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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

James Lockemy, Court of Appeals Judge
John D. Geathers, Court of Appeals Judge
Blake A. Hewitt, Court of Appeals Judge

Veronica Rodriguez, Respondent

V.

Peggy Evers and NorGuard Insurance Company, Appellants

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Peggy Evers and NorGuard Insurance Co. (“Petitioners”) hereby certifies that their Petition for Rehearing of the Court of Appeals’ substituted Order was finally ruled upon by the Court on August 5, 2020.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err as a matter of law in denying the Petition for Rehearing when such decision flouts prior decisions of the Supreme Court regarding the immediate appealability of interlocutory Orders from the South Carolina Workers Compensation Commission?
- II. Did the Court of Appeals err as a matter of law in denying the Petition for Rehearing to reinstate Petitioner’s appeal to the Workers Compensation Commission when its decision has deprived Petitioners of substantial due process rights?
- III. Did the Court of Appeals err as a matter of law by failing to reinstate Petitioners’ appeal to the South Carolina Worker’s Compensation Commission on the merits?

STATEMENT OF THE CASE

This matter comes before the Court following a long and convoluted procedural history before the South Carolina Workers Compensation Commission (“Commission”) and the Court of Appeals. The case initially stems from an accident allegedly arising out of and in the course of Respondent’s employment with Peggy Evers d/b/a Concept Cleaners (“Evers”) on December 5, 2016 when she fell down steps while cleaning a private residence. (R. p. 18). Petitioners 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”). (R. p. 6). 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 Evers’ “statutory employee,” which is contrary to this Court’s holding in Smith v. Squires Timber Co., 311 S.C. 321, 428 S.E.2d 878 (1993) that independent contractors or subcontractors are not included under the Act. *cf.* Neese v. Michelin Tire Corp., 324 S.C. 465, 478 S.E.2d 91 (an *employee* of an independent contractor may be considered a statutory employee of an upstream contractor even if the subcontractor himself is not covered under the Act). Commissioner Campbell ordered causally related medical evaluation and treatment for compensable injuries to the right knee and spine (lumbar and cervical). Commissioner Campbell also awarded Claimant running 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, which is the VERY DAY BEFORE THE HEARING AND HER TESTIMONY THAT SHE HAS BEEN UNABLE TO WORK DUE TO HER INJURIES SINCE SHORTLY FOLLOWING HER ACCIDENT. (R. pp. 23-24). Defense counsel made a Motion to Admit this newly discovered evidence of Respondent gainfully working. Commissioner Campbell summarily denied the Motion. Petitioners thereafter appealed that denial, as well as sought Full Commission review of Commissioner Campbell’s erroneous decision that Respondent was covered under the Act. (R. pp. 20-24). Due to a calendaring error in then defense counsel’s office, Petitioners did not timely file their Brief to the Full Commission. The Commission

administratively dismissed their appeal pursuant to WCC R. 67- 705(4) as a result of that mistake. (R. p. 33). The same regulation, however, also provides for reinstatement of an administratively dismissed appeal to the hearing docket upon a showing of “good cause.” Even though Respondent would not be prejudiced by the untimely filing of the Brief and the initial Motion was unopposed, the Commission denied Petitioner’s Motion to Reinstate without explanation via a form order. (R. p. 33). New defense counsel then filed a Motion to Reconsider the denial of reinstatement, including a memorandum of law regarding the due process implications of an administrative failure to reinstate the Petitioners’ statutory right of appeal the Full Commission as the ultimate arbiter of the case. (R. p. 40-42). The Commission denied the Motion to Reconsider via another form order without explanation. (R. p. 43). Petitioners then appealed the Commission’s denial of their due process rights to the Court of Appeals. (R. p. 59).

By Order filed May 6, 2020 the Court of Appeals initially affirmed the Commission’s dismissal of the appeal. Petitioners then filed their Petition for Rehearing respectfully submitting that the Court employed an incorrect standard of review. Specifically, the Court of Appeals cited the “substantial evidence” rule in its Opinion when no evidentiary issues were implicated by the Commission’s dismissal of Petitioners’ appeal. The Commission’s decision was memorialized via a form order without findings of fact or any other explanation supporting the action. As such, Petitioner’s argued the only germane issue is one of due process under the South Carolina Administrative Procedures Act (“APA”). Petitioners 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, the Court of Appeals granted the 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), the Court ruled *sua sponte* that it had no appellate jurisdiction because the Commission order dismissing Petitioners' appeal was not a "final agency decision" and therefore not immediately appealable. The Court noted parenthetically in its citation to Bone that compensability can be raised on appeal of the final Commission award. Petitioners filed a second Petition for Rehearing of the June 6, 2020 decision, respectfully submitting the Court overlooked and/or misapplied applicable law holding that interlocutory orders from the Commission are subject to immediate judicial review when deferring same until a final disposition of the case deprives an appellant of an "adequate remedy."

By Order dated August 5, 2020 the Court of Appeals cursorily denied the second Petition for Rehearing, stating "the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded." Petitioners now pray that the Supreme Court grant this Petition for Writ of Certiorari, review the issues presented, correct the Court of Appeals' patently erroneous and unjust decision to affirm the Commission's summary dismissal of Petitioners' appeal, and remand back to the Commission for consideration of same on the merits.

ARGUMENTS

I. DECLINING JUDICIAL REVIEW OF THE COMMISSION'S DISMISSAL OF THEIR APPEAL LEAVES PETIONERS 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." In Hilton v. Flakeboard of America Ltd., 418 S.C. 245, 791 S.E.2d 719 (SC 2016), this Court held that an injured worker'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 (“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. The injured worker then 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.” Hilton 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

Petitioners argue that deferring appeal on compensability until the Commission’s final adjudication of the matter as the Court of Appeals reasons is not only inadequate, but ***totally unavailable***. As such, Petitioners’ ONLY remedy is the Court’s consideration of the merits of their request to reinstate the appeal to the Commission. Here is why: Petitioners will not be able to challenge the single commissioner’s 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 that finding will be the “law of the case” at the 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 before the Commission). The single commissioner’s erroneous findings essentially become “unappealed findings” for future proceedings as a result of

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. In this case, the Commission’s improper dismissal of Petitioners’ appeal is equally egregious and subject to immediate correction by the Court. Appellants will have no “adequate remedy” within the meaning of S.C. Code §1-23-380 otherwise.

the administrative dismissal of Petitioners' appeal. Consequently, the issue of Claimant's coverage and entitlement to benefits under the Act would be unchallengeable again before the Full Commission or the Courts as the law of the case. Judicial review is absolutely necessary now to determine whether the Commission's dismissal was proper, or whether Petitioners have been deprived of due process of law. In sum, this predicament not only deprives Petitioners of an "adequate remedy," it in fact leaves them with *no remedy at all*. The Court must act now to provide Petitioners a remedy or the Commission's action will be totally unreviewable later as a matter of law via the law of the case doctrine.

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. Rose at 411 S.C. p. 369. The appellant employer/carrier in that case had 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, Petitioners here do not have that same luxury as they have continued to pay/provide compensation and medical benefits accruing after the date of the Commission Order pursuant to S.C. Code §42-17-60 and Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960). 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 propriety of the Commission's action at this juncture.

II. THE COMMISSION ARBITRARILY APPLIED A REGULATION TO DEPRIVE PETITIONERS OF A STATUTORY RIGHT OF APPEAL IN VIOLATION OF DUE PROCESS OF LAW.

Now that it has been established that immediate judicial review of the Commission's dismissal of their appeal is their only remedy at this juncture, Petitioners reiterate the points made in their original Petition for Rehearing as to why the Commission action is an outrageous denial of their substantial due process rights. The applicable legal standard for judicial review 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. Petitioners submit that the Commission's dismissal of their appeal is arbitrary, capricious, an abuse of discretion, and/or an unwarranted exercise of discretion in violation of every tenet of due process codified by the APA and the Act. This denial of procedural

due process has deprived them of their statutory right of appeal to the Full Commission- the ultimate arbiter of workers compensation matters.

To recap the Commission's dubious action in this case- an administrative department within the Commission dismissed Petitioners' appeal for failure to timely file an appellate brief. WCC Regulation 67-707 states that "the Judicial Department **may** remove the case from the review hearing docket." (emphasis added). The regulation further provides 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 denotes 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 within fourteen (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.

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).

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, Petitioners' 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. Moreover, the statutory right being thwarted by this capricious application of the regulation in the instant case is the right to have the merits of the case be decided by the ultimate decision maker- the Full Commission. In sum, Petitioners submit that the essentially administrative functions of WCC R. 67-705 cannot trump the substantive due process rights codified by S.C. Code §42-17-50.

The Commission action here supplants statutory due process rights for regulatory niceties, which is contrary to South Carolina law strongly disfavoring default and the triumph of form over substance. *See Micronics v. S.C. Department of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001) (in affirming the circuit court's reinstatement of a party in default's cause of action before the ALJ the Court stated "where there is a good faith mistake of fact and no attempt to thwart the judicial system, there is a basis for relief. This is consistent with South Carolina policy favoring disposition of issues on their merits rather than technicalities." [internal citations omitted]). *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”).

In facts eerily similar to the instant case, the Plaintiff in Mictronics failed to appear for a hearing before an administrative law judge (ALJ) on a sale tax exemption issue due to a calendaring error in counsel’s office. The ALJ found the plaintiff in default and dismissed the action with prejudice. Plaintiff immediately moved to reinstate its cause of action with the ALJ, which was denied. In affirming the Circuit Court’s reinstatement of the action before the ALJ, then Chief Judge Hearn wrote for the court:

It appears from the record that the [Department of Revenue] will suffer no prejudice should this case proceed for a determination on the merits. Here, DOR has no substantial stake in this windfall, and the resolution of the case on the merits has not been substantially delayed by the parties’ actions. Given Mictronics’ good faith mistake, its swift action to remedy the situation, the existence of a meritorious defense, and the lack of prejudice to DOR, we find the ALJ abused its discretion by refusing to reopen the case.

All of these factors cited by then Judge Hearn in Mictronics supporting reinstatement of the action certainly apply to the instant case- a good faith mistake by counsel due to a calendaring error, an unwarranted windfall to the opposing party, lack of prejudice to the opposing party, and the existence of a meritorious defense. Although Mictronics addresses the dismissal of an initial cause of action, whereas the instant case involves dismissal of an appeal from a decision already rendered, this is an immaterial distinction without a difference in the context of a workers compensation claim because the Full Commission is the ultimate fact finder, not the single commissioner. Review by the Full Commission is styled as an “appeal; however, the standard of review is *de novo* as to the findings of fact and conclusions of law. As such, only action by the Full Commission is deemed a “final agency” decision for purposes of judicial review. S.C. Code §1-23-380.

Again, an 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 that deprives Petitioners of a statutory right of appeal to the ultimate decision maker under the Act. The Court cannot allow this to stand.

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

Finally, Petitioners pray that this Court order reinstatement of their appeal directly to the Full Commission rather than remand back to the Court of Appeals. *See Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (SC 2019) (Supreme Court remanded case directly to the Commission with instructions after reversing Court of Appeals' dismissal of the appeal as interlocutory). Petitioners have clearly posited good cause for reinstatement of their appeal to the Commission's review hearing docket in their original Motion to the Commission. 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 good faith calendaring error within counsel's office. However, the Commission's inquiry should also focus on the rationale for the reinstatement, not just the mistake resulting in the dismissal. The Commission's decision may be more palatable if the standard for reinstatement is "excusable neglect." 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 Petitioners' 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,

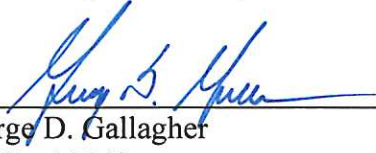
Respondent's position is *status quo*- she will still have the same right and opportunity to respond and be heard on the merits of the case. All other criteria for reinstatement set forth in Mictronics *supra*, including a meritorious defense to the claim, are applicable here as well.

CONCLUSION

In sum, Petitioners respectfully request that the Court grant its Petition for a Writ of Certiorari in light of the Court of Appeals' gross misapprehension of this Court's precedent providing for immediate judicial review of a Commission decision when the aggrieved party is deprived of an adequate remedy otherwise. In this case, Petitioners' 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 to the ultimate arbiter of the case.

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 and screams for immediate judicial review to correct it. The Petitioners pray for remand back to the Full Commission for consideration of their appeal on the merits.

Respectfully submitted,



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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA COURT OF APPEALS

James Lockemy, Court of Appeals Judge
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Blake A. Hewitt, Court of Appeals Judge

Veronica Rodriguez, Respondent

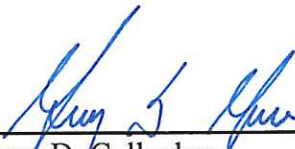
V.

Peggy Evers and NorGuard Insurance Company, Appellants

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Veronica Rodriguez by depositing a copy of it in the United States Mail, postage prepaid, on September 2, 2020, addressed to her attorney, Don C. Gibson, Post Office Box 60669, North Charleston, SC 29419 and via electronic mail at dgibson@dgibsonlaw.com.

September 2, 2020


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September 2, 2020

VIA EMAIL: supctfilings@sccourts.org
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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

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Sep 02 2020
SC Court of Appeals

Dear Mr. Shearouse:

Please find enclosed our Petition for Writ of Certiorari for filing in the above-referenced matter.

By copy of this letter to Don C. Gibson, attorney for Respondent, and The Honorable Jenny Abbott Kitchings, I am serving them a copy of this Petition.

Sincerely,


George D. Gallagher

GDG/kgl

Enclosures

cc: Don C. Gibson, Esquire (w/encl)
The Honorable Jenny Abbott Kitchings (w/encl)
The Honorable Amy Bracy (w/encl)
Rosie Torres (w/encl)