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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2018-000532

S.C. Court of Appeals Unpublished Opinion No. 2020-UP-00235
Submitted June 1, 2020 – Filed August 12, 2020
Withdrawn, Substituted and Refiled November 4, 2020

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, Petitioner,

v.

South Carolina Workers' Compensation
Commission, Respondent.

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record:
James Keith Roberts
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

Attorney for Respondent

David Proffitt
SC Bar No. 11193
Proffitt & Cox, LLP
140 Wildewood Park Drive, Ste. A
Columbia, SC 29223
(803) 834-7097
dproffitt@proffittcox.com

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CERTIFICATE OF COUNSEL

Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 4, 2020.

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in affirming the Commission's administrative dismissal of Petitioner's appeal to the Full Commission where the Commission acted in an arbitrary and capricious manner and abused its discretion by failing to consider the appeal on the merits, and where Petitioner 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 Petitioner 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?
- II. Did the Court of Appeals err in affirming the Commission's administrative dismissal of Petitioner's appeal to the Full Commission where the Commission's failure to consider the appeal on the merits violated Petitioner's constitutional and statutory right to procedural and substantive due process?
- III. Did the Court of Appeals err in affirming the Commission's administrative dismissal of Petitioner's appeal to the Full Commission where the Commission's failure to consider the appeal on the merits was made upon

unlawful procedure and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record?

STATEMENT OF THE CASE AND FACTS

Petitioner on November 15, 2017, timely filed a Form 30 Request for Commission Review of Commissioner Susan S. Barden's order denying in part his petition for attorney's fees. (R. pp. 3-15.) The Workers' Compensation Commission on December 15, 2017, issued a Form 31 Briefing Schedule and Notice of Appellate Hearing. (R. pp. 16-17.) Petitioner's brief was due to be filed on January 16, 2018, and the hearing was scheduled for February 20, 2018.¹

Petitioner received by email a letter from the Commission on January 26, 2018, stating that the appeal had been administratively dismissed because Petitioner's brief was not timely filed pursuant to Reg. 67-705(H)(3). (R. p. 18.) Pursuant to Reg. 67-705(H)(4), Petitioner moved on January 29, 2018, to reinstate the appeal, and his motion was filed on February 1, 2018. (R. pp. 19-46.)

In his motion, Petitioner apologized for the delay. Petitioner wrongly believed that the deadline to file the brief was January 31, 2018, when in fact the deadline was January 16. The deadline was not calendared correctly. (Affidavit of App. dated Feb. 22, 2018, R. pp. 61-63.)

The appeal involved the issue of the calculation of Petitioner's attorney's fee and there is no opposing party involved. Chad Abramson, attorney for Employer/Carrier, sent the Commission a letter on November 21, 2017, stating that his office is not involved

¹ The Form 31 stated the brief was due on January 14, 2018, but January 14 was a Sunday and January 15 was a holiday.

in this matter, does not intend to appear and does not need to be served with pleadings or briefs related to the appeal. Petitioner provided the Commission with a copy of that letter. (R. p. 24.)

Petitioner also submitted with the motion to reinstate a copy of the brief he intended to file if the Commission reinstated the appeal and allowed him to do so. Petitioner informed the Commission that he would be happy to file additional copies of the brief, the previously filed Form 30, the single commissioner's order, the transcript of the hearing and any other documents necessary to perfect the appeal. (R. pp. 19-46.)

Petitioner on February 20, 2018, received by email a copy of the Commission's one-page form order denying his motion to reinstate. (R. p. 1.)

Petitioner timely filed a motion for rehearing.² (Pet.'s Motion for Rehearing filed Feb. 26, 2018, R. pp. 47-66.) Petitioner on March 19, 2018, received by email a copy of the Commission's one-page form order denying his motion for rehearing. (R. p. 2.)

Petitioner timely appealed to the Court of Appeals and filed his brief. (App. p. 1.) The Commission filed a brief. (App. p. 21.) The Court of Appeals affirmed the Commission's ruling in an unpublished opinion filed August 12, 2020. (App. p. 31.) Petitioner filed a petition for rehearing on August 17, 2020. (R. p. 35.) The Court of Appeals granted the petition for rehearing, withdrew the former opinion and issued a substituted, unpublished opinion affirming the Commission's on November 4, 2020. Petitioner timely filed a petition for a writ of certiorari in the Supreme Court.

² See Rhame v. Charleston County School Dist., 412 S.C. 273, 772 S.E.2d 159 (2015) (holding that party may file motion for rehearing with Full Commission and the motion stays the deadline for serving notice of appeal with Court of Appeals for thirty days from receipt of decision on the motion for rehearing).

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers’ compensation commission.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981); Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate court’s review is limited to deciding whether the Appellate Panel’s decision is unsupported by substantial evidence or is controlled by some error of law. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. § 1-23-380(5).

Pursuant to S.C. Code Ann. § 1-23-380(5), the decision of the Commission may be reversed or modified “if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.”

ARGUMENT

I. The Court of Appeals erred in affirming the Commission’s administrative dismissal of Petitioner’s appeal to the Full Commission because the Commission acted in an arbitrary and capricious manner and abused its discretion by failing to consider the appeal on the merits. Petitioner 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 Petitioner 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.³

The Commission’s regulations explicitly contemplate and allow an extension of time to file an appellate brief. “With the consent of the opposing party, the time for filing a brief may be extended if a letter acknowledging the agreement is filed with the Commission on or before the original filing date.” 25A S.C. Code Ann. Reg. 67-705(H). In this case, there was no opposing party in the appeal to the Full Commission.

While the filing of the Form 30 Request for Review is jurisdictional, as stated in 25A S.C. Code Ann. Reg. 67-701(A), other deadlines for filing a brief and perfecting the appeal before the Full Commission are not jurisdictional. See Skinner v. Westinghouse

³ A similar factual situation and issue are pending before this Court in Veronica Rodriguez v. Peggy Evers and Norguard Insurance Company. In that case, the Worker’s Compensation Commission arbitrarily refused to reinstate an appeal after the employer’s counsel missed a briefing deadline due to a calendaring error. The Court of Appeals affirmed the Commission’s ruling and the employer petitioned the Supreme Court on September 2, 2020, to review the Court of Appeals’ decision.

Elec. Corp., 380 S.C. 84, 668 S.E.2d 795, 796-97 (2008) (teaching that jurisdictional appealability issues are governed by statute, not by rules of civil procedure; therefore, under former APA statute then in effect, notice of appeal was not required to be served on Workers' Compensation Commission and so failure to serve it on Commission did not deprive circuit or appellate courts of jurisdiction); cf. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985) (service, but not filing, of notice of appeal is jurisdictional requirement for appellate court and appellate court may not extend the time for doing it); Rule 203(b)(1), SCACR (stating that "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment."); Rule 263(b), SCACR ("time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof").

The Commission's regulations require that "[a]ll briefs must be filed at least five days before the scheduled date of review." 25A S.C. Code Ann. Reg. 67-705(H)(1). Petitioner was ready, willing and able to file his brief 22 days before the scheduled date of review. "An appeal which is administratively dismissed by the Judicial Department may be reinstated for good cause shown to the Commission." 25A S.C. Code Ann. Reg. 67-705(H)(4).

The Court of Appeals erred in finding that an attorney who makes an honest mistake in calendaring the deadline for an appellate brief provided "no basis to reverse the Commission's determination that Proffitt failed to establish good cause for reinstatement." (Op. filed 11/4/2020 at ¶ 1, App. p. 56.) Petitioner 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.

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. filed 11/4/2020 at ¶ 1, App. p. 56.) Petitioner 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 Petitioner missed a non-jurisdictional briefing deadline due to an admitted calendaring mistake.

The only question is whether the Commission may then deny Petitioner any right to be heard where there is no prejudice to any opposing party (an opposing party does not even exist), and there is no prejudice to the Commission because Petitioner was ready, willing and able to immediately submit his brief to the Commission long before the scheduled hearing date, or Petitioner was willing to postpone the hearing date if the Commission wished.

In fact, Matute actually *supports* Petitioner'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 mistake should not deprive the employer of the chance to be heard on appeal before the Full Commission. Similarly, Petitioner’s mistake should not deprive him of the chance to be heard.

Petitioner submits that he has shown good cause to reinstate the appeal to the Full Commission. Petitioner candidly admitted that he calendared the wrong due date for the brief, which resulted in the missing of a non-jurisdictional deadline and a slight delay that

prejudiced no one. Petitioner was ready, willing and able to immediately submit his brief to Respondent 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. (Aff. of Petitioner dated Feb, 22, 2018, R. pp. 61-63; Proposed appellate brief submitted to the Commission on January 29, 2018, R. pp. 25-46.)

There is no opposing party in this matter which could have been prejudiced by granting the motion because, as counsel for Employer/Carrier has informed the Commission, Employer/Carrier has no opinion or role and has not appeared in this attorney's fee matter. (Abramson letter dated Nov. 21, 2017, R. p. 24.)

Petitioner was ready to file his brief on January 29, 2018, as shown in the proposed brief submitted to the Commission with his motion to reinstate the appeal. (Proposed appellate brief submitted to the Commission on January 29, 2018, R. pp. 25-46.) Petitioner was ready and willing to submit his brief, perfect the appeal and proceed to the hearing on February 20. Conversely, Petitioner had no objection to continuing a hearing on the appeal until a later date if the Commission deemed it necessary.⁴

The Commission in its form orders denying the motions to reinstate the appeal and for rehearing gave absolutely no reason for the denial. The Commission made no

⁴ Petitioner is at a loss to understand the Commission's ruling or apparent displeasure at the missing of a non-jurisdictional deadline and a mere 13-day delay, given the fact that a hearing by the single commissioner on Petitioner's petition for attorney's fees was held on July 20, 2017, and the order denying the petition in part was filed 3½ months later on November 8, 2017. Petitioner is *not, repeat, not* in any way criticizing the Commission for the length of time it took to obtain a ruling because Petitioner is aware of the Commission's heavy workload. However, the slow and steady pace of the Commission's work does indicate that a slight delay in the filing of a brief should not completely derail an appeal from proceeding to a decision on the merits before the Full Commission.

findings of fact and stated no conclusions of law. The Commission offered Petitioner no opportunity to be heard before denying the motions, as Petitioner was informed the Commission would simply consider the written motion at a judicial conference.

An abuse of discretion occurs when a ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the factfinder is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, 467 (2006); Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

The Commission's ruling in this instance is based on an error of law because the law certainly should not condone the outright dismissal of an appeal when a party is 13 days late in filing a brief, but the brief could have been filed 22 days before the scheduled hearing date – far in advance of the five days stated in Regulation 67-705(H)(1) – and no one is prejudiced in any way.

The Commission's decision also is without evidentiary support. If it is the Commission's position that a single, non-jurisdictional calendaring mistake by counsel, which results in a single, non-jurisdictional missed deadline, is a "death sentence" for a case or an appeal, Petitioner respectfully submits that such a position must be deemed arbitrary, capricious and an abuse of discretion. Such a position would only be tenable in a world where every lawyer was perfect and unerring, every claimant an angel, every employer and insurer a demi-god, and every commissioner a saint. Such a world does not exist, and Petitioner is the first to admit he is far from perfect or unerring.

Petitioner asks that the Court grant a writ of certiorari to review the Court of Appeals' opinion which affirmed the Commission's administrative dismissal of Petitioner's appeal to the Full Commission.

II. The Court of Appeals erred in affirming the Commission's administrative dismissal of Petitioner's appeal to the Full Commission because the Commission's failure to consider the appeal on the merits violated Petitioner's constitutional and statutory right to procedural and substantive due process.⁵

Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution.

Mathews v. Eldridge, 424 U.S. 319, 332 (1976). "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const., art. I, § 3.

The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Clemmons v. Lowe's Home Center, Inc., 412 S.C. 366, 378-79, 772 S.E.2d 517 (Ct. App. 2015) ("This court previously has identified 'adequate notice,' 'adequate opportunity for a hearing,' 'the right to introduce

⁵ The Court of Appeals initially ruled these issues were not preserved for appellate review. (Op. filed 8/12/2020 at ¶ 2, App. p. 33.) Petitioner argued they were preserved in his petition for rehearing. (App. pp. 40-41.) In its revised opinion, the Court of Appeals addressed the issues on the merits simply by citing the regulations pertaining to motions to reinstate an appeal. (Op. filed 11/4/2020 at ¶ 2, App. p. 56.)

evidence,’ and ‘the right to confront and cross-examine witnesses’ as the minimal due process requirements in a contested case proceeding such as a workers’ compensation hearing.”) (citing Adams v. H.R. Allen, Inc., 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012); accord Stono River Env’tl. Protection Ass’n v. S.C. Dep’t of Health and Env’tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). “No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.” S.C. Const. art. 1, § 22.

The requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual’s property or liberty interest, generally include adequate notice, the opportunity to be heard at a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review. In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003); S.C. Dept. of Soc. Servs. v. Wilson, 352 S.C. 445, 452-53, 574 S.E.2d 730, 733-34 (2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972)); Cameron Barkley Co. v. S.C. Procurement Review Panel, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995).

Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. First Fed. Sav. & Loan Ass’n of

Walterboro v. Bd. of Bank Control, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) (quoting Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 894 (1961)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. S.C. Dept. of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002); In re Vora, 354 S.C. at 595, 582 S.E.2d at 416. The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. S.C. Dept of Soc. Servs. v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The Court of Appeals again recently recognized the importance and significance of meaningful due process before administrative agencies in McIntyre v. Securities Commissioner of South Carolina, 425 S.C. 439, 823 S.E.2d 913 (Ct. App. 2018). Citing Section 22 of the Constitution and this Court's precedent, the Court of Appeals held that the lack of established procedural rules deprived the individual and entity accused of securities fraud of procedural due process.⁶

In this case, the Commission's denial of the motion to reinstate and failure to consider the appeal on the merits constitutes a violation of procedural due process. Petitioner has a property interest in the attorney's fee charged in this case. Petitioner has been denied the right to adequate notice, the opportunity to be heard at all, let alone at a meaningful time and in a meaningful way, the right to meaningful review by the Commission and the right to meaningful judicial review.

⁶ Petitioner brought this case to the Court of Appeals' attention by letter dated October 17, 2018. (App. p. 30.)

Moreover, the Commission's decision has denied Petitioner his right to substantive due process.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, 1; S.C. Const. art. I, 3. In order to prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 430, 593 S.E.2d 462 (2004); Worsley Companies, Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000).

“The purpose of the substantive due process clause is to prohibit government from engaging in arbitrary or wrongful acts regardless of the fairness of the procedures used to implement them.” In re Treatment and Care of Luckabaugh, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (internal quotes omitted).

“The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause [of the Fourteenth Amendment]. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment.” Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 329, 391 S.E.2d 866, 867 (1990) (citing Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959)); Baird v. Charleston County, 333 S.C. 519, 537, 511 S.E.2d 69, 79 (1999) (recognizing same principle); Ezell v. Ritholz, 188 S.C. 39, 46-49, 198 S.E. 419, 422-23 (1938) (discussing same principle). “It cannot be doubted that a man's trade or profession is his property.” Byrne's Adminstrs. v. Stewart's Adminstrs., 3 S.C. Eq. (3 Des. Eq.) 466, 479 (1812); see also Sloan v. S.C. Bd.

of Physical Therapy Examiners, 370 S.C. 452, 636 S.E.2d 598, 611-12 (2006), overruled other grounds by Joseph v. S.C. Dept. of Labor, Licensing & Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016) (stating “[t]here is no reasonable doubt that the rights of those who have been duly licensed to practice medicine or other professions are property rights of value which are entitled to protection”) (citing Dantzler v. Callison, 230 S.C. 75, 92, 94 S.E.2d 177, 186 (1956)). A duly licensed attorney’s right to practice law and make his living doing so, of course, also is a property right of value which is entitled to protection. Cf. Ex Parte James A. Brown, 393 S.C. 214, 711 S.E.2d 899, 900 (2011) (holding that “the Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent litigant. In such circumstances, the attorney’s services constitute property entitling the attorney to just compensation.”).

In this case, Petitioner has a property interest in the attorney’s fee charged in this case. The Commission’s denial of the motion to reinstate and failure to consider the appeal on the merits constitutes a violation of substantive due process and an unlawful deprivation of Petitioner’s property interest.

III. The Court of Appeals erred in affirming the Commission's administrative dismissal of Petitioner's appeal to the Full Commission because the Commission's failure to consider the appeal on the merits was made upon unlawful procedure and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

As previously stated, Petitioner candidly admitted that he calendared the wrong due date for the brief, which resulted in a slight delay that prejudiced no one. Petitioner 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.

There is no opposing party in this matter which could have been prejudiced by granting the motion because, as counsel for Employer/Carrier has informed the Commission, Employer/Carrier has no opinion or role and has not appeared in this attorney's fee matter.

Petitioner was ready to file his brief, as shown in the proposed brief submitted to the Commission with his motion to reinstate the appeal. Petitioner was ready and willing to submit his brief, perfect the appeal and proceed to the hearing on February 20. Conversely, Petitioner had no objection to continuing a hearing on the appeal until a later date if the Commission deemed it necessary.

Given these factual circumstances, the Commission's denial of the motion to reinstate and failure to consider the appeal on the merits was made upon unlawful

procedure and is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

CONCLUSION

The Commission throughout this appeal has attempted to paint Petitioner as wrongly trying to keep an unearned fee. That is not true. On the merits of the underlying matter not presently before this Court, Petitioner believes the Commission's practice is to wrongfully reduce the attorney's fee when the attorney properly designates a portion of presently paid settlement proceeds as payment of future medical costs in order to maximize a disabled claimant's future Social Security disability award. The Commission says the designation of presently paid benefits as payment of future costs for purposes of a Utica-Mohawk provision means the attorney is not entitled to a fee on the "future" portion. Petitioner believes the Commission's position could cause attorneys to avoid such designations and consequently reduce a claimant's subsequent disability award. Petitioner believes the Commission's position is not supported in the law. (R. pp. 25-45.)

Petitioner may be right on the merits of the underlying case or he may be wrong, but he should have been allowed to appeal the matter to the Full Commission and the appellate courts.

For all the foregoing reasons, Petitioner asks that the Court grant a writ of certiorari to review the Court of Appeals' opinion which affirmed the Commission's administrative dismissal of Petitioner's appeal to the Full Commission.

Respectfully submitted,

s/ David Proffitt

David Proffitt
SC Bar No. 11193
Proffitt & Cox, LLP
140 Wildewood Park Drive, Suite A
Columbia, SC 29223
Telephone: (803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com

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November 12, 2020