Circuit Court for Montgomery County
Case No. 438289-V

<u>UNREPORTED</u>

<u>IN THE COURT OF SPECIAL APPEALS</u>

<u>OF MARYLAND</u>

No. 0076

September Term, 2019

HOUSING OPPORTUNITIES COMMISSION OF MONTGOMERY COUNTY, MARYLAND

v.

MIGUEL GARCIA HERRERA, *et al*.

Meredith,
Wells,
Wright, Alexander
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: May 11, 2020

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from the Circuit Court for Montgomery County's dismissal of a petition for judicial review from appellant, Housing Opportunities Commission of Montgomery County, Maryland (''HOC''). The Maryland Workers' Compensation Commission (''Commission'') found that HOC was the statutory employer of appellee, Miguel Garcia Herrera, who sustained injuries during the course of employment. On October 5, 2017, HOC filed an appeal to the circuit court seeking judicial review to challenge the findings of the Commission. The Uninsured Employers' Fund ("UEF"),[1] appellee, was made a party to the claim when it became clear that Mr. Miguel Alvarado Rodriguez ("uninsured employer") did not possess workers' compensation insurance. Both parties moved for summary judgment, informing the circuit court that the petition for judicial review contained an incorrect mailing address for Mr. Rodriguez. The circuit court held a motions hearing and heard a preliminary motion on the service issue. Following the hearing, the circuit court dismissed the petition for judicial review because the uninsured employer had not been properly served. In an Order entered on February 7, 2019, the circuit court denied HOC's motion for reconsideration. HOC timely filed an appeal on March 7, 2019, and presents one question for our review:

[1] The purpose of the UEF, "pursuant to [Md. Code (1991, 2016 Repl. Vol.), Labor and Employment Article] § 9-1002 of the [Workers' Compensation] Act, is . . . benevolent and remedial, that being to protect injured workers whose employers failed, either willfully or negligently, to carry workers' compensation insurance for them." *W.M. Schlosser Co. v. Uninsured Employers' Fund*, 414 Md. 195, 210-11 (2010) (quotations and citations omitted).

> Did the circuit court err in dismissing the workers' compensation appeal for lack of service to the uninsured employer when the uninsured employer was on notice of the appeal?

Answering that question in the negative, we affirm.

BACKGROUND

On May 31, 2014, Mr. Herrera was working for the uninsured employer as a tree trimmer. Mr. Herrera went to Potomac, Maryland, to attend to a property maintained by HOC. While trimming the tree, Mr. Herrera accidentally lost his footing, cut his safety line, and fell, sustaining serious injuries. Mr. Herrera proceeded to file for workers' compensation benefits. On September 15, 2017, the Commission issued two orders. First, the Commission concluded that Mr. Herrera was employed at the time of the incident and that the injury was sustained during employment. Second, the Commission found that HOC was the statutory employer/insurer,[2] and Mr. Rodriguez was the uninsured employer.

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[2] We explained the role of a statutory employer in *Uninsured Employers' Fund v. W.M. Schlosser Co., Inc.*, 186 Md. App. 599, 612-13 (2009), *rev'd on other grounds*, 414 Md. 195 (2010). There, we explained:

> Maryland courts have repeatedly defined a statutory employer as:
>
> 1. a principal contractor
> 2. who has contracted to perform work
> 3. which is part of his trade, business or occupation; and
> 4. who has contracted with another party as a subcontractor for the execution by or under the subcontractor of the whole or any part of such work.
>
> Under this analysis, the question of whether an entity is a statutory employer turns on the existence of the principal contractor/subcontractor relationship. Where the statutory criteria are met, the effect is to impose the absolute

HOC appealed both of the Commission's Orders to the circuit court on October 5, 2017. On October 4, 2018, counsel for HOC and UEF informed the circuit court that the petition for judicial review[3] filed by HOC contained an incorrect address for the uninsured employer.[4] The Commission mailed the notice of appeal and certification to the uninsured

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> liability of an employer upon the principal contractor, when he was not in law the employer of the injured workman.

Id. (internal quotations and citations omitted). There was testimony that Mr. Herrera may have been a day laborer contracted to perform this one job.

[3] The Petition for Judicial Review read as follows:

> Comes now the Petitioner, Housing Opportunities Commission of Montgomery County, by and through counsel, Marc P. Hansen, County Attorney, Patricia P. Via, Chief, Division of Litigation, and Jeffery W. Stickle, Associate County Attorney, and petitions this Court pursuant to Maryland Rule 7-201 for the judicial review of the July 14, 2016 and September 15, 2017 decisions of the Maryland Workers' Compensation Commission in the above-referenced matter. The County makes this petition on the record. The County specifically disputes the following findings: 1. That the Claimant was not a casual employee; 2. That the Claimant was not an independent contractor; 3. That the Claimant was employed on a part-time or "as-needed" basis; 4. That Housing Opportunities Commission of Montgomery County was the statutory employer of the Claimant (and self-insurer) and that "all legal prerequisites have been met" to establish statutory employment; 5. That the Claimant's average weekly wage is $952.00; and 6. That the Commission had authority or jurisdiction to amend the average weekly wage from $300.00 to $952.00.
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> In the agency proceedings, Housing Opportunities Commission of Montgomery County was involved as a party to the hearing which resulted in the Order from which this petition is taken.

[4] The petition for judicial review was sent to Alvarado & Sons Landscaping, a previously dismissed party.

employer on October 11, 2017. The mailing notified him that a petition for judicial review was filed by HOC in the Circuit Court for Montgomery County on October 5, 2017, and stated that any party wishing to oppose the petition must file a response with the circuit court within 30 days of the date of the notice.[5] The uninsured employer did not, at any point, received a copy of the petition for judicial review. At a motions' hearing on October 9, 2018, the circuit court dismissed the action because a necessary party was not added or included and therefore the appeal was not perfected properly. The circuit court stated:

> In looking at the Rule that requires that the petitioner's filing this appeal under 7-202(d)(2) – [Service by Petitioner in Workers' Compensation

[5] The Notice of Appeal and Certificate of Compliance read as follows:

> Pursuant to Maryland Rule 7-202, a petition or cross-petition for judicial review was filed by the Employers' Insurer in the Circuit Court for Montgomery County on 10/05/2017 in case No. 438289v. The Commission received the petition on 10/11/2017. Any party wishing to oppose the petition must file a response with the Circuit Court within 30 days of the date of this notice unless the court shortens or extends the time.
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> Pursuant to Maryland Rule 7-206.1, the transcript and all other portions of the record of the proceeding before the Commission shall not be transmitted to the Circuit Court unless the court, on motion of a party or on the court's own initiative, enters an order requiring the preparation and filing of all or part of the record in accordance with the provision of Rule 7-206 and 7-206.1(D). Payment for the preparation of the transcript shall be in accordance with Rule 7-206(B). To request a transcript, other than by Circuit Court order, the requestor must complete the request for transcript form WCC H-50 (v.4/2014), which is located on the Commission's website: www.wcc.state.md.us or mailed to WCC court reporting division, at the address above.
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> To the Circuit Court:
> The Workers' Compensation Commission hereby certifies that on this date the above parties were mailed or electronically transmitted a copy of this Notice and Certificate of Compliance.

> Cases]. Upon filing a petition for judicial review of a decision in the [Workers' Compensation] Commission, petitioner shall serve a copy of the petition together with all attachments by first-class mail on the Commission and each other party of the record in the proceeding before the Commissioner. So based upon the pleadings in this case that clearly was not done and therefore I'll find that the appeal was not perfected properly so I'll grant the oral motion to dismiss the appeal.

On October 15, 2018, HOC filed a motion for reconsideration, which was denied by the circuit court, whereupon HOC filed this timely appeal.

On appeal, HOC argues that the circuit court erred in dismissing the Workers' Compensation appeal for lack of service of the petition for judicial review to the uninsured employer, because the appeal substantially complied with the appeal requirements, and the uninsured employer was on notice of the petition for judicial review.

STANDARD OF REVIEW

A circuit court's dismissal of a petition for judicial review is reviewed for an abuse of discretion. *Hahn Transportation Inc. v. Gabeler*, 156 Md. App. 213, 221 (2004). "'[T]here is an abuse of discretion where no reasonable person would take the view adopted by the [trial court] . . . or when the court acts without reference to any guiding principles.'" *Id.* at 687 (quoting *Pasteur, Inc. v. Skevofilax,* 396 Md. 405, 418 (2007)). "In sum, to be reversed '[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Id.*

DISCUSSION

> *The general requirement of service on all parties of every pleading is fundamental to the adversarial system and is consistent with the prohibition against* ex parte *communication with the court.*[6]

We agree with the circuit court, holding that it properly dismissed HOC's petition because HOC failed to comply with its obligations to serve all parties as required the Maryland Rules and applicable statutes. HOC has conceded that Md. Rule 7-202(d)(2)[7] requires that its petition for judicial review be served upon the employer, in this case Mr. Rodriguez, and also conceded that the petition for judicial review was not served.

[6] *See* PAUL V. NIEMEYER & LINDA M. SCHUETT, MARYLAND RULES COMMENTARY 36 (3d ed. 2003).

[7] The full language of the provision reads as follows:

> *Service by Petitioner in Workers' Compensation Cases.* Upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner shall serve a copy of the petition, together with all attachments, by first-class mail on the Commission and each other party of record in the proceeding before the Commission. If the petitioner is requesting judicial review of the Commission's decision regarding attorneys' fees, the petitioner also shall serve a copy of the petition and attachments by first-class mail on the Attorney General.

Both Md. Rule 7-202(c)(2)[8] and Md. Code (1991, 2016 Repl. Vol.), Labor & Employment Article ("LE") § 9-737[9] set forth that service of a petition for judicial review upon all parties of record is required to secure review of a decision of the Commission. Md. Rule 7-202(c)(2) provides: "If review of a decision of the Workers' Compensation Commission is sought, the petitioner *shall* attach to the petition: (A) a certificate that copies

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[8] The full language of the subsection reads as follows:

> (2) Attachments –Review of Workers' Compensation Commission Decision. If review of a decision of the Workers' Compensation Commission is sought, the petitioner shall attach to the petition:
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> > (A) a certificate that copies of the petition and attachments were served pursuant to subsection (d)(2) of this Rule, and
> >
> > (B) if no issue is to be reviewed on the record before the Commission, copies of (i) the employee claim form and (ii) all of the Commission's orders in the petitioner's case.

[9] The full language of the provision reads:

> An employer, covered employee, dependent of a covered employee, or any other interested person aggrieved by a decision of the Commission, including the Subsequent Injury Fund and the Uninsured Employers' Fund, may appeal from the decision of the Commission provided the appeal is filed within 30 days after the date of the mailing of the Commission's order by:
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> > (1) filing a petition for judicial review in accordance with Title 7 of the Maryland Rules;
> >
> > (2) attaching to or including in the petition a certificate of service verifying that on the date of the filing a copy of the petition has been sent by first-class mail to the Commission and to each other party of record; and
> >
> > (3) on the date of the filing, serving copies of the petition by first-class mail on the Commission and each other party of record.

of the petition and attachments *were served* pursuant to subsection (d)(2) of this Rule." (Emphasis added). Md. Rule 7-202(d)(2) provides: "Upon filing a petition for judicial review of a decision of the Workers' Compensation Commission, the petitioner *shall serve a copy of the petition*, together with all attachments, by first-class mail on the Commission and *each other party of record* in the proceeding before the Commission." (emphasis added).

Md. Rule 7-202 reflects the intention of the legislature to require the petitioner in appeals of workers' compensation claims to serve all parties of record with the petition. Consistent with that, LE § 9-737 provides that an appeal of a decision of the Commission pursuant to Title 7 of the Maryland Rules also requires "serving copies of the petition by first-class mail on the Commission and each other party of record." Insufficient service of process is grounds for mandatory dismissal. Md. Rule 2-322(a); *see Conwell Law LLC v. Tung*, 221 Md. App. 481, 498 (2015) ("The court has no jurisdiction over a defendant until such service is properly accomplished or until service is waived by a voluntary appearance by the defendant, either personally or through a duly authorized attorney. A party's failure to comply with the Maryland Rules governing service of process constitutes a jurisdictional defect that prevents a court from exercising personal jurisdiction over the defendant." (Internal citations and quotations omitted)).

The requirement for service by the petitioner on parties of record in workers' compensation cases is in contrast to the requirements in other administrative appeals where the Rules provide that the petition is filed with the clerk of the court and the responsibility

for mailing a copy of the petition to the agency is transferred to the clerk. *See* Md. Rule 7-202(d)(1). Md. Rule 7-202 sets out a distinction between appeals in workers' compensation claims, where the petitioner is required to serve the petition on all parties of record, and appeals of other agency decisions, where the clerk of the court is responsible for mailing the petition to the agency. This distinction exists because workers' compensation claims are unique in that various parties may be involved, including the claimant, employer(s), statutory employer(s), insurance companies, the Uninsured Employers' Fund, and the Subsequent Injury Fund. Notably, the Commission is not a party to the appeal and judicial review of decisions of the Workers' Compensation Commission. LE § 9-737; *Mitchell v. Goodyear Serv. Store*, 63 Md. App. 426, 437 (1985).

Maryland Rule 7-202(c)(2), however, does not prescribe the consequences for non-compliance. Thus, we look to Md. Rule 1-201, which states in relevant part:

> [w]hen a rule, by the word "shall" or otherwise, mandates or prohibits conduct, the consequences of noncompliance are those prescribed by these rules or by statute. If no consequences are prescribed, the court may compel compliance . . . or . . . determine the consequences of noncompliance in light of the totality of the circumstances and the purpose of the rule.

In its consideration of the consequences, a court ordinarily "discern[s] the overall purpose of the statute and then determine[s] which, if any, sanction will best further that purpose." *Tucker v. State*, 89 Md. App. 295, 299 (1991). As stated in the Maryland Rules Commentary, the "general requirement of service [in Md. Rule 7-202] is fundamental to the adversary system and is consistent with the prohibitions against *ex parte*

communications with the court." In other words, Md. Rule 7-202 provides a safeguard against unfair surprise by ensuring that each party receives notice of filings in an action.

The uninsured employer was only informed by the Workers' Compensation Commission that a petition or cross-petition was filed by the employer's insurer in the Circuit Court for Montgomery County on October 5, 2017; the Commission received the petition on October 11, 2017; and, any party wishing to oppose the petition must file a response with the circuit court within 30 days of the date of that notice unless the court shortens or extends the time. Here, by failing to properly serve the uninsured employer, HOC impaired *his* ability to remain compliant with relevant Rules and statutory authority, and his ability to mount a proper defense. We cannot state too strongly that proper service is essential to the court process, and notice of an appeal is fundamental to our adversarial system.[10]

[10] Significantly, the uninsured employer was not informed that HOC disputed the findings that:

(1) The claimant was not a casual employer;

(2) That the claimant was not an independent contractor;

(3) That the claimant was employed on a part-time or "as needed basis;"

(4) That HOC was the statutory employer of the claimant and self-insures and "all legal prerequisites have been met" to establish statutory employment;

(5) That the claimant's average weekly wages were $952.00; and,

(6) That the Commission had authority or jurisdiction to amend the average weekly wage from $300.00 to $952.00.

Because HOC failed to comply with the service requirements of Md. Rule 7-202(d)(2), HOC made an argument that its failure to serve the employer was a "technical irregularity," and therefore attempts to shift the burden of providing proper notice of its appeal to the Commission and to shift the burden of obtaining the petition to the unserved party. These arguments have no merit.

We have recognized that "mere technical defects respecting the petition for review will not cause an appeal from an administrative agency to be dismissed if the petitioner otherwise has substantially complied with the procedural rules and there is no prejudice to the respondent[.]" *Colao v. County Council of Prince George's County*, 109 Md. App. 431, 445 (1996), *aff'd*, 346 Md. 342 (1997). HOC's failure to serve the other parties to the proceeding before the Commission, however, was not a mere technical defect, nor was it substantial compliance with the service requirements set forth by Maryland Rule and required by statute. Even if their failure was an "innocent clerical mistake," the failure to serve other parties to the proceeding before the Commission did result in "a real substantive flaw, as opposed to a mere technical irregularity." *Id.* at 451. The uninsured employer, in this case, was not served with the petition, was not properly made a party to the appeal, received no notices from the circuit court, and received no filings from any of the other parties.

HOC relies on cases which do not involve review of a decision of the Workers' Compensation Commission to argue erroneously that service of the petition on the Commission substantially complies with the service requirements of Md. Rule 7-202(d)(2).

In *Border v. Grooms*, 267 Md. 100 (1972), and *Board of County Commissioners of Prince George's County v. Kines*, 239 Md. 119 (1965), both of which involved zoning appeals, the Court of Appeals found substantial compliance with service rules in cases where the adverse party or his attorney actually was served. In *Grooms*, the service of a petition for appeal on the attorney for the zoning board was found to be in substantial compliance with the requirement under the former Subtitle B Rules[11] that the petition for the appeal be served on the board itself. In *Kines*, the County Commissioners were served with a summons and a copy of the petition for review the day after the petition was filed.

In this case, the petition for judicial review was sent to the wrong address, as was every other document filed by HOC and every notice issued by the circuit court. HOC did not serve the uninsured employer late or anyone associated with him. There being a complete absence of service in this case, there is no basis to find substantial compliance with the requirement under Md. Rule 7-202(d)(2) that the petitioner shall serve a copy of the petition on each other party of record.

In *Wormwood v. Batching Systems, Inc.*, 124 Md. App. 695 (1999), and *Hahn Transportation, Inc. v. Gabeler*, 156 Md. App. 213 (2004), we held that the circuit court improperly dismissed petitions for judicial review as the petitioners had substantially complied with the rules governing transmission of the record. In *Wormwood*, substantial compliance was found where, although there were delays in transmitting the record from

[11] Prior to 1993, administrative agency appeals were governed by Chapter 1100, Subtitle B of the Maryland Rules. Rules B1 to B13 were rescinded effective July 1, 1993. Md. Rule 7-202 is in part derived from former Rule B2 and in part is new.

the Commission, the record had been received prior to the motion to dismiss, and the delay in transmitting the record was not solely the responsibility of the petitioner. In *Hahn*, the record containing the transcript of the hearing that decided the issue on appeal had been transmitted, although subsequent orders were not timely transmitted. Transmission of the record after an appeal has been filed does not equate to the initial filing of the appeal with notice to all of the parties.

As we discussed, Md. Rule 7-202(d)(3) provides that upon receipt of a copy of a petition for judicial review from the clerk of the circuit court, the agency shall give notice to all parties to the agency proceeding. HOC asserts that the Commission's compliance with Md. Rule 7-202(d)(3) fulfills HOC's obligation under Md. Rule 7-202(d)(2) to serve the petition on all parties of record to the agency proceeding, including the uninsured employer. HOC has failed to cite a case that relieves a petitioner from serving all parties of record with a petition for judicial review of a decision of the Commission. Mr. Rodriguez was not required to obtain the petition on his own and respond based on the Commission's notice that an appeal was pending.

The Court of Appeals, in *Francois v. Alberti Van & Storage Co.*, 285 Md. 663 (1979), supports our conclusion that HOC has not substantially complied with the procedural rules. There, the Court considered the dismissal of an appeal from the Commission on the grounds that it had not been timely filed under former Rule B2. The petitioner conceded that he did not file a timely petition for judicial review with the circuit court, but asserted that his forwarding of notice to the Commission within the time for

filing an appeal constituted substantial compliance with Rule B2. The Court was not persuaded. In its discussion of occasions where the Court had found substantial compliance with Rule B2, the Court explained that "[p]rocedural rules are issued by the Court to construct a uniform and orderly flow of judicial business. We cannot countenance a party's substituting methods of his choice for established rules for perfecting appeals." *Id.* at 668. Here, too, HOC had an obligation under the Maryland Rules and the Workers' Compensation Act to serve its petition for judicial review upon all parties to the proceeding before the Commission. That obligation was theirs and the petitioner may not shift its obligation to serve each party and rely upon the Commission's limited notice.

HOC avers that because a petition for judicial review of an earlier decision of the Commission had been filed on behalf of the uninsured employer,[12] Mr. Rodriguez would have known to respond to the Commission's Notice of Appeal. The record reflects that Mr. Rodriguez was represented before the Commission and in that earlier petition, but that attorney had subsequently withdrawn his appearance from the previous appeal in the circuit court and also struck his appearance before the Commission. When Mr. Rodriguez appeared for the September 11, 2017 hearing before the Commission, he was unrepresented and had been unrepresented since July 28, 2017, before the previous appeal on the July 14, 2016 decision was remanded to the Commission for additional testimony. There is nothing

[12] After a hearing on July 8, 2016, the Commission issued an Award of Compensation on July 14, 2016. Separate Petitions for Judicial Review of the July 8, 2016 Award were filed on behalf of the employer and on behalf of the Housing Opportunities Commission of Montgomery County, Maryland.

in the record to support the allegation that Mr. Rodriguez was familiar with the appeal process, knew how to participate in the judicial review process, or how to respond to a petition for judicial review. There is nothing in the Maryland Rules that would require a party represented or self-represented party to obtain the unserved petition on his own. That burden is on HOC.

Even if we consider the notice by the Commission some sort of "delayed service," the discretion to dismiss "rests in the sound discretion of a trial judge in the first instance, based on his or her weighing of the balance of the rights, interests, and reasons of the parties for the delay and the public demand for prompt resolution of litigation." *Conwell Law*, 221 Md. App. 481 at 505. The "Notice of Appeal and Certificate of Compliance" electronically transmitted by the Commission to the parties lacked any specificity as to the action of which review was sought. Rather, the notice of appeal merely advises the parties that an appeal has been taken and a response must be filed within 30 days after the date the agency notice was sent. The circuit court's finding that HOC had not properly served the uninsured employer was proper, and the court was empowered to dismiss the case. We see no abuse of that discretion here.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.