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May 20 2020

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the 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

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APPELLANTS PETITION FOR REHEARING

Pursuant to South Carolina Appellate Court Rules 221 and 240, Appellants hereby petitions the Court for rehearing in this matter. Appellants respectfully submit the Court overlooked and/or misapprehended the significant due process issues presented in this case. SCACR 221 (a), *See Kennedy v. S.C. Retirement Systems*, 349 S.C. 531, 564 S.E.2d 322 (2011). Most glaringly, the Court employed an erroneous legal standard in its consideration of this matter. As such, the Court's Order filed on May 6, 2020 should be vacated or amended accordingly to grant the Appellants' requested relief for the reasons set forth herein.

STATEMENT OF THE CASE

This matter comes before the Court following a long and convoluted procedural history before the South Workers Compensation Commission ("Commission") below. 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 Appellants' "statutory employee." Commissioner Campbell ordered further causally related medical evaluation and treatment for compensable injuries to the right knee and spine (lumbar and cervical). Based on Respondent's testimony at the Hearing that she had not worked since shortly after her accident, Commissioner Campbell also awarded Claimant TTD disability benefits.

Unknown to then defense counsel at the time of the original Hearing on November 3, 2017, surveillance efforts commissioned by the Appellants 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 for Commissioner Campbell's consideration. Commissioner Campbell summarily denied that Motion. Appellants thereafter timely appealed the denial of their Motion to Admit new evidence of Respondent working, as well as Commissioner Campbell's initial erroneous decision that Respondent was covered under the Act. Due to a calendaring error in defense counsel's office, the Appellants did not timely file their Brief to the Full Commission. The Commission administratively dismissed the Appeal pursuant to WCC R. 67- 705(4). That Regulation provides for reinstatement of an administratively dismissed appeal upon a showing of "good cause." The Commission denied the Appellants Motion to Reinstate via a form order without explanation, even though Respondent was not prejudiced by the untimely filing of the Brief. Moreover, the initial Motion was unopposed by Claimant's counsel. 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 reinstatement of the appeal. Appellants then appealed the Commission's denial of their due process rights to appeal to the Court of Appeals.

By Order filed May 6, 2020 this Court AFFIRMED the Commission's dismissal of the appeal. Appellants respectfully submit that the cursory analysis employed by the Court's Order does not sufficiently consider the important due process implications raised by Appellants. The

Court overlooked and/or misapprehended the roles of the Hearing Commissioner and the Full Commission in the administration of the Act. Appellants suspect this fundamental misapprehension affected the Court's ensuing erroneous decision not to reinstate Appellants' appeal.

ARGUMENTS

First, Appellants respectfully submit that the Court undoubtedly employed an incorrect legal standard for analysis and disposition of this matter when it cites the case of Matute v. Palmetto Health Baptist, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2011). Matute only involves application of the well-established "substantial evidence rule" governing review of the Commissions' *factual* findings. In a substantial evidence case the court may not weight the evidence or substitute its judgement for that of the Commission regarding *questions of fact on the merits*. However, the instant case does not implicate the Commission's factual findings, so reliance on Matute is wholly misplaced. Indeed, 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. Rather, the instant case involves denial of procedural due process rights. As such, the correct legal standard of review is found 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." The Court failed to analyze this case under this correct standard and reconsideration of this matter should be conducted in that light.

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. ¹

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

¹ 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).

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

Further, an administrative dismissal 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. South Carolina law strongly favors disposition of cases on their merits, not technicalities or default. See Micronics 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"). 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.

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.

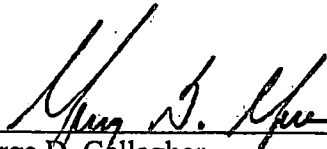
Again, it is elementary that parties cannot consent to jurisdiction; however, any fair application of a good cause standard for reinstatement of an administrative dismissal must give tremendous, if not conclusive, weight to an opposing parties acquiescence. See WCC Regulation 67-705 (H) (regulation providing for extension of time to file an Appellant's Brief via consent of the opposing party). In this case Respondent 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. The Commission's failure to

CONCLUSION

In sum, Defendants respectfully request that the Court reconsider its May 6, 2020 decision under the corrects legal standard per 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 Order reversing the Commission for the reasons stated herein and reinstatement of their appeal for a fair review hearing on the merits of their contentions.

Respectfully submitted,


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May 19, 2020
Columbia, SC

PROOF OF SERVICE OF APPELLANTS' PETITION FOR REHEARING

STATE OF SOUTH CAROLINA
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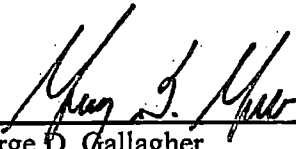
v.

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Veronica Rodriguez by depositing a copy of it in the United States Mail, postage prepaid, on **May 20, 2020**, addressed to her attorney, Don C. Gibson, Post Office Box 60669, North Charleston, SC 29419 and via electronic mail at dgibson@dgibsonlaw.com.

May 20, 2020


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