UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2506

September Term, 2014

FIDEL REYES VIVEROS

v.

LANDCRAFTERS, LLC. et al.

Woodward,
Friedman,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Davis, J.

Filed: December 16, 2015

Appellant, Fidel Reyes Viveros, appeals from the grant of the Motion to Dismiss filed by appellees, Landcrafters, LLC ("Landcrafters") and the Uninsured Employers' Fund ("UEF") by the Circuit Court for Anne Arundel County based on the Court's finding that the proceedings before the Workmen's Compensation Commission ("Commission") had not been timely filed pursuant to the dictates of Maryland Rule 7-206.[1] Appellant presents the following issue for this Court's review, which we quote:

> Did the Circuit Court err in granting UEF's Motion to Dismiss when the Commission had timely certified that the case record and transcript of testimony in the Commission proceedings had been forwarded to the Circuit Court, and it is undisputed that the complete transcript was filed with the Circuit Court on the day the Motion to Dismiss was filed and also had been received by UEF before its counsel began preparing for trial?

FACTS AND LEGAL PROCEEDINGS

Appellant sustained injuries, on July 20, 2012, from a thirty-foot fall in the course of his employment as a tree cutter for appellee, Landcrafters, a landscaping company. Because Landcrafters was not insured at the time of the accident, the UEF was joined when appellant filed a workers' compensation claim. The Commission scheduled hearings for April 30, 2013. After the April 30th hearing was postponed, due to an emergency in the employer's family, testimony was presented at the rescheduled hearing on August 6, 2013 by Landcrafters' owners, Richard and Roberta Allen, and two employees who worked at the site the day that appellant was injured. At the conclusion of the August 6th hearing, the presiding

[1] The current version of the rule was effective on July 1, 2015 — after the Circuit Court's decision. The earlier version applicable to the decision and cited in this opinion was amended Oct. 31, 2002, and became effective on Jan. 1, 2003.

Commissioner continued the hearing in order to procure the testimony of another employee, Javier Velasquez. When the hearing resumed on September 24, 2013, the Commission found that appellant did not sustain an accidental injury and that appellant had engaged in willful misconduct. Consequently, the Commission entered an Order, dated September 30, 2013, that appellant's claim be disallowed.

On October 21, 2013, appellant filed a Petition for Judicial Review, a Demand for Jury Trial and a Claimant's Issue of Fact identifying issues appellant intended to present to a jury. Also on October 21st, appellant filed a Motion to Extend Time for Filing the Record. The Motion to Extend stated that the "time for filing of the record be extended for an additional sixty (60) days," but listed the extension date as December 18, 2013, which provided less time for transmitting the record than the standard 60 days permitted under Maryland Rule 7-206(c). The *additional* sixty-day period requested by appellant in the Motion to Extend, and allowed under Md. Rule 7-206(d), permitted an extension for transmitting the record until February 18, 2014. On October 31, 2013, the Circuit Court granted the additional sixty-day period requested in the Motion to Extend.

The Commission filed with the Circuit Court a Notice of Appeal and Certificate of Compliance, stating that the Petition for Judicial Review had been filed and that the parties filing the petition bore the responsibility of ordering a transcript and certifying that a copy of the Notice of Appeal and Certificate of Compliance had been mailed to the parties. The Circuit Court issued a Scheduling Order containing deadlines and scheduling dates, most

notably, June 16, 2014, the deadline for discovery. The UEF subsequently filed an answer, but did not propound discovery.

The Commission, on December 26, 2013, issued a record transmittal notifying the parties as follows:

> THE CASE RECORD IN THE ABOVE ENTITLED CASE IS FORWARDED HEREWITH. THE TRANSCRIPT OF TESTIMONY IN THE ABOVE ENTITLED CASE IS FORWARDED HEREWITH.

The Commission subsequently filed, in the Circuit Court, "a case record and transcript of proceedings from the Workers Compensation Commission" on December 30, 2013. The Record transmittal was filed on January 2, 2014.

At a pretrial conference, on July 16, 2014, counsel for Landcrafters informed appellant's counsel that she discovered that she did not have a copy of the transcript of the August 6, 2013 hearing before the Commission. Appellant's counsel sent a letter to the Court Reporting Division of the Commission, dated July 17, 2014, advising that she had discovered that she did not have a copy of the transcript of the August 6, 2013 hearing and requested a copy. Appellant's counsel forwarded copies of the transcript to all parties on October 13, 2014.

Despite having the transcript in his possession, UEF's counsel, when he began his trial preparation on October 27th, believed he was missing the transcript and telephoned appellant's counsel, advising her that he was filing a Motion to Dismiss appellant's Petition for Judicial Review. Appellant's counsel advised UEF's counsel that she had forwarded a

copy of the transcript to him on October 13, 2014. On the same day, October 27th, Appellant's counsel filed the transcript with the court.

The Circuit Court, on October 30th, granted the Motion to Dismiss, finding that appellant had failed to timely file the transcript.

DECISION OF THE CIRCUIT COURT

On October 30, 2014, the Circuit Court issued the following decision:

> All right, I am going to grant the motion. I have had a chance to look at those over the lunchtime and review Rule 7-206. I was familiar with the *Wormwood* case already, but thank you for providing the *Hahn* case.
>
> I think that Mr. — sorry. I am forgetting your name right now — Mr. Massengill's client has shown that there has not been substantial compliance. And it does seem to me, in my reading of it, that that is step one. And then you look to see whether there is prejudice.
>
> Although I acknowledge that it appears that, when you learned of it in July of . . . the failure to transmit the transcript, that you did request the transmittal of the transcript. Apparently it was not even received until October. And it was given to Mr. Massengill without him realizing it, without any cover letter saying that that is what was contained behind the subpoenas.
>
> He did not know that it was not there until apparently he was told that. So there was a significant period of time beyond what is contemplated in the Rule where Mr. Massengill was without the transcript for purposes of preparation.
>
> Another thing I think is kind of important is the fact that the Court did not receive it because, although obviously Mr. Massengill is the person who has to prepare, the rules speak to transmittal to the Court. And I don't know of any adequate reason why, after it was transmitted to Mr. Massengill, it was not transmitted to the Court.
>
> So I feel there was not substantial compliance. I think the *Hahn* case and even the *Wormwood* case both talk a little bit about there is sort of a burden shifting or — I don't know if it is a burden shift, but it seems to me that the burden is on Ms.

> Levine's [sic][2] client to make sure that the proper documents are transmitted. And after learning that they were not initially transmitted, I would think it would be incumbent upon that party to make sure that everything was right.
>
> Also, I do think there is prejudice. If the Court of Special Appeals does not agree with me about substantial compliance, I think there is prejudice. You can never say too much about preparation for a case. And I think that Mr. Massengill has been prejudiced by the fact that he cannot adequately prepare a case when he does not have the correct transcript. It may be that he had a transcript, but it was not the correct transcript. He needed the entire case. And I think that puts him at a decided disadvantage.
>
> So I think there is prejudice in addition to the fact that there was not substantial compliance. So I am going to grant the motion to dismiss.

Thus, the Circuit Court, at the hearing on October 30, 2014, granted the Motion to Dismiss filed by the UEF, concluding that "there was not substantial compliance" with Rule 7- 206 and that "Mr. Massengill has been prejudiced by the fact that he cannot adequately prepare a case when he does not have the correct transcript." The Circuit Court did not address the continuance request made by appellant's counsel to avoid the "very harsh sanction of a dismissal." On November 10, 2014, appellant filed a Motion to Alter or Amend Judgment. On January 14, 2015, the Circuit Court denied the motion filed by appellant's counsel.

STANDARD OF REVIEW

"'We review the grant of a motion to dismiss *de novo.*'" *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 174 (2015) (citation omitted) (quoting *Reichs*

[2] Ms. Larin's name was misspelled in the transcript as "LEVINE."

Ford Road Joint Venture v. State Roads Comm'n, 388 Md. 500, 509 (2005)). "[W]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, [the appellate court] must determine whether the trial court's conclusions are legally correct under a *de novo* standard of review." (citing *Schisler v. State*, 394 Md. 519, 535 (2006) (quotation omitted).

DISCUSSION

A. Substantial Compliance

Maryland Code, Labor and Employment, §9-739(a) pertains to the filing of the record from an appeal of the Commission's proceedings. It requires that "[a] certified copy of the record of the proceedings, including any transcript of testimony . . . shall be filed with the circuit court in accordance with Title 7 of the Maryland Rules."

Maryland Rule 7-206 governs handling of the trial record and in pertinent part provides:

> (a) **Contents; Expense of Transcript.** The record shall include the transcript of testimony and all exhibits and other papers filed in the agency proceeding, except those papers the parties agree or the court directs may be omitted by written stipulation or order included in the record. If the testimony has been recorded but not transcribed before the filing of the petition for judicial review, the first petitioner, if required by the agency and unless otherwise ordered by the court or provided by law, shall pay the expense of transcription, which shall be taxed as costs and may be apportioned as provided in Rule 2-603. A petitioner who pays the cost of transcription shall file with the agency a certification of costs, and the agency shall include the certification in the record.

* * *

> (c) **Time for Transmitting.** Except as otherwise provided by this Rule, the agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after the agency receives the first petition for judicial review.
>
> (d) **Shortening or Extending the Time.** Upon motion by the agency or any party, the court may shorten or extend the time for transmittal of the record. The court may extend the time for no more than an additional 60 days. 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.

"Cases interpreting the [preceding] rules have distinguished between provisions that require strict compliance and provisions that are satisfied by *substantial compliance*." *Wormwood v. Batching Systems*, 124 Md. App. 695, 702 (1999) (Emphasis added). Although "[i]t has been clear for some time . . . that a petition for judicial review of an agency's decision invokes the original jurisdiction of the circuit court and the time for filing is in the nature of a statute of limitations," (*id.* at 704–05 (citing *Kim v. Comptroller*, 350 Md. 527, 536 (1998)), "[t]he transmittal of the record, however, is neither jurisdictional nor in the nature of a statute of limitations and the rule governing transmittal is subject to *substantial compliance*." *Id.* at 705 (Emphasis added). This Court has noted that "the substantial compliance test is particularly appropriate with respect to judicial review[s] of Workers Compensation Commission decisions." *Id*.

Citing *Wormwood v. Batching Systems Inc.*, *supra*, appellant argues that the filing of a petition for judicial review is all that is necessary to put the agency on notice that a transcript must be filed as part of the record. Rule 7-206 creates two burdens. First, because

the payment for preparation and transmission of the transcript is to be borne by the appellant, it is "incumbent upon the appellant to initiate the process of obtaining a transcript." *Hahn Transp., Inc. v. Gabeler*, 156 Md. App. 213, 220 (2004) (citations and quotations omitted). But ultimately, "the responsibility for transmitting the record to the clerk is *expressly delegated to the agency*." *Id.* at 220–21 (Emphasis added). Furthermore, this Court has stated that "the onus is on the agency to forward to the clerk a *complete record*, since a record without the testimony is meaningless." *Id.* (Emphasis added).

In the case *sub judice*, appellant filed his Petition for Judicial Review, a Demand for Jury Trial, and a Claimant's Issue of Fact on October 21, 2013. Also filed on October 21st was appellant's Motion to Extend Time for Filing Record, in which he avers that "said transcript may not be completed within the sixty-day period from the date that the appeal was noted," *i.e.*, October 21, 2013. The Commission, on December 26, 2013, notified the parties that it was issuing the case record and the transcript of testimony. The Commission filed the "Case Record and Transcript of Proceedings" with the court on December 30, 2013 and the "Record Transmittal" with the court on January 2, 2014, which was seventy-two days after appellant filed his Petition for Judicial Review.[3] Considering the sixty days allowed under Rule 7-206(c) and the additional sixty days allowed with a Motion to Extend Time for Filing Record under Rule 7-206(d) (which was granted by the court), appellant, according to *Hahn*,

[3] Seventy-two days after October 21, 2013 is technically January 1, 2014, but since that was a holiday, the next business day is January 2, 2014.

satisfied his burden to initiate the record transmittal proceedings. The burden then shifted to the Commission, which certified that it had transmitted the case record and transcript in accordance with Rule 7-206.

Regarding whether there had been substantial compliance, the trial judge acknowledged, in her decision, that appellant's counsel requested transmittal of the transcript in July, 2014, but it was not received until October, 2014. The trial judge also considered the failure of appellant's counsel to effect transmission of the proceedings before the Commission to the Circuit Court as a factor in determining substantial compliance. We have held that, once the notice of appeal is filed, the obligation to transmit the transcript and record of the proceedings is imposed upon the administrative body, in this case, the Commission. *See Hahn Transp., Inc.*, *supra*.

Finally, it is undisputed that appellant's counsel filed a request with the Commission's Court Reporting Division on July 17, 2014, requesting that the Commission issue the missing transcript from the August 6, 2013 hearing. As stated, *supra*, once the petitioner for judicial review files requests for transmittal of the record, it is the responsibility of the Commission to transmit the *complete* record. Appellant fulfilled his duty, *i.e.*, requesting the initial record transmittal *and* requesting the transmittal of the missing transcript. Therefore, appellant has met his burden and it was incumbent upon the agency to transmit the complete record.

Ultimately, the Circuit Court had the complete case record and both hearing transcripts were filed when the court rendered its decision granting UEF's Motion to Dismiss. Therefore, we hold that appellant substantially complied with Rule 7-206.

B. Prejudice

Counsel for UEF and the Circuit Court posit that, if this Court holds that there was substantial compliance with Rule 7-206, then there is still prejudice to appellant's counsel, *i.e.*, an inability to adequately prepare for trial due to the missing transcript. As noted, *supra*, the Circuit Court stated:

> One can never say too much about preparation for a case. And I think that Mr. Massengill has been prejudiced by the fact that he cannot adequately prepare a case when he does not have the correct transcript. It may be that he had a transcript, but it was not the correct transcript. He needed the entire case. And I think that puts him at a decided disadvantage.

"The requirement of adequate preparation has long been recognized as part of a lawyer's responsibility to provide competent representation . . . ." *Attorney Grievence Comm'n of Maryland v. Mooney*, 359 Md. 56, 74 (2000). This very notion is embodied at the beginning of the American Bar Association Model Rules of Professional Conduct, which have been incorporated into the Maryland Lawyers' Rules of Professional Conduct.[4]

Although adequate trial preparation is important, it is not an absolute to which other situations must yield. The Court of Appeals has stated that "it is unfair to the prevailing party and the witnesses, as well as a waste of judicial resources, to automatically grant the losing

[4] Md. Rule 16-812, MRPC 1.1.

party a new trial in cases where a full transcript is unavailable due to no fault of the litigants." *Bradley v. Hazard Technology Co., Inc.*, 340 Md. 202, 207 (1995). Where it is determined that the litigants are at fault for the failure to make a full transcript available, a dismissal has been deemed appropriate. *See Hohensee v. Hohensee*, 214 Md. 284, 286 (1957) (dismissing an appeal where a litigant failed to file any response or comply with a court order). Although Md. Rule 7-206(d) stipulates that "the action shall be dismissed if the record has not been transmitted within the prescribed time," the Rule does not demand dismissal if the moving party did not cause the delay.

It is undisputed that UEF's counsel, Scott Massengill, had been in possession of the transcript from the September 24, 2013 hearing—where he was present and representing UEF. The missing transcript was from the August 6, 2013 hearing, when Massengill was *not* present and not representing UEF. It is presumable that Massengill was aware that he was replacing counsel for UEF and that there may have been a prior hearing. In fact, at the very beginning of the September 24th hearing, appellant's counsel, Marc Hassan, stated on the record that "this is a hearing that we started back in August." Massengill acknowledged this, on the record, at the October 30, 2014 hearing. Therefore, at the earliest, Massengill was aware, at the September 24, 2013 hearing, that there were additional transcripts from August that he would need in preparation for his case.

Also, during the October 30, 2014 hearing, appellant's counsel, Nicole Larin, stated that, at a July 16, 2014 pretrial conference where Massengill was also in attendance,

Landcrafter's counsel, Evelyn Darden, stated that she was not in possession of the August 6, 2013 hearing transcript. At that July 2014 hearing, Massengill made no mention of the missing transcript.

Finally, Massengill stated, at the October 30, 2014 hearing, that when he began preparing for trial and *first* realized that he was missing the August 6, 2013 transcript, he called appellant's counsel to state that he was filing a motion to dismiss. During that telephone call, on the same day, appellant's counsel informed Massengill that the transcript had been forwarded to him on October 13, 2013. Indeed, at the October 30, 2014 hearing, Massengill stated, on the record, that "[w]e are not saying we didn't get it. We just didn't know that we had it." Massengill, in our view, could not have been prejudiced by the lack of the transcript necessary for trial preparation *before* he began preparing for the trial. Conceivably, if Massengill discovered he was missing the transcript a month earlier, he would have called appellant's counsel and filed a motion to dismiss at that time. Massengill had numerous opportunities to discover that he was missing the August 6, 2013 hearing transcript. Moreover, if he realized, for the first time, that he was missing the transcript on October 27, 2014, he was made aware that he actually was in possession of the transcript that same day. Therefore, UEF's counsel was not prejudiced by the delay of the August 6, 2013 hearing transcript.

CONCLUSION

In the instant case, as in *Wormwood*, the entire record, including the transcript, was before the Circuit Court at the time it was asked to dismiss the appeal. We are persuaded that appellant substantially complied Maryland Rule 7-206 and we further conclude that no detriment enured to appellee, UEF.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY REVERSED;

COSTS TO BE PAID BY APPELLEE.