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AUG 17 2020

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM S.C. WORKERS' COMPENSATION COMMISSION  
T. Scott Beck, Chair for the Commission

Unpublished Opinion No. 2020-UP-235 (Filed August 12, 2020)  
Appellate Case No. 2018-000532

Misty A. Morris, Claimant,

v.

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

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

v.

South Carolina Workers' Compensation  
Commission, Respondent.

**APPELLANT'S PETITION FOR REHEARING**

David Proffitt, SC Bar # 11193  
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Appellant

Appellant David Proffitt submits his Petition for Rehearing pursuant to Rule 221, SCACR. Proffitt submits that the Court of Appeals overlooked or misapprehended the following issues or arguments in the per curiam opinion filed August 12, 2020:

1. Proffitt incorporates by reference each and every argument and issue raised to the Court of Appeals in his brief, regardless of whether it is explicitly restated herein.

2. The South Carolina Workers' Compensation Commission's denial of Proffitt'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 Proffitt 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 Proffitt was ready, willing and able to immediately submit his brief to the Commission 13 days after the original due date and 22 days before the scheduled hearing date. See App. Br. pp. 10-13.

3. The Commission's denial of Proffitt's motion to reinstate the appeal after it was administratively dismissed and failure to consider the appeal on the merits violates Proffitt's constitutional and statutory right to due process, where Proffitt 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 Proffitt was ready, willing and able to immediately submit his brief to the Commission 13 days after the original due date and 22 days before the scheduled hearing date. See App. Br. pp. 14-18.

4. The Commission's denial of Proffitt'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 Proffitt 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 Proffitt was ready, willing and able to immediately submit his brief to the Commission 13 days after the original due date and 22 days before the scheduled hearing date. See App. Br. pp. 18-19.

5. The Court of Appeals erred in declining to find the Commission abused its discretion because the record shows the Commission, in fact, did not exercise its discretion. Proffitt was not allowed to appear or be heard at a hearing on his motion to reinstate the appeal, but the Commission considered only written pleadings. The Commission made no findings of fact or conclusions of law, but simply denied the motion to reinstate and motion for rehearing in one-page form orders. (R. pp. 1-2.)

6. The Court of Appeals erred in finding that an attorney who makes an honest mistake in calendaring the deadline for an appellate brief "is insufficient to establish good cause for reinstatement." (Op. at ¶ 1.) Proffitt respectfully submits that an attorney's calendaring mistake with regard to a non-jurisdictional deadline in the Commission's briefing schedule, as a matter of law in most instances, should constitute good cause for reinstatement, particularly when the attorney is immediately ready to proceed and file the brief long before the scheduled hearing date, and there is absolutely no showing of prejudice to any party or the Commission.

7. The Court of Appeals cited Matute v. Palmetto Baptist Hospital, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011), for the often-stated proposition that the appellate court “may not weigh the evidence or substitute its judgment for that of the appellate panel as to the weight of evidence on questions of fact.” (Op. at ¶ 1.) Proffitt respectfully submits this proposition is irrelevant in the analysis of the Commission’s ruling. There is no factual dispute; there are no facts or evidence to weigh. The undisputed fact is Proffitt missed a briefing deadline due to an admitted calendaring mistake. The only question is whether the Commission may then deny Proffitt any right to be heard where there is no prejudice to any opposing party (an opposing party does not even exist); there is no prejudice to the Commission because Proffitt was ready, willing and able to immediately submit his brief to the Commission 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, or Proffitt was willing to postpone the hearing date if the Commission wished; and the Commission abused its discretion because its ruling was based upon an error of law, was without evidentiary support, did not demonstrate that any discretion was exercised, and the ruling did not fall within the range of permissible decisions applicable under these facts and circumstances.

8. In fact, Matute actually *supports* Proffitt’s position. The Court of Appeals in that case affirmed the Commission’s decision to reinstate an employer’s appeal for good cause after it was administratively dismissed because the Form 30 was filed after the 14-day deadline to appeal the single commissioner’s order. The Court of Appeals explained:

The Commission will not accept for filing a Form 30 that is not postmarked or delivered to the Commission by the fourteenth day from the date *of receipt* of the

Hearing Commissioner's order. 25A S.C.Code Ann. Regs. 67–701 (Supp.2009) (emphasis added). Despite the mandates of Regulation 67–701, “[a]n appeal administratively dismissed by the Judicial Department may be reinstated for a good cause upon motion to the Commission.” 25A S.C.Code Ann. Regs. 67–705(H)(4) (Supp.2009).

The full commission’s determination that Palmetto Baptist demonstrated good cause to reinstate its appeal is supported by the record. The single commissioner received Matute’s proposed order on September 22, 2008, as evidenced by the “received front desk” stamp on the order. The certificate of service on the order stated a copy of the order was mailed first-class to all parties on September 24, 2008. However, Palmetto Baptist claimed it never received an order, either due to inadvertent improper service or nonservice, until it inquired to the single commissioner on October 24, 2008. Palmetto Baptist timely filed a Form 30 four days after it received the order as required by Regulation 67–701. . . .

Because the full commission has the discretion to reinstate an appeal pursuant to Regulation 67–705, and Palmetto Baptist demonstrated good cause as to why it did not file its Form [391 S.C. 296] 30 until October 28, 2008, the full commission was within its discretion to reinstate Palmetto Baptist’s appeal.

Matute, 705 S.E.2d at 474-75 (emphasis in original; footnote omitted).

The record in Matute showed the order had been timely served on the employer, but the employer asserted it did not receive the order until it inquired to the single commissioner a month later. Plainly, someone made a mistake – maybe the Commission staff failed to mail it, maybe the US Postal Service failed to deliver it, or maybe the employer’s attorney failed to properly receive and process it at his or her office.

Regardless of how the mistake occurred, the Commission and the Court of Appeals rightly concluded that the mistake should not deprive the employer of the chance to be heard on appeal. Similarly, Proffitt’s mistake should not deprive him of the chance to be heard.

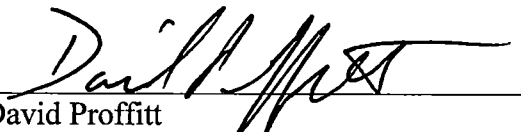
9. The Court of Appeals erred in concluding that Proffitt failed to raise the issue of whether the Commission’s denial of his motion to reinstate his appeal violated his rights to procedural and substantive due process, and consequently were not preserved

for review. (Op. at ¶ 2.) Proffitt raised those arguments in his written motion for rehearing to the Commission – which was the only opportunity to raise them because there was no hearing and the Commission only reviewed written submissions. (R. pp. 54-57.) The arguments made before the Commission are essentially identical to the arguments made in Proffitt’s brief to the Court of Appeals. (App. Br. pp. 14-18.) Proffitt respectfully submits that all arguments raised in the Court of Appeals were raised to and ruled on by the Commission, and consequently are preserved for review.

**CONCLUSION**

For all the foregoing reasons, Proffitt asks that the Court of Appeals to reconsider its decision, reverse the Commission’s denial of his motion to reinstate the appeal and remand this matter to the Commission for consideration of the appeal on the merits by the Full Commission.

Respectfully submitted,

  
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Appellant

August 17, 2020

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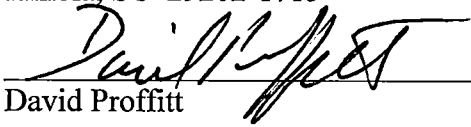
**PROOF OF SERVICE**

I, the undersigned lawyer or employee in the offices of Proffitt & Cox, LLP, attorneys for Appellant, do hereby certify that I have served the counsel or parties specified below in this action with a copy of the specified pleadings by causing a copy of the same to be  mailed by United States Mail, postage prepaid;  filed via SC Courts E-Filing System;  electronically mailed;  faxed; or  hand-delivered to the following address:

Pleading: Appellant's Petition for Rehearing to Court of Appeals

Counsel / Parties Served: James Keith Roberts  
S.C. Workers' Compensation Commission  
P.O. Box 1715  
Columbia, SC 29202-1715

August 17, 2020

  
\_\_\_\_\_  
David Proffitt

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## HAND-DELIVERED

August 17, 2020

The Honorable Jenny Abbott Kitchings  
S.C. Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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Hartford Accident & Indemnity Co., Carrier,  
IN RE: Attorney's Fee Petition of David Proffitt, Appellant v. S.C. Workers'  
Compensation Commission, Respondent  
Appellate Case No. 2018-000532  
PC File No. 1464.01

Dear Ms. Kitchings:

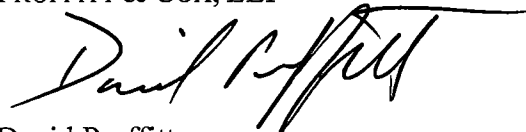
Please find enclosed for filing the original and seven copies of Appellant's Petition for Rehearing, along with proof of service on Respondent and its counsel. Also enclosed is a check for the \$50 filing fee.

Please file the original and return a date-stamped copy to me in the enclosed envelope.

With kindest personal regards, I remain

Sincerely yours,

PROFFITT & COX, LLP



David Proffitt

RDP/nif  
Enclosures

cc: James Keith Roberts (w/ enclosures)