

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE S.C. WORKERS' COMPENSATION COMMISSION

Case No: 2018-000532

RECEIVED

SEP 18 2020

SC Court of Appeals

Misty A. Morris, Claimant,

v.

BB&T Corporation, Employer, and Hartford Accident & Indemnity Co., Carrier.

RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondent, by and through the undersigned attorney, files this return to Appellant's August 17th, 2020 Petition for Rehearing. A Petition for Rehearing must state with particularity the points that have been overlooked or misapprehended by the court. See Rule 221(a), SCACR. The Court in this case did not misapprehend or overlook any material fact or principle of law, and the court appropriately affirmed the Decision and Order of the South Carolina Workers' Compensation Commission. Appellant raises nine (9) grounds he asserts justify rehearing. For the reasons set forth below, the Court should deny the Petition for Rehearing.

1. Appellant's paragraph (1) merely incorporates the arguments raised in his brief and does not raise any point which could have been overlooked or misapprehended.
2. Appellant's paragraph (2) asserts without evidence that the Commission acted in an arbitrary, capricious manner and abused its discretion. These are conclusory statements and Appellant does not cite any facts or law to support them. Unsupported conclusory

statements are not grounds for rehearing. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) (“South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.”) Appellant asserts his acknowledged failure to follow the Commission’s regulations governing appellate procedure should be forgiven because it did not prejudice anyone. There is no evidence to support Appellant’s allegation that no one was prejudiced by his tardiness. Regardless, the Commission’s regulations governing appellate procedure do not require that a party be prejudiced for an appeal to be dismissed. *See* S.C. Code Ann. Regs. 67-705(B) (“The appellant *shall* file the brief and proof of service on the opposing party with the Commission’s judicial Department . . . on or before the date on the Form 31.”) (Emphasis added); (“Under the rules of statutory interpretation, use of words such as “shall” . . . indicates the legislature’s intent to enact a mandatory requirement.”) *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002); *See also* S.C. Code Ann. Regs. 67-705(H)(4).

3. Appellant’s paragraph (3) asserts the Commission’s decision violated Appellant’s constitutional and statutory right to due process. Appellant does not cite to any law to support this allegation. In fact, Appellant was afforded due process and he was the one who failed to follow the proper administrative procedures. Had Appellant honored the due date clearly printed on the Form 31, his appeal would not have been dismissed. S.C. Code Ann. Regs. 67-705 was enacted and amended in accordance with the Administrative Procedures Act and S.C. Code Ann. § 42-3-30, and published in the

State Register¹. *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) (“Regulations authorized by the legislature have the force of law.”) Appellant does not assert that the Commission failed to follow the procedure set out in its regulations; rather Appellant acknowledges the Commission strictly followed the procedure set forth in its regulations. He is merely unhappy with the result as applied to him. Appellant candidly admits he failed to file his brief in the timeframe required by Reg. 67-705(B). The Commission’s dismissal of his appeal was consistent with Reg. 67-705(H)(3). The Commission’s denial of his Motion to Reinstate was within its discretion under Reg. 67-705(H)(4). The Commission’s finding that Appellant’s failure to properly calendar his due dates is not “good cause” to reinstate an appeal was within the discretion of the Commission. Appellant cites no provisions of law to support his assertion the Commission abused its discretion by denying his motion to reinstate and does not identify anything the court overlooked or misapprehended.

4. Appellant’s paragraph (4) asserts without evidence the Commission’s denial of his motion to reinstate was made upon unlawful procedure and was clearly erroneous in light of the reliable, probative and substantial evidence. The record shows that the Commission followed proper procedure under its regulations. Regulation 67-705 establishes the procedure for an appellant to follow in submitting its briefs and Appellant simply chose not to follow it.
5. Appellant’s paragraph (5) asserts the Commission did not exercise its discretion and somehow erred by only considering the written pleadings and not allowing Appellant to appear at a hearing or present oral argument. There is no error. Reg. 67-

¹ SC State Register Vol. 14, Issue No. 9, eff September 2, 1990; SC State Register Vol. 21, Issue No. 4, eff April 25, 1997.

705(H)(4)(b) expressly provides that a Motion to Reinstate an Appeal will be heard without oral arguments or appearance of the party. S.C. Code Ann. Regs. 67-705(H)(4)(b) (“The motion will be heard by the Full Commission without oral argument or appearance of the party”). As Appellant acknowledges in his Petition, there were no facts in dispute. Therefore, it was not an abuse of discretion for the Commission to make no findings of fact in its denial of the motion to reinstate. It is undisputed that the sole provision of law applicable was Reg. 67-705. There is no evidence that the Commission abused its discretion in denying the Motion to Reinstate. Likewise, Reg. 67-215(G)(1) does not guarantee an appearance and oral arguments on a Motion to Reconsider. There is no evidence the Commission abused its discretion in denying the Motion for Reconsider

6. Appellant’s paragraph (6) does not assert the Court of Appeals overlooked or misapprehended anything. Rather, it challenges the findings of the Court of Appeals that Appellant’s pleading was insufficient to establish good cause for reinstatement. Disagreeing with the court’s finding on the issue is different that the court overlooking or misapprehending an issue. Appellant readily admits he made a calendaring mistake but is displeased he must live with the consequences. This is not a proper ground for the Court to grant rehearing under Rule 221, SCACR.
7. Appellant’s paragraph (7) acknowledges that there are no facts in dispute and acknowledges that he was negligent in not timely filing his brief. Appellant stated “[t]he undisputed fact is Proffitt missed a briefing deadline due to an admitted calendaring mistake.” Appellant’s Petition for Rehearing, p. 3, ¶ 7. This statement acknowledges Appellant had a duty to file his brief on or before the deadline and

breached that duty by not filing his brief within the timeframe. Appellant's own actions were the sole proximate cause of this breach. Appellant must now live with the damage he caused to himself by his own negligence. Appellant's negligence cannot be grounds for granting a rehearing.

8. Appellant's paragraph (8) attempts to argue that *Matute v. Palmetto Baptist Hospital*, supports his position for rehearing. Appellant's assertion is misplaced. The court correctly cited *Matute* to demonstrate the general rule that "[w]hen reviewing an appeal from the [Commission], this court may not weigh the evidence or substitute its judgement for that of the appellate panel as to the weight of the evidence on questions of fact." *Matute v. Palmetto Baptist Hospital*, 391 S.C. 291, 294 705 S.E.2d 472, 474 (Ct. App. 2011). The language in *Matute* is a citation to the Supreme Court's decision in *Therrell v. Jerry's Inc.*, which in turn is a citation to language of the Administrative Procedures Act at § 1-23-380(A)(6) (2005). These citations demonstrate only that the court will not substitute its judgement for that of the commission as to the weight of the evidence on questions of fact. See *Therrell v. Jerry's Inc.*, 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). Further analysis of *Matute* is not helpful to Claimant's position. In *Matute* there was confusion over the date the Commission gave notice of the award to the party for purposes of calculating the date the decision of the Commission was "received" by the Defendant in accordance with Reg. 67-701. *Matute* did not involve a dispute under or interpret Reg. 67-705. There is no evidence that the delay in filing in *Matute* was due to a mistake by the Appellant. In this case, Appellant candidly admits he was the one who made a mistake and did not file his brief within the deadline. Appellant was on notice per Reg. 67-705(H)(3) that if his brief was not


timely filed his appeal would be dismissed. It was Appellant's negligence that resulted in his appeal being dismissed, and he has no one to blame but himself. The Court of Appeals properly applied *Matute*, and Appellant has not cited any authority that demonstrates the court overlooked or misapprehended any issue in its analysis.

9. In paragraph (9), Appellant challenges the court's ruling that his allegations the Commission violated his rights to substantive and procedural due process were not preserved for appeal. This argument is irrelevant. Appellant repeatedly concedes there are no facts in dispute. Once his appeal was dismissed, he was afforded both procedural and substantive due process. It is undisputed he was given notice his appeal was being dismissed in accordance with Reg. 67-705(H)(3). It is undisputed that he was given the opportunity to be heard in accordance with Reg. 67-705(H)(4)(b). It is undisputed that he was given notice of the Commission's decision on his motion. It is undisputed that he was given further opportunity to be heard on his Motion to Reconsider under Reg. 67-215(B) and (G). At every step of the litigation, Appellant was afforded procedural and substantive due process. Whether it was properly before the Court of Appeals or not, the only conclusion that can be made from the undisputed facts in the record is that Appellant was afforded substantive and procedural due process. The game was fair; Appellant failed to play by the rules and must live with the consequences.

For the reasons stated above, Appellant's Petition for Rehearing should be denied.

Respectfully submitted,

THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION



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P.O. Box 1715
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(803) 737-5701

Attorney for the South Carolina Workers' Compensation Commission

09/11/2020

DATE

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2018-000532

MISTY A. MORRIS, CLAIMANT,

V.

BB&T CORPORATION, EMPLOYER, AND HARTFORD ACCIDENT & INDEMNITY
CO., CARRIER.

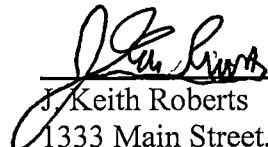
PROOF OF SERVICE

I, the undersigned counsel for the Workers' Compensation Commission, hereby certify that I have served a copy of the RETURN TO PETITION FOR REHEARING by causing a copy of the same to be deposited in the United States mail, first class postage, prepaid, addressed to the Appellant and Claimant as listed below.

Ms. Misty A. Morris
200 Farmhouse Loop
Lexington, SC 29072

Mr. David Proffitt
Proffitt & Cox, LLP
140 Wildewood Park Dr., Suite A
Columbia, SC 29223

September 11th, 2020


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*Attorney for the South Carolina
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Workers' Compensation Commission

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SC Court of Appeals

September 11, 2020

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: Misty A. Morris v. BB&T Corporation (David Proffitt)
Appellate Case No. 2018-000532
WCC File No. 1600715

Dear Ms. Kitchings:

Enclosed please find the original of the Respondent's Return to Appellant's Petition for Rehearing which was requested by the court on September 2nd, 2020. In accordance with 2020-05-29-02(d), I have not included additional copies.

By copy of this letter to Robert David Proffitt, Appellant, and Misty Morris, Claimant, I am hereby serving them with copies of our Return. Please see the attached Certificate of Service.

If there is anything further the court requires from the Commission at this time, please do not hesitate to ask.

With warmest regards,

Sincerely,

A handwritten signature in black ink that reads "J. Keith Roberts". The signature is written in a cursive, flowing style.

J. Keith Roberts, Esquire
S.C. Workers' Compensation Commission

Enclosure

Cc: David Proffitt, Esquire
Ms. Misty Morris

South Carolina Workers' Compensation Commission

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SC Court of Appeals

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