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STATE OF SOUTH CAROLINA
In the Court of Appeals

SC Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner

SCWCC File No. 1619767

Appellate Case No. 2018-001111

Veronica Rodriguez, Employee, Respondent

v.

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

**APPELLANTS PETITION FOR REHEARING OF THE COURT'S SUBSTITUTED
OPINION FILED JUNE 10, 2020**

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APPELLANTS PETITION FOR REHEARING

Pursuant to South Carolina Appellate Court Rules 221 and 240, Appellants hereby petition the Court for rehearing of its Substituted and Refiled Opinion dated June 6, 2020. Appellants respectfully submit the Court overlooked and/or misapprehended applicable law regarding immediate appealability and judicial review of interlocutory orders of the South Carolina Worker's Compensation Commission ("Commission") when deferral of those issues until final adjudication of the case deprives an aggrieved party of an adequate remedy.

STATEMENT OF THE CASE

This matter comes before the Court following a long and convoluted procedural history before the Commission and not this Court. The case initially arises out of an accident allegedly arising out of and in the course of Respondent's employment with Peggy Evers d/b/a Concept Cleaners (collectively "Appellants") on December 5, 2016 when she fell down steps. Appellants contend Respondent was an independent contractor at the time in question and is therefore not a covered "employee" entitled to medical and compensation benefits under the South Carolina Workers Compensation Act ("Act"). By Order dated January 5, 2018 Commissioner Mike Campbell found that Claimant was indeed an independent contractor, but still nevertheless covered under the Act as a "statutory employee." Commissioner Campbell ordered further causally related medical evaluation and treatment for compensable injuries to the right knee and spine (lumbar and cervical). Commissioner Campbell also awarded Claimant TTD disability benefits, based on Respondent's testimony at the Hearing that she had not worked since shortly after her accident.

Unknown to then defense counsel at the time of the original Hearing on November 3, 2017, surveillance efforts commissioned by the carrier revealed Respondent working cleaning houses on

November 2, 2017, the VERY DAY BEFORE THE HEARING AND HER TESTIMONY THAT SHE HAS ESSENTIALLY BEEN UNABLE TO WORK DUE TO HER INJURIES SINCE SHORTLY FOLLOWING HER ACCIDENT. Defense counsel made a Motion to Admit this newly discovered evidence. Commissioner Campbell summarily denied that Motion. Appellants thereafter appealed the denial of their Motion to Admit new evidence of Respondent working, as well as Commissioner Campbell's erroneous decision that Respondent was covered under the Act. Due to a calendaring error in defense counsel's office, Appellants did not timely file their Brief to the Full Commission. The Commission administratively dismissed the Appeal pursuant to WCC R. 67- 705(4) for that mistake. However, the regulation also provides for reinstatement of an administratively dismissed appeal upon a showing of "good cause." Even though Respondent was not prejudiced by the untimely filing of the brief and the initial Motion was unopposed, the Commission denied the Appellants Motion to Reinstate without explanation via a form order. New defense counsel filed a Motion to Reconsider the denial of reinstatement with a detailed Memorandum of Law regarding the due process implications of the Commission's administrative failure to reinstate the Appellants statutory right of appeal to the ultimate arbiter of the case. The Commission denied the Motion to Reconsider via another form order. Appellants then appealed the Commission's denial of their due process rights to the Court of Appeals.

By Order filed May 6, 2020 this Court AFFIRMED the Commission's dismissal of the appeal. Appellants filed their Petition for Rehearing respectfully submitting that the Court employed an incorrect standard of review. The Court cited the "substantial evidence" rule in its Opinion when in fact the issue is one of due process under the Administrative Procedures Act. Appellants also contended the Court overlooked and/or misapprehended the roles of the Hearing Commissioner and the Full Commission in the administration of the Act.

Thereafter, this Court GRANTED the Appellants' initial Petition for Rehearing, withdrew its May 6, 2020 Opinion, and substituted a new Opinion filed on June 6, 2020. Citing Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (SC 2013), this Court ruled *sua sponte* that it had no appellate jurisdiction over this matter because the underlying Commission Order at issue was not a final agency decision and therefore not immediately appealable. The Court also noted parenthetically in its citation to Bone that compensability can be raised on appeal of the final Commission award. Appellants now file this Petition for Rehearing, respectfully submitting the Court has overlooked applicable law finding interlocutory orders from the Commission subject to immediate judicial review when deferring same until a final disposition of the case deprives the appellant of an adequate remedy.

ARGUMENTS

I. DECLINING JUDICIAL REVIEW OF THE COMMISSION'S DISMISSAL OF THEIR APPEAL LEAVES APPELLANTS WITHOUT AN ADEQUATE REMEDY.

S.C. Code §1-23-380 states, in pertinent part, “[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” (emphasis added). Given the peculiar posture of this case, Appellants argue that deferring appeal on compensability until the Commission's final adjudication of the matter is not only inadequate, but totally *unavailable*. As such, the Appellants' ONLY remedy is the Court's consideration of the merits of their request to reinstate the appeal to the Commission.

In Hilton v. Flakeboard of America Ltd., 418 S.C. 245, 791 S.E.2d 719 (SC 2016), the Supreme Court held that an injured worker appellant's appeal from an interlocutory order of the Commission was subject to immediate judicial review because the appellant would not have an

adequate remedy otherwise. In that case, the employer/carrier appealed a decision from the Single Commissioner to the Full Commission Appellate Panel. The Panel essentially ordered an entirely new hearing to address the claimant's competency, even though the employer/carrier had not requested that relief, nor even raised the issue of claimant's competency in its appeal to the Full Commission. Claimant appealed the Commission's order to the Court of Appeals, which dismissed the appeal as interlocutory in accordance with Bone supra. The Supreme Court reversed, holding "under these unique circumstances where the Commission has ordered relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy." Bone at 418 S.C. p. 250. The Court also noted disapprovingly that the remedies ordered by the Commission were "extreme" and "without any explanation." *Id* at p. 251.¹

In this case, the Commission's improper dismissal of Appellants' appeal is equally egregious and subject to immediate correction by this Court. Appellants will have no "adequate remedy" within the meaning of S.C. §1-23-380 otherwise. Here is why: Appellants will not be able to challenge the Single Commissioner's patently erroneous finding that an independent contractor/subcontractor can be a "statutory employee" subject to coverage and compensation under the Act following a final adjudication of the claim because such finding will be the "law of the case" at that point. See Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (Ct. App. 1999) (holding that an unappealed finding of the single commissioner regarding medical treatment was the law of the case for future proceedings). The Single Commissioner's findings only become the law of the case as a result of the Full Commission's dismissal of Appellants' appeal on that

¹ Similar to the Commission in Hilton, the Commission never made any findings of fact to justify its decision not to reinstate Appellants' appeal. It merely issued a form order to that effect.

issue. Therefore, judicial review of the propriety of that dismissal can only be done NOW to determine whether the Commission action was proper or whether Appellant's have been deprived of procedural due process. In sum, this predicament not only deprives Appellants of an "adequate remedy," it in fact leaves them with *no remedy at all*. The Court must act now to provide Appellants a remedy or the Commission's action will be totally unreviewable later as a matter of law.

It is worth noting that the situation presented here is not the same as that presented in Rose v. JJS Trucking LLC et al, when then Chief Judge Few cautioned that mere obligation of a defendant to make monetary payments pending a final adjudication of the claim does not render a Commission order to that effect immediately appealable. 411 S.C. at p. 369. The appellant employer/carrier in that case has a clear remedy at the final adjudication of the claim- the right to pursue reimbursement for benefits paid on the claim from the Uninsured Employer's Fund. Again, due to the law of the case doctrine the Appellants here literally have no remedy other than immediate judicial review of whether the Commission's dismissal of their appeal was proper. Surely, S.C. Code §1-23-380 cannot be applied in a manner that would leave dubious Commission action totally unassailable, which will be the result here if the Court declines to address the merits of Appellants contentions on the propriety of the Commission's action.

II. THE COMMISSION ARBITRARILY APPLIED A REGULATION TO DEPRIVE APPELLANTS OF A STATUTORY RIGHT OF APPEAL IN VIOLATION OF THE ADMINISTRATIVE PROCEDURES ACT.

Now that it has been established that immediate judicial review of the Commission's dismissal of the appeal is their only remedy at this juncture, Appellants reiterate the points made in their original Petition for Rehearing. The instant case involves an outrageous denial of

substantial procedural due process rights. As such, the correct legal standard for judicial review by this Court is codified in the Administrative Procedures Act (“APA”), specifically S.C. Code § 1-23-380 (5), which provides for reversal of the Commission’s decision when “substantial rights of a party have been prejudiced by an error of law, made upon unlawful procedure, and/or are otherwise arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.” S.C. Code §42-17-50 codifies the right of a party aggrieved by a hearing commissioner’s decision to appeal to the Full Commission, who may then “review the award and, if good grounds be shown, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award.” It is elementary that the Full Commission, not the hearing commissioner, is the ultimate arbiter of matters arising under the Act. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967) (the statute empowers the Full Commission to make its own findings of fact or conclusions of law consistent or inconsistent with those of the hearing commissioner). Denial of a statutory right of appeal to the ultimate decision maker under the Act should therefore be strictly scrutinized because it implicates a substantial right of an aggrieved party under the APA.

In this case, an administrative department within the Commission dismissed Appellants’ appeal for failure to timely file an appellate brief. Indeed, WCC Regulation 67-707 states that “the Judicial Department **may** remove the case from the review hearing docket.” The regulation further provided that the case may be reinstated for “good cause shown.” The Regulation’s language providing for removal of the case from the “review hearing docket” merely connotes a temporary disposition until the administrative/procedural requirement of filing a Brief has been met. Hence the minimal “good cause” standard for reinstatement applies. Further, unlike the *jurisdictional* requirement that an appeal from an Order of the single commissioner to the Full Commission be

filed with 14 Days, the regulatory provision for administrative dismissal of an appeal for failure to file a brief is *discretionary*, not mandatory. ² It is elementary that parties cannot consent to jurisdiction; however, any fair application of a good cause standard for reinstatement of an administrative dismissal must give tremendous, if not conclusive, weight to an opposing parties acquiescence. *See WCC Regulation 67-705 (H)* (regulation providing for extension of time to file an Appellant's Brief via consent of the opposing party). Again, Respondent in this case did not initially object to the reinstatement. There is simply no logical distinction between a party's leave to consent to an extension of time for filing a brief and an administrative reinstatement of an Appeal without objection by the opposing party. As such, the Commission's failure to reinstate the appeal was arbitrary and capricious.

Next, a regulation, although having the force of law, cannot be applied in a manner that thwarts a statutory right or purpose. *See Goodman v. City of Columbia*, 318 S.C. 488 458 S.E.2d 531 (SC 1995) (holding that a regulation may not alter or add to a statute requirements). In *Goodman* the Supreme Court reinstated a claimant's appeal when he failed to file it on the form prescribed by regulation. The Court reasoned that claimant substantially complied with the statutory requirement that an appealing party merely provide notice of an intent to appeal to the Full Commission within fourteen (14) days of the single commissioner's ruling. Certainly, Appellant's mistake in the instant case is no more egregious than claimant's failure in *Goodman*. To allow reinstatement of an appeal in that case and deny it in this one embodies the very definition of arbitrary and capricious in violation of the APA. In essence, the Commission's Order denying

² Pursuant to S.C. Code §42-17-50 and WCC Regulation 67-701, a party has fourteen (14) days from notice of the Order to file an Appeal from the single commissioner's ruling to the Full Commission. The Regulation further provides that the time to Appeal to the Full Commission is a jurisdictional requirement- "[t]he fourteen-day period is *jurisdictional*." WCC Regulation 67-701 (emphasis added). *See also Allison v. W.L. Gore & Associates*, 394 S.C. 185, 714 S.E.2d 547 (SC 2011).

Appellants' appeal in this case supplants statutory due process rights for regulatory niceties. As such, it is nothing but the triumph of form over substance, which South Carolina law and policy strongly disfavor.

Further, South Carolina law strongly favors disposition of cases on their merits, not technicalities or default. *See Mictronics 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 addressing setting aside entry of default for "good cause shown" should be "liberally construed to promote justice and dispose of cases on the merits"). Administrative dismissal of a claim for a technical failure to submit an appellate filing was not intended to be a primary means for summary disposition of cases pending before the Commission on the merits. The Commission's actions in this matter flout this important policy consideration and constitute an arbitrary and capricious abuse of discretion in violation of the APA.

III. APPELLANTS HAVE SHOWN GOOD CAUSE FOR REINSTATEMENT OF THEIR APPEAL TO THE FULL COMMISSION.

Finally, Defendants clearly posited good cause for reinstatement of their appeal to the review hearing docket in their original Motion. The Commission's reasoning for denying the Motion is unknown from the face of its form order. Presumably, the Commission may have singularly focused on the reasons for the Defendant's failure to file its Brief- a calendaring error within counsel's office. However, the Commission's inquiry should instead focus on the rationale for the reinstatement, not just the mistake resulting in the dismissal. The Commission's decision may be palatable if the standard for reinstatement is "excusable neglect" causing the dismissal. However, the standard per the regulation is *reinstatement for good cause shown*. The good cause shown here is that Respondent suffered no immediate prejudice as a result of Appellants mistake in not timely filing their brief. Whether the brief was filed when purportedly due per the

Commission's Notice, or whether it was filed after any reinstatement of the appeal, Respondent's position is *status quo*- she will still have the same right and opportunity to Respond and be heard on the merits of the case.

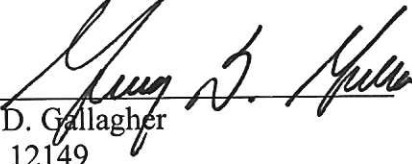
CONCLUSION

In sum, Defendants respectfully request that the Court reconsider its substituted opinion dated June 6, 2020 in light of applicable law from the Supreme Court providing for immediate judicial review of a Commission decision when the aggrieved party is deprived of an adequate remedy otherwise. In this case, Appellants only remedy under the peculiar circumstances presented here is immediate judicial review. Likewise, immediate judicial review is the only mechanism available to check the Commission's authority to dismiss an aggrieved party's appeal.

Moreover, the correct legal standard for assessing this issue is codified in S.C. Code §1-23-380 (5), which provides for reversal of the Commission's decision when substantial rights of a party have been prejudiced by an error of law, made upon unlawful procedure, and/or are otherwise arbitrary, capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion. Arbitrary and capricious application of a regulation to thwart a substantial statutory right is the most grievous violation of a party's due process rights. The fact that the regulatory violation was a mere technicality only compounds the Commission's error.

Appellants pray for a new opinion from the Court REVERSING the Commission for the reasons stated herein and reinstatement of Appellants appeal for a fair review hearing on the merits of their contentions before the Appellate Panel.

Respectfully submitted,


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19 JUNE, 2020
Columbia, SC

PROOF OF SERVICE OF APPELLANTS' PETITION FOR REHEARING

STATE OF SOUTH CAROLINA
In the Court of Appeal

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Jun 19 2020

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

T. Scott Beck, Commissioner

SCWCC File No. 1619767

Appellate Case No. 2018-001111

Veronica Rodriguez, Employee, Respondent

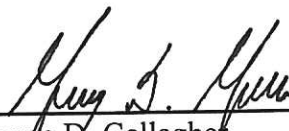
v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing of the Court's Substituted Opinion filed June 10, 2020, by depositing a copy of it in the United States Mail, postage prepaid, on **June 19, 2020**, addressed to her attorney, Don C. Gibson, Post Office Box 60669, North Charleston, SC 29419 and via electronic mail at dgibson@dgibsonlaw.com.

June 19, 2020


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June 19, 2020

VIA EMAIL: CTAPPFILINGS@SCCOURTS.ORG

The Honorable Jenny Abbott Kitchings
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∞
GEORGE D. GALLAGHER (SC), of counsel

RE: Veronica Rodriguez v. Peggy Evers
Appellate Case No.: 2018-001111
WCC No.: 1619767
Claim No.: PEWC734403-001
DOA: 12/5/16
Our File No.: 1700-0612

Dear Ms. Kitchings:

Please find enclosed our Petition for Rehearing of the Court's Substituted Opinion filed June 10, 2020, for filing in the above-referenced matter. The filing fee has been placed in the mail to your office today.

By copy of this letter to Don C. Gibson, attorney for Respondent, I am serving him a copy of this Motion.

Sincerely,


George D. Gallagher

GDG/kl
Enclosures

cc: Don C. Gibson, Esquire (w/encl)
Rosie Torres (w/encl)