THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001477

Robert J. D'Espies, ... Claimant, Appellant,

v.

S&A Constr iction and More, LLC, Employer, and the South Carolina Workers' Compensation Uninsured Employers' Fund, ... Respondents.

FINAL BRIEF OF APPELLANT

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2. DID THE COMMISSION ERR IN FINDING THAT RESPONDENT S&A WAS DENIED DUE PROCESS BECAUSE IT FAILED TO RECEIVE NOTICE OF THE HEARING BEFORE THE SINGLE COMMISSIONER?

STATEMENT OF THE CASE

This matter arises from the Appellant's Form 50 dated May 25, 2017 in which Appellant alleged injuries to both heels while employed by Respondent S&A Construction and More, LLC ("S&A"). It is undisputed that Respondent S&A is an uninsured employer and it did not file a Form 51 in response to Appellant's Form 50. Due to Respondent S&A's uninsured status, Respondent SC Workers Compensation Uninsured Employers Fund ("UEF") filed a Form 51 and defended the claim. On July 19, 2017, the Workers' Compensation Commission emailed its Notice of Hearing to Appellant and Respondent UEF and mailed the Notice to Respondent S&A. Respondent UEF appeared at the hearing, however, Respondent S&A did not. Following a hearing on the merits on September 14, 2017, the Single Commissioner filed his Decision and Order dated November 29, 2017 ruling in favor of the Appellant.

Both Respondents UEF and S&A filed timely Form 30's requesting Commission review of the Single Commissioner's Decision and Order raising myriad grounds for appeal, including *inter alia*, that Respondent S&A did not receive notice of the hearing before the single Commissioner. A hearing was held before an Appellate Panel of the Commission on February 20, 2018 and on July 2, 2018 it issued its Decision and Order vacating the Order of the Single Commissioner and remanding the case for a hearing *de novo* on the ground that Respondent S&A did not receive notice of the hearing before the Single Commissioner and as such had been denied substantive and procedural due process.

Appellant received the Appellate Panel Decision and Order on July 9, 2018 and served his Notice of Appeal on the Respondents and filed the same with this court on August 7, 2018.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). In an appeal from the South Carolina Workers' Compensation Commission, the appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Gibson v. Spartanburg Sch. Dist. # 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). This Court's review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law. Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

In this case, whether S&A actually received the Notice of Hearing mailed to it by the Commission is a question of fact, however, whether S&A was properly notified of the hearing before the Single Commissioner for purposes of due process is a question of law. Appellant respectfully submits that the substantial evidence in the record as a whole does not support a finding that S&A did not receive the Notice of Hearing in this case. Appellant further submits that even if such finding were supported by substantial evidence, the Full Commission's decision is controlled by an error of law.

STATEMENT OF THE FACTS

The facts as they relate to this appeal center on whether S&A actually received the Notice of Hearing before the Single Commissioner. As noted above, S&A is an uninsured employer. S&A does not claim it was not served with Appellant's Form 50 but instead maintains that it did not actually receive the Notice of Hearing dated July 19, 2017 which was mailed to S&A by the Commission on that date. S&A does not challenge the actual mailing of the Notice of Hearing and admits that it contains S&A's correct mailing address. S&A's position is that it did not actually receive the Notice of Hearing and as such was denied the opportunity to appear and participate in the hearing in its own defense.

At the Full Commission Hearing, Respondent S&A, a South Carolina limited liability company (LLC), was allowed to proceed *pro se* by Commissioner Aisha Taylor as the Chair of the Appellate Panel. Scott Calder ("Calder") appeared on behalf of S&A and testified under oath that he is the sole LLC member of S&A and that he did not actually receive the Notice of Hearing before the Single Commissioner which was mailed to S&A. Calder did not claim that the Notice of Hearing was not mailed to S&A and confirmed S&A's mailing address to the panel when asked about it. (R. p. 94, lines 8-10). This address matched the address on the Notice of Hearing.

Calder testified that he learned that the Single Commissioner hearing was "coming up" from Appellant's witness Randy Allison. (R. p. 94, lines 19-22). Calder then testified that he contacted Respondent UEF's attorney, Timothy Killen, Esq. based upon a letter he had received from Mr. Killen earlier in the year. Calder stated that he contacted Mr. Killen "to check with him on what was going on because I was scared I was out of the loop and I wasn't sure what was going on and I didn't know what I had missed." (R. p. 94, lines 19-22). Calder was advised by email on

September 7, 2017 that Mr. Killen wanted to depose both Calder and the Appellant prior to the hearing to which Calder agreed. (R. pp. 19-20). Mr. Killen's office attempted to schedule the depositions of Calder and the Appellant for the afternoon of September 13, 2017 (the day before the scheduled hearing). Appellant's counsel was not available for the depositions that afternoon and on September 12, 2017 (2 days before the scheduled hearing) Mr. Killen's office notified Calder by email that the depositions would not take place. (R. pp. 19-20). Calder went on to testify that "I still was not sure of the hearing date" and that "I assumed once I got to the depositions and we went through all that I would know what was going on, so I thought I was in the loop. (R. p. 95, lines 13-17).

Calder next stated that he learned the hearing had been held when he was contacted by Appellant's witness Randy Allison who was looking for work. (R. p. 95, line 17 – R. p. 96, line 1). Lastly, Calder testified that he "contacted Mr. Killen's office again, I think by email or by telephone, wanting to know what was the results of the hearing ... and then I received some paper work later telling me that I was at fault and that I was required to carry Workmen's Comp insurance. (R. p. 96, lines 1-7).

Conspicuously, absent from Calder's testimony is any reference to why he was not told by Mr. Killen's office when the hearing was scheduled to be held or questioning Mr. Killen's office as to why he was not called as a witness to testify at the hearing. According to Calder he knew a hearing was coming up, that he hadn't received anything in the mail about the hearing, that Mr. Killen wanted to depose him before the hearing and even though the depositions were cancelled, he never asked anyone, and was never told, when the hearing would be held.

Appellant's counsel moved to strike Calder's testimony and Commissioner Taylor ruled that "with regard to the motion to strike, I will note a lot of it was hearsay testimony but I'll rule -- I guess I'll go ahead and ***rule that it will be admitted just for the purpose of his reason for not attending the hearing and not necessarily for the truth of the matter in those particular statements***." (R. p. 106, lines 14 – 23, emphasis added). Appellant's counsel rested at that point without seeking permission to cross examine Calder as the Commission Chair had ruled his testimony was not being admitted for the truth of the matters asserted therein.[1]

[1] See Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967)("Where the Commission sits as judge and jury, as the Full Commission did, it is understandable that counsel would be reluctant to object to questions asked by Commissioners. He may well have felt that he could not in good propriety object to questions which the several Commissioners obviously thought were proper. *Cf.* State v. Vickers, 226 S.C. 301, 84 S.E.2d 873 (1954). More important and decisive is the fact that counsel could not reasonably be expected to anticipate that the Commissioners asking the questions would accord the claimant an unwarranted benefit on the credibility issue.").

ARGUMENTS[2]

I. THE SUBSTANTIAL EVIDENCE IN THE RECORD AS A WHOLE DOES NOT SUPPORT THE COMMISSION'S FINDING THAT S&A DID NOT RECEIVE THE NOTICE OF HEARING IN THIS CASE.

As alluded to hereinabove, Calder's testimony on the whole lack of notice issue makes little sense. Appellant respectfully submits that the substantial evidence in the record as a whole will not allow reasonable minds to reach the conclusion the Commission reached in order to justify its action. According to Calder he knew a hearing was coming up, that he hadn't received anything in the mail about the hearing, that Mr. Killen wanted to depose him before the hearing and even though the depositions were cancelled, he never asked anyone, and was never told, when the hearing would be held. How does someone know everything he knows yet fail to know the date of the hearing around which everything else is centered? Is it reasonable under these circumstances for someone in Calder's position to sit idly by and take no steps to protect his interest? Even if Calder's testimony was admissible to establish the truth of the matters asserted, which Commissioner Taylor ruled it was not, it is not credible in view of the record as a whole and does

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[2] Respondent UEF should not be permitted to address the issues of lack of actual notice to S&A and denial of S&A's due process rights as a result thereof. This is true for several reasons. First, UEF and S&A are different parties, separate and distinct from one another. This point is illustrated by the statement from UEF's counsel during the Single Commissioner hearing that he does not represent S&A or Scott Calder. (R. p. 34, lines 22-23 – R. p. 51, lines 3-7). UEF has no standing to assert lack of notice or denial of due process on behalf of any party other than itself. Second, as discussed in detail hereinabove, UEF's counsel was in contact with Scott Calder prior to the hearing and advised Calder that he wished to depose Appellant and Calder prior to the hearing. Calder fully cooperated with UEF's counsel in this respect however the depositions were not able to be taken prior the hearing. Had the UEF wanted to secure S&A/Calder's appearance at the hearing it could easily have done so by contacting Calder and/or subpoenaing them to appear. This was not done and UEF voiced no objection to the hearing proceeding in the absence or S&A/Calder. UEF has waived any such objections and should now be estopped from using S&A's absence from the hearing as a mechanism to obtain relief from an unfavorable result before the Single Commissioner.

not pass muster under the substantial evidence rule.

II. EVEN IF S&A DID NOT ACTUALLY RECEIVE THE NOTICE OF HEARING IT WAS NOT DENIED DUE PROCESS.

Procedural due process requirements are not technical, and no particular form of procedure is necessary. Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 636 S.E.2d 598 (2006). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Ogburn-Matthews, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998); see also Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

Pursuant to the provisions of S.C. Code Ann. Regs. 67-210 A (2) (1997) and S.C. Code Ann. Regs. 67-213 B (2010), the Commission serves hearing notices on uninsured employers such as S&A by depositing the notice in the United States mail, first class postage, addressed to the uninsured employer. Service is complete upon mailing. This is precisely what the Commission did in this case. (R. p. 25). S&A does not challenge the fact that the Commission mailed a proper Notice of Hearing by first class United States mail addressed to S&A Construction & More, LLC at 296 Highway 66, Conway, SC 29526. This is the same address shown on the Commission's Certificate of Service and the same address was provided by S&A on its Form 30. This address was confirmed by Calder in his testimony to the Full Commission. (R. p. 94, lines 8-18). S&A maintains instead that it *did not actually receive* the Notice of Hearing in the mail and for that reason it was denied due process. (R. p. 94, lines 1-7).

If actual receipt of notice of a hearing were required in order to satisfy due process then literally every hearing notice would have to be hand delivered or personally served on the parties to a proceeding. Clearly this is not the case. Our statutes, rules and regulations are replete with notice mechanisms designed to satisfy the requirements of due process and predicated upon less than actual receipt of notice. For example, pursuant to the South Carolina Rules of Civil Procedure, notice of orders or judgments are served by first class mail. See Rule 77(d), SCRCP. Similarly, written motions and notices may be served upon an attorney or a party by mailing it to their last known address. See Rule 5, SCRCP. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint. See Rule 5(b), SCRCP. Similarly, Rule 6(e), SCRCP provides that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail ... five days shall be added to the prescribed period. These rules of court recognize the sufficiency of notice by mail. They comport with the requirements of due process and are used in our judicial system on a daily basis. S.C. Code Ann. Regs. 67-213 B (2010) pursuant to which the Notice of Hearing was mailed to S&A in this case is no different in form or substance.

The notice provided by S.C. Code Ann. Regs. 67-210 A (2) (1997) and S.C. Code Ann. Regs. 67-213 B (2010) is entirely consistent with the due process requirement of "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, *supra*. Absent some defect or irregularity in the service of the Notice of Hearing, S&A's claim that it did not receive notice of the hearing does not establish a due process violation. As noted above, service of the Notice of Hearing is complete upon mailing. S.C. Code Ann. Regs. 67-213 B (2010).

Complete in this context means fully performed and binding upon the parties served. Based upon the foregoing, as a matter of law, S&A's argument is without merit and the Commission erred in finding and concluding that S&A was denied due process on this ground.

CONCLUSION

For the reasons stated hereinabove, this Court should reverse the Decision and Order of the South Carolina Workers' Compensation Commission date July 2, 2018 and reinstate the Decision and Order of the Single Commissioner dated November 29, 2017.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

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