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Workers' Compensation Commission

July 7th, 2021

The Honorable Patricia A. Howard, Clerk of Court
Supreme Court of South Carolina
PO Box 11330
Columbia, SC 29211

Re: Misty A. Morris v. BB&T Corporation (David Proffitt)
Appellate Case No. 2020-001494
WCC File No. 1600715

Dear Ms. Howard:

Enclosed please find the Brief of Respondents in the above-referenced matter, with the unbound original and fifteen (15) bound copies. If you require a copy to be submitted electronically, please let me know and we will send one over immediately.

By copy of this letter to Robert David Proffitt, Appellant, and Misty Morris, Claimant, I am hereby serving them with copies of our Brief.

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

With warmest regards,

Sincerely,

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

J. Keith Roberts, General Counsel

Cc: David Proffitt, Esquire
Ms. Misty Morris

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2020-001494

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 Brief of Respondent complies with Rule 211(b), SCACR.

July 7th, 2021



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2020-001494

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 Brief of Respondents 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.

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July 7th, 2021



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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

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S.C. Court of Appeals Unpublished Opinion No. 2020-UP-00235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Withdrawn, Substituted and Refiled November 4, 2020

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.

South Carolina Workers' Compensation Commission, Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities.....3

Issues Presented.....5

Statement of the Case and Statement of Facts.....6

Standard of Review.....9

Argument.....10

I. The Court of Appeals did not err in affirming the Commission’s administrative dismissal of Petitioner’s Appeal. 10

 A. The Commission did not act arbitrarily and capriciously and did not abuse its discretion by declining to consider Petitioner’s appeal on the merits.10

 B. The Commission’s decision declining to consider Petitioner’s appeal on the merits was not made upon unlawful procedure and was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.....13

II. Petitioner’s constitutional and statutory rights to procedural and substantive due process were not violated. 15

 A. Procedural due process requires only such procedure commensurate with the import of the right at issue; Petitioner received sufficient procedure. 15

 B. Petitioner was not arbitrarily and capriciously deprived of a property interest. 19

Conclusion.....21

TABLE OF AUTHORITIES

Cases

<u>Brown v. S.C. State Bd. of Educ.</u> , 301 S.C. 326 (1990).....	17, 20
<u>Campbell v. City of N. Charleston</u> , 431 S.C. 454, 462 (Ct. App. 2020).....	11,12
<u>Crane v. Raber’s Disc. Tire Rack</u> , 429 S.C. 636, 642 (2020).....	9
<u>Dantzler v. Callison</u> , 230 S.C. 75, 92 (1956).....	19
<u>DeGroot v. Employment Sec. Comm’n</u> , 285 S.C. 209 (Ct. App. 1985).....	16
<u>Fontaine v. Peitz</u> , 291 S.C. 536, 538 (1987).....	10
<u>Geathers v. 3v, Inc.</u> , 371 S.C. 570, 576 (2007).....	9
<u>Glasscock, Inc. v. U.S. Fidelity and Guar. Co.</u> , 348 S.C. 76 (Ct. App. 2001).....	13
<u>In re Vora</u> , 354 S.C. 590 (2003).....	17,20
<u>Jordan v. The Hartford Financial Group</u> , No. 2019-001190 (Ct. App. 2019).....	8
<u>Kurschner v. City of Camden Planning Comm’n</u> , 376. S.C. 165, 171 (2008).....	16
<u>Lark v. Bi-Lo Inc.</u> , 276 S.C. 130 (1981).....	9
<u>Matute v. Palmetto Health Baptist</u> , 391 S.C. 291, 294-96 (Ct. App. 2011).....	11,12
<u>McIntyre v. Sec. Comm’r of South Carolina</u> , 425 S.C. 439, 449 (Ct. App. 2018).....	16,17
<u>Mitchell v. UPS</u> , No. 2019-001361 (Ct. App. 2019).....	8
<u>Morris v. BB&T</u> , Op. No. 2020-UP-235 (S.C. Ct. App. filed November 4, 2020).....	19
<u>Pierre v. Seaside Farms Inc.</u> , 386 S.C. 534, 540 (2010).....	9
<u>Roberts v. LaConey</u> , 375 S.C. 97, 100 (2007).....	11,12
<u>Rodney v. Michelin Tire Corp.</u> , 320 S.C. 515, 519 (1996).....	14
<u>Rodriguez v. Peggy Evers</u> , S.C. Sup. Ct. Order dated May 7, 2021.....	8
<u>Ross v. Med. Univ. of S. Carolina</u> , 328 S.C. 51, 58 (1997).....	16
<u>Scott v. Greenville County</u> , 716 F.2d 1409 (4 th Cir. 1983).....	19
<u>Sloan v. S. Carolina Bd. of Physical Therapy Exam’rs</u> , 370 S.C. 452, 485 (2006).....	16
<u>S. Carolina Ambulatory Surgery Ass’n v. The S. Carolina Workers’ Comp. Comm’n</u> , 389 S.C. 380, 392 (2010).....	17
<u>S. Carolina Dep’t of Soc. Servs. v. Beeks</u> , 325 S.C. 243, 246 (1997).....	16
<u>S. Carolina. Dep’t of Soc. Servs. v. Wilson</u> , 352 S.C. 445, 452 (2002).....	17
<u>Sundown Operating Co., Inc. v. Intedge Indus., Inc.</u> , 383 S.C. 601, 609-10 (2009).....	11,12
<u>Unisys Corp. v. S. Carolina Budget and Control Bd.</u> , 346 S.C. 158, 173-75 (2001).....	17,19
<u>U.S. Outdoor Advertising, Inc. v. S. Carolina Dep’t of Transp.</u> , 324 S.C. 1, 3-4 (1997).....	14
<u>White Oak Manor, Inc. v. Lexington Ins. Co.</u> , 407 S.C. 1, 11 (2014).....	11,12
<u>Worsley Co., Inc. v. Town of Mt. Pleasant</u> , 339 S.C. 51, 56 (2000).....	19

Statutes

S.C. Code Ann. § 1-23-20(A) (2021).....	14
S.C. Code Ann. § 1-23-40 (1) (2021).....	14
S.C. Code Ann. § 1-23-280(5)(2021).....	9
S.C. Code Ann. § 42-3-30 (2021).....	14
S.C. Code Ann. § 42-15-90 (2021).....	18
S.C. Code Ann. § 42-15-90(b)(2)(2021).....	18

Court Rules

Rule 208(a)(4), SCACR.....11
Rule 260, SCACR.....11
Rule 55, SCRCF11
Rule 55(c), SCRCF.....11

Administrative Regulations

S.C. Code Ann. Regs. 67-209 (2021).....7
S.C. Code Ann. Regs. 67-215 (2021).....13
S.C. Code Ann. Regs. 67-701A(2021).....11
S.C. Code Ann. Regs. 67-705A (2021).....10,13,17
S.C. Code Ann. Regs. 67-705B (2021).....10,13,17
S.C. Code Ann. Regs. 67-705H(3)-(4)(2021).....10,13,17

Constitutional Provisions

U.S. CONST. amend. V.....16
U.S. CONST. amend. XIV, § 1.....16
S.C. Const. art. I, § 3.....16
S.C. Const. art. I, § 22.....16,19

State Register Publications

S.C. Reg. Vol. 16, Issue No. 4, eff April 24, 1992.....14
S.C. Reg. Vol. 21, Issue No. 4, eff April 25, 1997.....14

ISSUES PRESENTED

- I. Did the Court of Appeals err in affirming the Commission's administrative dismissal of Petitioner's Appeal where the Commission did not act arbitrarily and capriciously or abuse its discretion and where the Commission's decision was made upon lawful procedure and not clearly erroneous?

- II. Did the Court of Appeals err in affirming the Commission's administrative dismissal of Petitioner's appeal where Petitioner's constitutional and statutory rights to procedural and substantive due process were not violated because Petitioner was either not entitled to due process protections or received minimal due process protections and because Petitioner was not arbitrarily and capriciously deprived of a property interest?

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This appeal arises from Ms. Morris' 2016 workers' compensation claim by which Petitioner, acting as her legal counsel, alleged that she sustained serious injuries involving the circulatory system, immune system, respiratory system, physical brain damage, and other body parts as the result of toxic mold exposure during her employment with BB&T Corporation. (R. p. 25-26). On March 15, 2017, the parties agreed to settle the claim for \$109,900.00. (R. p. 8). Under the agreement, the parties allocated \$35,976.88 towards Ms. Morris' future medical costs, \$47,767.43 towards Petitioner's attorney fees and costs, and \$9,876.38¹ towards out-of-pocket medical costs. (R. p. 8-9). The balance, \$22,279.31, represented future compensation. (R. p. 9).

Thereafter, a hearing was held on July 20, 2017 before the Single Commissioner on Petitioner's Form 61 to determine whether to approve the requested amount of attorney's fees. (R. p. 7). By Decision and order, dated November 8, 2017, the Single Commissioner approved an attorney's fee of \$25,641.04, the maximum allowable fee under our current Workers' Compensation Act and corresponding regulations, and full reimbursement for Petitioner's costs² holding that because lump sums paid for future medical care are not considered "compensation" under the Workers' Compensation Act, Petitioner was ethically and legally only able to claim a fee on 33.3% of the difference between the total settlement amount and monies allocated for future medical care. (R. p. 7-15). Petitioner timely filed a Form 30 notice of appeal with the Commission on November 9, 2017 disputing the calculation of his fees. (R. p. 3-5).

¹ The Single Commissioner's Decision and Order contains a typographical error. It states that \$99, 876.38 would be deducted from the total settlement amount to reimburse past medical expenses. (R. p. 9). Per the parties' agreement, that sum was \$9,876.38. (R. p. 27).

² The difference between the fee requested on the Form 61 and the fee approved by the Commission is \$11,992.29. Pursuant to the Single Commissioner's Order, that sum was to be held in trust pending final resolution of the issue by the Commission or on appeal. (R. p. 15). Presuming Petitioner's full compliance with the Order, the funds have been held for 1,337 days (3 years, 7 months, and 29 days) and continuing at the time Respondent's brief was due.

The Commission served Petitioner with a Form 31 Notice of Appellate Hearing and Briefing Schedule on December 15, 2017 setting January 14, 2018³ as the due date for Petitioner's brief. (R. p. 16-17). Petitioner does not dispute receipt. Having not received Petitioner's brief by January 16, 2018, the Commission followed the procedures specified by its regulations and administratively dismissed the appeal pursuant to S.C. Code Ann. Regs. 67-705H(3) and notified Petitioner of its decision by letter, dated January 26, 2018. (R. p. 18, 65-66). On January 29, 2018, Petitioner moved to reinstate the appeal for "good cause" pursuant to S.C. Code Ann. Regs. 67-705H(4) arguing an incorrectly calendared deadline caused a misunderstanding of the due date. (R. p. 19, 21, 62, 66).

Agreeing that negligently calendaring a deadline would not be considered "good cause" to reinstate an appeal after failing to timely file a brief, the Full Commission denied Petitioner's motion by Form Order on February 20, 2018. (R. p. 1). Petitioner's subsequent motion for rehearing was also denied by Form Order on March 19, 2018. (R. p. 2). He then filed Notice of Appeal with the Court of Appeals on March 22, 2018. In an amended opinion,⁴ dated November 4, 2020, the Court of Appeals affirmed the Commission holding that there was no basis to reverse the Commission's refusal to reinstate the appeal for "good cause" where "an honest mistake in calendaring the deadline" was the sole reason for the brief's untimeliness and the Commission

³ January 14, 2018 was a Sunday and Monday, January 15, 2018 was a holiday. Pursuant to Commission regulation 67-209, Petitioner's brief would be due the next business day, Tuesday, January 16, 2018. See S.C. Code Ann. Regs. 67-209 (2021).

⁴ In an unpublished opinion dated August 12, 2020, the Court of Appeals affirmed the Commission for the same reasons stated in the amended decision but incorrectly held that Petitioner failed to preserve his constitutional arguments for review. (Appendix p. 31).

followed the procedure outlined in its regulations. (Appendix p. 53). Petitioner filed a petition for certiorari on November 12, 2020. This Court granted certiorari on May 28, 2021.⁵

⁵ Appellant referenced Rodriguez v. Peggy Evers in his brief. This appeal is no longer pending before either the Court of Appeals or the Supreme Court. The Court of Appeals dismissed the appeal as interlocutory. This Court denied certiorari. In Rodriguez, the appellant argued that a calendaring error causing the appellant to miss the brief filing deadline should be considered "good cause" under S.C. Code Regs. 67-705H(4). See Rodriguez v. Peggy Evers, S.C. Sup. Ct. Order dated May 7, 2021. Two additional cases raising a similar issue are pending disposition at the Court of Appeals. See Jordan v. The Hartford Financial Group, No. 2019-001190 (Ct. App. 2019), available at <https://ctrack.sccourts.org/public/caseView.do?csIID=70393> (paralegal inadvertently calendaring the incorrect due date should be considered "good cause" to reinstate an appeal under S.C. Code Regs. 67-705H(4)); Mitchell v. UPS, No. 2019-001361 (Ct. App. 2019) available at <https://ctrack.sccourts.org/public/caseView.do?csIID=70580> (appeal was improperly dismissed because the brief was timely filed and served pursuant to Rule 5(b) and Rule 6 of the South Carolina Rules of Civil Procedure and S.C. Code Regs. 67-205(E)).

STANDARD OF REVIEW

“Appellate review of workers’ compensation decisions is governed by the Administrative Procedures Act.” Geathers v. 3v, Inc., 371 S.C. 570, 576 (2007) (internal citations omitted). This Court may affirm the Commission’s decision or remand the case for further proceedings. S.C. Code Ann. § 1-23-280(5)(2021). An agency’s judgment as to “the weight of the evidence on questions of fact” will not be disturbed on appeal. Crane v. Raber’s Disc. Tire Rack, 429 S.C. 636, 642 (2020)(citing S.C. Code Ann. § 1-23-280(5)(Supp. 2019)). This Court may reverse or modify the Commission’s decision if:

[S]ubstantial rights of the appellant have been prejudiced because the administrative findings. . . or decisions are (a) in violation of constitutional or statutory provisions; . . .(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 abuse of discretion.

S.C. Code Ann. § 1-23-280(5)(2021). A Commission finding of fact that is properly supported by substantial evidence must be upheld. Pierre v. Seaside Farms Inc., 386 S.C. 534, 540 (2010)(internal citations omitted); *See also* (Lark v. Bi-Lo Inc., 276 S.C. 130 (1981)).

ARGUMENT

I. The Court of Appeals did not err in affirming the Commission's administrative dismissal of Petitioner's appeal.

A. The Commission did not act arbitrarily and capriciously and did not abuse its discretion by declining to consider Petitioner's appeal on the merits.

"An abuse of discretion occurs when the judge's ruling is based upon an error of law, or when based upon factual conclusions, is without evidentiary support." Fontaine v. Peitz, 291 S.C. 536, 538 (1987)(internal citations omitted). The South Carolina Workers' Compensation Commission Regulations provide the procedure for appeal hearings. South Carolina Code of Regulations Section 67-705 requires an appellant to file a brief for each case appealed to the Commission. S.C. Code Ann. Regs. 67-705A (2021). The brief is due (filed and served) on or before the date on the Form 31 Briefing Schedule and Notice of Appellate Hearing. S.C. Code Ann. Regs. 67-705B (2021). However, the parties may agree to extend the brief filing deadline in a letter filed with the Commission prior to the original due date. S.C. Code Ann. Regs. 67-705H (2021). Where there has been no agreement between the parties and an appellant's brief is not timely filed, the Commission may administratively dismiss the appeal. S.C. Code Ann. Regs. 67-705H(3)(2021). Thereafter, an aggrieved party may file a motion to reinstate the appeal for "good cause" within in thirty (30) days. S.C. Code Ann. Regs. 67-705H(4)(a)(2021). The motion to reinstate is considered without oral argument by the Full Commission. S.C. Code Ann. Regs. 67-705H(4)(b)(2021). A showing of prejudice is not required. This Court, sitting in its original jurisdiction, has previously dismissed an appellant's appeal for failure to timely file a brief

according to similar authority in Rule 208(a)(4) of the South Carolina Rules of Appellate Procedure. See Roberts v. LaConey, 375 S.C. 97, 100 (2007); Rule 208(a)(4), SCACR.⁶

No cases have interpreted the meaning of “good cause” specifically under Regulation 67-705. Failure to receive proper service of a Commission Order has been considered “good cause” to reinstate an appeal that has been filed outside the fourteen (14) day appeal period under Regulation 67-701A. See Matute v. Palmetto Health Baptist, 391 S.C. 291, 294-96 (Ct. App. 2011); S.C. Code Ann. Regs. 67-701A(2021). However, the Commission’s administrative dismissal for failure to file an appellate brief is analogous to the Clerk’s entry of default under our Rules of Civil Procedure. Rule 55 requires the Clerk to make an entry of default where a party against whom a judgment is sought fails to plead or defend. Rule 55, SCRCR. The entry of default may be set aside upon a showing of “good cause.” Rule 55(c), SCRCR. The good cause standard, in this context, is instructive in interpreting the Commission regulation. For example, negligent failure to internally forward a complaint to the proper party resulting in a lack of response was not good cause to set aside a default judgment. Campbell v. City of N. Charleston, 431 S.C. 454, 462 (Ct. App. 2020). Failing to forward pleadings to the insurance company until after the expiration of time to answer was also not good cause to set aside default judgment. Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 609-10 (2009). This Court has held that losing a complaint is not good cause to set aside default. White Oak Manor v. Lexington Ins. Co., 407 S.C. 1, 11 (2014).

Appellant concedes that he was required to file a brief to perfect his appeal to the Appellate Panel. (R. p. 19). It is also undisputed that Appellant received the Form 31 notice clearly setting

⁶ The South Carolina Rules of Appellate Procedure provide for an analogous procedure in the event of an appellant’s untimely brief submission. Rule 208(a)(4) requires the Clerk to issue an order dismissing the appeal where an appellant’s brief is untimely filed. Rule 208(a)(4), SCACR. The appeal may be reinstated for “good cause.” Rule 260, SCACR. Respondent knows of no cases addressing the constitutionality of this Appellate Court Rule.

forth the due date for the brief. (R. p. 19, 21, 62, 66). In Maute, a finding of good cause was based upon the procedural defect in service of the Order on the Defendants. Unlike the Defendant in Maute, Appellant received proper notice of all filings. Instead, he admittedly, inadvertently, and negligently allowed the filing deadline to expire. Under Roberts this Court has previously dismissed an appeal under similar Appellate Procedure rules for failure to file a brief. Holding otherwise in this case would effectively negate the need for a briefing schedule. This strong public interest overrules any justification supporting the adjudication of claims in face of alleged harmless error.

Furthermore, the decisions of our state appellate courts interpreting the meaning of “good cause” to set aside default judgments also support the Commission’s decision to administratively dismiss Appellant’s appeal. The Court of Appeals decision in Campbell, and this Court’s decisions in Sundown, and White Oak, are all examples of instances that a party’s negligence in asserting their rights failed to meet the good cause standard. Here, Appellant negligently calendared the brief due date for an appeal he initiated. A similar decision in this case is consistent with the public policy of requiring that an aggrieved person timely assert their rights to promote judicial efficiency.

That the regulations allowed Appellant to seek a consent order extending the brief deadline prior to the due date does not disturb this conclusion. Appellant could have inquired of the Commission as to the propriety of extending the deadline for the brief prior to its expiration, given that the merits involved only approval of his attorney fee and that the Defendants previously disclaimed any involvement in the appeal. However, because of the aforementioned “calendar error” this approval was not timely sought. The due date remained unchanged and Petitioner, admittedly, missed the deadline.

In addition, any assertion that Defendants were not prejudiced because of Appellant's untimely brief submission is an emotional appeal to this Court's sense of fairness and is illogical. A showing of prejudice is not required when administratively dismissing an appeal under either the Commission regulations or the Appellate Court Rules. Even if it was, the Claimant, Ms. Morris is continually and substantially prejudiced by the lengthy delay in receipt of the balance of her settlement.

Consideration of the aforementioned examples of good cause and the pervasive evidence in the record establishing that Appellant negligently missed his own deadline supports the Commission's decision to administratively dismiss the appeal and judicially dismiss⁷ the motion to reinstate. The Commission fully considered and the cumulative evidence in the record established that Appellant negligently missed his own deadline. Such evidence pervades the record; the Commission's decision was neither arbitrary or nor capricious and was not an abuse of discretion. (R. p. 19, 21, 49, 52, 58, 62, 66).

- B. The Commission's decision declining to consider Petitioner's appeal on the merits was made upon lawful procedure and was not clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.⁸

As previously stated, the Commission's regulations provide the lawful procedure to perfect an appeal to the Appellate Panel. *See* S.C. Code Ann. Regs. 67-705A, B, H(3)-(4) (2021). Regulation 67-215 governs motions practice before the Commission and does not guarantee a formal hearing to dispose of a petitioner's motion. *See* S.C. Code Ann. Regs. 67-215 (2021). The

⁷ Respondent asserts that there is no jurisdictional question. The Commission's dismissal of Appellant's appeal was not based upon a lack of jurisdiction. Under 67-705, the Commission had jurisdiction to determine whether good cause existed to reinstate.

⁸ Appellant offers no legal support for these conclusory statements. "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76 (Ct. App. 2001). Respondent, wishing to argue these issues on appeal, addresses these arguments.

Commission promulgated these regulations pursuant to its legislative delegation, submitted them to the General Assembly for review, and published them in the State Register.⁹ See S.C. Code Ann. § 1-23-20(A) (2021); S.C. Code Ann. § 1-23-40 (1) (2021); S.C. Code Ann. § 42-3-30 (2021). An administrative regulation reasonably related to the purpose of the enabling legislation is valid and carries the force of law. U.S. Outdoor Advertising, Inc. v. South Carolina Department of Transportation, 324 S.C. 1, 3-4 (1997)(internal citations omitted).

“A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency’s findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” Rodney v. Michelin Tire Corp., 320 S.C. 515, 519 (1996)(internal citations omitted). “Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached.” Id. (internal citations omitted).

The Commission followed the procedure provided in its regulations to the letter. Appellant’s Form 30 Request for Commission Review was received on November 15, 2017. (R. p. 3). On December 15, the Form 31 Briefing Schedule and Notice of Appellate Hearing was sent to Appellant. (R. p. 16). This notice set January 14, 2018 as the filing date for Appellant’s brief. (R. p. 16). After receiving no response, and pursuant to Regulation 67-705H(3), the Commission exercised its discretion, administratively dismissed the appeal, and notified Appellant of the decision. (R. p. 18). After receiving Appellant’s timely motion to reinstate on February 1, 2018, it considered and dismissed the motion without oral argument pursuant to its authority under 67-705H(4)(b). (R. p. 1). As discussed above, Appellant’s grounds for good cause, that he made a negligent mistake, was legally and factually inadequate to support a decision to reinstate the

⁹ S.C. Reg. Vol. 16, Issue No. 4, eff April 24, 1992; S.C. Reg. Vol. 21, Issue No. 4, eff April 25, 1997.

appeal. Thereafter, on March 19, 2018, the Commission considered and denied Appellant's motion to reconsider also pursuant their regulations. (R. p. 2).

The regulation at issue was lawfully enacted: Promulgated by the Commission, reviewed by the Legislature, and published in the State Register. No evidence has been presented to suggest otherwise. The Commission's decision was not made upon unlawful procedure and was not an unlawful application of lawful procedure.

The assertion that a party that is "ready and willing" to file an untimely brief and did not object to a continuance has no bearing on whether the procedure utilized by the agency to dispose of the claim is lawful or unlawful. Furthermore, there is no requirement that a party be prejudiced for a finding of unlawful procedure or a clearly erroneous decision. Both assertions are an emotional plea for relief lacking logical and legal support.

In sum, as previously stated, evidence that the Appellant negligently missed the briefing schedule deadline pervades the record. (R. p. 19, 21, 49, 52, 58, 62, 66). The record lacks any evidence that the Commission could reasonably rely upon to hold otherwise. No explanation, reason, or circumstances were provided to explain the circumstances surrounding the incorrect calendaring of the due date. Therefore, because the Commission's decision was based upon lawful procedure and was not clearly erroneous, the Court of Appeals decision affirming the Commission should not be disturbed on review.

- II. The Commission's failure to consider Petitioner's appeal on the merits did not violate his constitutional and statutory rights to procedural due process or his constitutional and statutory rights to substantive due process.
 - A. Procedural due process requires only such procedure commensurate with the import of the right at issue; Petitioner received sufficient procedure.

The Fifth Amendment to the United States Constitution guarantees that no citizen shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. This provision is applied to the individual States through the protections of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1. In accordance with its federal counterpart, the South Carolina Constitution guarantees due process protections of an individual's life, liberty, or property. S.C. Const. art. I, § 3. The concept that the protection of liberty or property rights must be accompanied by sufficient procedural safeguards also applies with equal force to administrative proceedings: "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." S.C. Const. art. I, § 22. "[T]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." McIntyre v. Sec. Comm'r of S. Carolina, 425 S.C. 439, 449 (Ct. App. 2018)(citing Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171 (2008)). Due process, in the administrative context, "does not require notice and the opportunity to be heard at each level of the administrative process" only that notice and the opportunity to be heard occur prior to the final agency decision. Ross v. Med. Univ. of S. Carolina, 328 S.C. 51, 58 (1997)(citing DeGroot v. Employment Sec. Comm'n, 285 S.C. 209 (Ct. App. 1985)).

Under either constitutional provision, due process does not always require a "trial type hearing," but rather is "flexible dependent upon the demands of the situation." Kurschner, 376 S.C. at 171-72 (internal citations omitted). "The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. Sloan v. S. Carolina Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 485 (2006)(overruled on other grounds)(citing S.C. Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 246 (1997)). For example,

a defendant in a DSS intervention hearing must be provided the opportunity to confront his minor accuser, with some exceptions, when the interest involved is the important liberty right to parent one's children. *See S. Carolina Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445 (2002). More formal notice and hearing procedures are also required where the government deprives a teacher of the important liberty interest in the ability to practice her profession and property interest in her job by invalidating her teaching certification. *See Brown v. S.C. State Bd. of Educ.*, 301 S.C. 326 (1990); *see also In re Vora*, 354 S.C. 590 (2003)(physician received adequate due process because he was afforded a hearing and an appeal before a deprivation of the important liberty interest to practice his profession). An administrative hearing assessing a fine against managers of a limited liability company and lacking any promulgated rules for hearing procedure violated due process. *See McIntyre*, 425 S.C. at 439. In some cases, the presence of provisions for *de novo* review and formal type hearing procedures on appeal can cure procedural due process defects during lower tribunal proceedings. *Unisys Corp. v. S. Carolina Budget and Control Bd.*, 346 S.C. 158, 173-75 (2001).

Some alleged "rights" are viewed as so insignificant that they are not categorized as a right at all, requiring no due process protections. A mere "desire for future work" is not a "right" and therefore due process protections are inapplicable. *See S. Carolina Ambulatory Surgery Ass'n v. The S. Carolina Workers' Comp. Comm'n*, 389 S.C. 380, 392 (2010).

The alleged constitutional right at issue in this case is a property interest in unapproved attorney fees. Characterizing the constitutional right as the right to practice a chosen profession is overly broad. Regulation 67-705 on its face does not restrict the ability to practice law, only the ability to fully argue a single case on appeal. Unlike the teacher in *Brown*, whose license to teach was invalidated or the physician in *Vora* who's employment with the hospital was completely

terminated, an attorney who receives an administrative dismissal from the Commission may continue to assist other clients, move to reinstate the appeal, and otherwise continue practicing their chosen profession.

Neither Appellant nor Respondent can point to any cases specifically holding that a property right exists in unapproved attorney fees. However, Respondent argues that this Court should not recognize a constitutional right to such fees as doing so would invalidate duly enacted portions of the South Carolina Workers' Compensation Act regulating fees. Section 42-15-90 requires the approval of attorney fees before a fee is received by the attorney. *See* S.C. Code Ann. § 42-15-90 (2021). Receipt of such fees prior to approval by the Commission constitutes a misdemeanor and the offending individual is subject to a \$500.00 fine and up to one year in prison. S.C. Code Ann. § 42-15-90(B)(2)(2021). It is axiomatic there can be no property right to a fee that is illegal to possess prior to approval and due process would not be offended without any procedural safeguards in place for unapproved fees. Thus, Petitioner's "right" to unapproved attorney fees is on equal footing with the Ambulatory Surgery Center's "desire for future work." No process would be required as there has been no unconstitutional deprivation.

Should this Court disagree and find, to some degree, a constitutionally protected property interest in unapproved attorney fees, the Commission's legitimately enacted regulations provide sufficient process for its protection. In this case, Petitioner admittedly and negligently missed the brief deadline. The Commission, following its regulations, notified Petitioner by letter that his appeal had been administratively dismissed. Thereafter, Petitioner availed himself of the duly enacted regulatory procedure to reinstate the appeal and timely filed a motion to reinstate for "good cause." This was subsequently and thoroughly considered by the Full Commission without oral

argument consistent with the regulations and ruled upon. Petitioner was timely notified of the decision.¹⁰ Petitioner received all the process he was due under the Federal and State Constitutions.

That the Commission's regulations allow for a subsequent motion to reinstate and judicial review of such motion,¹¹ cures any potential procedural defect inherent in the administrative dismissal pursuant to this Court's holding in Unisys. Furthermore, because an administrative court need not provide notice and a hearing at every level of proceeding, Petitioner also received the basic protections of notice and an opportunity to be heard. No additional procedural requirements are necessary under Article I, section 22.

B. Petitioner was not arbitrarily and capriciously deprived of the property interest in practicing his profession.

A substantive due process inquiry focuses on whether an individual was deprived of a constitutionally protected right for arbitrary reasons. Worsley Co., Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 56 (2000). "A plaintiff must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law." Id. (citing Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983)). "There 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." Dantzler v. Callison, 230 S.C. 75, 92 (1956)(internal citations omitted). In fact, the right of a person to practice his profession for which he has prepared himself is property of the highest quality. Id. (internal citations omitted).

¹⁰ Thereafter, Petitioner moved for a rehearing before the Commission and, following an unsatisfactory decision, appealed his cause to the Court of Appeals. (R. p. 47). The Court of Appeals affirmed the Commission's denial of the motion to reinstate. Morris v. BB&T, Op. No. 2020-UP-235 (S.C. Ct. App. filed November 4, 2020). This petition for certiorari followed.

¹¹ The Commission's issuance of a Form Order following judicial deliberation on Petitioner's motion to reinstate is not necessarily indicative of a lack of "meaningful judicial review."

As previously stated, the proper characterization of the right at issue is the right to an unapproved attorney's fee. There can be no property right to a fee that is illegal to possess prior to its approval. Where no property right exists, there is no unconstitutional deprivation.

Even if this Court agrees that the proper characterization of the constitutional right at issue is the right to practice one's profession, Appellant was not deprived of his right to practice law. Brown involved a unilateral revocation of a teaching certificate. In re Vora involved a medical doctor's right to be reappointed to a staff position at a hospital. The underlying theme in these cases is that the aggrieved individuals were denied licenses or some other necessary qualification for continued employment. Petitioner was denied none of these. It does not follow that one's right to practice a profession is inhibited by one court ruling in one case out of many that an attorney handles regularly for multiple clients. Furthermore, Appellant was awarded a fee by the Commission.

Furthermore, as above, any alleged deprivation was not arbitrary and capricious. The record on appeal is replete with references to Appellant's negligently missed deadline and lack of prejudice. (R. p. 19, 21, 49, 52, 58, 62, 66). No additional circumstances are provided, other than a calendaring error, upon which a court could have found good cause. Also as previously stated, the Commission precisely followed its regulatory procedure in disposing of Appellant's appeal. Therefore, the Commission's decision was well supported by the record and not arbitrary and capricious.

CONCLUSION

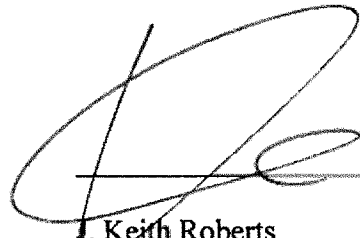
At its core, this case involves an attorney's failure to properly appeal a Commission decision awarding an attorney's fee according to its governing statutes, regulations, and the rules of professional conduct where the interests of a seriously injured claimant requires that she receive the maximum amount possible to properly compensate her for her injuries and the expenses associated with future care. It should be noted that Appellant has already received \$24,641.04 as a contingency fee for his services and \$5,134.10 as costs. The matter Appellant was attempting to appeal to the Commission only involved an additional \$11,992.29 Appellant was attempting to collect against Ms. Morris's settlement funds designated for her future medical treatment, which, by the terms of the settlement agreement, the parties agreed she needed.

In awarding this fee, the Commission followed legal procedure. In dismissing the appeal for failure to file a brief, the Commission followed legal procedure and based its decision on the substantial evidence in the record. In dismissing the motions to reinstate and for rehearing, the Commission again followed legal procedure and based its decision on the substantial evidence in the record. If there was additional explanation that could have assisted the Commission in its determination of good cause, Appellant bore the burden to present it to the administrative tribunal. According to lawful procedure, the Commission could only base its decision on the evidence before it.

In addition, Appellant, was not unconstitutionally deprived of any property right in his fee or liberty right in practicing his chosen profession nor were the Commission's determinations arbitrary or capricious, clearly erroneous, based upon lawful procedure, or an abuse of discretion.

For the reasons stated above, the Court of Appeals did not err in affirming the administrative dismissal of Appellant's appeal.

Respectfully submitted,



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