April, 2012.

Kristuttelland (L.S.)
Notary Public for South Carolina

My Commission Expires: 2-14-22

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0918195

Charles B. DeForrest, Appellant,

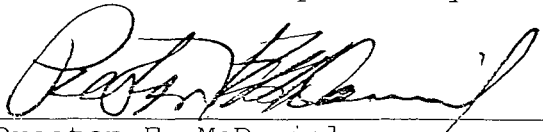
v.

WalMart Stores, Inc., Employer,
and American Home Assurance, Carrier, Respondents.

NOTICE OF APPEAL

Claimant Charles B. DeForrest appeals the Administrative Order issued by the Judicial Director dated May 2, 2012 and the Decision and Order of the South Carolina Workers' Compensation Commission Full Commission dated June 19, 2012: Appellant has not received written notice of entry of either Order nor has he been served with Notice pursuant to either S.C. Code §1-23-350 or §42-17-60 which require service by regular mail and registered mail respectively.

Dated: July 16, 2012


Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211
Attorney for Appellant

Other Counsel of Record:

Johnnie W. Baxley, III, Esquire
Willson, Jones, Carter & Baxley
421 Wando Park Blvd., Suite 100
Mt. Pleasant, SC 29464
(843) 284-1080
Attorney for Respondents

RECEIVED
JUL 17 2012
SC Court of Appeals

GROUNDS/ALLEGED ERRORS OF LAW

Charles B. DeForrest v. Wal-Mart Stores, Inc.
W.C.C. File No. 0918195

Pursuant to S.C. Code §42-17-60 and 1-23-380, the following grounds and/or alleged errors of law are presented to the Court for a decision:

1. Did the Judicial Director of the South Carolina Workers' Compensation Commission err as a matter of law by issuing an Administrative Order on May 2, 2012 dismissing the appeal of the Claimant/Appellant to the Full Commission requesting review of the Hearing Commissioner's Decision pursuant to S.C. Code §42-17-50 where the only notice of the Order having been filed that was given to the parties was by electronic mail which does not constitute valid notice of the filing of an Order or Award under any Statutory Law in a workers' compensation or APA case?
2. Did the South Carolina Workers' Compensation Commission err as a matter of law by dismissing the, "Motion to Reinstate the Request for Review before the Full Commission and/or Service of the Order pursuant to S.C. Code §1-23-350" by Order dated June 18, 2012, which Motion had been filed concerning the Administrative Order that had been issued by the Judicial Director on May 2, 2012 especially where that Judicial Conference Decision and Order was itself not served by U.S. Mail or any other type of valid service but was forwarded to the parties by electronic mail?
3. Does the Judicial Director of the South Carolina Workers' Compensation Commission have any statutory authority to enter an Order dismissing an appeal that has been filed pursuant to S.C. Code §42-17-50; and especially where the statutory authority specifically providing the duties of a Judicial Director under S.C. Code §42-3-50 was repealed by Acts & Joint Resolution No. 327 of the 2006 Acts & Joint Resolutions effective June 2, 2006?
4. Did the South Carolina Workers' Compensation Commission err as a matter of law by failing to comply with S.C. Code §1-23-350 which specifically provides that,

"Parties shall be notified either personally or by mail of any Decision or Order. Upon request a copy

of the Decision or Order shall be delivered or mailed forthwith to each party and to his Attorney of Record." (Emphasis added).

By not mailing a copy after requested and specifically where as part of the Motion to Reinstate the Claimant/Appellant specifically requested that he be properly notified by having a copy of the Decision or Order mailed to him?

5. Did the South Carolina Workers' Compensation Commission err as a matter of law by failing to make Findings of Fact and Conclusions of Law that are sufficiently detailed and definite enough to allow for judicial review as to the basis for the decision, "dismissing" the Motion to Reinstate the Appeal of the Claimant/Appellant in the above-referenced matter as is required under S.C. Code §1-23-350; 42-17-40 and 50 and 42-17-60 and 1-23-380?

6. Did the Commission err as a matter of law by serving an Order or Award by electronic mail where there is absolutely no statutory authority for service by electronic mail; and specifically where the statutory time period for taking any action concerning service of an Order or Award does not begin to run under the Appellate Statute of the South Carolina Workers' Compensation Commission S.C. Code §42-17-60 until, "after receipt of notice to be sent by Registered Mail of the Award" and especially in this matter wherein no Order or Award of Decision has of the date of the filing of this appeal been served by Certified Mail on the Appellant?

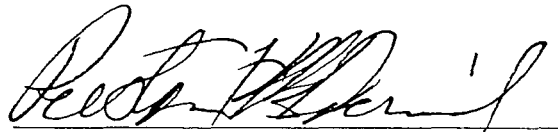
7. Did the South Carolina Workers' Compensation Commission err as a matter of law by, "dismissing" the Motion and thereby by innuendo affirming the Administrative Order that had been issued by the Judicial Director which dismissed the appeal of the Claimant/Appellant that had been filed from the Hearing Commissioner's Order to the Full Commission, without proper notice as required by Statute of either Order thereby denying the Claimant/Appellant procedural due process of law by failing to comply with the statutory provisions concerning Notice to the Claimant/Appellant or the filing of an Order in his claim?

FILING OF THE RECORD OR REMAND REQUESTED

Pursuant to S.C. Code §1-23-380(4), 1-23-320 and Circuit Court Rule 75, the Claimant/Appellant would specifically request that a copy of the Record of the Commission specifically from

the date of the filing of the Order of the Hearing Commissioner on April 6, 2012 forward to the date of this appeal be filed with the Court or that a certified copy of that Record be filed with the Court specifically to include all emails, correspondence and any other document pertaining to this matter within the possession and as part of the Record of the Agency, the South Carolina Workers' Compensation Commission, or in the alternative that pursuant to S.C. Code §1-23-380(4) that this matter be remanded by the Court to the Commission with specific directions to provide the documents relevant to this appeal or certified copies of those documents and that the Commission submit documents to establish its compliance with the S.C. Code §1-23-350 and 42-17-40, 50 and 60 as to Notice of the filing of an Order in accordance with law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Preston F. McDaniel", written over a horizontal line.

Preston F. McDaniel, Esquire
Attorney for the Claimant/Appellant

July 16, 2012

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



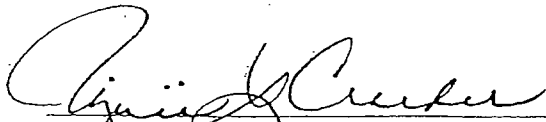
WCC File #: 0918195

Date of Injury: 11/13/2009

ADMINISTRATIVE
ORDER

CHARLES DEFORREST v. SAMS CLUB WALMART STORES INC
WCC File No: 0918195

The Request for Commission Review in the above captioned case is dismissed. It was not filed timely pursuant to R.67-701 and R.67-205 D.


Virginia L. Crocker
Judicial Director

Date: May 2, 2012

CERTIFICATE OF SERVICE

I hereby certify on May 2, 2012, I served this document on the parties listed below by electronic mail or depositing a copy hereof, postage prepaid, in the United States mail and addressed as follows:

Preston F. McDaniel
McDaniel Law Firm
1315 Elmwood Ave.
Columbia, SC 29201

SAMS CLUB WALMART STORES INC
702 S.W. 8TH STREET
BENTONVILLE, AR 72716-0000

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

By: Valerie D. Deller, Judicial Department

RECEIVED
JUL 17 2012
SC Court of Appeals

**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER**

**Charles B. DeForrest v WalMart Stores, Inc.
SCWCC: 0918195
Commissioner: Roche**

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby _____

_____ dismissed as Interlocutory. _____ Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is; _____ Granted. _____ Denied. ab _____ Dismissed. _____ Set for Hearing.

BEFORE THE;
_____ Hearing Comm. _____ Jurisdictional Comm. _____ Full Commission.

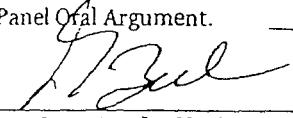
IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

_____ Remand to Panel as indicated below.
_____ Barden _____ James _____ Williams
_____ Beck _____ Roche _____ Wilkerson

_____ Remand for Order consistent with the Order of the Court.
_____ Remand to the Hearing Commissioner.
_____ Remand to the Jurisdictional Commissioner.
_____ Other: _____

_____ Remand: _____ Panel Oral Argument. _____ En Banc Oral Argument.

AND IT IS SO ORDERED.



T. Scott Beck, Chair

Columbia, South Carolina
4/10 2012

CONCURRING:	NOT PARTICIPATING:	DISSENTING:
Commissioner Susan S. Barden _____	_____	_____
Commissioner Melody L. James _____	_____	_____
Commissioner Derrick Williams _____	_____	_____
Commissioner Avery Wilkerson _____	_____	_____
Commissioner Andrea C. Roche _____	_____ X _____	_____
Commissioner Gene McCaskill _____	_____	_____

CERTIFICATE OF SERVICE
THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 19 day of March, 2012. Johanne W. Boyley
By: Kalene D. Belli Preston F. McDaniel
SCWCC Judicial Department

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 0918195

Charles B. DeForrest, Appellant,


v.

WalMart Stores, Inc., Employer,
and American Home Assurance, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the NOTICE OF APPEAL by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2012 addressed to: Ms. Virginia L. Crocker, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202 AND also serving a copy upon Johnnie W. Baxley, III, Esquire, WILLSON, JONES, CARTER & BAXLEY, 421 Wando Park Boulevard, Ste. 100, Mt. Pleasant, SC 29464.

Dated: July 16, 2012


Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

RECEIVED
JUL 17 2012
SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No: 0918195

CHARLES B. DEFORREST,)
Employee/Claimant,)
v.)
SAMS CLUB WAL-MART)
STORES, INC.,)
as Employer, and)
AMERICAN HOME ASSURANCE,)
as Carrier,)
Defendants.)

MOTION TO REINSTATE
THE REQUEST FOR REVIEW BEFORE
THE FULL COMMISSION AND/OR
SERVICE OF THE ORDER
PURSUANT TO S.C. CODE §1-23-350

TO: JOHNNIE W. BAXLEY, ESQUIRE, ATTORNEY FOR THE DEFENDANTS,
AND SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION:

The Claimant pursuant to Commission Regulation 67-215 hereby moves to have the Request for Commission Review filed in the above-referenced matter reinstated following the Administrative Order dismissing the appeal for good cause shown for service of the Order pursuant to S.C. Code §1-23-350. The grounds for this Motion are set forth in the Memorandum attached hereto and incorporated herein by reference.

I SO MOVE.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201

Attorney for the Employee/Claimant

May 4, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No: 0918195

CHARLES B. DEFORREST,)
)
Employee/Claimant,)
)
v.)
)
SAMS CLUB WAL-MART)
STORES, INC.,)
)
as Employer, and)
)
AMERICAN HOME ASSURANCE,)
)
as Carrier,)
)
Defendants.)
)
_____)

**MOTION TO REINSTATE
THE REQUEST FOR REVIEW BEFORE
THE FULL COMMISSION AND/OR
SERVICE OF THE ORDER
PURSUANT TO S.C. CODE §1-23-350**

In support of the Motion to Reinstate the Request for Commission Review made pursuant to S.C. Code §42-17-50, the Claimant would respectfully show unto the Commission as follows:

1. That pursuant to the Affidavit of Ms. Patty K. Boatwright, the paralegal assigned to this file, she received notice of the filing of the Order on the morning of April 9, 2012. At that point, Ms. Boatwright docketed the filing deadline for filing a Request for Commission Review for nineteen (19) days following that date which falls on a Saturday, thus making the Request for Commission Review due on the next business date, Monday April 30, 2012.

2. That as set forth in the Commission file, a Motion for Review was properly filed with the Commission on April 30th. Attorneys and parties appearing before the Workers' Compensation

Commission have been instructed that the time limits for filing, where the Commission has provided Notice by electronic filing to be nineteen (19) days from the date that the parties received notice of the filing.

3. That the Claimant does not dispute that the electronic notice of the filing of the Order is time dated as being transmitted late on the afternoon of April 6th, however again the Claimant's Attorney's office did not have actual notice of the filing until it was electronically referred to paralegal's email on the 9th at 8:51 a.m.

4. That while Commission Reg. 67-213(A) provides that the Commission may serve Orders electronically, Subsection 2 only provides for service either by Certified Mail, and sets forth when that is deemed complete, or service by First Class Mail and when then deemed complete. In reference to First Class Mail, service is deemed complete on the date of deposit in the United States Postal Service but five (5) days is added to the time period for filing.

5. That S.C. Code §42-17-50 does not speak to the form of service that is required and only refers to notice. However, South Carolina Statutory Law and the South Carolina Rules of Court do not allow for electronic service of any document as to establishing a date after which any action, whether it is to file an appeal or motion or response, is to be filed with the Court. The Statutory Law of South Carolina and the Rules of

Court do allow for service on an Attorney by First Class Mail. See S.C. Code §1-23-350 and South Carolina Rules of Civil Procedure Rule 5(b)(1). See also South Carolina Rules of Civil Procedure Rule 6(e), "additional time after service by mail or upon statutory agent" which specifically provides that five (5) days shall be added to the prescribed time for doing any act or filing any matter or service of any matter where that service is made by First Class Mail.

Also, SCRCP Rule 6(b) allows the time period for an action to be taken to be enlarged for "good cause shown." Further, Rule 4(d)(8) which provides for "service by Certified Mail" provides that a default judgment cannot occur under the type of service except where the return receipt shows there was actual receipt, i.e. personal notice of the pleadings.

6. That while Rule 67-213 does allow for electronic service by the Commission, again Subsection (A)(2) only provides and sets out the requirements of service by either Certified Mail or First Class Mail. Further, the Administrative Procedures Act, S.C. Code §1-23-350 specifically provides that,

"Parties shall be notified either personally or by mail of any Decision or Order." (Emphasis added).

That Section further provides that upon request, a copy of the Decision or Order "shall" be delivered or mailed forthwith to each party and to his Attorney of Record.

7. That Counsel for the Claimant as an Officer of the Court would submit that he has never been nor has his client ever been served by First Class Mail or Certified Mail with a copy of the Commission's Decision.

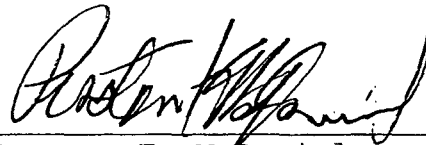
8. That Counsel for the Claimant would further submit that no where under the Statutory Law nor the Rules of Court of the State of South Carolina does service or notice of an Order by electronic mail constitute a valid method of service of an Order or Award or court pleading or document under law. While Claimant's Counsel readily recognizes the cost effectiveness and procedural simplicity and effectiveness of filing or giving notice of Orders by electronic mail, Counsel would submit that such notice which is not recognized as a valid method of service pursuant to law under either the Statute or Court Rules should not be allowed to deny the Claimant his right to review by the Full Commission especially where his Request for Commission Review was properly filed within the time limits from the date that he received actual notice of the filing of the Order.

9. That if the Commission determines that this case cannot be Administratively reinstated without further service, the Claimant would take the position that he has not been properly served with the Order pursuant to S.C. Code §1-23-350 and would request and move to be properly served pursuant to that Code Section which requires that the party and/or his

attorney be either personally served or served by mail with a copy of the Decision or Order.

Wherefore, based on the above set of facts, the Claimant would respectfully request that the Request for Review be reinstated.

Respectfully submitted,



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201

Attorney for the Employee/Claimant

May 4, 2012

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION COMMISSION
COUNTY OF RICHLAND) WCC File No: 0918195

Charles B. DeForrest,)
)
Employee-Claimant,)
)
v.)
)
WalMart Stores, Inc.,)
)
as Employer, and)
)
American Home Assurance,)
)
as Carrier,)
)
Respondent-Defendants.)

**AFFIDAVIT OF
PATTY K. BOATWRIGHT**

I, Patty K. Boatwright, having been duly and properly sworn, do dispose and state the following:


1. That I am the Paralegal at McDaniel Law Firm that is assigned to this file.

2. That on Monday, April 9, 2012, I entered the office and checked Mr. McDaniel's office email and found that the Decision and Order of Commissioner Andrea C. Roche had been issued.

3. I printed the Order and calculated the Appeal deadline in accordance with the direction of the Commission. I have been informed by the Commission on several occasions all parties are being given an additional 5 (five) days for service by mail although all Orders are being delivered electronically. Therefore, I calculated our Appeal deadline as follows: Date we received service of the Order April 9, 2012 plus 14 (fourteen) days allowed by statute to file an Appeal Notice plus 5 (five) days for service by mail equals an Appeal filing deadline of April 28, 2012. April 28, 2012 fell on a Saturday and according to the Rules all deadlines that fall on a weekend or a Federal Holiday move to the next business day thereafter. Based on these guidelines and due

date as noted by me on the file Mr. McDaniel filed the Appeal on Monday, April 30, 2012.

Further the Affiant sayeth not.


Patty K. Boatwright
Paralegal

SWORN TO BEFORE ME this
4th day of May, 2012.


Notary Public for South Carolina (L.S.)
My Commission Expires: 2-14-22

CERTIFICATE OF SERVICE BY MAIL

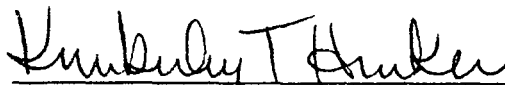
WCC FILE NO. 0918195

I hereby certify that I have on this day served the following in the matter of Charles DeForrest vs. Wal-Mart Stores, Inc. with a copy of the **MOTION TO REINSTATE THE REQUEST FOR REVIEW BEFORE THE FULL COMMISSION** with **MEMORANDUM IN SUPPORT** by depositing the same in the United States Mail with adequate postage thereon, addressed as follows:

Virginia L. Crocker, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

Johnnie W. Baxley, III, Esquire
WILLSON JONES CARTER & BAXLEY
421 Wando Park Blvd., Suite 100
Mt. Pleasant, South Carolina 29464


Sams Club Walmart Stores Inc.
702 S.W. 8th Street
Bentonville, AR 72716-000



Kimberley T. Hinkle

SWORN TO BEFORE ME this

~~7th~~ day of May, 2012.



Notary Public for South Carolina (L.S.)

My Commission Expires: 12/08/18

FW: Order - 0918195: Deforrest

From: **Preston McDaniel** (mcdaniellaw@hotmail.com)

Sent: Mon 4/09/12 8:51 AM

To: Patty Boatwright (pbmcdlaw@hotmail.com)

1 attachment

R08 ORD - SCWCC Order PDF - 04_06_2012 - WCC #_ 0918195.PDF (457.7 KB)

> From: bcheeseboro@wcc.sc.gov

> To: BCHEESEBORO@WCC.SC.GOV; JWBAXLEY@WJLAW.NET; MCDANIELLAW@HOTMAIL.COM;
SJHOFF@WJLAW.NET

> Subject: Order - 0918195: Deforrest

> Date: Fri, 6 Apr 2012 15:24:08 +0000

>

> Please find the following order attached:

>

> R08 ORD - Decision & Order - 4/6/2012 - ORDER#: - WCC #: 0918195

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION COMMISSION
 COUNTY OF RICHLAND) WCC File No: 0918195

Charles B. DeForrest,)
)
 Employee-Claimant,)
)
 v.)
)
 WalMart Stores, Inc.,)
)
 as Employer, and)
)
 American Home Assurance,)
)
 as Carrier,)
)
Respondent-Defendants.)

**AFFIDAVIT OF
 PATTY K. BOATWRIGHT**

I, Patty K. Boatwright, having been duly and properly sworn, do dispose and state the following:

1. That I am the Paralegal at McDaniel Law Firm that is assigned to this file.

2. That on Monday, April 9, 2012, I entered the office and checked Mr. McDaniel's office email and found that the Decision and Order of Commissioner Andrea C. Roche had been issued.

3. I printed the Order and calculated the Appeal deadline in accordance with the direction of the Commission. I have been informed by the Commission on several occasions all parties are being given an additional 5 (five) days for service by mail although all Orders are being delivered electronically. Therefore, I calculated our Appeal deadline as follows: Date we received service of the Order April 9, 2012 plus 14 (fourteen) days allowed by statute to file an Appeal Notice plus 5 (five) days for service by mail equals an Appeal filing deadline of April 28, 2012. April 28, 2012 fell on a Saturday and according to the Rules all deadlines that fall on a weekend or a Federal Holiday move to the next business day thereafter. Based on these guidelines and due

date as noted by me on the file Mr. McDaniel filed the Appeal on Monday, April 30, 2012.

Further the Affiant sayeth not.


Patty K. Boatwright
Paralegal

SWORN TO BEFORE ME this
4th day of May, 2012.



Notary Public for South Carolina (L.S.)
My Commission Expires: 2-14-22

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2012-212519

RECEIVED
FEB 06 2013
SC Court of Appeals

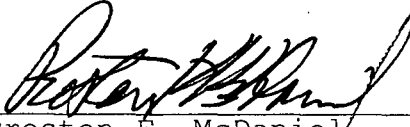
Charles B. DeForrest, Appellant,

v.

WalMart Stores, Inc., Employer,
and American Home Assurance, Carrier, Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on
Appeal contains all material proposed to be included by any
of the parties and not any other material.


Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

Attorney for Appellant

2/6, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

FEB 06 2013

SC Court of Appeals

Case No. 2012-212519

Charles B. DeForrest, Appellant,

v.

WalMart Stores, Inc., Employer,
and American Home Assurance, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the **RECORD ON APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on February _____, 2013 addressed to: Johnnie W. Baxley, III, Esquire, WILLSON, JONES, CARTER & BAXLEY, 421 Wando Park Boulevard, Ste. 100, Mt. Pleasant, SC 29464.



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

Attorney for Appellant

Dated: February 6, 2013