

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM S.C. WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Chair for the Commission

Appellate Case No. 2018-000532

Misty A. Morris,

Claimant,

v.

BB&T Corporation, d/b/a BB&T Bank,
and Hartford Accident & Indemnity Co.,

Employer,
Carrier,

IN RE: Attorney's Fee Petition of
David Proffitt,

Appellant,

v.

South Carolina Workers' Compensation
Commission,

Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did Respondent act in an arbitrary and capricious manner and abuse its discretion in denying Appellant's motion to reinstate his appeal after administratively dismissing it, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

- II. Did Respondent violate Appellant's constitutional and statutory right to procedural and substantive due process in denying Appellant's motion to reinstate his appeal after administratively dismissing it, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

- III. Is Respondent's denial of Appellant's motion to reinstate the appeal after it was administratively dismissed made upon unlawful procedure and is it clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the

motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant on November 15, 2017, timely filed a Form 30 Request for Commission Review of Commissioner Susan S. Barden's order denying in part his petition for attorney's fees. (R. pp. 3-15.) Respondent on December 15, 2017, issued a Form 31 Briefing Schedule and Notice of Appellate Hearing. (R. pp. 16-17.) Appellant's brief was due to be filed on January 16, 2018, and the hearing was scheduled for February 20, 2018.¹

Appellant received by email a letter from Respondent on January 26, 2018, stating that the appeal had been administratively dismissed because Appellant's brief was not timely filed pursuant to Reg. 67-705(H)(3). (R. p. 18.) Pursuant to Reg. 67-705(H)(4), Appellant moved on January 29, 2018, to reinstate the appeal, and his motion was filed on February 1, 2018. (R. pp. 19-46.)

In his motion, Appellant apologized for the delay. Appellant wrongly believed that the deadline to file the brief was January 31, 2018, when in fact the deadline was January 16. The deadline was not calendared correctly. (Affidavit of App. dated Feb. 22, 2018, R. pp. 61-63.)

The appeal involved the issue of the calculation of Appellant's attorney's fee and there is no opposing party involved. Chad Abramson, attorney for Employer/Carrier, sent the Commission a letter on November 21, 2017, stating that his office is not involved in this matter, does not intend to appear and does not need to be served with pleadings or briefs related to the appeal. Appellant provided the Commission with a copy of that letter. (R. p. 24.)

¹ The Form 31 stated the brief was due on January 14, 2018, but January 14 was a Sunday and January 15 was a holiday.

Appellant also submitted with the motion to reinstate a copy of the brief he intended to file if Respondent reinstated the appeal and allowed him to do so. Appellant informed Respondent that he would be happy to file additional copies of the brief, the previously filed Form 30, the single commissioner's order, the transcript of the hearing and any other documents necessary to perfect the appeal. (R. pp. 19-46.)

Appellant on February 20, 2018, received by email a copy of Respondent's form order denying his motion to reinstate. (R. p. 1.)

Appellant timely filed a motion for rehearing.² (App.'s Motion for Rehearing filed Feb. 26, 2018, R. pp. 47-66.) Appellant on March 19, 2018, received by email a copy of Respondent's form order denying his motion for rehearing. (R. p. 2.)

Appellant timely filed the notice of appeal to this Court.

² See Rhame v. Charleston County School Dist., 412 S.C. 273, 772 S.E.2d 159 (2015) (holding that party may file motion for rehearing with Full Commission and the motion stays the deadline for serving notice of appeal with Court of Appeals for thirty days from receipt of decision on the motion for rehearing).

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers’ compensation commission.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981); Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate court’s review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(5).

Pursuant to S.C. Code Ann. § 1-23-380(5), the decision of the Commission may be reversed or modified “if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.”

ARGUMENT

- I. **Respondent's denial of Appellant's motion to reinstate the appeal after it was administratively dismissed and failure to consider the appeal on the merits is arbitrary, capricious and constitutes an abuse of discretion, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.**

Respondent's regulations explicitly contemplate and allow an extension of time to file an appellate brief. "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." 25A S.C. Code Ann. Reg. 67-705(H). In this case, there was no opposing party in the appeal to the Full Commission.

While the filing of the Form 30 Request for Review is jurisdictional, as stated in 25A S.C. Code Ann. Reg. 67-701(A), other deadlines for filing a brief and perfecting the appeal before the Full Commission are not jurisdictional. See Skinner v. Westinghouse Elec. Corp., 380 S.C. 84, 668 S.E.2d 795, 796-97 (2008) (teaching that jurisdictional appealability issues are governed by statute, not by rules of civil procedure; therefore, under former APA statute then in effect, notice of appeal was not required to be served on Workers' Compensation Commission and so failure to serve it on Commission did not deprive circuit or appellate courts of jurisdiction); cf. Mears v. Mears, 287 S.C. 168, 337

S.E.2d 206 (1985) (service, but not filing, of notice of appeal is jurisdictional requirement for appellate court and appellate court may not extend the time for doing it); Rule 203(b)(1), SCACR (stating that “[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.”); Rule 263(b), SCACR (“time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof”).

Respondent’s regulations require that “[a]ll briefs must be filed at least five days before the scheduled date of review.” 25A S.C. Code Ann. Reg. 67-705(H)(1). Appellant was ready, willing and able to file his brief 22 days before the scheduled date of review.

“An appeal which is administratively dismissed by the Judicial Department may be reinstated for good cause shown to the Commission.” 25A S.C. Code Ann. Reg. 67-705(H)(4). See also Matute v. Palmetto Baptist Hosp., 391 S.C. 291, 705 S.E.2d 472, 474-75 (Ct. App. 2011) (affirming Commission’s decision to reinstate employer’s appeal for good cause after it was administratively dismissed because Form 30 was filed after the 14-day deadline to appeal single commissioner’s order, where record showed order had been timely served on employer but employer asserted it did not receive the order until it inquired to the single commissioner a month later).

Appellant submits that he has shown good cause to reinstate the appeal to the Full Commission. Appellant candidly admitted that he calendared the wrong due date for the brief, which resulted in the missing of a non-jurisdictional deadline and a slight delay that prejudiced no one. Appellant was ready, willing and able to immediately submit his brief to Respondent on January 29, 2018 – 13 days after the original due date of January 16,

2018, and 22 days before the scheduled hearing date of February 20, 2018. (Aff. of Appellant dated Feb, 22, 2018, R. pp. 61-63; Proposed appellate brief submitted to Respondent on January 29, 2018, R. pp. 25-46.)

There is no opposing party in this matter which could have been prejudiced by granting the motion because, as counsel for Employer/Carrier has informed Respondent, Employer/Carrier has no opinion or role and has not appeared in this attorney's fee matter. (Abramson letter dated Nov. 21, 2017, R. p. 24.)

Appellant was ready to file his brief on January 29, 2018, as shown in the proposed brief submitted to Respondent with his motion to reinstate the appeal. (Proposed appellate brief submitted to Respondent on January 29, 2018, R. pp. 25-46.) Appellant was ready and willing to submit his brief, perfect the appeal and proceed to the hearing on February 20. Conversely, Appellant had no objection to continuing a hearing on the appeal until a later date if Respondent deemed it necessary.³

Respondent in its form orders denying the motions to reinstate the appeal and for rehearing gave absolutely no reason for the denial. Respondent made no findings of fact and stated no conclusions of law. Respondent offered Appellant no opportunity to be heard before denying the motions, as Appellant was informed Respondent would simply consider the written motion at a judicial conference.

³ Appellant is at a loss to understand Respondent's ruling or apparent displeasure at the missing of a non-jurisdictional deadline and a mere 13-day delay, given the fact that a hearing by the single commissioner on Appellant's petition for attorney's fees was held on July 20, 2017, and the order denying the petition in part was filed 3½ months later on November 8, 2017. Appellant is *not, repeat, not* in any way criticizing Respondent for the length of time it took to obtain a ruling because Appellant is aware of Respondent's heavy workload. However, the slow and steady pace of Respondent's work does indicate that a slight delay in the filing of a brief should not completely derail an appeal from proceeding to a decision on the merits before the Full Commission.

An abuse of discretion occurs when a ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the factfinder is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, 467 (2006); Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

Respondent's ruling in this instance is based on an error of law because the law certainly should not condone the outright dismissal of an appeal when a party is 13 days late in filing a brief and no one is prejudiced in any way.

Respondent's decision also is without evidentiary support. If it is Respondent's position that a single, non-jurisdictional calendaring mistake by counsel, which results in a single, non-jurisdictional missed deadline, is a "death sentence" for a case or an appeal, Appellant respectfully submits that such a position must be deemed arbitrary, capricious and an abuse of discretion. Such a position would only be tenable in a world where every lawyer was perfect and unerring, every claimant an angel, every employer and insurer a demi-god, and every commissioner a saint. Such a world does not exist, and Appellant is the first to admit he is far from perfect or unerring.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits before the Full Commission.

II. Respondent's denial of Appellant's motion to reinstate the appeal after it was administratively dismissed and failure to consider the appeal on the merits violates Appellant's constitutional and statutory right to due process, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. Mathews v. Eldridge, 424 U.S. 319, 332 (1976). "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const., art. I, § 3.

The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Clemmons v. Lowe's Home Center, Inc., 412 S.C. 366, 378-79, 772 S.E.2d 517 (Ct. App. 2015) ("This court previously has identified 'adequate notice,' 'adequate opportunity for a hearing,' 'the right to introduce evidence,' and 'the right to confront and cross-examine witnesses' as the minimal due process requirements in a contested case proceeding such as a workers' compensation hearing.") (citing Adams v. H.R. Allen, Inc., 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App.

2012); accord Stono River Evtl. Protection Ass'n v. S.C. Dep't of Health and Evtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review." S.C. Const. art. 1, § 22.

The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual's property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003); S.C. Dept. of Soc. Servs. v. Wilson, 352 S.C. 445, 452-53, 574 S.E.2d 730, 733-34 (2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)); Cameron Barkley Co. v. S.C. Procurement Review Panel, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995).

Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. First Fed. Sav. & Loan Ass'n of Walterboro v. Bd. of Bank Control, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) (quoting Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. S.C. Dept. of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002); In re

Vora, 354 S.C. at 595, 582 S.E.2d at 416. The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. S.C. Dept of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

In this case, Respondent's denial of the motion to reinstate and failure to consider the appeal on the merits constitutes a violation of procedural due process. Appellant has a property interest in the attorney's fee charged in this case. Appellant has been denied the right to adequate notice, the opportunity to be heard at all, let alone at a meaningful time and in a meaningful way, the right to meaningful review by Respondent and the right to meaningful judicial review.

Moreover, Respondent's decision has denied Appellant his right to substantive due process.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; S.C. Const. art. I, 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462 (2004); Worsley Companies, Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000).

"The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them." In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (internal quotes omitted).

“The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause [of the Fourteenth Amendment]. The liberty interest at stake is the individual’s freedom to practice his or her chosen profession; the property interest is the specific employment.” Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 79 (1999) (recognizing same principle); Ezell v. Ritholz, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938) (discussing same principle). “It cannot be doubted that a man’s trade or profession is his property.” Byrne’s Adminstrs. v. Stewart’s Adminstrs., 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812); see also Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598, 611-12 (2006), overruled other grounds by Joseph v. S.C. Dept. of Labor, Licensing & Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016) (stating “[t]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection”) (citing Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956)). A duly licensed attorney’s right to practice law and make his living doing so, of course, also is a property right of value which is entitled to protection. Cf. Ex Parte James A. Brown, 393 S.C. 214, 711 S.E.2d 899, 900 (2011) (holding that “the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney’s services constitute property entitling the attorney to just compensation.”).

In this case, Appellant has a property interest in the attorney's fee charged in this case. Respondent's denial of the motion to reinstate and failure to consider the appeal on the merits constitutes a violation of substantive due process and an unlawful deprivation of Appellant's property interest.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits.

III. Respondent's denial of Appellant's motion to reinstate the appeal after it was administratively dismissed and failure to consider the appeal in the merits was made upon unlawful procedure and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, where Appellant has shown good cause to reinstate the appeal after mistakenly calendaring the wrong due date for the brief, there is no opposing party which could have been prejudiced by granting the motion, and Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.

As previously stated, Appellant candidly admitted that he calendared the wrong due date for the brief, which resulted in a slight delay that prejudiced no one. Appellant was ready, willing and able to immediately submit his brief to Respondent on January 29, 2018 – 13 days after the original due date of January 16, 2018, and 22 days before the scheduled hearing date of February 20, 2018.

There is no opposing party in this matter which could have been prejudiced by granting the motion because, as counsel for Employer/Carrier has informed Respondent, Employer/Carrier has no opinion or role and has not appeared in this attorney's fee matter.

Appellant was ready to file his brief, as shown in the proposed brief submitted to Respondent with his motion to reinstate the appeal. Appellant was ready and willing to submit his brief, perfect the appeal and proceed to the hearing on February 20. Conversely, Appellant had no objection to continuing a hearing on the appeal until a later date if Respondent deemed it necessary.

Given these factual circumstances, Respondent's denial of the motion to reinstate and failure to consider the appeal on the merits was made upon unlawful procedure and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits.

CONCLUSION

For all the foregoing reasons, Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits by the Full Commission.

Respectfully submitted,



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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certified that Appellant's final brief complies with Rule 211(b), SCACR.



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