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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

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Court of Appeals Appellate Case No. 2018-000532  
Supreme Court Appellate 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S.C. Court of Appeals Unpublished Opinion No. 2020-UP-00235  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Withdrawn, Substituted and Refiled November 4, 2020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, d/b/a BB&T Bank,  
and Hartford Accident & Indemnity Co.,

Employer,  
Carrier,

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

Petitioner,

v.

South Carolina Workers' Compensation  
Commission,

Respondent.

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**REPLY BRIEF OF PETITIONER**

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Petitioner

## TABLE OF CONTENTS

Table of Authorities .....	3
Arguments .....	4
Conclusion .....	9

## TABLE OF AUTHORITIES

### Cases

<u>Atlantic Coast Builders &amp; Contractors, LLC v. Lewis</u> , 398 S.C. 323, 730 S.E.2d 282 (2012).....	8
<u>Campbell v. City of N. Charleston</u> , 431 S.C. 454, 848 S.E.2d 788 (Ct. App. 2020).....	5
<u>Jordan v. The Hartford Financial Group</u> , No. 2019-001190 (Ct. App. 2019) (available at <a href="https://ctrack.sccourts.org/public/caseView.do?csIID=70393">https://ctrack.sccourts.org/public/caseView.do?csIID=70393</a> ) .....	8
<u>Russell v. Wal-Mart Stores, Inc.</u> , 426 S.C. 281, 826 S.E.2d 863 (2019).....	7
<u>Sundown v. Intedge Indus.</u> , 383 S.C. 601, 681 S.E.2d 885 (2009) .....	5
<u>Veronica Rodriguez v. Peggy Evers and Norguard Insurance Company</u> , No. 2020-001194 (Sup. Ct. 2020) (available at <a href="https://ctrack.sccourts.org/public/caseView.do?csIID=72629">https://ctrack.sccourts.org/public/caseView.do?csIID=72629</a> ) .....	8
<u>White Oak Manor, Inc. v. Lexington Ins. Co.</u> , 407 S.C. 1, 753 S.E.2d 537 (2014).....	5
<u>Wilder v. Blue Ribbon Taxicab Corp.</u> , 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011) ....	6

### Rules

Rule 55(c), SCRCP .....	4, 6
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### Regulations

S.C. Code of Regs. 67-705(H)(4) .....	6
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Petitioner David Proffitt respectfully submits the following points in reply to Respondent's brief.

Respondent, for the first time in the course of this appeal, argues the Court should look to case law analyzing "good cause" to set aside default after the clerk's entry of default under Rule 55(c), SCRCF, as an analogous means of resolving the present case. (Resp. Br. pp. 11-12.)

In Petitioner's view, missing a non-jurisdictional deadline to file an appellate brief with the full commission after a case has been heard and the issue of attorney's fees decided by the single commissioner is in a very different posture than a case in which nothing has occurred except the filing and service of a Summons and Complaint. The entry of default only means that *liability* is established if the default is not set aside. In most cases a subsequent hearing must be held to determine whether a default judgment should be entered and *damages* awarded under Rule 55(b), SCRCF. More significantly, of course, the Rules of Civil Procedure do not apply in a workers' compensation matter, which is an administrative proceeding before a state agency with its own rules and procedures.

However, to the extent that Respondent may be suggesting that case law under Rule 55(c) illuminates a path to requiring the Commission to consider the factual circumstances of a given case and not act in an arbitrary and capricious manner by apparently automatically and routinely denying a motion to reinstate an appeal whenever a non-jurisdictional briefing deadline is missed, Petitioner certainly agrees on that point.

With regard to Rule 55(c), the Court has stated that

Rule 55(a) provides that when a party fails to respond to a complaint, the clerk shall record an entry of default. However, Rule 55(c) permits a party to move to

set aside the entry of default. The standard for granting relief from an entry of default under Rule 55(c) is mere “good cause.” Rule 55(c), SCRC. This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct.App.1989). The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record for the finding of the lack of good cause. *Dixon v. Besco Engineering, Inc.*, 320 S.C. 174, 179, 463 S.E.2d 636, 639 (Ct.App.1995). A motion under Rule 55(c) is addressed to the sound discretion of the trial court. *Williams v. Stalnaker*, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct.App.1994).

Sundown v. Intedge Indus., 383 S.C. 601, 681 S.E.2d 885, 888 (2009) (affirming denial of motion to set aside default where defendant’s registered agent, manager and insurance agent received the complaint but failed to timely respond because, “[a]lthough the presence of other factors, in the totality of the circumstances, may amount to a showing of ‘good cause,’ a defendant may not be relieved from the entry of default *solely* because it relied to its detriment on a negligent insurance agent”) (emphasis in original); see also White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 753 S.E.2d 537, 538 & 542-43 (2014) (applying Sundown analysis and holding that insurer’s assertion that it lost the complaint – where the complaint had been served on the insurer by acknowledged certified mail at the specific address provided in the insurance policy – was not a satisfactory reason to set aside the entry of default and so the trial court properly denied the motion to set aside default); Campbell v. City of N. Charleston, 431 S.C. 454, 848 S.E.2d 788, 790-91 (Ct. App. 2020) (applying Sundown analysis to affirm denial of motion to set aside default where city’s mayor was properly served, but city’s risk manager sent the complaint to the city’s claims coordinator instead of the liability claims

handler, and the claims coordinator never opened the email and entry of default was entered six months later after no response from city); Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E.2d 703, 706-07 (Ct. App. 2011) (applying Sundown analysis and the Wham factors to affirm denial of motion to set aside default where motion for relief was filed a year after service of complaint, defendant acknowledged it had not meritorious defense to liability and plaintiff would be prejudiced if matter were further delayed).<sup>1</sup>

Petitioner respectfully urges the Court to resolve this case by holding that a party's failure to meet a non-jurisdictional briefing deadline due to a calendaring mistake by counsel usually should not constitute grounds for dismissal of an appeal by the Commission where (1) the party timely moves to reinstate the appeal under S.C. Code of Regs. 67-705(H)(4) and (2) the opposing party, if one exists, cannot demonstrate undue prejudice with regard to the reinstatement of the appeal. The burden should be on the opposing party to demonstrate any such prejudice.

Petitioner submits that such a holding should result in the Commission rarely dismissing an appeal for missing a non-jurisdictional deadline, absent unusual or egregious circumstances which result in undue prejudice to the opposing party by reinstatement of the appeal. As this Court recently recognized again, the goal in workers' compensation matters should be to move them to an efficient, expeditious conclusion on the merits in keeping with the overall purposes of providing timely compensation and medical care to injured employees in a no-fault system. The same is true, of course, with

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<sup>1</sup> Respondent's brief descriptions of Rule 55(c) case law ignore the nuances of the factual background of each case, which more fully explains the reasoning of the courts and the outcome.

regard to related issues such as the amount of an attorney's fee award. See Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 283, 826 S.E.2d 863 (2019) (holding that repeated remands to single commissioner were improper and finding that third remand order was immediately appealable "because the commission's unwarranted delay in making a final decision requires immediate review to avoid leaving [the claimant] with no adequate remedy on appeal from a final decision").

The Court further explained that

[i]f this Court's role in achieving this goal of the Workers' Compensation Act is limited, however, the commission's role is primary. *See James v. Anne's Inc.*, 390 S.C. 188, 201-02, 701 S.E.2d 730, 737 (2010) (stating the "workers' compensation commission . . . is, in the first instance, responsible for effectuating the purposes of the workers' compensation act by administering, enforcing, and construing its provisions in order to secure its humane objectives." (quoting 100 C.J.S. *Workers' Compensation* § 706 (2000) )). The Workers' Compensation Act sets forth the procedure the commission should follow to fulfill its purpose.

...

In most instances, therefore, a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and "determine the dispute in a summary manner." § 42-17-40(A). If the commissioner's decision is appealed, an appellate panel must promptly hear the appeal, and "if proper, amend the award." § 42-17-50. In all but rare cases, the appellate panel should proceed promptly to make a final decision without the necessity of any remand. *When the commission follows this procedure, it will have fulfilled the legislatively set goal to "provide[ ] a ... system focusing on quick recovery, relatively ascertainable awards, and limited litigation."* *Nicholson*, 411 S.C. at 389, 769 S.E.2d at 5.

Russell, 426 S.C. at 287-88 (emphasis added).

Respondent notes this matter has been pending since the filing of the single commissioner's order for about 3 years and 8 months. (Resp. Br. p. 6 n. 2.) If the Commission had simply reinstated the appeal pursuant to Petitioner's motion filed February 1, 2018, this matter presumably would have been resolved by the full commission on the merits and, if any party appealed, the appeal on the merits also likely

would have been resolved by now. Cf Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 330, 730 S.E.2d 282, 285 (2012) (noting it is “good practice for us to reach the merits of an issue when error preservation is doubtful”). Instead this matter has been stuck in limbo on a procedural matter.

Finally, Petitioner notes the apparently automatic dismissal of an appeal for missing a non-jurisdictional deadline must arise with some frequency. It was presented in Veronica Rodriguez v. Peggy Evers and Norguard Insurance Company, No. 2020-001194 (Sup. Ct. 2020) (available at <https://ctrack.sccourts.org/public/caseView.do?csIID=72629>), where the Commission arbitrarily refused to reinstate an appeal after the employer’s counsel missed a briefing deadline due to a calendaring error. Respondent noted the Court of Appeals dismissed the appeal as interlocutory and this Court denied certiorari on May 7, 2021. (Resp. Br. p. 8 n. 5.)

Respondent noted two other pending appeals presenting similar facts and issues. In one of them, Jordan v. The Hartford Financial Group, No. 2019-001190 (Ct. App. 2019) (available at <https://ctrack.sccourts.org/public/caseView.do?csIID=70393>), the facts are similar to the present case. The insurer’s attorney’s paralegal mistakenly calendared the wrong deadline for an appellate brief, according to the appellant’s brief. After receiving notification of the administrative dismissal, the insurer’s attorney filed a brief the next day, 24 days before the scheduled hearing, but the Commission denied the insurer’s attorney’s to reinstate the appeal in a form order.

In the present case, Petitioner submitted a motion to reinstate the appeal on January 29, 2018, three days after receiving by email a letter from the Commission

stating that the appeal had been administratively dismissed. Petitioner also filed a brief with the motion to reinstate, and informed the Commission he 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.

### **CONCLUSION**

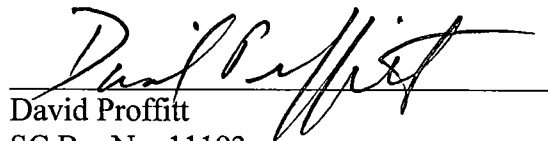
The Commission throughout this appeal has attempted to paint Petitioner as wrongly trying to keep an unearned fee and, in its brief to the Court, now contends that Petitioner is making an “emotional plea for relief lacking logical and legal support.” (Resp. Br. pp. 13, 15.) Neither assertion is true.

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 reverse the Court of Appeals' decision and the Commission's ruling, and remand this matter for the Commission to consider the appeal on the merits.

Respectfully submitted,



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Petitioner

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