

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

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APPELLATE PANEL

JAN 06 2016

SC Court of Appeals

Appellate Case No. 2015-001918
WCC File No. 1319471

Daniel Davis, Employee, ... Appellant,

v.

ABC Amusements, Inc., Employer and
SC Uninsured Employers' Fund, Carrier, ... Respondents,

**FINAL BRIEF OF RESPONDENT,
SC UNINSURED EMPLOYERS' FUND**

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STATEMENT OF ISSUE ON APPEAL

1. Has the Appellant properly and timely perfected his appeals or did the SC Workers' Compensation Commission properly dismiss his appeal?
2. Was the Administrative Order issued by the Commission defective due to failure to state findings of fact or conclusions of law?

STATEMENT OF THE CASE

This claim began with the filing of a Form 50 on September 23, 2014 (R. pp. 15-17) by the Claimant seeking benefits under the SC Workers' Compensation Act. Because the employer in this matter was uninsured, the SC Workers' Compensation Uninsured Employer's Fund (hereinafter "SCUEF") was added as a Defendant. A Form 51 (R. pp. 18-19) answering the claim was filed by the SCUEF on October 22, 2014. A hearing on the issues therein was held before the Single Commissioner on February 12, 2015. From that hearing an Order was signed on May 12, 2015 (R. pp. 8-14), and a copy of that order containing a Certificate of Service was served by the Workers' Compensation Commission (hereinafter, "Commission") on May 12, 2015 by "electronic mail" on all attorneys of record and by certified mail to any unrepresented party (R. p. 14).

Claimant's attorney filed a Form 30 appeal to the Full Commission on May 27, 2015 (R. pp. 20-24), fifteen (15) days after service of the Order of the Single Commissioner.

On June 3, 2015, the Commission served by electronic service an Administrative Order (R. p. 6) dismissing the Claimant's appeal stating specifically, "The Request for Commission Review in the above captioned case is dismissed. It was not timely filed pursuant to R. 67-701 and R. 67-205 D.

On June 15, 2015, the Claimant filed a "Motion" (R. pp. 25-27) requesting reinstatement of his appeal, although there is no authority for filing a "post order motion" in Workers' Compensation cases. Claimant's Motion alleged that his appeal was not due within fourteen (14) days of service of the Order, but that he was entitled to fifteen (15) days following service of the order. Claimant alleged that the "five day rule" should

apply to electronic service as well as service by mail. The SCUEF responded to this Motion with a Return dated June 24, 2015 (R. pp. 28-35).

The Commission issued another Order dated August 17, 2015 (R. p. 7), that dismissed the Claimant's Motion.

The Claimant's attorney then filed a "Motion for Reconsideration" on August 27, 2015 (R. pp. 36-39). The SCUEF filed a Reply to the Motion on September 2, 2015 (R. pp. 40-51) arguing that there was no procedure for a "reconsideration" in Workers' Compensation as the Claimant should have properly appealed the Order.

The Claimant's attorney then filed a Notice of Appeal to this Court on September 11, 2015.

ISSUE

Has the Appellant properly and timely perfected his appeals or did the SC Workers' Compensation Commission properly dismiss his appeal?

ARGUMENT

The Appellant's case herein is wrought with procedural defects. The first of these came when his appeal by filing a Form 30 (R. pp. 20-24) from a Single Commissioner's Order to the Full Commission was not timely.

The Single Commissioner's Order was electronically served on the attorneys of record on May 12, 2015 (R. pp. 8-14). The Order contained a Certificate of Service indicating it had been electronically mailed that day (R. p. 14). The Form 30 appeal was dated and served, according to the Certificate of Service on May 27, 2015 (R. p. 22), fifteen (15) days after service of the Order even though the Certified mail date from the

USPS and stamped on the envelope was actually May 28, 2015 (R. pp. 23-24), sixteen (16) days after service of the Order.

There are several Regulations that address service can be perfected electronically by the Commission. The Commission's Regulation R. 67-211 provides that a Claimant request for hearing may be served electronically or by USPS first class postage. The employer's response, in turn, may also be served either way. Regulation R. 67-211 (C) states that other forms or documents may also be served "electronically or by depositing the form or document in the United States Postal Service first class postage". More specifically, Regulation R. 67-213 entitled, "Service of Order, Hearing Notices, and Review Hearing Notices" state that the Commission can serve these also either electronically or by USPS.

Regulation R. 67-701 entitled, "Requesting Commission Review of the Hearing Commissioner's Decision" is clear that the Form 30 must be filed within fourteen days after the Commissioner's Order is received and that the fourteen day period is jurisdictional. Further, "The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day..." (Regulation R. 67-701 (A)).

The Appellant alleges that he is allowed five days that should be added to his appeal time when he was served electronically just as is provided for service by mailing. However, Regulation R. 67-213 (A)(2) states, "When service is made by **certified mail**, the date of service is the date of the addressee's receipt indicated by the certified mail return receipt. When service is mailed by **first class mail**, five days are added to the date of mailing. Service by first class mail is deemed complete five days after the date of

deposit to the United State Postal Service. These Regulations were last amended February 26, 2010.

There is no such five day extension for electronic service. The Regulations are, in fact, filled with specifics that service is deemed complete upon mailing unless the document is returned. There is no evidence that the Appellant's electronic mailing was returned or not received. The only allegation by the Appellant is that he should have fifteen (15) days to appeal instead of fourteen (14) after service of the Order.

The Appellant has argued that it is "reasonable" to grant the five (5) day extension for electronic service because "most law offices will check their e-mail within five days". (Appellant's Motion dated June 15, 2015)(R. pp. 25-27) or "attorneys have varying degrees of computer sophistication" (Appellants brief, p. 11). Appellant also argues that the rules don't address service by email. Conversely," e-mail has, in fact, been contemplated by the rules. See, e.g., Rule 410(e), SCACR (providing that both "the mailing and e-mail address shown in this AIS [Attorney Information System] shall be used for the purpose of notifying and serving the member (an attorney)." Wells Fargo Bank, N.A. v. Fallon Properties SC, LLC Ct. of App Case No. 2015-000157 (August 26, 2015).

However, SCRCR Rule 6(b) sets forth that, "The time for filing a notice of intent to appeal is jurisdictional and may not be extended by consent or Order." The Commission, therefore, lacks the authority to extend the fourteen days permitted for the filing of an appeal from a decision of a single commissioner. (Allison v. W.L. Gore & Associate, 394 S.C. 185, 714 S.E.2d 547 (2011).

Based on the foregoing, Respondent would argue that the issues raised by the Appellant of Due Process, Equal Protection, and the South Carolina Electronic Transactions Act lack merit and do not need to be addressed in this appeal.

ISSUE

Was the Administrative Order issued by the Commission defective due to failure to state findings of fact or conclusions of law?

ARGUMENT

Appellant alleges that the Administrative Order dismissing his appeal fails to comply with Section 1-23-350 SC Code of Laws (1976, as amended) because it has no finding of fact or conclusions of law.

Although it appears that this code section is applicable to an Administrative Law Court or Judge, the Administrative Order herein does not stem from any hearing where evidence was taken or considered. This was not an Order from a contested matter. The Order of the Single Commissioner contained this information. Because the Appellant failed to timely appeal that Order the Commission lacked jurisdiction to make any further findings of fact or to accept further testimony or evidence. The Administrative Order (R. p. 6) clearly stated that the case was Dismissed as "It was not timely filed pursuant to R. 67-701 and R. 67-205 D."

CONCLUSION

The South Carolina Workers' Compensation Commission properly dismissed Claimant's Appeal (Form 30) as Claimant did not file timely file it as mandated by statute, regulation, and case law. The Claimant was served an electronic order which gave him fourteen days to file his Form 30. Claimant was not entitled to add five days to his due date as the Order was served by electronic mail and not through the US Postal Service. Therefore, the dismissal of this matter by the Commission must be affirmed.

Respectfully submitted,

BY:

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January 6, 2015
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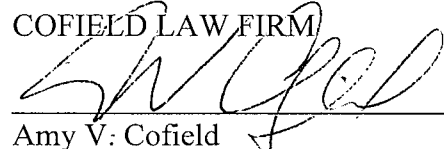
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b)
SCACR.

January 6, 2015

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