

STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

SCWCC File No. 1619767

Appellate Case No. 2018-001111

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SC Court of Appeals

Veronica Rodriguez, Claimant.....Respondent

v.

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

FINAL BRIEF OF THE APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. An arbitrary decision is one that is devoid of any governing rationale. In refusing to reinstate Evers' appeal, the Commission did not provide a reason, let alone a course of reasoning, that explained its decision. Did the Commission arbitrarily refuse to reinstate her appeal?
2. The governing statute commands the Commission to review all awards of a Single Commissioner. The Commission refused to reinstate Evers' appeal and review Commissioner Campbell's award. Did the Commission exceed its statutory authority?
3. An abuse of discretion is an error of law. The Commission has no authority to refuse to review an appeal. But, even if it did, when "good cause" is shown, the Commission may reinstate an appeal that was removed from the "review hearing docket." Despite demonstrating "good cause," the Commission refused, because of Evers' clerical mistake, to reinstate Evers' appeal. Did the Commission abuse its discretion by failing to find "good cause" for reinstatement?
4. Evers' underlying appeal is meritorious. Only employees of subcontractors can be considered statutory employees of upstream contractors. Commissioner Campbell specifically found that Rodriguez was a subcontractor of Evers (the upstream contractor), not an employee of a subcontractor. Nevertheless, he still determined she was a statutory employee of Evers, which is a legal impossibility under the undisputed facts of this case. Does the Commissioner's glaring error of law justify reinstatement of Evers' Appeal?

STATEMENT OF THE CASE

By Order dated January 5, 2018,¹ Workers' Compensation Commissioner Mike Campbell found that, under section 42-1-400,² Veronica Rodriguez was an independent contractor/subcontractor³ of Peggy Evers. He also ruled that she was a statutory employee of Evers, thereby establishing the Commissioner's jurisdiction to issue an award to Rodriguez.⁴ This was clear error. Only employees of subcontractors can be considered statutory employees of upstream contractors. *McDowell v. Silley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) ("The wording of [section 42-1-400] clearly evinces an intention on the part of the Legislature not to include therein a subcontractor or independent contractor, but only workmen or employees of [] the 'owner' of the subcontractor."). Evers and NorGuard Insurance Company Carrier (hereinafter collectively referred to as Evers) appealed the Commissioner's ruling to the full Commission, contesting jurisdiction and the failure to admit evidence.⁵

¹ The date of the hearing was November 3, 2017. (Order of Commissioner Campbell) (R. pp. 2-15). Respondent initiated her claim in the Worker's Compensation Commission on March 3, 2017. (WCC Form 50) (R. pp. 18-19).

² (Order of Commissioner Campbell, ¶ 2, p. 6) (R. p. 7). Although the Appellants' arguments would remain the same, they contend the Commissioner should have analyzed the employment relationship under section 42-1-410, not section 42-1-400.

³ "'Subcontractor' was defined in *Murray v. Aaron Mizell Trucking Company*, as 'an independent contractor contracting with the contractor to do part of the work which the contractor has previously agreed to perform.'" Grady L. Beard, *et al.*, *The Law of Workers' Compensation Insurance in South Carolina* (Sixth Ed.), p. 65 (citing *Murray v. Aaron Mizell Trucking Company*, 286 S.C. 351, 355, 334 S.E.2d 128, 130 (1985) (internal citation omitted)).

⁴ (Order of Commissioner Campbell, ¶ 1, p. 11) (R. p. 12).

⁵ (Appellants' Motion to Reinstate, ¶4, p. 2). (R. p. 36). The Appellants contend that the new evidence, if admitted, undermines Rodriguez's claim that she cannot work. (Form 30 Appeal, ¶¶22-23, pp. 3-4 of Addendum). (R. pp. 23-24).

Due to a calendaring error in defense counsel's office,⁶ the deadline (March 19, 2018)⁷ for filing the initial brief was missed. On March 26, the Commission removed the appeal from the "review hearing docket," under the authority of Regulation 67-705(H)(3). S.C. Code Ann. Regs. 67-705(H)(3). One day later, March 27, Evers filed a Motion to Reinstate the appeal for "good cause."⁸ S.C. Code Ann. Regs. 67-705(H)(4) ("An appeal administratively dismissed by the Judicial Department may be reinstated for a good cause upon motion to the commission."). The Commission summarily denied the motion to reinstate via Form Order, without any accompanying explanation, on April 16.⁹ Evers filed a Motion to Reconsider the denial of the motion to reinstate on April 26.¹⁰ On May 4, she filed an amended Motion to Reconsider,¹¹ which the Commission summarily denied on May 21, also via Form Order and without any accompanying explanation.¹²

Neither the denial of the Motion to Reinstate nor the denial of the motion to reconsider explained the Commission's decision. Evers filed the Notice of Appeal on June 12, 2018 (received by the Court of Appeal on June 15, 2018).

⁶ The attorney previously handling this case is no longer with Speed, Seta. The attorney filing this brief started at Speed, Seta on July 6, 2018.

⁷ (Appellants' Motion to Reinstate, ¶5, p. 2) (R. p. 36).

⁸ (Appellants' Motion to Reinstate, ¶¶6-7, p. 2 (March 27, 2018)). (R. p. 36).

⁹ (Form Order of the Commission (April 16, 2018)). (R. p. 16).

¹⁰ (Appellants' Motion to Reconsider (April 26, 2018)). (R. pp. 40-42). Although unmentioned in the Motion to Reconsider and Amended Motion to Reconsider, the authority to file such a motion is contained within regulation 67-215(B). S.C. Code Ann. Regs. 67-215(B).

¹¹ (Appellants' Amended Motion to Reconsider (May 4, 2018)). (R. pp. 49-52)

¹² (Form Order of the Commission (May 21, 2018)). (R. p. 17).

STANDARD OF REVIEW

The standard of review set forth in the Administrative Procedures Act applies to Workers' Compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304, 305 (1981).

1. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(5)(f).
2. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is in excess of the statutory authority of the agency. S.C. Code Ann. §1-23-380(5)(b).
3. The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because other error of law affects the administrative decision. S.C. Code Ann. §1-23-380(5)(d).

ARGUMENT

I. The Commission's decision to refuse to reinstate the appeal is arbitrary.

The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(5)(f).

Evers has a statutory right to appeal the decision of the Commissioner to the full Commission. Section 42-17-50 provides, "if an application for review is made to the [C]ommission within fourteen days from the date when notice of the award shall have been given, *the [C]ommission shall review the award...*" (emphasis added). After the Commission removed the

appeal from the “review hearing docket,” the Commission denied Evers’ Motion to Reinstate, prejudicing—in fact denying—her statutory right to the full Commission’s review.

“A decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.” *Deese v. S.C. State Bd. Of Dentistry*, 286 S.C. 182, 332 S.E.2d 539, 541 (1985). In this case, the Commission decided to deny the motion to reinstate the appeal without giving any reason, let alone a course of reasoning, for its decision. The order denying Evers’ motion to reconsider is similarly devoid of a governing rationale. Consequently, the Commission’s decision is irrefutably arbitrary.¹³

II. The Commission lacks authority to deny Evers’ statutory right to the full Commission’s review.

The court may reverse the Commission’s decision if the substantial rights of the appellant have been prejudiced because the administrative decision is in excess of the statutory authority of the agency. S.C. Code Ann. §1-23-380(5)(b).

The General Assembly did not give the Commission the authority to refuse to hear appeals.

If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, *the commission shall review* the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award.

S.C. Code Ann. §42-17-50 (emphasis added).

¹³ A letter from the Commission’s Judicial Director similarly failed to disclose any rationale for its decision. (Letter from the Commission’s Judicial Director (June 28, 2018)). (R. p. 33).

Although the Commission can administratively remove a case from the “review hearing docket” by regulation,¹⁴ it has no discretion to refuse reinstatement of an appeal. A refusal to reinstate the appeal is, in effect, a refusal to hear the appeal. Because the Commission cannot bypass the General Assembly’s clear statutory command via regulation,¹⁵ the Commission’s decision to deny reinstatement is in excess of its statutory authority.

III. Even if the Commission has the authority to refuse to hear an appeal (which the Appellants do not concede), Evers demonstrated “good cause” for reinstatement, so the Commission’s refusal to do so is an abuse of discretion.

The court may reverse the Commission’s decision if the substantial rights of the appellant have been prejudiced because the administrative decision is arbitrary or capricious, or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. §1-23-380(5)(f). “For appellate purposes, an abuse of discretion occurs where the ruling is based on an error of law.” *Trotter v. Trane Coil Facility*, 393 S.C. 637, 646, 714 S.E.2d 289, 293 (2011).

As discussed previously, Evers has a right to appeal the Commissioner’s ruling to the full Commission, and the Commission has no statutory authority to refuse to hear her appeal. If the court determines the Commission has this authority, however, then the Commission still committed legal error in this case by failing to find “good cause” for reinstatement. Regulation 67-705(H)(4) enables the Commission to reinstate an administratively dismissed appeal if “good cause” is shown. “Good cause” is not defined in the regulation, but Evers provided several reasons to reinstate that should constitute “good cause.”

¹⁴ S.C. Code Ann. Regs. 67-705(H)(3).

¹⁵ See *Goodman v. City of Columbia*, 318 S.C. 488, 458 S.E.2d 531 (1995) (holding that a regulation may not alter or add to a statute’s requirements).

First, Regulation 67-705(H)(3) is not intended to be a means of summarily dismissing appeals for procedural reasons. After all, the full Commission, not an individual Commissioner, is the ultimate fact-finder for workers' compensation matters. *See* S.C. Code Ann. §42-17-50 (“[The Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, *receive further evidence*, rehear the parties or their representatives and, if proper, amend the award.”) (emphasis added). The purpose of regulation 67-705(H)(3) is simply to remove an appeal from the “review hearing docket,” thereby enabling immediate review of appeals that are already procedurally compliant. The Commission’s decision in this case thwarts South Carolina’s clear policy of favoring the disposition of cases on the merits. *See, e.g., Microtronics v. S.C. Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001); *see also Dixon v. Besco Engineering*, 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995) (rule 55(c), the rule addressing setting aside an entry of default for “good cause shown,” should be “liberally construed to promote justice and dispose of cases on the merits”).

Second, although a calendaring error resulted in the missed deadline that led to administrative removal from the “review hearing docket,” Evers filed a motion to reinstate the appeal one day after learning of the removal. (Appellants’ Motion to Reinstate, ¶¶6-7, p. 2) (R. p. 36). This is not a situation where the Commission could infer a waiver of her right to full Commission review. Third, Ms. Rodriguez did not file a Return to Evers’ original Motion to Reinstate. (Appellants’ Amended Motion to Reconsider, ¶2, p. 1) (R. p. 40). This lack of objection is significant because parties can agree to extend the deadline for filing briefs. S.C. Code Ann. Regs. 67-705(H). There is no practical difference between an opposing party agreeing to extend a deadline and an opposing party refusing to object to an extension of a deadline; in either case, the opposing party seems content to have the deadline extended. Fourth and finally, because she will

have the opportunity to consider and respond to Evers' argument, Ms. Rodriguez is not prejudiced by reinstating the appeal.

Based on the above, discerning a lack of "good cause" for reinstatement is impossible. The failure to find "good cause" for reinstatement in her case was an error of law and prejudiced Evers' substantial right to full Commission review. Consequently, the Commission abused its discretion.

IV. Evers' underlying Appeal is meritorious because the Commission had no jurisdiction to award benefits.

The court may reverse the Commission's decision if the substantial rights of the appellant have been prejudiced because the administrative decision is affected by other error of law. S.C. Code Ann. §1-23-380(5)(d).

"The Workers' Compensation Commission has subject matter jurisdiction only where the relationship of employer and employee exists at the time of the alleged injury for which the claim is made." Grady L. Beard, *et al.*, *The Law of Workers' Compensation Insurance in South Carolina* (Sixth Ed.), p. 1 (citing *McCreery v. Covenant Presbyterian Church*, 299 S.C. 218, 221, 383 S.E.2d 264, 265 (Ct. App. 1989) (*reversed on other grounds*)). Not every relationship qualifies as an employment relationship, however. "[I]ndependent contractors have been excluded from coverage as employees in South Carolina at least since the case of *Carter's Dependents v. Palmetto State Life Insurance Company*." *Id.*, p. 9 (citing *Carter's Dependents v. Palmetto State Life Insurance Company*, 209 S.C. 67, 38 S.E.2d 905 (1946)). As already shown, a "subcontractor" is an "independent contractor" under the Law. *Supra* n. 2.

Commissioner Campbell ruled that Rodriguez is entitled to benefits under the South Carolina Workers' Compensation Law.¹⁶ Specifically, he determined that Rodriguez was a subcontractor and statutory employee of Evers, the upstream contractor. But both cannot be true. If she is a subcontractor of Evers, then Rodriguez cannot be a statutory employee of Evers. *McDowell v. Silley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947) (“The wording of [section 42-1-400] clearly evinces an intention on the part of the Legislature not to include therein a subcontractor or independent contractor, but only workmen or employees of [] the ‘owner’ of the subcontractor.”). The Commissioner obviously muddled the distinction between a subcontractor and an employee of a subcontractor. In doing so, he Committed a fundamental error of law; that is, he determined he had jurisdiction when in fact he does not. This resulted in an award that prejudices the substantial rights of Evers—making her pay an award that she should not have to pay. Consequently, the Commissioner’s decision prejudices Ms. Evers’ substantial rights because it is affected by a fundamental error of law.

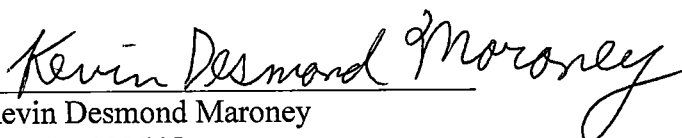
CONCLUSION

Refusing to reinstate Evers’ appeal on the “review hearing docket” was arbitrary and beyond the Commission’s authority. Failing to find “good cause” to reinstate Evers’ appeal was an abuse of discretion. In addition, a fundamental error of law affected the Commissioner’s decision. This court should reverse the Commission’s decision, and order the Commission to reinstate and hear Evers’ appeal.

¹⁶ “This title shall be known and cited as ‘The South Carolina Workers’ Compensation Law.’” S.C. Code Ann. §42-1-10.

Respectfully submitted,

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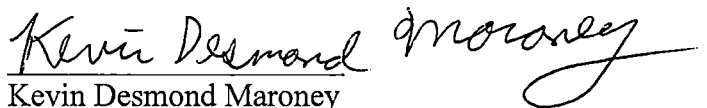
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CERTIFICATION

In accordance with Rule 211(a), I certify that the final briefs comply with Rule 211(b).

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