

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck Commissioner

SCWCC File No. 1619767

Appellate No. 2018-001111

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SC Court of Appeals

Veronica Rodriguez, Employee Respondent

v.

Peggy Evers, Employer and NorGuard Insurance Company, Carrier ... Appellants.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Is review in this appeal precluded by unappealed rulings and orders?
2. Is this appeal mooted by unappealed rulings and orders?
3. Did Appellants' notice of appeal fail to confer appellate jurisdiction for this appeal?
4. Did Appellants fail to show good cause to reinstate their appeal to the Commission?
5. Did Appellants fail to articulate a reversible error?

STATEMENT OF THE CASE

This Workers' Compensation matter commenced on March 3, 2017 with Respondent, Veronica Rodriguez's ("Claimant") Form 50, claiming injuries sustained at work on December 5, 2016. (R. p. 18). On April 6, 2017, Appellants, Peggy Evers ("Employer") and NorGuard Insurance Company ("Carrier") (jointly, "Appellants") filed their Form 51 denying every aspect of the claim, including the employment relationship. (4/6/2017 Form 51) (As referenced) (R. pp. 2; 5; 6; 7; 12) Com. Mike Campbell presided over the final hearing on the merits of the claim on November 3, 2017. (R. p. 2)

On November 10, 2017, prior to entry of Com. Campbell's order, Appellants filed a "Motion to Reopen the Record or Alternatively to Admit New Evidence" so as to submit surveillance video into the record. (As referenced) (R. p. 36, ¶ 4) On November 24, 2017, Claimant filed her Return to that motion, objecting to the motion as defective and objecting to the evidence as undisclosed impeachment evidence. (11/24/2017 Return to Motion) Appellants' motion to reopen was denied by Com. Campbell on December 12, 2017. (12/12/2017 Motion Order)

On January 5, 2018, Com. Campbell issued his "Decision and Order" on the merits in Claimant's favor. (R. pp. 2-13) Appellants timely appealed this final order as well as the December 12, 2017 order denying the motion to reopen, to the Full Commission on January 19,

2018. (R. pp. 20-24)

Appellants did not file an appellate brief with the Commission, which then administratively dismissed the appeal on March 26, 2018. (R. Appendix p. 2) On March 27, 2018, Appellants filed a "Motion to Reinstate Appeal" seeking reinstatement for good cause. (3/27/2018 Mot. to Reinstate Appeal ¶¶ 5-14) (R. pp. 36-37) The motion was unanimously denied by the Full Commission (Com. Campbell abstaining) on April 16, 2018. (R. p. 16)

On April 26, 2018, Appellants filed with the Commission a "Motion to Reconsider" its order denying the motion to reinstate, reiterating their good cause grounds, contending that the Commission abused its discretion and violated Appellants' due process rights by denying the motion to reinstate. (4/26/2018 Mot. to Reconsider ¶¶ 2-10) (R. pp. 40-42) On May 4, 2018, Appellants filed an "Amended Motion to Reconsider and/or for Rehearing" with the Commission, repeating the arguments and contentions in the original motion to reconsider. (R. pp. 49-51)

On May 7, 2018, Claimant filed a "Return" to the motion to reconsider, contending that it was noncompliant with R.67-215(D), did not show good cause under R.67-705 and that Claimant would be prejudiced by reinstatement. (R. pp. 54-57)

Appellants' motion was unanimously denied by the Full Commission (Com. Campbell abstaining) on May 21, 2018. (R. p. 17) And, on June 12, 2018, Appellants filed a Notice of Appeal to this Court from that May 21, 2018 order. (R. p. 59)

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This Court reviews decisions of the Commission under the substantial evidence standard. S.C. Code Ann. § 1-23-380(5); Thompson v. S.C. Steel Erectors, 369 S.C. 606, 611-12, 632 S.E.2d 874, 877-78 (Ct. App. 2006).

FACTS

At the November 3, 2017 hearing, Appellants stipulated to the date of Claimant's injury (December 5, 2016) and both parties' documentary evidence was incorporated into the record as Claimant's APA Exhibits 1-19, pp 1-106; Appellants' APA Exhibits 1 and 19, pp 1-36. (R. pp. 3-5) Com. Campbell found and concluded, *inter alia*, that a preponderance of the evidence showed that, at the time of her injury, Claimant was a self-employed house cleaner and sub-contractor of Employer, who deducted and paid workers' compensation insurance premiums to Carrier for the Claimant and Employer's similarly situated sub-contractors; and, on this basis, Appellants are estopped from denying coverage under the Workers' Compensation Act. (R. pp. 6-13)

Com. Campbell found that Claimant's supervisor, "Molly", inspected her work and, when Claimant was injured in a fall down the front steps of the house she was cleaning, Claimant phoned Molly to inform her of the injury and Molly directed Claimant to wait for her, while Molly finished inspecting other houses. (R. p. 5). Claimant waited for "some thirty (30) minutes

or so" before calling her supervisor again. (*Id.*) Molly then directed Claimant to meet her at Employer's Mt. Pleasant office; Claimant complied with this directive and, at that meeting, Molly gave Claimant permission to seek medical care from the doctor of her choice. (R. p. 5.)

Com. Campbell found that initially, Appellant-Carrier "monitored and approved [Claimant's] care", "approved x-rays and MRIs for her right knee and back" and "provided her with an Optum Prescription card for her prescriptions." (R. p. 5) But, after the MRI results showed various injuries, Appellants denied coverage. (R. p. 5) They also denied the employment relationship contending that Claimant was not covered by the Act because she was an independent contractor. (R. p. 6)

Documentary evidence and Employer's testimony showed that Employer "deducted worker compensation insurance premiums from each of the Claimant's pay checks during her period of employment." (R. p. 6; p. 27, line 3-p. 28, line 20; p. 29, line 23-p. 30, line 13; p. 31, lines 11-25) "[A]ll premiums were paid twice each month by involuntary deduction from Claimant's pay check." (R. p. 6) Employer "testified she also deducted workers compensation insurance premium contributions from all of her subcontractors similarly situated as Ms. Rodriguez." (R. p. 6) Evidence also showed that Employer, through supervisor Molly, exercised control over Claimant by directing her to wait for the supervisor after Claimant's injury; then, by directing Claimant to meet the supervisor at the Employer's office that same day, prior to receiving medical care; by permitting Claimant to seek medical care of her choice; and Employer "had total control over her work assignments and schedule each week. Claimant had no control." (R. pp. 5 and 9) Other evidence showed that Carrier initially monitored and approved Claimant's care, X-rays, MRI and provided a prescription card. (R.

pp. 5 and 7)

Prior to entry of Com. Campbell's decision on the merits, Appellants moved to reopen the record to allow them to submit video surveillance evidence that they had ordered two days before the hearing, on November 1, 2017, and was created on November 1 and 2, 2017 (for the November 3, 2017 hearing). (11/10/2017 Mot. to Reopen ¶¶ 11-12) Appellants' motion states that they were "unaware" of the "results" of the surveillance at the time of the hearing; that their counsel learned about it when he "checked his email" after the hearing; and, that they "came to be in receipt" of it on November 8, 2017. (*Id.* ¶¶ 13-14). Appellants' motion to reopen concedes that the surveillance evidence existed at the time of the hearing, but states that it "had not been reduced to a format" suitable for use at the hearing. (*Id.* ¶ 20)

Claimant filed a return to this motion, objecting that Appellants did not file a Form 58 Pre-hearing brief disclosing the surveilling witness and the existence of the surveillance evidence as required by R.67-611(B); that Appellants' counsel had recently explicitly denied the existence of videotape of the Claimant in response to two Form 27 subpoenas; that the evidence is impeachment evidence only; and, that the evidence does not constitute newly discovered evidence because it was known to Appellants' counsel prior to the hearing and it could have been secured for the hearing. (11/25/2017 Return to Mot. to Reopen)

Com. Campbell denied Appellants' motion to reopen and later issued his decision on the merits in Claimant's favor. (12/12/2017 Mot. Order; 1/5/2018 Decision and Order) (R. pp. 2-13) Appellants timely filed their Form 30 appeal from both orders, attaching detailed statements of the Commissioner's errors as to both orders. (R. pp. 20-24)

On February 16, 2018, the Commission notified Appellants that their brief to the Commission was due on or before March 18, 2018. (R. p. 25) Appellants failed to meet this deadline and, approximately one week later, the appeal was administratively dismissed (R. Appendix p. 2)

Appellants filed a "Motion to Reinstate Appeal" the next day, March 27, 2018. (R. pp. 35-38) In it, they concede receipt of the briefing schedule and that their failure to file a brief resulted in administrative dismissal of their appeal. (*Id.* at ¶¶ 5-6) (R. p. 36) They state the grounds for their motion as "good cause". (*Id.* ¶¶ 11-14) (R. p. 37) They explain: "The deadline for the Appellant's Brief was mis-calendared and was not docketed for March 18, 2018. Accordingly, that deadline passed without the Defendants' appeal being filed" (*Id.* at ¶ 6) and, "Through a docketing error, the brief was not calendared correctly." (*Id.* at ¶ 8) (R. p. 36) Appellants emphasize that they were only eight days late and that claimant's counsel did not object to the motion. (*Id.* at ¶¶ 13-14) (R. p. 37) Their motion was not accompanied by an affidavit, their proposed appellate brief or a statement that Appellants were prepared to file their brief as of that date. (R. pp. 35-38)

On April 16, 2018 the Full Commission unanimously denied Appellants' motion to reinstate:

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Reinstate**. The Commissioners considered the matter and ordered the matter handled in the following manner. ... **IT IS, THEREFORE, ORDERED**, the pending motion be and hereby is denied."

(R. p. 16) (emphasis and capitalization original)

Thereafter, Appellants filed a "Motion to Reconsider" with the Commission, requesting

that it reverse itself. "Defendant's[sic] urge the Commission to reverse its Order and place Defendant's[sic] appeal back on the review hearing docket." (4/26/2018 Mot. to Reconsider, final paragraph) (R. p. 42) The motion refers to matters outside the record: a telephone call in which they claim that "Claimant's attorney ... graciously extended the professional courtesy of promising not to object to reinstatement of the appeal" (*Id.* at ¶ 7). (R. p. 42) Claimant does not concede the accuracy of this statement. The motion argues "[t]his courtesy is tantamount to an acknowledgement that Claimant has sustained no harm or prejudice as a result of Defendant's mistake in not timely filing their brief"; "there is no better cause for reinstatement than implied consent of an opposing party regardless of the reason for the underlying administrative failure"; "the minimal good cause standard for reinstatement applies"; the Commission's April 16, 2018 denial of the motion to reinstate was an "abuse of discretion" violating Appellants "fundamental" substantive due process rights because Claimant did not object to reinstatement; Claimant's failure to object amounts to good cause; and, that the Commission "should focus on the rationale for the reinstatement, not just the mistake resulting in the dismissal." (*Id.* at ¶¶ 2, 5 and 6) (R. pp. 40-41) The motion refers to the "mistake resulting in the dismissal" as a "calendar error within counsel's office", and their "rationale for reinstatement" is that "***OPPOSING COUNSEL DID NOT OPPOSE REINSTATEMENT!***" [sic] (*Id.* at ¶¶ 6, 7) (emphasis, italics, underlining, increased font size and capitalization in original). (R. pp. 41-42)

This motion was quickly followed by Appellants' "Amended Motion to Reconsider and/or for Rehearing", containing identical arguments, but adding a request for rehearing. (R. p. 49) (Both motions to reconsider hereafter interchangeably "motion to reconsider")

Claimant filed a return to the motion to reconsider, accompanied by a letter from

Claimant's counsel noting that the attorney previously defending the appeal had been relieved of those duties; that, as a result of this change, the return was hastily prepared by undersigned; and, therefore, Claimant's counsel requested additional time to file an amended return to the motion. (R. pp. 53-58) The Commission did not respond to this letter request.

Claimant's Return contended that the motion was facially defective per R.67-215(D) for failure to attach an affidavit as to statements of matters outside the record; Appellants did not show good cause under R.67-705; and, that Claimant would be prejudiced by reinstatement because she had already won on the merits. (R. pp. 54-58)

The Full Commission, by Com. T. Scott Beck, unanimously denied Appellants' motion to reconsider. (R. p. 17) Thereafter, Appellants noticed their appeal to this Court from "the FINAL Decision and Order of Honorable T. Scott Beck, Chairman of the Workers Compensation Commission, dated May 21, 2018" (capitalization in original). (R. p. 59) It does not give notice of appeal from Com. Campbell's 1/5/2018 Decision and Order on the merits, the 3/26/2018 Admin. Order dismissing the appeal from Com. Campbell's order on the merits, nor the 4/16/2018 WCC Jud. Conf. Decision and Order denying reinstatement. (*Id.*) The Notice of Appeal does not state any grounds for appeal or errors appealed. (*Id.*)

ARGUMENTS

I. THE NOTICE OF APPEAL IS DEFECTIVE AND FAILS TO CONFER APPELLATE JURISDICTION OVER THE ISSUES PRESENTED BY APPELLANTS.

For appeals such as this one, from decisions of the Workers' Compensation Commission, the Workers' Compensation Act requires: "Notice of appeal *must* state the *grounds* of the appeal or the alleged *errors* of law." S.C. Code Ann. § 42-17-60 (emphasis added).

In addition, the Rules of Court require:

In appeals from administrative tribunals, the notice of appeal shall contain the following information:

- (A) The name of the agency ...
- (B) The ... docket number before the agency.
- (C) *The date of the decision from which the appeal is taken...*
- (D) The name of the party taking the appeal.
- (E) The names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each.

Rule 203 SCACR (emphasis added)

Here, Appellants' notice of appeal states neither grounds nor errors of law and it identifies only one decision "from which the appeal is taken":

Peggy Evers and NorGuard Insurance Company hereby appeal the FINAL Decision and Order of Honorable T. Scott Beck, Chairman of the Workers Compensation Commission, dated May 21, 2018. Appellants received written notice of entry of this order on May 22, 2018.

(R. p. 59) (capitalization in original)

Issues not raised in the notice of appeal are not preserved for appellate review. See, e.g., Solomon v. W.B. Easton, Inc., 307 S.C. 518, 521, 415 S.E.2d 841, 843 (Ct. App. 1992); and, White v. Med. Univ. of S.C., 355 S.C. 560, 564–65, 586 S.E.2d 157, 160 (Ct. App. 2003). "The court lacks jurisdiction of the appeal if the notice is insufficient." Solomon v. W.B. Easton, Inc., 307 S.C. at 522, 415 S.E.2d at 844. See, also, Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016) (explaining the importance of avoiding "repeated unexplained do overs before a final decision[.]")

Appellants cannot correct these errors by filing a new notice of appeal because more than thirty days has passed since entry of the orders in this case. "The award of the commission ... if not reviewed in due time ... is conclusive and binding [.]" S.C. Code Ann. § 42-17-60. "[E]ither

party ... within thirty days from the date of the award ... but not after ... may appeal from the decision of the commission to the court of appeals." *Id.*

Thus, this Court lacks appellate jurisdiction to review any of the issues raised in Appellants' brief and it lacks jurisdiction to review the unappealed 3/26/2018 administrative dismissal and the unappealed 4/16/2018 order denying reinstatement. Affirmance is, therefore, required.

Jurisdiction being dispositive, the Court need not consider any additional issues. See e.g., Pertuis v. Front Roe Restaurants, Inc., 2016-000749, 2018 WL 3297910, at *8 (S.C. July 5, 2018) (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (explaining an appellate court need not address remaining issues when disposition of prior issue is dispositive).

II. THE UNAPPEALED RULINGS OF COM. CAMPBELL AND THE FULL COMMISSION ARE THE LAW OF THE CASE, REQUIRING AFFIRMANCE.

"[A]n unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)¹. See also, Roberts v. Roberts, 277 S.C. 459, 462, 289 S.E.2d 640, 641 (1982). (explaining "[b]ecause Roberts did not appeal from the May 8, 1979 order which denied his motion ... that issue is not now properly before us.") (citation omitted).

Appellants' June 12, 2018 notice of appeal seeks review of the May 21, 2018 decision of Workers Compensation Commission only. (R. p. 59) It does not appeal the other orders central to Appellants' contentions. The single order appealed from is the "Judicial Conference Decision and

¹ Accord, Skywaves I Corp. v. Branch Banking & Tr. Co., 814 S.E.2d 643, 653–54 (S.C. Ct. App. 2018), reh'g denied (June 21, 2018); Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 659, 780 S.E.2d 263, 276 (Ct. App. 2015); Carolina Chloride, Inc. v. Richland Cty., 394 S.C. 154, 171–72, 714 S.E.2d 869, 878 (2011).

Order" of the Full Workers Compensation Commission, unanimously denying Appellants' motion to reconsider the Commission's denial of Appellants' motion to reinstate. (R. p. 17)

A nearly identical, unanimous, "Judicial Conference Decision and Order" of the Full Commission denied Appellants' motion to reinstate their appeal on April 16, 2018. (R. p. 16) That order is *not* appealed. Nor is the dismissal itself, entered by the Commission on March 26, 2018. (R. Appendix p. 2) These unappealed orders dismissing the appeal and denying reinstatement of the appeal to the Full Commission are the law of this case. "An unappealed ruling is the law of the case and requires affirmance." Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010) (cited by Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (emphasis added)).

An appealable order from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter. Matheson v. McCormac, 187 S.C. 260, 196 S.E. 883 (1938); Professional Bankers Corp. v. Floyd, 285 S.C. 607, 331 S.E.2d 362 (Ct.App.1985); Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, 324 S.C. 645, 653, 486 S.E.2d 14, 18 (Ct. App. 1997), *aff'd in part as modified, vacated in part*, 334 S.C. 244, 513 S.E.2d 96 (1999). Com. Campbell's interlocutory Motion Order² denying Appellants' motion seeking to reopen the Record became "appealable" upon entry of Com. Campbell's final Decision and Order.³ See, Bone v. U.S. Food Serv., 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012), *adhered to on reh'g*, 404 S.C. 67, 744 S.E.2d 552 (2013)

2 (12/17/2017 Motion Order)

3 (1/5/2018 Decision and Order) (R. p. 2)

("Where the party is not yet able to appeal due to the lack of a final judgment, the issue is not precluded by the law of the case doctrine as there was no prior opportunity for appeal.")

The law of the case applies equally to *appealed* orders, where the appeal is withdrawn or abandoned and dismissed. See, Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); Hudson ex rel. Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014) (The Hudson Court applied the law of the case in a Workers Compensation appeal to "preclude" "relitigating issues" initially appealed, but later abandoned.).

The law of the case, thus, applies to Com. Campbell's denial of the motion to reopen the record and to his final decision and order, which were initially appealed, but which appeal was dismissed; and it also applies to the dismissal itself (unappealed) and to the April 16, 2018 denial of reinstatement (unappealed)⁴. See, e.g., Rodarte v. Univ. of S.C., 419 S.C. 592, 599, 799 S.E.2d 912, 916 (2017) (where Supreme Court denied certiorari previously, lower court's decision is the law of the case "and *cannot* be challenged") (emphasis added) (citations omitted). And, see Watkins v. Hodge, 232 S.C. 245, 247-48, 101 S.E.2d 657, 658 (1958) (refusing to consider issue from underlying case which had been ruled upon below and was not challenged on appeal).

The law of the case applies to appeals from orders of the Workers Compensation Commission. See, e.g., Sparks v. Palmetto Hardwood, Inc., 2010-UP-525, 2010 WL 10088098,

⁴ The Commission's dismissal order reads: "The Request for Commission Review in the above captioned case is dismissed. The appellant brief was not timely filed pursuant to R.76-705H(3)." (R. Appendix p. 2))

at *1 (S.C. Ct. App. Dec. 13, 2010) (affirming workers compensation commission decision because "[t]he [unappealed] ruling of the Workers' Compensation Commission ... is the law of the case) (citing ML-Lee Acquisition Fund, LP v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (noting an unappealed ruling is the law of the case)).

Moreover, any evidence contradicting the Commission's unappealed orders should not be considered on appeal. See, e.g., Segars v. Segars, 279 S.C. 564, 570, 310 S.E.2d 156, 159 (Ct. App. 1983) ("Testimony in contradiction of the unappealed order for summary judgment was inadmissible" at a later hearing).

On the basis of the January 5, 2018 Decision and Order of Com. Campbell (appeal having been dismissed on March 26, 2018) and the unappealed orders of the Commission (R. Appendix p. 2; R. p. 16), the May 21, 2018 order of the Commission denying reinstatement a second time must be affirmed.

The law of the case being a dispositive issue here, the Court need not consider any additional issues, per Pertuis v. Front Roe Restaurants, Inc., 2016-000749, 2018 WL 3297910, at *8; and Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. at 613, 518 S.E.2d at 598.

III. THIS APPEAL IS MOOT

The present appeal is moot, because this Court's reversal would not provide meaningful relief to Appellants, who would nevertheless be subject to the award of Com. Campbell and the unappealed dismissal and first order denying reinstatement. See, e.g., Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). "A case becomes moot when judgment, if rendered, will have *no practical legal effect* upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Id.* 321 S.C. at 431, 468

S.E.2d at 864 (emphasis added). See, also, Smith v. Town of Sullivan's Island, 2014-002128, 2016 WL 6247425, at *1 (S.C. Ct. App. Oct. 26, 2016) (trial court's unappealed finding is the law of the case, any question on this issue is academic and, therefore, moot and not a proper subject for review) (citations omitted).

Once the Court determines that the appeal is moot, it need not consider Appellants' contentions. Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. at 659, note 15, 780 S.E.2d 263 at 276 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. at, 613, 518 S.E.2d at, 598) (an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal). Mootness being dispositive, the Court need not consider any other issues.

IV. APPELLANTS FAILED TO PRESENT EVIDENCE AND AUTHORITY SUPPORTING THEIR GOOD CAUSE ARGUMENTS BEFORE THE COMMISSION AND THIS COURT

(A) Appellants Presented No Evidence Of Good Cause.

Appellants cannot succeed in this appeal because at no point did they present evidence of good cause to reinstate appeal. Appellants' post-dismissal motions failed to include an affidavit as to statements of fact outside the record, which they presented as good cause to reinstate their administratively dismissed appeal. (R. pp. 35-52) The motion to reconsider incorporates by reference the motion to reinstate.⁵ It refers to unsupported matters outside the record: a telephone call in which Appellants claim that "Claimant's attorney ... graciously extended the professional courtesy of promising not to object to reinstatement of the appeal." (Mot. to Reconsider at ¶ 7) (R. p. 42) (Undersigned does not concede the accuracy of this statement but has no burden to

⁵ (R. p. 40)

refute it⁶ at this stage because the Commission ruled in Claimant's favor.)

The motion continues: "This courtesy is tantamount to an acknowledgement that Claimant has sustained no harm or prejudice as a result of Defendant's mistake in not timely filing their brief" that "there is no better cause for reinstatement than implied consent of an opposing party regardless of the reason for the underlying administrative failure." (*Id.* ¶ 7) (R. p. 42) They urged the Commission to focus on "the rationale for the reinstatement", which they state "is simple: ***"OPPOSING COUNSEL DID NOT OPPOSE REINSTATEMENT!"***[sic]" (*Id.*) (emphasis, italics, underlining, enlarged font size and capitalization in original) (R. p. 42)

There is no basis for the "implied consent" rationale because, per the Regulations, failure to respond to a motion is deemed a general denial of that motion. S.C. Code Ann Regs. 67-215(F) No filed objection was required.

As to the "tantamount" "acknowledgement that Claimant has sustained no harm or prejudice" from Appellants' failure to file a brief, the prejudice to be considered on such a motion is whether she would likely suffer prejudice as a result of reinstating the appeal. No cogent argument was offered as to this consideration. Moreover, the record does not reflect the telephone call and "promise" not to oppose reinstatement at the base of the "tantamount" acknowledgement. (R. pp. 40-42) None of the post-dismissal motions included an affidavit as to the truth of the matters outside the record. (R. pp. 35-52)

The motion to reconsider is, thus, like the motion to reinstate, facially defective, per S.C. Code Ann Regs. 67-215(D) for failure to attach an affidavit addressing evidence outside the

⁶ *Conran v. Joe Jenkins Realty, Inc.*, 263 S.C. 332, 334, 210 S.E.2d 309, 310 (1974) ("The burden of proof is on the appellant to convince this Court that the lower court was in error.")

record. This point was argued, inter alia, in Claimant's (albeit hurried) return to the motion to reconsider. (R. pp. 53-57)

Regulation 67-215 provides, in pertinent part: "This regulation governs motions practice at all levels of proceedings before the Commission." S.C. Code Ann Regs. 67-215 "If the grounds on which the motion or reply depend is based on the existence of facts not in the Commission's file, the moving party shall file an affidavit or affidavits evidencing those facts." S.C. Code Ann Regs. 67-215(D)

Appellants' counsel's unsworn statements of matters not in the Commission's file do not constitute evidence of good cause. See, e.g., *Gilmore v. Ivey*, 290 S.C. 53, 60, 348 S.E.2d 180, 184 (Ct. App. 1986) (explaining that counsel's statements of fact and argument are not evidence, but are relevant matter and may constitute admissions by the party counsel represents).

The Regulation also provides: "The Commission will not address a motion involving the merits of the claim[.]" S.C. Code Ann Regs. 67-215(B) Appellants argue the merits of the claim by arguing the merits of their defense as grounds to reinstate. (3/27/2018 Mot. to Reinstate at ¶ 11) (R. p. 37) Appellants argue the import of their meritorious defense in their brief to this Court as well. (Final Brief of Appellants pp. 12-13) But, their defense is irrelevant because the Commission was not at liberty to consider the merits of the fully resolved underlying claim, per S.C. Code Ann Regs. 67-215(B).

These R.67-215 motion defects alone provide sufficient legal basis for the Commission to have denied the motion. "[I]t becomes *necessary* to refuse reinstatement when counsel fail to follow plainly declared rules of the court and statutory provisions concerning appeals." Brewton v. Inter-Carolinas Motor Bus Co., 167 S.C. 151, 166 S.E. 85 (1932) (emphasis added).

As a result, the decision may not be reversed. "In workers' compensation cases, the Full Commission is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). This Court reviews facts based on the substantial evidence standard. Under this approach, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (2005); Thompson v. S.C. Steel Erectors, 369 S.C. 606, 611-12, 632 S.E.2d 874, 877-78 (Ct. App. 2006).

This Court can modify the Commission's decision only if Appellants' substantial rights have been prejudiced ... by an error of law ... in view of the reliable, probative, and substantial evidence. S.C. Code Ann. § 1-23-380(5); Shealy v. Aiken County, 341 S.C. at 454-55, 535 S.E.2d at 442. This "substantial evidence" "is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Id., 341 S.C. at 455, 535 S.E.2d at 442 (citation omitted).

Reasonable minds could not find evidence of good cause for reinstatement, because none was presented. The *absence* of evidence supports the Commission's decision. Its denial of reinstatement cannot now be reweighed or modified.

(B) Appellants Failed To Enunciate The Applicable Standard Of Good Cause To Reinstatement A Workers' Compensation Appeal To The Full Commission.

Appellants argue that court should reverse the Commission's decision because Com. Campbell's decision prejudiced their substantial rights to appeal. (Final Brief of Appellants p. 13) In this argument, they focus on the alleged meritorious defense to Claimant's underlying claim, which, we know, the Commission was not at liberty to consider, per S.C. Code Ann Regs. 67-

215(B).

Nevertheless, they contend that their meritorious defense is an element of the good cause standard for setting aside entry of default in civil court; and, they argue that this standard applies here. (Final Brief of Appellants p. 11) Appellants offer no authority applying the standard for setting aside entry of default, under Rule 55 SCRPC, to a Workers' Compensation motion to reconsider denial of a motion to reinstate an appeal to the Full Commission. Undersigned finds none.

This may be explained by the fundamental differences between entry of default in a civil trial court and reinstatement of an appeal from a fully adjudicated Workers' Compensation award. In the former, suit has just begun and the merits have never been addressed, while the latter is fully resolved on the merits, including an appeal that was also resolved by dismissal.

Workers' Compensation matters differ from civil court matters so fundamentally that the Legislature treats them differently and the Rules of Civil Procedure do not apply. Instead, workers' compensation claims are governed by the Workers' Compensation Act and the Regulations promulgated by the Commission under the Act's authority. "The Workers' Compensation Act is a comprehensive scheme created to provide compensation to employees injured by accidents arising out of and in the course of their employment." S.C. Code Ann. § 42-1-100 et seq.; Machin v. Carus Corp., 419 S.C. 527, 799 S.E.2d 468 (2017).

"[T]here is no provision in the workers' compensation regulations...allowing for the South Carolina Rules of Civil Procedure to fill in any gaps[.]" Adams v. Westinghouse SRS, 2009-UP-401, 2009 WL 9529409, at *4 (S.C. Ct. App. Aug. 10, 2009). Thus, Appellants' materials fail to

enunciate the applicable standard for a showing of good cause to the Workers' Compensation Commission.

Likewise, Appellants' brief to this Court makes scant references to the record and offers conclusory argument and inapposite authorities. These failures constitute abandonment of their argument on appeal. See, e.g., Bass v. Gopal, Inc., 384 S.C. 238, 250, note 7, 680 S.E.2d 917, 923 (Ct. App. 2009), *aff'd*, 395 S.C. 129, 716 S.E.2d 910 (2011) (noting that without authority to support an argument, the party "has actually abandoned this argument"). See, also, Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

(C) Good Cause Requires An Explanation, Satisfactory To The Commission, For Why Appellants' Missed Deadline May Be Excused.

Whether good cause is established is within the sound discretion of the [tribunal]. Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct.App.1989). "An appeal administratively dismissed by the Judicial Department may be reinstated for a good cause upon motion to the Commission." S.C. Code Ann Regs. 67-705(H)4

It follows that good cause, being a discretionary determination, is to some extent subjective, 'in the eye of the beholder', so to speak. It nevertheless requires an *explanation* of events the punitive effects of which the movant seeks to avoid with a 'do-over', a 'Mulligan'. "Good cause is defined as *a legally sufficient reason*. Good cause is often the burden placed on the litigant ... to show *why* a request should be granted or an action excused." O'Keefe ex rel. Muckenfuss v. Muckenfuss, 2010-UP-350, 2010 WL 10080088, at *2 (S.C. Ct. App. July 7, 2010) (quoting Black's Law Dictionary 251 (9th Ed. 2009) (internal quotation marks and

brackets omitted) (emphasis added).

In their motion to reconsider, Appellants' counsel barely acknowledge their error in missing the briefing deadline⁷. No *explanation* being offered, the only reasonable inference is attorney negligence.

In South Carolina, negligence on the part of an attorney is imputed to the client and does not constitute good cause, even with regard to the standard for setting aside a default. See, e.g., Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409-410, (Ct. App. 1994) (imputed negligence of an attorney to a defaulting litigant is not good cause for setting aside entry of default). Accord, Richardson v. P.V., Inc., 383 S.C. 610, 618–19, 682 S.E.2d 263, 267 (2009) (attorney negligence does not constitute good cause to relieve an appellant from entry of default); see also Black's Law Dictionary 1133 (9th ed. 2009) (defining negligence as the failure to act reasonably under a specific set of circumstances).

Appellants' motions do not concede attorney negligence, and Appellants offer no *mea culpas*. Instead, Appellants' motions presume to *demand* reversal and reinstatement: "The rationale for reinstatement here is simple - **OPPOSING COUNSEL DID NOT OPPOSE REINSTATEMENT!**"[sic] (4/26/2018 Mot. to Reconsider ¶ 7) (emphasis, italics, underlining, increased font size and capitalization in original) (R. p. 42) But, as noted above, this argument provides no grounds for reinstatement, because failure to reply to a motion before the Commission is taken as a general denial. S.C. Code Ann Regs. 67-215(F)

⁷ (See, 4/26/2018 Mot. to Reconsider at ¶¶ 6 and 7: "mistake resulting in the dismissal"; "the reasons for the Defendant's failure to file its Brief - a calendaring error within counsel's office"; and "Defendant's mistake in not timely filing their brief" (R. pp. 41-42); see also, 5/4/2018 Am. Mot. to Reconsider and/or for Rehearing at ¶ 2 (R. p. 49); and, see, 3/27/2018 Mot. to Reinstate at ¶¶ 6 and 8 "The deadline for the Appellant's Brief was mis-calendared and was not docketed for March 18, 2018. Accordingly, that deadline passed without the Defendants' appeal being filed."; "Through a docketing error, the brief was not calendared correctly.") (R. p 36)

Even under the Rule 55 standard for good cause, Appellants' materials fail. "[B]ecause unreasonable conduct does not amount to good cause, an unreasonable explanation for defaulting is not a satisfactory explanation that serves a sufficient interest of justice." Limehouse v. Hulsey, 397 S.C. 49, 71, 723 S.E.2d 211, 223 (Ct. App. 2011), *rev'd on other grounds*, 404 S.C. 93, 744 S.E.2d 566 (2013) (discussing good cause to set aside default).

(D) Appellants Do Not Show That Fundamental Rights Were Violated By The May 21, 2018 Order Denying Reinstatement.

Appellants' brief notes that the Commission *may* reinstate on a showing of good cause (Final Brief of Appellants p. 8)) But, they offer no pertinent authority for their contention that the Commission *must* reinstate and that failure to do so was an abuse of discretion, arbitrary, capricious or violated their substantial rights. (Final Brief of Appellants pp. 8-13)

Appellants' brief fails to explain how their non-compliant 3/27/2018 motion to reinstate (incorporated by reference into their motion to reconsider) *required* reinstatement. Nor do they explain, with facts and pertinent authority, the same as to the motion to reconsider itself. This argument is, therefore, abandoned. See, e.g., First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (issue deemed abandoned where appellant failed to provide arguments or supporting authority for his assertion); Eaddy v. Smurfit-Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003) (“[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.”); and, Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010) (issue was abandoned where the Fund failed to cite authority for its position and its argument fell "far short of overcoming the substantial evidence standard of review.")

Appellants argue: "*Evers demonstrated "good cause" for reinstatement, so the Commission's refusal to do so is an abuse of discretion*"; and, "*Good cause" is not defined in the regulation, but Evers provided several reasons to reinstate that should constitute "good cause."*" (Final Brief of Appellants p. 10) Definitions are often not provided in regulations and statutes, but the Regulations do provide guidance: "South Carolina Supreme Court Disciplinary Rules and the Common Law of this State define good cause." S.C. Code Ann Regs. 67-1203(B) (in the context of attorneys withdrawing representation in Workers Compensation matters).

"A six-member full commission panel, exclusive of the original hearing commissioner, determines whether good cause exists to reinstate an appeal that has been administratively dismissed[.]"Matute v. Palmetto Health Baptist, 391 S.C. 291, 294, 705 S.E.2d 472, 474 (Ct. App. 2011) (citing S.C. Code Ann. § 42-3-20 (Supp.2009). Here, the Full Commission (Com. Campbell abstaining) made this determination as to the motion to reinstate and, later, the motion to reconsider. (R. pp. 16; 17)

It follows that part of the Commission's good cause analysis must have focused on the various Reg. 67-215 defects in the motions, including the lack of an explanation suggesting any reason other than attorney negligence for missing the briefing deadline. There can be no doubt that the Workers Compensation Regulations mandated (not suggested) appellants' compliance with the briefing schedule:

"The Commission serves the parties ... a Form 31, Notice of Review, at least thirty days before the date of review hearing." S.C. Code Ann Regs. 67-704A "The Form 31 states the ... filing date for the appellant's brief." S.C. Code Ann Regs. 67-704A(1) "The appellant's brief must be filed with the Commission according to S.C. Code Ann Regs. 67-205 and R.67-705 on

or before the date stated on the Form 31." S.C. Code Ann Regs. 67-704A(2) (emphasis added) "The appellant ... must file his or her brief according to R.67-205 and R.67-705 on or before the date stated on the Form 31." S.C. Code Ann Regs. 67-704(D) (emphasis added) Likewise, a Regulation referenced in S.C. Code Ann Regs. 67-704(D) states: "The appellant shall file the brief and proof of service on the opposing party with the Commission's Judicial Department according to R.67-205 on or before the date on the Form 31." S.C. Code Ann Regs. 67-705(B) (emphasis added) party.

By contrast, Appellants point to a Regulation that gives the Commission *limited* discretion to extend briefing time: "With the consent of the opposing party, the time for filing a brief may be extended if a letter acknowledging the agreement is filed with the Commission on or before the original filing date." S.C. Code Ann Regs. 67-705(H) (emphasis added) This discretion does not include extensions sought *after* the filing date where written consent has not been obtained. Use of the word "may" signals that extra time is permissive. "If" signals that it is conditional and that the condition is *not* permissive. Thus, even a timely motion for extension depends upon written consent from opposing counsel.

Here, Appellants did not seek Claimant's consent to a timely motion for extension, they missed a briefing deadline, and moved to reinstate with no basis in law or fact. Appellants argue that the Commission "has no discretion to refuse reinstatement of an appeal" (despite Regulations to the contrary) because S.C. Code Ann. §42-17-50, directs the Commission to hear appeals from decisions of a single Commissioner. (Final Brief of Appellant pp 9-10) This argument conflates the substantive statutory directives to the Commission, with the Commission's procedural discretion in implementing those directives.

The Act explicitly directs the Commission to make rules for implementing the Act. "The commission shall promulgate all regulations relating to the administration of the workers' compensation laws of this State necessary to implement the provisions of this title and consistent therewith." S.C. Code Ann. § 42-3-30. Appellants offer no cogent argument, nor any authority for their inference, that the discretion vested in the Commission (to make and enforce procedural requirements for appeals) somehow *contradicts* the Act and *violates* their right to appeal. They *did* appeal. Their failure to comply with Regulation 67-704 resulted in the dismissal of their appeal. Their further failures to comply with several provisions of Regulation 67-215 ensured the denial of their motions to reinstate and to reconsider.

Moreover, in this appeal, Appellants fail to provide the Court with a record sufficient to allow meaningful review by this Court to support reversal.⁸ "Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision." Germain v. Nichol, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983). Accord, Webb v. CSX Transp., Inc., 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) ("It is the appellant's burden to present a sufficient record for appellate review.") "[T]he appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h) SCACR; Rakowsky v. Law Offices of Adrian L. Falgione, LLC, 2014-002029, 2018 WL 3578500, at *2 (S.C. Ct. App. July 25, 2018).

For these reasons, Appellants' fundamental rights argument should be deemed to be abandoned.

This argument also fails because Appellants did not preserve the issue for review in

⁸ Appellants' Designation of Matter does not include the 6/12/2018 Notice of Appeal to this Court (a jurisdictional failure); 2/16/2018 Form 31, advising of briefing schedule; and, 3/26/2018 WCC Admin. Order dismissing appeal.

their Notice of Appeal, which states neither issues nor errors. See, e.g., Solomon v. W.B. Easton, Inc., 307 S.C. at 521, 415 S.E.2d at 843 (Issues not raised in the notice of appeal are not preserved for appellate review)

It fails, additionally, because the unappealed dismissal and denial of reinstatement (R. Appendix p. 2; R. p. 16)) along with Com. Campbell's decision (R. p. 2) are the law of the case and no argument may contradict their holdings. See, e.g., Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. at 659, 780 S.E.2d at 276 (An unchallenged ruling, right or wrong, becomes the law of the case) Segars v. Segars, 279 S.C. at 570, 310 S.E.2d at 159 (Ct. App. 1983). Com. Campbell's decision is not subject to review. See, e.g., Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. at 329, 730 S.E.2d at 285 (“[A]n unappealed ruling, right or wrong, is the law of the case.”); Judy v. Martin, 381 S.C. at 458-59, 674 S.E.2d at 153 (“[A]n unappealed ruling ... precludes further consideration of the issue on appeal[.]”).

Appellants' fundamental rights argument fails, yet again, because the appeal is moot due to the controlling unappealed 3/26/2018 administrative dismissal and 4/16/2018 denial of reinstatement. (R. Appendix p. 2; R. p. 16) Reversal would provide no relief. See, Smith v. Town of Sullivan's Island, 2014-002128, at *1 (unappealed finding is the law of the case, any question on this issue is academic and, therefore, moot and not a proper subject for review) (citations omitted).

CONCLUSION

On the basis of the above and foregoing, Claimant, Respondent, Veronica Rodriguez respectfully requests that this Court affirm the May 21, 2018 WCC Full Commission Judicial

Conference Decision and Order in this case.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Don C. Gibson", written over a horizontal line.

October 2, 2018

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FORM 16
CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck Commissioner

SCWCC File No. 1619767

Appellate No. 2018-001111

RECEIVED
OCT 04 2018
SC Court of Appeals

Veronica Rodriguez, Employee Respondent

v.

Peggy Evers, Employer and NorGuard Insurance Company, Carrier Appellant.

CERTIFICATE OF COUNSEL

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

October 2, 2018

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