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.

FINAL BRIEF OF APPELLANT

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1. The form order denying the Appellant's motion to reinstate his Form 30, Request for Review, is void as it was issued without the Appellant being given notice and an opportunity to be heard, in violation of the Due Process Clause of the South Carolina Constitution, Article I, Section 3, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. The form order denying the Appellant's motion to reinstate his Form 30, Request for Review, fails to comply with Section 1-23-350 of the Code of Laws of South Carolina (1976, as amended), the Administrative Procedures Act, in that said order contains no findings of fact or conclusions of law to the effect that a reviewing court cannot determine the evidence, legal authority or reasoning upon which the order was based.

3. The Form 30, Request for Review, was timely, and the South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, Request for Review, despite the fact that it was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because the written policy of the Commission states that, in determining the date of service of an order, five days are added to the date of electronic posting, just as in the case of service by first class mail.

4. Fundamental fairness demands that electronic service be treated the same as service by first class mail in the case of requests for review generally and in this case specifically.

5. The Form 30, Request for Review, filed by the Appellant was timely filed, and the South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, Request for Review, despite the fact that it was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because the Commission has applied the policy of adding five days to the date of electronic posting in determining the date of service on many occasions and has never promulgated a policy revoking its written policy that the five days will be added. The order being appealed not only violates the only written policy of the Commission, it denies the Appellant equal protection of the law, as guaranteed by the South Carolina and United States Constitutions.

6. The South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, Request for Review, despite the fact that it

was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because Regulation 67-213 states when service by first class and certified mail is effective, but is silent as to when electronic service is effective.

7. The South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, despite the fact that it was postmarked fifteen (15) days after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because the only written policy of the Commission, which states that date five days are added to the date of electronic posting, just as in the case of service by first class mail, is fair and a reasonable standard for overcoming the failure of the regulation to properly account for the fact that electronic service is no more immediate than service by first class mail or certified mail.

8. The South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, despite the fact that it was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because Regulation 67-213 to the extent that it governs electronic service fails to comply with the South Carolina Electronic Transactions Act.

9. Regulation 67-213 of the South Carolina Workers' Compensation Commission is unconstitutionally vague and ambiguous in that it does not state whether or not service by electronic mail is effective on posting or to be treated like service by first class mail.

STATEMENT OF THE CASE

The Appellant was injured while working for the Employer. The Employer denied that the injury was compensable. The Employer was uninsured, thus requiring the South Carolina Uninsured Employers Fund to participate in this claim. The Appellant required surgery, but received no medical treatment or temporary compensation under the Workers' Compensation Act. When the matter was tried before a single Commissioner, the hearing Commissioner found his injury to be compensable and the Fund and Employer were required to pay his related medical bills and permanent partial disability. Yet temporary compensation was denied because the Appellant was fired by the Employer after the work injury. Temporary compensation was not even allowed while the Claimant was completely incapacitated due to surgery.

Once an order was issued by the Commissioner, it was electronically posted to the office of the Appellant's attorney. The Appellant filed a Form 30, Request for Review, asking that the "full Commission" consider whether the Commissioner was wrong to deny temporary compensation. The Form 30 was postmarked on the fifteenth day after the order was electronically posted.

The Form 30 was administratively rejected by the staff of the Commission. The Appellant then filed a motion asking that the Form 30 be reinstated so that his request for review could proceed. Without a hearing or opportunity four counsel to present arguments or legal authority, a form order was issued denying the Appellant's motion. The order contains no findings of fact, conclusions of law, or any reasoning to support the order.

The Appellant submitted an order to the Commission which was issued by the chair of the Commission in a case he heard as a single Commissioner. In that order, the chair stated that the policy of the Commission in determining the date of service for appeal purposes is to add five days, just as is done with service of an order by first class mail. This policy has been followed by the Commission for quite some time, to the best information and knowledge of the Appellant. As far as this Appellant can tell, no writing exists changing the policy of the Commission that five days should be added in the case of electronic service.

From the aforementioned order refusing to reinstate the Form 30, Request for Review, the Appellant has filed a Notice of Appeal to the Court of Appeals.

ARGUMENTS

1. **The form order denying the Appellant's motion to reinstate his Form 30, Request for Review, is void as it was issued without the Appellant being given notice and an opportunity to be heard, in violation of the Due Process Clause of the South Carolina Constitution, Article I, Section 3, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.**

2. **The form order denying the Appellant's motion to reinstate his Form 30, Request for Review, fails to comply with Section 1-23-350 of the Code of Laws of South Carolina (1976, as amended), the Administrative Procedures Act, in that said order contains no findings of fact or conclusions of law to the effect that a reviewing court cannot determine the evidence, legal authority or reasoning upon which the order was based.**

The order being appealed is a form order. So the text of the order does not give any history, findings, or conclusions. No hearing was noticed and, therefore, the parties had no opportunity to be heard. The Appellant filed a motion to reinstate the Form 30 he filed, and the Respondents filed a return or reply. Yet no hearing was noticed by the Commission. The parties were not asked to appear or given the opportunity to submit argument or evidence. No transcript was made of the proceedings which resulted in the form order. An order issued without notice and an opportunity to be heard being given the litigants violates the right of those litigants under the Due Process Clauses of the United States and South Carolina Constitutions. Such an order is void. Webster vs. Clanton, 259 S.C. 387, 192 S.E.2d 214 (1972).

> Section 1-23-350 of the South Carolina Code of Laws, the Administrative Procedures Act, requires that an order contain findings of fact and conclusions of law. This is so that orders will sufficiently detail the facts and law a tribunal relied upon in reaching a decision. Such is necessary for an appellate court to determine whether the evidence and law support the order of the tribunal, in this case the South Carolina Workers' Compensation Commission. See §1-23-35, S.C. Code Ann. (1976, as amended); Canteen v. McLeod Regional Medical Center, 400 S.C. 551, 735 S.E.2d 246 (S.C. App. 2012). The order under appeal contains no findings of fact, conclusions of law, or any legal reasoning to support the Commission's action in refusing to reinstate the Appellant's Form 30. On its face, the order fails to meet legal muster.

Section 42-17-50 and Regulation 67-213 of the Commission provide that an "application for review" of the order of a single Commissioner be filed within fourteen days from the date a party receives notice of an order. The Regulation provides for service of orders by certified mail, first class mail, or electronically. Section 1-23-350 requires that a party receive notice either personally or by mail. The Appellant submits that the Administrative Procedures Act controls in this case. See Therell vs. Jerry's Inc., 370 S.C. 22, 633 S.E.2d 893 (2006) (Administrative Procedures Act governs appellate review of the Commission's decisions.) The Administrative Procedures Act makes no provision for

electronic service. The review process has been held to involve the appellate jurisdiction of the Commission. Allison vs. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E. 547 (2011). This means that the Appellant was never properly served with the order of the Commission of which he seeks review.

3. **The Form 30, Request for Review, was timely filed, and the South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, Request for Review, despite the fact that it was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because the written policy of the Commission states that, in determining the date of service of an order, five days are added to the date of electronic posting, just as in the case of service by first class mail.**

4. **Fundamental fairness demands that electronic service be treated the same as service by first class mail in the case of requests for review generally and in this case specifically.**

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7. **The South Carolina Workers' Compensation Commission should have reinstated the Appellant's Form 30, despite the fact that it was postmarked on the fifteenth day after the order of a hearing Commissioner was electronically posted to the law office of the Appellant's attorney, because Regulation 67-213 to the extent that it governs electronic service fails to comply with the South Carolina Electronic Transactions Act.**

8. **Regulation 67-213 of the South Carolina Workers' Compensation Commission is unconstitutionally vague and ambiguous in that it does not state whether or not service by electronic mail is effective on posting or to be treated like service by first class mail.**

Section 42-17-50 and Regulation 67-701 of the Commission set a fourteen day period within which a request for review (Form 30) must be filed. The regulation goes on to state that "the fourteen day period is jurisdictional". This statement is demonstrably incorrect. Regulation 67-213 adds five days for service by first class mail, giving a litigant so served nineteen days to request the review. The return receipt is the date of service for service by certified mail, giving a litigant so served an indeterminate amount of time.

If the fourteen days is indeed "jurisdictional", then Regulation 67-213 is of no effect and many, many requests for review must be denied filing. Despite the statute and the regulation, numerous cases provide that the Act is to be liberally construed in favor of coverage for injured workers. An order of a hearing Commissioner is not even a final order; the decision of the "full Commission" is the final order. Fundamental fairness and equal protection of the law requires that those served electronically have at least as much time to request review as those served by first class mail.

On December 6, 2012, Commissioner T. Scott Beck, who served as chair of the Commission, issued an order in the case of Terry Grant, Employee, vs. UTI Integrated Logistics, Inc., Employer, and American Home Assurance Co., Carrier, WCC File No. 0715584. In this order Chairman Beck wrote as a finding of fact: "The Commission, as a matter of policy, has applied the 5-day rule for electronic service specified in 67-213(A)(2). **For purposes of determining timeliness of appeals.**" (Bold is in original.) The attorney for the Appellant learned of this case when he received a Form 30 from a defendant in another case between the fifteenth and nineteenth day after electronic service. The administrative staff at the time provided a copy of the Grant order. This writer's understanding was that the "five day rule" was being applied. At some point, the policy stated by Commissioner Beck was apparently changed, but no notification was given to members of the Bar or others of this change.

The courts of our state do not generally allow service of papers or orders electronically. See Appellate Practice Rule 262 and Civil Procedure Rule 5. The Supreme Court has allowed electronic service in certain instances where the attorneys have agreed for its use,

but the Court has taken pains to protect the rights of the litigants. In 2004, for example, the Supreme Court issued an administrative order allowing electronic service of documents where attorneys agreed in writing to such service. The order requires that, to be effective, the document electronically served must be postmarked by the United States Postal Service Electronic Post mark; only then does electronic service have the same effect as delivery by the United States Postal Service. The Act specifically requires that service via email "shall be in conformity with the requirements contained in the South Carolina Uniform Electronic Transactions Act, S.C. Code Ann. §§26-6-10, et seq. If litigants are to be subject to electronic service of legal papers, then any regulation governing the issue should be just as protective of litigants' rights as the Supreme Court Administrative Order.

As far as this writer knows, the Commission has not taken the steps necessary to protect litigants in the case of electronic service. The only other promulgation of the Commissioner relative to electronic service is Regulation 67-205B, which says that documents received at the Commission by first class mail, hand delivery or electronically are deemed filed on the date of receipt "as indicated by the earliest date stamped on the form or document by an official Commission stamp." Perhaps the fact that the 2010 change to this regulation simply added the word "electronically" emphasizes the lack of analysis of how electronic service can best serve litigants and the Commission. This is true because that is also the only word added to Regulation 67-213 by the 2010 amendment. Note that the order under appeal assumes that electronic service to a litigant is immediate, but that electronic service to the Commission is not effective until it is stamped.

The argument surely will be made that, since Regulation 67-213 is silent on the matter of when electronic service is effective or constitutes notice to a litigant, such service is immediate. This is neither a reasonable view nor a logical inference. The Appellant submits that the failure to state whether or not electronic service is immediate or to be treated as first class mail renders the regulation unconstitutionally vague and ambiguous. In the Supreme Court Appellate Rule and the Civil Procedure Rule cited above, the rules specifically say that service by first class mail is complete on mailing. (Electronic service is not routinely allowed.) The Appellant submits that the omission of the five day rule in the regulation for electronic service was an oversight. The five day rule is important in an application for review by the "full Commission" because one has only fourteen days to file the application, whereas one has thirty days to file a notice of appeal with the appellate courts. The five day rule, deeming service to be complete five days after electronic posting of an order, previously stated as the policy of the Commission, was fair and reasonable to litigants and not disruptive for the Commission.

The bottom line is that the Appellant properly filed his Form 30 with the Commission according to the written policy of the Commission. If that policy was changed, it was apparently changed without notice to anyone. Because the Commission order gives no findings, conclusions or reasoning as to how it reached its decision, we really do not know why the Commission changed its policy or when. Fundamental fairness, however,

requires that the Form 30 filed by this Appellant be reinstated so that review of the order can proceed.

Given the slow implementation of electronic service in the courts of our state, this Court could rule that electronic service is not allowed in a workers' compensation claim. Electronic service is not personal service; and electronic service is not always received instantly or necessarily any faster than service by mail. South Carolina attorney are required by the Supreme Court to have an email address, but attorneys have varying degrees of computer sophistication. Section 26-6-195 of the South Carolina Electronic Transactions Act states the following:

> Notwithstanding any other provisions in this chapter, a governmental agency may use, in accordance with policies and procedures developed by the South Carolina Budget and Control Board and as circumstances allow, in order to perfect service of process of any communication, an e-mail address from any vendor, entity, or individual the governmental agency regulates or does business with, or an e-mail address from the agent for service of process of that vendor, entity, or individual. Such communication postmarked by a United States Postal Service Electronic Postmark shall have the same force of law as the United States Post Office certified mail-return receipt requested. The South Carolina Budget and Control Board shall devise policies and procedures for the use of the United States Postal Service Electronic Postmark in respect to state agencies and operations. These policies and procedures, where necessary, must consider the persons or entities which do not have an e-mail address.

This Act applies to service of documents by electronic means. The Supreme Court in its administrative order endorsed the necessity of complying with the Act for electronic service to be effective. Regulation 67-213 does not comply with the Act. The Appellant submits that compliance should be required.

This Act applies to a "governmental agency" which includes "an executive, legislative, or judicial agency, department, board, commission, authority...or other political subdivision of the state" and, therefore, to the service of documents by the Commission by electronic means. S.C. Code Ann. §26-6-21(9) (1976, as amended). The Supreme Court in its administrative order endorsed the necessity of complying with the Act for electronic service to be effective. Regulation 67-213 does not comply with the Act. The Appellant submits that compliance is required and that electronic service by the Commission is not legal service of an order.

9. Regulation 67-213 of the South Carolina Workers' Compensation Commission is unconstitutionally vague and ambiguous in that it does not state whether or not service by electronic mail is effective on posting or to be treated like service by first class mail.

CONCLUSION

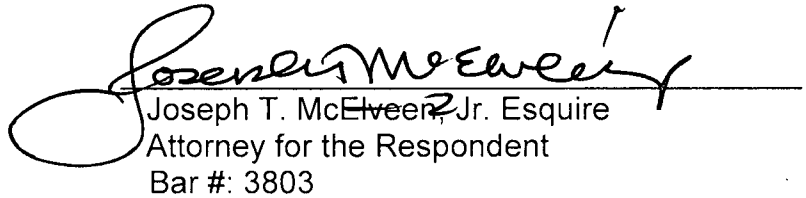
As best the Appellant can tell, the Commission for some time deemed electronic service of its orders to be effective five days after sending the "email". It was Commission policy. This interpretation apparently was changed at some time without notice to those who might be affected by such change. Applying the "five day rule" is fair to all and takes into account that electronic service is still relatively new in the legal system and often not immediate. Our courts are moving slowly in allowing electronic service, and courts which allow it almost always allow some "grace period" for electronic service to be effective, unless the response time is longer than fourteen days. The fact that electronic service was accomplished in the workers' compensation field by changing two words in existing regulations suggests that little planning went into the changes. In these days of difficult budgets, one understands that the savings in postage are an important consideration for government entities; but the rights of litigants must be protected too.

The Appellant contends that electronic service of a Commission order is not appropriate in light of the Administrative Procedures Act and the reluctance of courts to allow such service routinely. The "five day rule" should be applied under the circumstances of this case, where the Appellant was following the written policy of the Commission. If it is not, then the Appellant respectfully submits that something should not be read into the regulation that is not written in it. When two other methods of service specifically give additional time to a litigant for filing, the third should also either state that service is immediate or give a time extension.

Whatever the reason, fairness and sound policy require that the Form 30 filed by the Appellant be accepted by the Commission and that the review process move forward. This Appellant should not be prejudiced for following the written policy of the Commission.

Respectfully submitted,

The Bryan Law Firm of SC, L.L.P.



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief on the Respondents, by depositing a copy it in the United States Mail, postage prepaid, on 12/17/15, addressed to their attorney of record, Amy Cofield, Esquire, 809 S. Lake Dr., Lexington, SC 29072 on 12/17/15.

12/17/15
Date

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