

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL

WCC File No. 1319471

Case No. 2015-001918

Daniel Davis, Employee,

Appellant,

v.

ABC Amusements, Inc., Employer
And SC Uninsured Employers Fund, Carrier,

Respondents.

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SC Court of Appeals

APPELLANT'S REPLY BRIEF

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REGULATIONS

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ARGUMENT

The Brief of the Respondent/Carrier ("Carrier" hereinafter) fails to respond to several issues raised in the Brief of the Appellant/Claimant ("Claimant" hereinafter).

The Carrier does not dispute in its brief that the only written policy of the South Carolina Workers' Compensation Commission (the Commission) on the issue of when a litigant is deemed to actually have received notice of an order is as stated by the Claimant: Five days is to be added to the date on which the order is electronically served. As argued previously by the Claimant, the written policy of the Commission, stated in an order issued by its chair, says that service is effective five days after the order is electronically mailed. The Claimant is aware of no writing changing this policy. The Carrier's brief is silent on this issue. This is the primary argument of the Claimant

The Carrier also has failed to respond to the constitutional objections raised in the Claimant's brief. The Claimant submits that these are significant objections, in that following the Commission's stated policy has resulted in the loss of substantive and procedural rights and protections.

Appellate Rule 203(b) (6) fixes actual receipt of an order from an administrative agency as the date from which time is calculated. Regulation 67-701A also says that the fourteen days for serving a Form 30, Request for Review, means "within fourteen days of the day the Commissioner's order is *received*." (Emphasis added.) Nothing in the Regulation says when the sending of an electronic document is deemed to be received. Appellate Rule 203(b)(1), concerning orders from the Court of Common Pleas, requires only "written notice." The Claimant mentions this because the Carrier cites Wells Fargo Bank, N.A., v. Fallon Properties, Appellate Case No. 2015-000157 (August 26, 2015) in support of its position. This case was dealing with Appellate Rule 203(b)(1), not the portion of the rule governing administrative agencies.

The argument of the Carrier apparently is that, since Regulation 67-213, which covers service of orders, gives specific terms for determining the date of service by certified mail and first class mail, the failure to specify such terms for electronic service means that service is immediate. The Claimant submits that it is more reasonable to assume that the date on which an order is electronically sent to a party is not the date on which electronic service is complete. After all, Regulation 67-701 requires that party must actually receive the order, as stated above. The policy of the Commission, stated in an order of its chair, to add five days was a reasonable one. Perhaps the Commission and the Carrier confuse "service" with the "computation of time". Note that Rule of Civil Procedure 5(b)(1) does not provide for electronic service, but it says that service of an order by mail is "complete upon mailing". However, Rule 6 deals with "Time", and five days are added to the time for response when service is by mail. Both the Rule of Civil Procedure and the Regulations of the Commission are approved by the General Assembly. If the General Assembly meant for electronic service to be effective immediately, such would have been stated in the Regulation.

To the best of the Claimant's knowledge, the courts of this state are only now preparing to recognize electronic service as a valid means of effecting service of an order or other papers. An Order of the Supreme Court from several years ago is cited in the Claimant's brief. That Order allowed electronic service in certain areas of the state and where attorneys agree. Even that Order was very careful to protect rights of litigants. The Court required compliance with the South Carolina Electronic Transactions Act even in these limited circumstances. The reason the Supreme Court required compliance with that Act is that such compliance is required by the Act. Such compliance safeguards the rights of litigants.

When Regulation 67-213 was amended to allow electronic service of orders, the extent of the change was to add only the word "electronically". No justification is found anywhere for treating electronic mailing any differently than first class mail.

The Carrier says that the Claimant "was not entitled to add five days to his due date". The Claimant did not do this unilaterally. He is entitled to have five days added because of an order of the Commission. In the alternative, the Claimant has not yet been served with the order of the Commission, because the Regulation does not say when time begins to run and because the Regulation does not comply with the Act governing electronic service.

The Carrier apparently argues that because Appellate Court Rule 410 sets up the South Carolina Bar and requires member attorneys to participate in the Attorney Information System (AIS) those member attorneys consent to the electronic service of orders and papers. This does not make sense. The AIS rule is not persuasive on the issue of service of legal papers. It says: "the mailing and email address shown in this AIS shall be used for the purpose of notifying and serving the member." The Court rules do not allow electronic service. An allusion to this Rule in footnote 3 of the Wells Fargo Bank case is certainly not controlling in the instant case.

As this brief is being prepared, the Supreme Court has issued a comprehensive program to permit "E-filing and E-service" on a pilot basis in the Courts of Common Pleas. The "South Carolina Electronic Filing Policies and Guidelines Pilot Version-Common Pleas" meticulously sets out how "e-filing" will work. Section 4(E)(4) provides that electronic service will be treated the same as service by mail, with five days being added to the "Official File Date" shown on the served document. The Claimant submits that litigants before the Commission should have no less protection than litigants in the courts of our State.

Section 1-23-350 and the cases requiring an order to contain findings and facts and conclusions of law do not exempt orders such as the one that dismissed the Claimant's Form 30. This was not an administrative order. The staff of the Commission issued an administrative order refusing to file the Form 30. The Claimant requested review of the administrative order and reinstatement of his Form 30. He raised essentially the same issues he raises in this appeal. The order should have responded to those issues and at least have given some justification for its order.

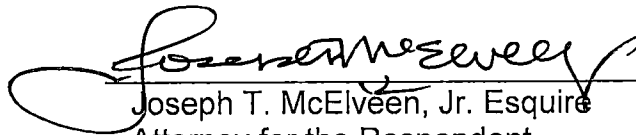
CONCLUSION

The Claimant submits that the written order of the Commission providing for five days to be added after service in determining the time when his Form 30, Request for Review, was due. Fundamental fairness should require such a result. In the alternative, the authority submitted above should justify striking down Regulation 67-213 to the extent that it permits electronic service, as the Regulation does not comply with either the South Carolina Electronic Transactions Act or the system of e-filing and e-service being implemented by our Supreme Court.

Finally, any order should have details in it that allow an appellate court to know what was done and why.

Respectfully submitted,

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November 18, 2015

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Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief on the Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on 11.18.15, addressed to their attorney of record, Amy Cofield, Esquire of Cofield Law Firm, 809 South Lake Dr., Lexington, SC 29072, on 11.18.15.

11.18.15
Date

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**RE: Daniel Davis v. ABC Amusements, Inc.
Case No.: 2015-001918**

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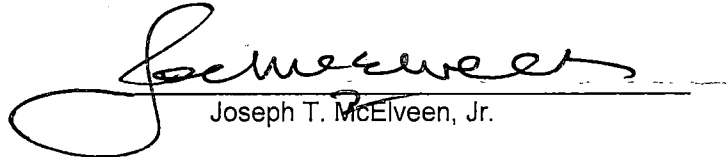
Dear Clerk Kitchings:

Enclosed for filing please find two copies of the Appellants' Reply Brief and Designation of Matter in the above-referenced case. Please return a clocked copy in the self-addressed, stamped envelope enclosed for your convenience. By copy of this letter, we are serving the opposing counsel of same and our Proof of Service is enclosed.

If you need anything else from me or if I may be of any further assistance, please do not hesitate to contact me.

With kind regards, I am

Sincerely,


Joseph T. McElveen, Jr.

JTMcjr/ewn

Enclosure

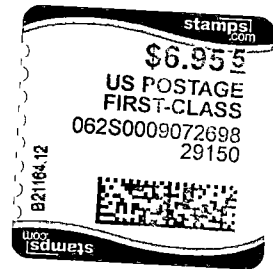
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