

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 763

September Term, 2015

JOSE A. PORTILLO-MORENO

v.

JUAN IBANEZ, ET AL.

Graeff,
Reed,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 27, 2017

*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.

Following denial of his claim for workers' compensation benefits by the Workers' Compensation Commission (Commission), appellant, Jose A. Portillo-Moreno, petitioned for judicial review in the Circuit Court for Howard County. Upon motion by appellees, employer Juan Ibanez and the Uninsured Employers' Fund (UEF), the circuit court dismissed the petition on the ground that appellant had failed to transmit the transcript of the Commission hearing within the time allotted by rule.

In this appeal, appellant presents one question for our review, which we have recast:¹

Did appellant substantially comply with the rule requiring filing of the Commission hearing transcript?

Finding no abuse of discretion, we shall affirm.

BACKGROUND

On May 13, 2014, following a hearing on the preceding day, the Commission issued an order denying appellant's claim, having found that he was an independent contractor, not an employee of Ibanez.

On May 30, 2014, appellant petitioned the circuit court for judicial review. Judicial review of Commission actions is governed by Rules 7-206 and 7-206.1 which, *inter alia*, require that a transcript of the administrative proceedings be filed with the

¹In his brief, appellant asks:

Did the circuit court err when it failed to follow existing case law and dismissed the case when there was substantial compliance with the rule and no showing of prejudice by the appellees?

circuit court within 60 days of the agency receiving the petition for judicial review. *See* Rule 7-206(d). Although the rule allows the court to extend this time for up to an additional 60 days, in the instant case no such motion was made by either party.

On June 2, 2014, the circuit court issued a scheduling order, requiring that all dispositive motions be filed by November 15, 2014. On January 23, 2015, the transcript not having been transmitted to the court, UEF moved to dismiss appellant's petition for judicial review for failure to transmit the complete record. Finally, on January 29, 2015, appellant requested, of the Commission, preparation of the transcript, which was transmitted to the court on February 23, 2015.

On February 2, 2015, appellant filed an opposition to the motion to dismiss, arguing that he had substantially complied with the transcript transmittal rule. Nonetheless, the circuit court granted the motion to dismiss on March 2, 2015.

Appellant then moved to vacate the order of dismissal on March 24, 2015, again arguing that the filing of the transcript in late February constituted substantial compliance with the requirements and, further, that appellees had not demonstrated prejudice resulting from the late filing.

On May 27, 2015, following a hearing, the circuit court denied the motion to vacate, noting that the delay in filing the transcript was seven months. The trial court observed, further, that “[n]o explanation was offered for the failure to timely provide the transcript. No suggestion was made that any delay was attributable to anyone other than [appellant].” Finally, the court concluded that “[t]he significant delay in transmitting the

record in this case was entirely the fault of [appellant]; therefore, the delay falls short of substantial compliance.” The court also noted that, even at the time of the filing of the motion to dismiss, the record was incomplete.

DISCUSSION

We apply an abuse of discretion standard of review. *See Wormwood v. Batching*, 124 Md. App. 695, 700 (1999). We consider the nature of the error, the diligence of the parties, and all surrounding facts and circumstances. Thus, our determination is case specific. *See id.*

In his appeal, appellant presses his argument that he substantially complied with the Rule 7-206 requirements and, therefore, dismissal was an excessive sanction for his late filing of the transcript. He supports this argument by asserting that appellees suffered no prejudice by the late filing.²

Rule 7-206³ allows 60 days for transmittal of the record from the agency to the circuit court, and provides the circuit court the authority to extend that deadline for not

²He also argues that the circuit court erred in considering UEF’s motion to dismiss, which was filed more than two months after the deadline for dispositive motions, by, in his words, “cherry-picking” which rules it chose to enforce. The consideration of motions filed beyond the parameters of a scheduling order is firmly within the trial court’s discretion. *See Maddox v. Stone*, 174 Md. App. 489, 501 (2007) (the scheduling order is not meant to function as a statute of limitations, and sanctions for violations of such are discretionary). Moreover, appellant’s counsel conceded at oral argument that this issue was not raised in the circuit court, nor does it appear in the record. It has not been preserved for our review.

³Rule 7-206.1 governs appeals from the Commission. It provides, in relevant part, that Rule 7-206 governs the preparation and filing of the Commission record when judicial review has been noted. *See* Rule 7-206.1(b).

more than 60 days. *See* Rule 7-206(d)-(e). The rule requires that the action shall be dismissed if the record has not been transmitted within the time prescribed unless the court finds that the inability to transmit the record was caused by the act or omission of the agency, a stenographer, or a person other than the moving party. *See* Rule 7-206(e).

Appellant maintains that the rule is ambiguous as to whose obligation it is to order the transcript. In support of this argument, he refers us to a discussion in *Hahn v. Gabeler*, 156 Md. App. 213, 220-21 (2004), regarding silence of the rule as to which party is responsible for the actual *transmittal* of the record. While that may be true, he does not offer any argument as to how this affected his decision not to *order* the transcript until more than six months after it was due. In *Hahn*, we acknowledged that the agency, as the party in possession of the record, should bear the responsibility of actual transmittal, but did not relieve the petitioning party of the obligation to timely initiate the request. *See id.* (quoting *Town of New Market v. Frederick County*, 71 Md. App. 514, 517 (1987), and *Healthcare v. Howard County*, 117 Md. App. 349, 352 n. 2 (1997)).

Further, an agency's regulations and rules are valid and binding unless they contradict the language or purpose of the enabling statute. *See Oyarzo v. Dept. of Health*, 187 Md. App. 264, 292 (2009) (quoting *Christ v. Department*, 335 Md. 427, 437-38 (1994), and *Lussier v. Md. Racing Commission*, 343 Md. 681, 689 (1996)). Md. Code (1999, 2016 Repl. Vol.), § 9-309(a) of the Labor and Employment Article, permits the Commission to adopt regulations to carry out its duties under the title. The

Commission's regulations specify that the first party to petition for judicial review is responsible for requesting the transcript. *See* COMAR 14.09.11.02. This regulation was in force at all times relevant to this case, and its requirement was noted on the Commission's certificate of compliance in response to appellant's petition for judicial review. The regulation was likewise set out in the advance letter from the court reporter to appellant's counsel estimating the cost of transcription. We find no ambiguity as to which party bears the responsibility to order the transcript.

Nevertheless, appellant maintains that he substantially complied with the requirements of the applicable Rules and Commission regulations. Because time requirements are not jurisdictional for judicial review of administrative decisions, substantial compliance is the appropriate test for our review of a dismissal. *See Wormwood*, 124 Md. App. at 705. In *Hahn*, for example, we found substantial compliance because, while the appellant failed to file the entirety of the record by the deadline, the portion that contained the testimony on the issue for review was timely filed. *See* 156 Md. App. at 223. *See also Mears v. Bruce, Inc.*, 39 Md. App. 649, 657 (1978) (substantial compliance found where transcript was timely transmitted but exhibits filed late).

However, the rule outlines the boundaries of the trial court's discretion in considering questions of substantial compliance. In *Jacobson v. High Hill Realty, Inc.*, 22 Md. App. 115 (1974), the transcript was not filed within the 90 day maximum extension

permitted by the rule then in effect. *See id.* at 121.⁴ The current rule restricts the circuit court’s authority to extend the time beyond that maximum, as the court may extend the time for no more than an additional 60 days. *See* Rule 7-206(e). The rule further requires dismissal of the action if the timeline is not met, unless the court finds that the delay in transmittal was caused by the act or omission of the agency, a stenographer, or a person other than the moving party. *See id.* Therefore, “[t]o avoid mandatory dismissal of his appeal, [Jacober] had to sustain his burden of proof under [the rule], that the *delay* was due to the neglect, omission or inability of someone other than himself.” *Jacober*, 22 Md. App. at 121 (emphasis in original). The claimant was unable to do so, and the dismissal was affirmed. *See id.* at 125.

In contrast, in *Wormwood* the petitioner made a timely request for preparation of the transcript, and was able to show that the delay was caused by another. *See* 124 Md. App. at 698, 701. The transcript was filed with the Commission’s appeals clerk on the day of the deadline, but the full record was not received in the circuit court until ten days later. *See id.* at 698. Those facts, we concluded, amounted to substantial compliance because “the delay was not solely attributable to appellant, and the entire record, including the transcript, was before the circuit court *at the time it was asked* to dismiss

⁴The former Rule B7, in effect in *Jacober*, permitted a maximum of 120 days to transmit the record: 30 days as of right, and up to another 90 days on a party’s motion. The current iteration of the rule also allows a maximum of 120 days to transmit the record; 60 days as of right, and up to another 60 days on a party’s motion. *See* Rule 7-206(d)-(e).

the appeal because of appellant's non-compliance with Rule 7-206." *Id.* at 705 (emphasis added).

Here, appellant has failed to demonstrate substantial compliance. He has not argued that the delay was caused by someone other than him. Nor has he given any explanation, except obliquely through his argument that the rule is ambiguous about who bears the responsibility of ordering the record, as to his failure to order the transcript until six months after it was due. Further, as the trial court noted, the transcript was not yet before the court at the time of the filing of the motion to dismiss. Although the record was filed prior to the court issuing its order, it can be inferred from the record that the ordering of the record was prompted by UEF's motion to dismiss.

Finally, appellant posits that there was no showing of prejudice to the appellees due to his late filing of the record. His correctness on this point, however, is of no benefit to him, for prejudice is not a factor in the substantial compliance analysis. Rather, it is a factor to be considered by the court once substantial compliance has been demonstrated. *See Wormwood*, 124 Md. App. at 705.

**JUDGMENT OF THE CIRCUIT
COURT FOR HOWARD COUNTY
AFFIRMED.
COSTS ASSESSED TO APPELLANT.**