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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S.C. Court of Appeals Unpublished Opinion No. 2020-UP-00235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Withdrawn, Substituted and Refiled November 4, 2020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.

APPENDIX

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Employer,
Carrier,

IN RE: Attorney's Fee Petition of
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Respondent.

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did Respondent act in an arbitrary and capricious manner and abuse its discretion in denying Appellant's motion to reinstate his appeal after administratively dismissing it, where Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

- II. Did Respondent violate Appellant's constitutional and statutory right to procedural and substantive due process in denying Appellant's motion to reinstate his appeal after administratively dismissing it, where Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

- III. Is Respondent's denial of Appellant's motion to reinstate the appeal after it was administratively dismissed made upon unlawful procedure and is it clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, where Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Appellant 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.) Respondent on December 15, 2017, issued a Form 31 Briefing Schedule and Notice of Appellate Hearing. (R. pp. 16-17.) Appellant's brief was due to be filed on January 16, 2018, and the hearing was scheduled for February 20, 2018.¹

Appellant received by email a letter from Respondent on January 26, 2018, stating that the appeal had been administratively dismissed because Appellant's brief was not timely filed pursuant to Reg. 67-705(H)(3). (R. p. 18.) Pursuant to Reg. 67-705(H)(4), Appellant 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, Appellant apologized for the delay. Appellant 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 Appellant'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 in this matter, does not intend to appear and does not need to be served with pleadings or briefs related to the appeal. Appellant provided the Commission with a copy of that letter. (R. p. 24.)

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.

Appellant also submitted with the motion to reinstate a copy of the brief he intended to file if Respondent reinstated the appeal and allowed him to do so. Appellant informed Respondent 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.)

Appellant on February 20, 2018, received by email a copy of Respondent's form order denying his motion to reinstate. (R. p. 1.)

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

Appellant timely filed the notice of appeal to this 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. **Respondent’s denial of Appellant’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 Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.**

Respondent’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 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”).

Respondent’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). Appellant 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). See also Matute v. Palmetto Baptist Hosp., 391 S.C. 291, 705 S.E.2d 472, 474-75 (Ct. App. 2011) (affirming Commission’s decision to reinstate employer’s appeal for good cause after it was administratively dismissed because Form 30 was filed after the 14-day deadline to appeal single commissioner’s order, where record showed order had been timely served on employer but employer asserted it did not receive the order until it inquired to the single commissioner a month later).

Appellant submits that he has shown good cause to reinstate the appeal to the Full Commission. Appellant 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. Appellant 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 Appellant dated Feb, 22, 2018, R. pp. 61-63; Proposed appellate brief submitted to Respondent 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 Respondent, 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.)

Appellant was ready to file his brief on January 29, 2018, as shown in the proposed brief submitted to Respondent with his motion to reinstate the appeal. (Proposed appellate brief submitted to Respondent on January 29, 2018, R. pp. 25-46.) Appellant was ready and willing to submit his brief, perfect the appeal and proceed to the hearing on February 20. Conversely, Appellant had no objection to continuing a hearing on the appeal until a later date if Respondent deemed it necessary.³

Respondent in its form orders denying the motions to reinstate the appeal and for rehearing gave absolutely no reason for the denial. Respondent made no findings of fact and stated no conclusions of law. Respondent offered Appellant no opportunity to be heard before denying the motions, as Appellant was informed Respondent would simply consider the written motion at a judicial conference.

³ Appellant is at a loss to understand Respondent'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 Appellant'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. Appellant is *not, repeat, not* in any way criticizing Respondent for the length of time it took to obtain a ruling because Appellant is aware of Respondent's heavy workload. However, the slow and steady pace of Respondent'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.

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).

Respondent'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 and no one is prejudiced in any way.

Respondent's decision also is without evidentiary support. If it is Respondent'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, Appellant 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 Appellant is the first to admit he is far from perfect or unerring.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits before the Full Commission.

II. Respondent’s denial of Appellant’s motion to reinstate the appeal after it was administratively dismissed and failure to consider the appeal on the merits violates Appellant’s constitutional and statutory right to due process, where Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.

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 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 Morrisey 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).

In this case, Respondent's denial of the motion to reinstate and failure to consider the appeal on the merits constitutes a violation of procedural due process. Appellant has a property interest in the attorney's fee charged in this case. Appellant 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 Respondent and the right to meaningful judicial review.

Moreover, Respondent's decision has denied Appellant 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, Appellant has a property interest in the attorney's fee charged in this case. Respondent'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 Appellant's property interest.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits.

III. Respondent's denial of Appellant'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 Appellant 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 Appellant was ready, willing and able to immediately submit his brief to Respondent 13 days after the original due date and 22 days before the scheduled hearing date.

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

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 Respondent, Employer/Carrier has no opinion or role and has not appeared in this attorney's fee matter.

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

Given these factual circumstances, Respondent'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.

Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits.

CONCLUSION

For all the foregoing reasons, Appellant asks that the Court reverse Respondent's denial of his motion to reinstate the appeal and remand this matter to Respondent for consideration of the appeal on the merits by the Full Commission.

Respectfully submitted,



David Proffitt
Proffitt & Cox, LLP
140 Wildewood Park Drive, Suite A
Columbia, SC 29223
Telephone: (803) 834-7097
FAX: (888) 711-1057
Email: dproffitt@proffittcox.com

September 24, 2018

Appellant

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,

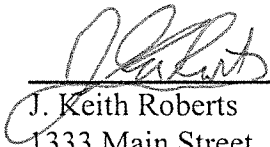
v.

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

CERTIFICATE OF COUNSEL

I, the undersigned counsel for the Workers' Compensation Commission, hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

October 12th, 2018



J. Keith Roberts
1333 Main Street, Suite 500,
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5701

*Attorney for the South Carolina
Workers' Compensation Commission*

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 FINAL BRIEF OF RESPONDENT 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
107 Waverly Point Dr.,
Lexington, SC 29072

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

October 12th, 2018


J. Keith Roberts
1333 Main Street, Suite 500,
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5701

*Attorney for the South Carolina
Workers' Compensation Commission*

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM S.C. WORKERS' COMPENSATION COMMISSION

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.

FINAL BRIEF OF RESPONDENT

J. Keith Roberts
*Counsel to South Carolina
Workers' Compensation Commission*
S.C. Bar No. 100735
Post Office Box 1715
Columbia, South Carolina 29202-1715
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COUNSEL FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Did Respondent abuse its discretion in denying Appellant's motion to reinstate his appeal, where Appellant failed to submit his brief on the due date?

STATEMENT OF THE CASE

The Commission served as the Administrative Tribunal before whom a dispute was decided between an employee, represented by attorney David Proffitt, and her employer. Following the resolution of that dispute Mr. Proffitt filed a Petition for Approval of Attorney's Fees to be decided by the Commission in accordance with § 42-15-90 and S.C. Code Regs. 67-1205.

That petition was adjudicated by a single Commissioner of the Workers' Compensation Commission in accordance with § 42-17-40, and a Final Decision and Order of the single Commissioner was issued in accordance with § 1-23-350. (R. pp. 7-15). The single Commissioner found that Mr. Proffitt was attempting to charge Ms. Morris an excessive fee in the amount of \$11,992.29. The single Commissioner ordered that the disputed \$11,992.29 should be paid to Ms. Morris.

Mr. Proffitt, in an effort to keep the disputed \$11,992.29 for himself, attempted to appeal the single Commissioner's decision to the Full Commission in accordance with § 42-17-50. (R. pp. 3-6). However, he failed to follow the procedure prescribed by law for perfecting his appeal and the appeal was administratively dismissed in accordance with S.C. Code Regs. 67-705(H)(3). (R. p. 18). Following a Petition for Reconsideration of the Administrative Dismissal, the Commission issued an order dismissing his appeal, which constituted the final decision of the administrative tribunal. (R. p. 1). Rather than pay Ms.

Morris the \$11,992.29 to which she is entitled, Mr. Proffitt appealed the final decision of the Commission to the Court of Appeals.

STANDARD OF REVIEW

Under the South Carolina Administrative Procedures Act, an appellate court can reverse or modify a decision of the South Carolina Workers' Compensation Commission "where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO REINSTATE.

Appellant submits that the Respondent has abused its discretion in denying Appellant's Motion to Reinstate, because Appellant has shown good cause to reinstate the appeal.

If the appellant fails to file a brief within ten days of receipt of the Form 31, the Judicial Department may remove the case from the review hearing docket by issuing an administrative order dismissing the appeal. S.C. Code Regs. 67-705(H)(3). An appeal administratively dismissed by the Judicial Department may be reinstated for a good cause upon motion to the Commission. S.C. Code Regs. 67-705(H)(4).

In the present case, Respondent on December 15, 2017, issued a Form 31 Briefing Schedule and Notice of Appellate Hearing. (R. p. 16). Appellant's brief was due to be filed on January 16, 2018.

Respondent sent Appellant a letter received by Appellant on January 26, 2018, stating the appeal had been administratively dismissed because Appellant's brief was not timely filed pursuant to Regs. 67-705(H)(3). (R. p. 18). Pursuant to Regs. 67-705(H)(4), Appellant moved on January 29, 2018, to reinstate the appeal, and his motion was filed on February 1, 2018. (R. pp. 19-23). Appellant apologized for the delay and admitted the Appellant did not calendar the deadline correctly.

Respondent submits that Appellant has not shown good cause to reinstate the appeal to the Full Commission. Just because an attorney candidly admits they were wrong, does not amount to good cause. If that were the case, the Briefing Schedule would be meaningless.

Therefore, the Respondent did not abuse its discretion in denying the motion to reinstate, and the Appellant has not shown good cause to reinstate the appeal.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION IS NOT A PROPER PARTY TO THIS APPEAL

This issue was already raised in Respondent's Motion filed on June 28th, 2018, and ruled upon by the Court of Appeals decision served on August 16th, 2018. However, Respondents are not abandoning this position and want it preserved for purposes of appellate review.

CONCLUSION

The Workers' Compensation Commission held that Appellant's Motion to Reinstate should be denied pursuant to S.C. Code Regs. 67-705(H)(3) due to Appellant not

filing his brief on time. Appellant has not shown good cause as to why the appeal should be reinstated pursuant to S.C. Code Regs. 67-705(H)(4). Therefore, the decision of the Workers' Compensation Commission denying the Motion to Reinstate should be UPHELD and Appellant's appeal should be DISMISSED.

Dated this the 12 Day of October, 2018.

Respectfully submitted,

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



J. Keith Roberts

SC Bar No. 100735

1333 Main Street, Suite 500,

P.O. Box 1715

Columbia, South Carolina 29202-1715

(803) 737-5701

*Attorney for Respondent South Carolina Workers' Compensation
Commission*

PROFFITT & COX

Attorneys at Law

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DAVID PROFFITT
dproffitt@proffittcox.com

October 17, 2018

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

RE: 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. S.C. Workers'
Compensation Commission, Respondent
Appellate Case No. 2018-000532
PC File No. 1464.01

Dear Ms. Kitchings:

It has come to my attention that the Court of Appeals has issued an opinion which may be pertinent and significant with regard to the issues of due process raised in this appeal. The opinion addresses the role and importance of procedural due process with regard to the actions and decisions of administrative agencies. Pursuant to Rule 208(b)(7), SCACR, please accept the case of John M. McIntyre et al. v. Securities Commissioner of South Carolina, Op. No. 5602 (S.C. Ct. App. filed October 17, 2018) as additional authority submitted for consideration in this matter.

Please return a date-stamped copy of this letter to me in the enclosed envelope.

With kindest personal regards, I remain

Sincerely yours,

PROFFITT & COX, LLP


David Proffitt

RECEIVED

OCT 19 2018

SC Court of Appeals

RDP/nif

cc: J. Keith Roberts



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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August 12, 2020

Robert David Proffitt, Esquire
140 Wildewood Park Drive
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Mr. James Keith Roberts, Esquire
1333 Main St., Suite 500
PO Box 1715
Columbia SC 29202-1715

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

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen

CLERK

cc: Amy Bracy

APPENDIX-031

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Misty A. Morris, Claimant,

v.

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

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

v.

South Carolina Workers' Compensation Commission,
Respondent.

Appellate Case No. 2018-000532

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2020-UP-235
Submitted June 1, 2020 – Filed August 12, 2020

AFFIRMED

Robert David Proffitt, of Proffitt & Cox, LLP, of
Columbia, for Appellant.

James Keith Roberts, of the South Carolina Workers'
Compensation Commission, of Columbia, for
Respondent.

PER CURIAM: David Proffitt appeals the Workers' Compensation Commission's (the Commission's) denial of his motion to reinstate his appeal. On appeal, he argues (1) the Commission's denial of his motion constitutes an abuse of discretion and was the product of an unlawful procedure, and (2) the Commission's refusal to reinstate his appeal violates his constitutional and statutory rights to due process. We affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities:

1. We hold the Commission did not abuse its discretion in determining Proffitt failed to establish good cause for the reinstatement of his appeal. The evidence in the record shows Proffitt's only justification for reinstating his appeal is that he made an honest mistake in calendaring the deadline for his appellate brief—which the Commission provided in the Form 31. We find this is insufficient to establish good cause for reinstatement. *See Matute v. Palmetto Health Baptist*, 391 S.C. 291, 294, 705 S.E.2d 472, 474 (Ct. App. 2011) ("When reviewing an appeal from the Workers' Compensation Commission, this 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."); S.C. Code Ann. Regs. 67-704(D) (2012) ("The appellant [in cases in which the Commission has issued a Form 31] must file his or her brief according to . . . R.67-705 on or before the date stated on the Form 31."); S.C. Code Ann. Regs. 67-705(H)(3) (2012) ("If the appellant fails to file a brief within ten days of receipt of the Form 31, the [Commission] may remove the case from the review hearing docket by issuing an administrative order dismissing the appeal."); S.C. Code Ann. Regs. 67-705(H)(4) (2012) ("An appeal administratively dismissed by the [Commission] *may* be reinstated for a good cause upon motion to the Commission." (emphasis added)).

2. We hold Proffitt never raised the issue of whether the Commission's denial of his motion to reinstate his appeal violated his rights to procedural and substantive due process to the tribunal below. Consequently, it is not preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal . . ."); *Transp. Ins. Co. and Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."

(quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004))).

AFFIRMED.¹

HUFF, THOMAS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

PROFFITT & COX

Attorneys at Law

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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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AUG 17 2020

SC Court of Appeals

RE: 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. S.C. Workers'
Compensation Commission, Respondent
Appellate Case No. 2018-000532
PC File No. 1464.01

Dear Ms. Kitchings:

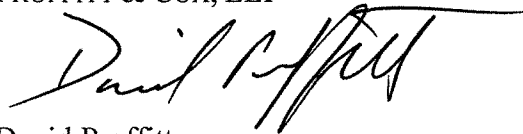
Please find enclosed for filing the original and seven copies of Appellant's Petition for Rehearing, along with proof of service on Respondent and its counsel. Also enclosed is a check for the \$50 filing fee.

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)

RECEIVED

AUG 17 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC 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
Proffitt & Cox, LLP
140 Wildewood Park Drive, Suite A
Columbia, S.C. 29223-4311
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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.

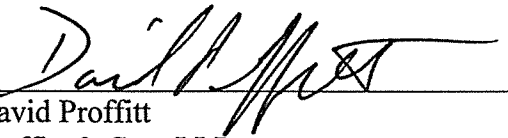
9. The Court of Appeals erred in concluding that Proffitt failed to raise the issue of whether the Commission’s denial of his motion to reinstate his appeal violated his rights to procedural and substantive due process, and consequently were not preserved

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,



David Proffitt
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Telephone: (803) 834-7097
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Appellant

August 17, 2020

RECEIVED

AUG 17 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

SC Court of Appeals

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

Unpublished Opinion No. 2020-UP-235 (S.C. Ct. App. 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.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

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September 02, 2020

Robert David Proffitt, Esquire
140 Wildewood Park Drive
Ste A
Columbia SC 29223-4311

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

Dear Counsel:

This will acknowledge receipt of your Petition for Rehearing.

By copy of this letter, opposing counsel is requested to file a return to this petition for rehearing no later than ten (10) days from the date of this letter.

Very truly yours,


CLERK

cc: James Keith Roberts, Esquire

State of South Carolina

J. Keith Roberts
General Counsel
1333 Main Street, 5th Floor
P.O. Box 1715
Columbia, S.C. 29202-1715



TEL: (803) 737-5701
FAX: (803) 737-5764
KeRoberts@wcc.sc.gov

Workers' Compensation Commission

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,

RECEIVED

SEP 18 2020

A handwritten signature in black ink, appearing to read "J. Keith Roberts".

BY PROFFITT & COX, LLP

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

Enclosure

Cc: David Proffitt, Esquire
Ms. Misty Morris

1464.01
SCANNED
Date: 9/18 LP
Proffitt & Cox, LLP

APPENDIX-044

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE S.C. WORKERS' COMPENSATION COMMISSION

Case No: 2018-000532

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

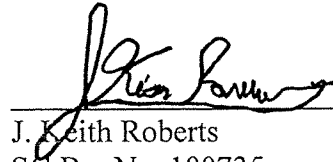
timely filed his appeal would be dismissed. It was Appellant's negligence that resulted in his appeal being dismissed, and he has no one to blame but himself. The Court of Appeals properly applied *Matute*, and Appellant has not cited any authority that demonstrates the court overlooked or misapprehended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



J. Keith Roberts
SC Bar No. 100735
1333 Main Street, Suite 500,
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5701

Attorney for the South Carolina Workers' Compensation Commission

09/11/2020

DATE

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.

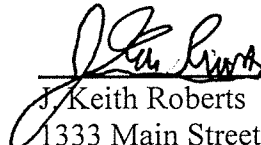
PROOF OF SERVICE

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



J. Keith Roberts
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*Attorney for the South Carolina
Workers' Compensation Commission*

The South Carolina Court of Appeals

Misty A. Morris, Claimant,

v.

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

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

v.

South Carolina Workers' Compensation Commission,
Respondent.

Appellate Case No. 2018-000532

ORDER

The petition for rehearing is granted. We dispense with further briefing and argument. The attached opinion is substituted for the previous opinion, which is withdrawn.

Thomas C. Huff

J.

Paul W. Thomas

J.

Stephen P. McNeill

J.

Columbia, South Carolina

FILED

November 4, 2020

APPENDIX 053

cc:

Robert David Proffitt, Esquire

James Keith Roberts, Esquire

Amy Bracy

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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.

Appellate Case No. 2018-000532

Appeal From The Workers' Compensation Commission

Unpublished Opinion No. 2020-UP-235
Submitted June 1, 2020 – Filed August 12, 2020
Withdrawn, Substituted, and Refiled November 4, 2020

AFFIRMED

Robert David Proffitt, of Proffitt & Cox, LLP, of
Columbia, for Appellant.

James Keith Roberts, of the South Carolina Workers'
Compensation Commission, of Columbia, for
Respondent.

PER CURIAM: David Proffitt appeals the Workers' Compensation Commission's (the Commission's) denial of his motion to reinstate his appeal. On appeal, he argues (1) the Commission's denial of his motion constitutes an abuse of discretion and was the product of an unlawful procedure, and (2) the Commission's refusal to reinstate his appeal violates his constitutional and statutory rights to due process. We affirm pursuant to Rule 220(b)(2), SCACR, and the following authorities:

1. We hold the Commission did not abuse its discretion in determining Proffitt failed to establish good cause for the reinstatement of his appeal. The evidence in the record shows Proffitt's only justification for reinstating his appeal is that he made an honest mistake in calendaring the deadline for his appellate brief—which the Commission provided in the Form 31. Thus, we find no basis to reverse the Commission's determination that Proffitt failed to establish good cause for reinstatement. *See Matute v. Palmetto Health Baptist*, 391 S.C. 291, 294, 705 S.E.2d 472, 474 (Ct. App. 2011) ("When reviewing an appeal from the Workers' Compensation Commission, this 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."); S.C. Code Ann. Regs. 67-704(D) (2012) ("The appellant [in cases in which the Commission has issued a Form 31] must file his or her brief according to . . . R.67-705 on or before the date stated on the Form 31."); S.C. Code Ann. Regs. 67-705(H)(3) (2012) ("If the appellant fails to file a brief within ten days of receipt of the Form 31, the [Commission] may remove the case from the review hearing docket by issuing an administrative order dismissing the appeal."); S.C. Code Ann. Regs. 67-705(H)(4) (2012) ("An appeal administratively dismissed by the [Commission] *may* be reinstated for a good cause upon motion to the Commission." (emphasis added)).

2. We hold the Commission's denial of Proffitt's motion to reinstate his appeal did not violate his right to procedural and substantive due process. Proffitt's request for commission review was administratively dismissed pursuant to regulations 67-705(H)(3) and (H)(4). *See* S.C. Code Ann. Regs. 67-705(H)(3) (2012) ("If the appellant fails to file a brief within ten days of receipt of the Form 31, the [Commission] may remove the case from the review hearing docket by issuing an administrative order dismissing the appeal."); S.C. Code Ann. Regs. 67-705(H)(4) (2012) ("An appeal administratively dismissed by the [Commission] *may* be

reinstated for a good cause upon motion to the Commission." (emphasis added)). Subsequently, the Commission denied Proffitt's motion to reinstate pursuant to regulation 67-705(H)(4)(b), of the South Carolina Code (2012). *See* S.C. Code Ann. Regs. 67-705(H)(4)(b) (2012) ("The motion [to reinstate] will be heard by the Full Commission without oral argument or appearance of the party.").

AFFIRMED.¹

HUFF, THOMAS, and MCDONALD, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.