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THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. SUPREME COURT**

APPEAL FROM THE S.C. WORKERS' COMPENSATION COMMISSION

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Case No: 2020-001494

S.C. Court of Appeals Unpublished Opinion No. 2020-UP-00235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Withdrawn, Substituted and Refiled November 4, 2020

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Misty A. Morris, Claimant,

v.

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

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

v.

S.C. Workers' Compensation Commission, Respondent.

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**RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## 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?

## COUNTERSTATEMENT OF THE CASE

The Commission served as the Administrative Tribunal before whom a dispute under the Workers' Compensation Act was decided between an employee, Ms. Misty Morris, 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 wanted to keep the disputed \$11,992.29 for himself, so he 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 her \$11,992.29, benefits in which she has a property right, Mr. Proffitt appealed the final decision of the Commission to the Court of Appeals.

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 on November 4, 2020. Petitioner filed a petition for a writ of certiorari in the Supreme Court.

## ARGUMENTS

Pursuant to Rule 242 of the S.C. Appellate Court Rules, “a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242 provides a list of general reasons the Court will consider, including the following:

1. Where there are novel questions of law.
2. Where there is a dissent in the decision of the Court of Appeals.
3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
4. Where substantial constitutional issues are directly involved.
5. Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

Appellant’s Petition clearly fails to qualify under reasons 1,2,3, and 5, since there is no novel question of law, there was no dissent to the opinion, the decision of the Court of Appeals does not conflict with any prior Supreme Court decision, and there are no federal questions involved.

Petitioner contends this case involves substantial constitutional issues. However, the only conclusion that can be drawn from the undisputed facts of this case as stipulated to by Petitioner is that Petitioner has been afforded procedural and constitutional due process. Petitioner has not raised any substantial constitutional violations and instead is simply displeased with the result of due process as applied to him. Petitioner alone is responsible for the dismissal of his appeal. Had Petitioner followed the law and submitted his brief at the time it was due, none of these proceedings before the appellate courts would have been necessary.

- I. **The petition should be denied because the Court of Appeals did not err in affirming the Commission's dismissal of Petitioner's appeal to the Full Commission. Petitioner's appeal was dismissed by the Commission in accordance with the Regulations of the S.C. Workers' Compensation Commission, and Petitioner's admitted unilateral mistake of failing to correctly docket the due date of his Appellant's Brief does not constitute good cause for reinstatement. There is no requirement that a party must be prejudiced for an appeal to be dismissed. Petitioner did not submit his brief in a timely manner.**

"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 Ann. 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 Ann. Regs. 67-705(H)(4).

On December 15, 2017, the Commission issued a Form 31 Briefing Schedule and Notice of Appellate Hearing. (R. p. 16). Petitioner's Appellant's brief was due to be filed on January 16, 2018. This date was clearly printed in bold font on the Form 31. Petitioner does not dispute that he received this document. At no point did Petitioner seek an extension for filing his brief.

The Commission noticed Petitioner on January 26, 2018, the appeal had been administratively dismissed because Petitioner's Appellant's Brief was not timely filed pursuant to Regs. 67-705(H)(3). (R. p. 18). Pursuant to Regs. 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. 19-23). Petitioner admitted he did not calendar the deadline correctly.

Petitioner did not show good cause to reinstate the appeal to the Full Commission. An attorney candidly admitting they missed a deadline does not amount to good cause for reinstatement. If that were the case, the Briefing Schedule would be meaningless. It was

well within the discretion of the Commission to find Petitioner's unilateral calendaring mistake was not a good ground to reinstate the appeal.

Petitioner asserts without evidence that the Commission acted in an arbitrary, capricious manner and abused its discretion. These are conclusory statements and Petitioner 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.")

Petitioner asserts his acknowledged failure to follow the Commission's regulations governing appellate procedure should be forgiven because it did not prejudice anyone. First, there is no evidence to support Petitioner's allegation that no one was prejudiced by his tardiness. Second, Petitioner's statement that there was no opposing party is false. The disabled worker, Misty Morris, was the opposing party. It was her disability benefits against which Petitioner was trying to take an excessive contingency fee. She had a right to notice under Rules 1.7 and Rule 1.8, RPC, Rule 407, SCACR, that her own lawyer was pursuing an appeal directly contrary to her interests. 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).<sup>1</sup>

Petitioner 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 Petitioner had a duty to file his brief on or before the deadline and breached that duty by not filing his brief within the timeframe. Petitioner’s own actions were the sole proximate cause of this breach. Petitioner must now live with the damage he caused to himself by his own negligence. Petitioner’s negligence cannot be grounds for granting a writ of certiorari. Yet Petitioner repeatedly argues that his unilateral calendaring mistake should be the “good grounds” for reinstatement of his appeal. A party’s negligence should not constitute “good grounds” for reinstatement, and the Petition should be denied.

Petitioner spends much time arguing that *Matute v. Palmetto Baptist Hospital*, supports his position. Appellant’s assertion is misplaced. *Matute* demonstrates 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). *See Therrell v. Jerry’s Inc.*, 370 S.C. 22, 25, 633 S.E.2d 893, 894 (2006). These citations demonstrate only that the

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<sup>1</sup> Petitioner references in a footnote the pending appeal in *Rodriguez v. Peggy Evers and Norguard Ins. Co.*, Case No. 2020-001194. The *Rodriguez* case is distinguishable, as it involves an appeal on the merits of a Commission decision and challenges whether a decision of the Commission was a “final decision” making it appealable. Those circumstances are not present in the case at bar. Further the case at bar involves an attorney challenging an award of attorneys’ fees and lists the Workers’ Compensation Commission as the Respondent, significant circumstances not present in *Rodriguez*.

court will not substitute its judgement for that of the commission as to the weight of the evidence on questions of fact. Further analysis of *Matute* is not helpful to Petitioner'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* is distinguishable from the case at bar as it 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, Petitioner candidly admits he was the one who made a mistake and did not file his brief within the deadline. Petitioner was on notice per Reg. 67-705(H)(3) that if his brief was not timely filed his appeal would be dismissed. It was Petitioner'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 affirmed the decision of the Commission.

**II. The petition should be denied because the Court of Appeals correctly affirmed that the Commission's dismissal of Petitioner's appeal afforded Petitioner procedural and substantive due process.**

Petitioner asserts the Commission's decision and Court of Appeals affirmation somehow violated Petitioner's constitutional and statutory right to due process. Appellant does not cite to any law to support this allegation. Petitioner 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 Register<sup>2</sup>. *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.”)

Petitioner does not assert that the Commission failed to follow the procedure set out in its regulations; rather Petitioner acknowledges the Commission strictly followed the procedure set forth in its regulations. He is merely unhappy with the result as applied to him. Petitioner 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. Petitioner cites no provisions of law to support his assertion the Commission abused its discretion by denying his motion to reinstate. The Court of Appeals was correct to affirm the decision of the Commission, and certiorari should be denied.

Petitioner asserts the Commission did not exercise its discretion and somehow erred by only considering the written pleadings and not allowing Petitioner to appear at a hearing or present oral argument. There is no error. Reg. 67-705(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 Petitioner acknowledges, 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, so further rulings

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

of law were not necessary. There is no evidence that the Commission abused its discretion in denying the Motion to Reinstate.

Petitioner then filed a Motion to Reconsider the denial of the Motion to Reinstate with the Full Commission pursuant to S.C. Code Ann. Regs. 67-215(B). Reg. 67-215(G)(1) does not guarantee an appearance and oral arguments on a Motion to Reconsider. He was given notice and an opportunity to be heard through his written filings. There is no evidence the Commission abused its discretion in denying the Motion for Reconsider.

Petitioner asserts he has a property right in the funds in dispute. However, the Workers' Compensation Act makes clear that a lawyer does not have a property right in requested attorneys' fees until the fee has been approved by the Commission. S.C. Code Ann. § 42-15-90 (1976, as amended) ("Attorney fees . . . for services under this title are subject to the approval of the commission".) Further, he ignores Ms. Morris's property rights to the benefits awarded her under the Workers' Compensation Act.

Petitioner 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 of the due date for his Appellant's Brief. It is undisputed he did not file a brief on or before that date. 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). The only conclusion that can be made from the undisputed facts in the record is

that Petitioner was afforded substantive and procedural due process at every step. The game was fair. Petitioner did not play by the rules and must live with the results. The law should not condone a party neglecting a due date without having to face the consequences specifically spelled out by regulation. The decisions of the Commission and Court of Appeals should not be disturbed, and certiorari should be denied.

**III. The petition should be denied because the Court of Appeals correctly affirmed the Commission's dismissal of Petitioner's appeal by finding the Commission followed proper procedure and dismissed Petitioner's appeal in accordance with the Regulations of the S.C. Workers' Compensation Commission.**

Petitioner 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. As discussed above, 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.

The Commission followed the letter of the law as provided in its regulations. Rather than complaining that the Commission did *not* follow proper procedure, Petitioner is complaining that the Commission *did* follow procedure and hold him accountable for his own negligence by enforcing Regs. 67-705(H)(3). The only grounds for "good cause" to reinstate the appeal that Petitioner offered were that he made a mistake. It is well within the discretion of the Commission to find that a unilateral, negligent mistake by a party is not good cause to reinstate an appeal. The Court of Appeals was correct in its decision, and the Petition for Certiorari should be denied.

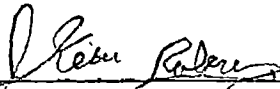
CONCLUSION

It must not be lost on the Court when considering this Petition that there is a real disabled worker, Ms. Misty Morris, who has had no voice in this appeal and yet is suffering due to Mr. Proffitt's actions. The original decision of the Commission was that Mr. Proffitt, acting as attorney for Ms. Morris, attempted to pay himself an extra \$11,992.29 from Ms. Morris' award of disability. It was during his attempt to appeal this decision that Mr. Proffitt negligently calendared the due date for his Appellant's Brief, thus resulting in its dismissal. Mr. Proffitt's dilatory tactics in pursuing this appeal only serve to harm Ms. Morris, who is (or was) his client. It is unclear whether the attorney/ client relationship still exists between Mr. Proffitt and Ms. Morris, but it is undisputed she is being harmed by this protracted litigation. There is no relief that can be granted against the Workers' Compensation Commission. It is Ms. Morris who is suffering. It is Ms. Morris's money Petitioner is attempting to improperly keep. Petitioner should not be allowed to use his own negligent failure to follow the rules of procedure to prolong Ms. Morris's misfortune.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE SOUTH CAROLINA WORKERS' COMPENSATION  
COMMISSION



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