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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner and Chairman for the Panel
R. Michael Campbell, Commissioner
Gene McCaskill, Commissioner

Appellate Case No. 2022-000581
Case No.: W.C.C. File No.: 1611416

John A. Hinson, Employee, Respondent,

v.

BS Telecommunications, Employer, and Old Republic Insurance Co., Carrier, Defendants, of which BS Telecommunications is the Appellant.

BRIEF OF APPELLANT

Michael E. Patterson, Jr.
Christopher C. Mingledorff
Mingledorff & Patterson, LLC
245 Seven Farms Drive, Suite 310
Box 13
Charleston, South Carolina 29492
(843) 471-1015
Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the Appellate Panel err by finding the language of the Agreement required Appellant to pay anything other than the $200.00 outstanding balance to Dr. Mullen? (R. p. 7, ¶ 14-16).

2. Did the Appellate Panel err in the admission of parol evidence to assist in its determination of the intent of the parties in drafting the Agreement and the interpretation of the language of the Agreement? (R. p. 6, ¶ 5, ¶ 7; R. p. 8, ¶ 18).

   A. Did the Appellate Panel err by using a prior consent order, (R. p. 190), as parol evidence to help interpret the language of the Agreement and or the responsibilities of the parties pursuant to the Agreement? (R. p. 6, ¶ 7).

   B. Did the Appellate Panel err by using a prior consent order, (R. p. 190), as parol evidence to help interpret the language of the Agreement and the responsibilities of the parties pursuant to the Agreement when Respondent's counsel agreed at the hearing before Commissioner Wilkerson the Agreement controls the issue and takes precedence over the prior consent order, (R. p. 146-147)? (R. p. 6, ¶ 7)?

   C. Did the Appellate Panel err by failing to explain, justify or cite to specific evidence that would require and/or allow the introduction and admission of parol evidence to assist in determining the intent of the parties and in evaluating the language contained in the Agreement? (R p. 6, ¶ 5, ¶ 7; R. p. 8, ¶ 18).

3. If the Appellate Panel was correct in allowing the introduction and admission of parol evidence, then did the Appellate Panel err in its interpretation of the parol evidence that was admitted, when an email from Appellant, (R. p. 193-200), clearly states its intent was to only pay the outstanding balance to Dr. Mullen? (R. p. 6, ¶ 5, ¶ 7; R. p. 8, ¶ 18).

4. Did the Appellate Panel err by finding that a settlement agreement between represented parties, which is not titled as an "order", is not reviewed or approved by a commissioner, nor signed by a commissioner, is an order of the Commission? (R. p. 7, ¶ 15).

   A. Did the Appellate Panel err in its interpretation of South Carolina Code Section 42-9-390, especially when considering the revisions, or more appropriately stated, deletions, to this specific section, which were enacted by the South Carolina Legislature as part of the 2007 South Carolina Workers' Compensation reforms, in determining that a settlement agreement between represented parties, which is not signed and not reviewed by a commissioner is an order of the Commission? (R. p. 12, ¶ 7).

   B. Did the Appellate Panel fail to apply the rules of statutory construction by finding either, or both, South Carolina Regulation 67-801 and 67-803 controlled the issue of whether a settlement agreement is an order of the Commission when the settlement agreement is not signed and not reviewed by a commissioner and is in contravention

of the plain language contained in South Carolina Code Section 42-9-390? (R. p. 12, ¶ 7).

5. If the Agreement is not an order, then does South Carolina Code Section 42-3-175(A) apply? (R. p. 12, ¶ 7).

6. Whether the Appellate Panel erred in awarding attorney's fees and costs to Respondent if South Carolina Code Section 42-3-175(A) only applies to orders? (R. p. 12, ¶ 10).

   A. Whether the Appellate Panel erred in awarding attorney's fees and costs to Respondent's attorney pursuant to South Carolina Code Section 42-3-175(A) when there were no specific findings of fact as to whether employer and carrier had good cause as required by the statute? (R. p. 12, ¶ 10).

   B. Whether the Appellate Panel erred in awarding sanctions against Appellant in the amount of $30.00 per day for 386 days pursuant to South Carolina Code Section 42-3-175(A) when there were no specific findings of fact, or any evidence of, willful disobedience as required by 42-3-175(A)? (R. p. 12-13, ¶ 11).

   C. Whether the Appellate Panel erred in failing to specify what facts and evidence led to the sanctions against Appellant? (R. p. 12-13, ¶ 11).

7. Whether the Appellate Panel erred in failing to specify whether Appellant must pay Dr. Mullen directly and also reimburse the balance to Respondent; or, whether Appellant are to pay Dr. Mullen directly and then Dr. Mullen is to reimburse Respondent; or, whether Appellant is supposed to only reimburse Respondent for his out-of-pocket payments to Dr. Mullen and Appellant is not required to pay any money directly to Dr. Mullen? (R. p. 9-10, ¶ 25).

8. Whether the Appellate Panel erred in failing to specify Respondent's counsel's hourly rate when it awarded Respondent's counsel four (4) hours of attorney's fees, which are to be paid by Appellant? (R. p. 10, ¶ 26; R. p. 12, ¶ 10).

   A. Whether the Appellate Panel erred in failing to conduct any analysis as to what a reasonable hourly rate or reasonable attorney's fee would be when he awarded Respondent's counsel four (4) hours of attorney's fees. (R. p. 10, ¶ 26; R. p. 12, ¶ 10).

9. Whether the Appellate Panel erred in awarding sanctions of $30.00 per day for 386 days, which amounts to $11,580.00, when the amount in question is potentially $200.00, Respondent has suffered no detriment and Respondent only attempted to address the issue with Appellant once over the course of an entire year? (R. p. 10, ¶ 27)

10. Whether the Appellate Panel violated Appellant's right to due process, violated the United States Constitution and the South Carolina Constitution by awarding sanctions in the amount of $30.00 per day for 386 days, which amounts to $11,580.00, when the amount in

question is potentially $200.00 and there has been no finding or evidence of willful disobedience. (R. p.. 10, ¶ 27; R. p. 12, ¶ 8-9).

STATEMENT OF THE CASE

Appellant is asking the Court of Appeals to reverse the decisions of the South Carolina Workers' Compensation Commission Appellate Panel (hereinafter the "Appellate Panel") and South Carolina Workers' Compensation Commissioner Avery B. Wilkerson, Jr. (hereinafter "Commissioner Wilkerson"). (R. pp. 13-14).

On March 19, 2020, the parties entered into and executed a full and final settlement agreement, titled "Settlement Agreement and Release" (hereinafter the "Agreement"), and otherwise generically known as a "clincher agreement" in workers' compensation parlance. (R. pp. 207-214). The Agreement was received by the South Carolina Workers' Compensation Commission (hereinafter the "Commission") and stamped as filed on March 23, 2020. (R. p. 207). The Commission then closed its case file on March 26, 2020.

On March 29, 2021, approximately one year after the Agreement was executed by the parties, Respondent filed a Motion to Compel. (R. pp. 99-109). Respondent's Motion alleged Appellant owed Respondent more money than the $285,000.00 Appellant already paid to Respondent pursuant to the Agreement. (R. pp. 100, 210). Respondent's Motion also sought sanctions against Appellant as well as attorney's fees and costs. (R. p. 100).

Appellant timely filed a response to Respondent's Motion. (R. pp. 96-98). Arguments on Respondent's Motion were heard by Commissioner Wilkerson on April 28, 2021. (R. pp. 138-139).

On July 13, 2021, Commissioner Wilkerson issued an "Order Imposing Sanctions" against Appellant. (R. pp. 17-29). The Order from Commissioner Wilkerson found the Agreement was an order of the Commission despite the fact the Agreement was not reviewed or

signed by a Commissioner, Appellant owed additional money in excess of the original settlement agreement, Appellant owed four (4) hours of attorney's fees, fifty dollars ($50.00) in costs, and ordered sanctions against Appellant in the amount of five hundred dollars ($500.00) per day from March 23, 2020 to April 12, 2021, which totaled approximately one hundred ninety-nine thousand dollars ($199,000.00). (R. pp. 27-29).

On July 27, 2021, Appellant timely filed a Form 30 Request for Commission Review. (R. pp. 84-88, 89-95). Both parties timely filed briefs with the Appellate Panel. (R. pp. 32-42, 43-48, 59-83). On January 24, 2022, the Appellate Panel heard oral arguments on the matter. (R. pp. 110-137).

The Appellate Panel issued an Order on April 20, 2021, affirming Commissioner Wilkerson's Order in every aspect but for the amount of the sanctions imposed against Appellant. (R. p. 14). The Appellate Panel reduced the sanctions to a total of eleven thousand five hundred eighty dollars ($11,580.00), or $30.00 per day for 386 days. Id.

Appellant then timely served and filed a Notice of Appeal with the South Carolina Court of Appeals on April 29, 2022.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Appellate Panel. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, an appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1–23–380(5)(d), (e); Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010).

The Appellate Panel is the ultimate factfinder in workers' compensation cases. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, an appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. Pierre, 386 S.C. at 540, 689 S.E.2d at 618 (2010). "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Hill v. Eagle Motor Lines, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). Although, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." Id. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Bass v. Isochem, 365 S.C. 454, 468, 617 S.E.2d 369, 376 (Ct. App. 2005).

STATEMENT OF FACTS

On August 20, 2016, Respondent suffered multiple injuries when he fell from a ladder while installing a Direct TV dish on the roof of a customer's house. (R. p. 207). Appellant provided all benefits Respondent was entitled to under the South Carolina Workers' Compensation Act (hereinafter the "Act").

Part of Respondent's treatment included treatment for psychological overlay with Dr. Mullen at Poinsette Psychiatric Group (hereinafter "Dr. Mullen"). (R. p. 191). Appellant initially denied the compensability of Respondent's psychological overlay, but later agreed to the compensability of this psychological overlay through a consent order with Respondent. Id.

The parties began to discuss settlement in August of 2019. While settlement negotiations were ongoing, the value of the claim was negotiated extensively. (R. pp. 193-194). By the time the amount of settlement was reached, Appellant had paid Respondent 181 weeks of temporary

total disability (hereinafter "TTD"). Based on the number of weeks Appellant had paid TTD, the net present value of the claim was approximately 301 weeks. Based on Respondent's compensation rate ($555.84), the net present value of the claim was worth approximate $167,000.00.

At the time the settlement agreement was executed, Respondent had paid out-of-pocket for his treatment with Dr. Mullen. (R. pp. 215-217). The total amount Respondent paid to Dr. Mullen was $3,425.00. Id. However, at the time the Agreement was executed, there was a $200.00 outstanding balance owed to Dr. Mullen. (R. p. 217).

In addition to the compensable portions of the claim, there were other parts of the claim that were denied and disputed by Appellant. (R. p. 208). Respondent also had future medical requirements and out-of-pocket expenses that went into the negotiation of the Agreement. (R. p. 207). Ultimately, the parties agreed to a total settlement amount of $285,000.00. (R. p. 209).

Once the parties reached an agreement on the value of the claim, the parties continued to negotiate, for over a month, the specific language of the Agreement. (R. p. 193). One of the terms negotiated by the parties, was that Appellant would reimburse Respondent for any outstanding mileage that Respondent would be entitled to under the Act. Id. Therefore, there is an express provision in the clincher addressing this reimbursement. (R. p. 193; R. p. 209 ¶ 2).

The parties also contemplated the payment for any authorized medical bills that were currently outstanding as of February 13, 2020. To address this issue, the parties included the following language in the Agreement,

> "Employer and Carrier will pay any previously authorized medical expenses to medical providers that were incurred prior to February 13, 2020, but have inadvertently not been paid as of the date of this agreement."

(R. p. 209, ¶ 2).

During the continued negotiation of the language of the Agreement, there were numerous email exchanges between counsel for Appellant and counsel for Respondent. (See, e.g., R. p. 193). On March 11, 2020, prior to the execution of the Agreement, counsel for Appellant sent counsel for Respondent an email which included language explicitly stating to counsel for Respondent that counsel for Appellant would discuss payment of the outstanding balance to Dr. Mullen with the adjuster. (R. p. 193). At the time of this email, all parties were aware that the outstanding balance to Dr. Mullen was $200.00. (R. p. 217). Counsel for Respondent never responded to this email in any way with an objection to this interpretation of the Agreement.

On March 19, 2020, the parties signed and executed the Agreement. (R. p. 213). The Agreement was received by the Commission and stamped as filed on March 23, 2020. (R. p. 207). The Commission then closed its case file on March 26, 2020.

Between March 23, 2020, and March 29, 2021, Respondent's counsel sent exactly one email to Appellant's counsel regarding the outstanding $200.00 medical bill. (R. p. 197). This one and only communication from Respondent's counsel was sent on July 8, 2020, four months after execution of the Agreement. (R. p. 197). Counsel for Appellant reviewed the Agreement's terms and conditions to ensure all of Appellant's obligations had been fulfilled. No other communications were received from Respondent's counsel until he filed his Motion to Compel on March 29, 2021, more than a year after the claim was closed. (R. pp. 99-109)

Once Appellant received the Motion, they sent a check for $200.00 to Dr. Mullen, to pay the outstanding balance. (R. p. 199). This check was confirmed received by Dr. Mullen prior to the April 28, 2021, hearing with Commissioner Wilkerson. Id.

To date, there has been no allegation that Respondent suffered any prejudice as a result of this outstanding $200.00 balance. (R. pp. 43-58, 99-109, 110-137, 138-189). Respondent has produced no evidence, that Dr. Mullen sent any letters to Respondent asking for payment of the outstanding balance. Id. Respondent has produced no evidence that Dr. Mullen sent Respondent to a collections agency as a result of this outstanding balance. Id.

Respondent's Motion to Compel alleged Appellant was responsible for reimbursement of the entire amount ($3,425.00) Respondent paid out-of-pocket to Dr. Mullen, as well as the outstanding balance of $200.00; or, alternatively, payment of the entire bill to Dr. Mullen pursuant to the South Carolina Medical Fee Schedule, and Dr. Mullen would then reimburse Claimant for his out-of-pocket expenses. (R. pp. 99-100). Additionally, Respondent sought sanctions, attorney's fees, and costs pursuant to South Carolina Code Section 42-3-175(A). (R. p. 100).

Appellant raised numerous arguments and timely filed a response to Respondent's Motion. (R. pp. 96-97). The hearing was held on April 28, 2021, before Commissioner Wilkerson. (R. pp. 139-139).

On July 13, 2021, Commissioner Wilkerson issued his Order. (R. pp. 17-29). The Order concluded that the Agreement was an order of the Commission whether it was signed by a commissioner or not. (R. p. 23, ¶ 15). Commissioner Wilkerson also found that "medical bills are to be paid directly to Dr. Mullen at Poinsett Psychiatric. Reimburse balance to Respondent." (R. p. 26, ¶ 25). In addition to these findings, Commissioner Wilkerson also imposed sanctions on the Appellants in the amount of $193,000.00. (R. p. 29, ¶11). The Order states that the sanctions were calculated based on $500.00 a day from March 23, 2020, to April 12, 2021. (R.

p. 26, ¶ 27). Finally, Commissioner Wilkerson ordered the payment of four hours of attorney's fees and $50.00 in costs. (R. p. 26, ¶ 26).

After filing for Appellate Panel review, briefing and the Appellate Panel Hearing, the Appellate Panel affirmed all of Commissioner Wilkerson's findings, but reduced the amount of sanctions against Appellant to $11,580.00, or $30.00 per day for 386 days. (R. p. 14). Appellant then filed this appeal.

ARGUMENTS

1. APPELLANT FULLY COMPLIED WITH THE AGREEMENT, AND THE APPELLATE PANEL ERRED IN ITS INTERPRETATION OF THE AGREEMENT.

There is zero ambiguity in the Agreement that the only amounts being paid by Appellant was the following: 1. Two Hundred Eighty-Five Thousand Dollars ($285,000.00) being paid to Respondent; 2. Reimbursement to Respondent for any authorize mileage Defendant's had yet to pay; and 3. Any unpaid bills to an authorized medical provider which had not yet been paid. (See generally, R. p. 209).

The language in the Agreement clearly states, "Employer and Carrier will pay any previously authorized medical expenses to medical providers that were incurred prior to February 13, 2020, but have inadvertently not been paid as of the date of this agreement." (R. p. 209, ¶ 2). When the Agreement was signed there was a $200.00 balance at Dr. Mullen's. (R. p. 217). Prior to the Hearing, Appellant had paid off this $200.00 balance. (R. p. 6, ¶ 10; R. p. 199)

The Agreement also clearly states the Agreement was full and final. (R. p. 211, ¶ 2). The following conditions in the Agreement make this clear.

- [In] consideration of the sum of Two Hundred Eighty-Five Thousand Dollars ($285,000.00) paid to Claimant. the undersigned Jon Hinson, **does hereby release and**

forever discharge Employer and Carrier from any and all claims, demands, actions or causes of action under the South Carolina Worker's Compensation Act;

(R. p. 209, ¶ 1 (emphasis added)).

- [Claimant] **does hereby acknowledge that Employer and Carrier have fully, finally and completely paid and discharged each and every of their obligations, liabilities and responsibilities under the South Carolina Workers' Compensation Act** and that the sum set forth above is being paid to, and received by, the undersigned Jon Hinson, in full and final satisfaction of all claims whatsoever as a result of the alleged accident described above **and that Employer and Carrier shall not henceforth be liable for the payment of any amount whatsoever**;

Id. (emphasis added).

- It is expressly understood, and the parties agree that any medical treatment authorized and/or paid for by Employer and Carrier does not constitute any admission of liability under the South Carolina Workers' Compensation Act on the part of the Employer and Carrier for any claims not specifically admitted herein; (*Id. at p. 2).*

(R. p. 208, ¶ 2 (emphasis added)).

- On account of the doubts that exist as to what benefits, if any, Claimant would be adjudged to be entitled to recover under the Workers' Compensation Act, Claimant and Employer and Carrier, with the approval of the South Carolina Workers' Compensation Commission, have deemed it advisable, proper and in the best interests of all parties to compromise **and settle all possible liabilities and controversies between them**, now and in the future; *Id.*

(R. p. 208, ¶ 4 (emphasis added)).

- The parties acknowledge the Commission **relies upon the representation of counsel for Claimant** that Claimant has been fully apprised of his rights under the laws of the South Carolina Workers' Compensation Act and he believes the settlement is reasonable and fair and thus requests the South Carolina Workers' Compensation Commission approve this settlement as set forth herein. (The Agreement p. 6).

(R. p. 212, ¶ 1 (emphasis added)).

- **Claimant further acknowledges the consideration herein expressly recited is the sole and only consideration for the execution hereof, and no promise, agreement or suggestions of any other or additional consideration has been made to, or received by, the undersigned, Jon Hinson.**

(R. p. 212, ¶ 3 (emphasis added)).

The Agreement indicates numerous times Respondent's acceptance of $285,000.00 would release Appellant from all future liability. (See generally, R. pp. 208-212, supra). In addition, this language makes it clear Appellant has fully, finally, and completely fulfilled all its obligations. (R. p. 208). The Agreement is unambiguous and specifically states all ***possible liabilities and controversies*** between the parties **were settled now and in the future**. Id. The Agreement further states Respondent agreed to the fact that the consideration ***expressly recited*** in the Agreement was the only consideration that he was entitled to. (R. p. 212, ¶ 3). Therefore, Appellant followed the Agreement as it was drafted and agreed to and there exists no evidence to the contrary.

Moreover, Respondent's entire argument relies on the premise that you have to add language to the Agreement to reach the same conclusions the Appellate Panel reached. In his brief to the Appellate Panel, the first argument Respondent sets forth can be located at the bottom of page 3 and the top of page 4 of Respondent's Appellate Panel brief.

In pertinent part Respondent states the following:

"[T]he phrasing in question would have been more artfully worded as follows: Employer and Carrier will pay any previously authorized medical expenses to medical providers that were incurred prior to February 13, 2020, but have inadvertently not been paid [***by the Defendants***] as of the date of this agreement."

(R. pp. 45-46 (emphasis and italics in original)).

In making this argument, the Respondent is admitting that you have to add new language to a negotiated clincher settlement agreement, to reach the conclusion Respondent wants you to reach. The language of the Agreement was extensively negotiated by the parties for approximately 30 days prior to the execution of the Agreement, and the Agreement is in not ambiguous in any sense of the word. In fact, counsel for Respondent executed an "Attorney's Certificate" on page

8 of the Agreement in which counsel for Respondent states that he negotiated the Agreement on Respondent's behalf and read and explained the Agreement to Respondent. (R. p. 214).

If Respondent thought the language should have been more "artfully worded" there was ample time for this issue to have been raised prior to the execution of the Agreement. What is really at issue, is Respondent now has buyer's remorse for the deal he made and is now trying to wiggle his way out of a wholly unambiguous clincher settlement agreement.

If Respondent wanted to add language concerning reimbursement for certain medical bills, then he could have asked for such language to be added, such as he did regarding reimbursement for his mileage, which is expressly outlined and included in the Agreement just below the paragraph in question. (R. p.209, ¶ 3).

Again, Respondent's position in this matter is that additional amounts were owed by Appellants. In accordance with the clear and unambiguous language of the Agreement, the only amounts due by the Appellants were the $285,000 due to Respondent, payment of any unpaid, outstanding medical bills and mileage reimbursement to Respondent. Nevertheless, Respondent argues an additional reimbursement was owed to him, specifically the reimbursement of amounts paid by Respondent to a doctor during a prior period of the claim for medical treatment which was denied at the time it was incurred. Because the Agreement clearly provides for reimbursement to Respondent for mileage, it is apparent the intent and purpose of the Agreement was not to provide an additional reimbursement to Respondent.

The statutory construction maxim expression unius est exclusio alterius, means to express one thing implies the exclusion of the other, or the alternative. Put another way, the enumeration of particular things excludes the idea of something else not mentioned. Page 3 of the Agreement clearly provides Respondent will be reimbursed for outstanding mileage. (R. p. 209, ¶ 3). What

the express condition regarding mileage reimbursement evidences is that the parties were willing and capable of including terms into the Agreement regarding reimbursement to Respondent. Thus, if the parties intended to include another reimbursement to Respondent, then it surely could have been negotiated and included. The simple fact is it was not.

The illogical idea the parties intended to include reimbursing Respondent for his expenses at Dr. Mullen's office but did not think to explicitly put it in writing, is wrong. If the parties had agreed to such it would have been explicitly stated in the Agreement – just like the mileage reimbursement due to Respondent. The parties purposefully and with intent excluded any further reimbursement to Respondent.

Regarding any payment to an authorized medical provider, the only outstanding balance was the $200.00 outstanding balance at Dr. Mullen's. This $200.00 balance was paid before the date of the Hearing. (R. p. 4). Once Appellant satisfied payment of this balance there were no other unsatisfied conditions of the Agreement. Therefore, by the time this matter was heard, the only possible issue between the parties was already resolved. As such, the Appellate Panel's decision should be reversed.

2. THE APPELLATE PANEL VIOLATED THE PAROL EVIDENCE RULE, HOWEVER IN THE EVENT THE APPELLATE PANEL DID NOT VIOLATE THE PAROL EVIDENCE RULE, THEN THE AVAILABLE PAROL EVIDENCE AND THE LAW OF THE CASE CAN ONLY BE INTERPRETED AS SUPPORTING APPELLANT'S ARGUMENT.

At the hearing before Commissioner Wilkerson, Respondent's attorney introduced emails that were exchanged by the parties prior to the execution of the Agreement. Additionally, Respondent's counsel introduced a previously signed consent order in an effort to support his arguments regarding the meaning of the language contained in the Agreement. (See generally, R. pp. 193, 146). However, the Parol Evidence Rule prevents the introduction of extrinsic evidence

of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument. (Rodarte v. Univ. of S.C., 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017)). The South Carolina Supreme Court in Rodarte v. University of South Carolina, stated where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement. Id. The language of the Agreement is clear on its face and unambiguous, therefore the Commissioner Wilkerson and the Appellate Panel erred by going outside of the four corners of the document and allowing the introduction of parol evidence to interpret the Agreement.

Respondent's counsel introduced two consent orders at the hearing before Commissioner Wilkerson, despite the fact that these consent orders were executed well before the Agreement was executed. The introduction of this evidence was for purpose of offering up extrinsic evidence so as to either contradict, vary, and/or explain the plain language of the Agreement. (R. 147, lines 9-12). Therefore, these consent orders should also be barred pursuant to the Parol Evidence Rule. (Rodarte v. Univ. of S.C.)

Moreover, at the hearing before Commissioner Wilkerson and on the record, Respondent's counsel and Commissioner Wilkerson agreed the Agreement controlled and takes precedence over the consent orders. (R. p. 146, line 24-p.147, line 4). Therefore, by the rule of the "Law of the Case" these consent orders should never have been admitted and should not have been considered, since both Commissioner Wilkerson and Respondent's counsel agreed the Agreement was the controlling document. Therefore, even if the Parol Evidence Rule does not exclude these consent orders, the Law of the Case should exclude these consent order. Id. Imagine the chilling effect this

type of ruling would have on settlements if prior agreements or orders could control a full and final clincher agreement. As such, the Appellate Panel's decision should be reversed.

The Appellate Panel further erred by allowing Respondent's counsel to introduce email correspondence between the parties from March 11, 2020, which pre-date the Agreement. (R. pp. 149, 193-194). In addition to the parol evidence rule, this correspondence should not have been admitted because it was a part of settlement negotiations. (R. pp. 193-194). It is entirely improper to allow settlement negotiations between represented parties to then control the terms of a full and final clincher agreement. By allowing settlement negotiations to control over the written terms of a clincher agreement, the Appellate Panel is saying that settlement negotiations are the equivalent of a full and final clincher agreement. (R. p. 8, ¶ 18).

However, even if the admission of the email correspondences from March 11, 2020, were proper and admissible then the language in the correspondence from March 11, 2020, only serves to bolster Appellant's interpretation of the Agreement. (R. pp. 193-194). The March 11, 2020, email correspondence from Appellant's counsel to Respondent's counsel states, in pertinent part, the following:

> "I spoke with the adjuster and she is working to pay the outstanding balance at Dr. Mullen's office."

(R. p. 193).

Both parties had the medical billing from Dr. Mullen and were aware the only outstanding balance was a $200.00 unpaid bill. (R. pp. 215-217). Therefore, there is no other way to interpret the March 11, 2020, email from Appellant's counsel to Respondent's counsel other than Appellant was only responsible for paying the $200.00 outstanding balance to Dr. Mullen.

It is common knowledge that "balance" refers to an amount unpaid pertaining to a debt. In fact, according to Blacks Law Dictionary, *Balance* means "to compute the difference between the debits and credits of (an account)." (*Balance*, Black's Law Dictionary (11th ed. 2019)).

Counsel for Respondent never responded to this email from Appellants' counsel. Counsel for Respondent never called or emailed to correct counsel for Appellants understanding of the negotiated terms. There was never a response from counsel for Respondent saying, hold on, wait, we want you to pay the entire amount to Dr. Mullen – we expect that you will pay not only the balance owed to Dr. Mullen, but rather we want you to pay for the entire amount Respondent already paid to Dr. Mullen.

Counsel for Respondent never raised this issue in response to this email. Therefore, Appellant never would have assumed they needed to somehow pay bills to Dr. Mullen, which had already been paid. Also, keep in mind that a large portion of the amount Respondent paid to Dr. Mullen office was paid at a time in which Respondent's psych overlay was a denied portion of the claim. Respondent sought that treatment on his own and made those payments on his own, all prior to Appellant's acceptance of this portion of the claim. (R. pp. 215-217). Therefore, the Appellate Panel's decision in this matter should be reversed.

3. THE AGREEMENT IS NOT AN ORDER OF THE COMMISSION, AND THE APPELLATE PANEL ERRED IN FINDING THAT IT WAS AN ORDER.

The Agreement is not an Order of the commission. (S.C. Code Ann. § 42–9–390 (1976)). An Order is defined as, "1. A command, direction, or instruction. 2. A written direction or command delivered by a government official, esp. a court or judge." (*Order*, Black's Law Dictionary (11th ed. 2019). According to South Carolina Code of Laws Section 42-9-390, the only settlement agreement that requires review and approval by a commissioner is when the claimant is unrepresented. (§ 42–9–390). Throughout the entirety of the claim, and at the time of the

Agreement, Respondent was represented by legal counsel. (R. p. 214). Therefore, pursuant to Section 42-9-390, since the parties were represented by counsel, the Agreement did not require review or approval by a commissioner and did not require that a commissioner sign the Agreement. Id. As such, the Appellate panel will not find the signature of a commissioner on the Agreement, because the Agreement was not reviewed, approved or signed by a commissioner. (R. p. 207-214). Therefore, the Agreement executed by the parties was not an Order. (§ 42-9-390; See generally, R. p. 207-214).

The Appellate Panel's decision that unsigned clincher agreements are orders of the Commission is wholly unsupported by any of the statutes contained in the South Carolina Workers' Compensation Act, the regulations contained in Title 67 of the South Carolina Code of Regulations, or any other law, regulation, court rule, or case law that Appellant's are aware of in the State of South Carolina. Moreover, the implications this ruling could have are not just chilling, but rather more dangerous than black ice in the middle of the night on a rural county road without any street lights or headlights. Allowing unsigned documents to somehow morph into orders of the Commission creates more than just a slippery slope and is more akin to an earthquake wholly removing the ground from under your feet.

A. The Plain Language of Section 42-9-390 proves the Agreement is not an order.

The Appellate Panel erred when concluding clincher agreements can be orders whether signed or unsigned. (R. p. 7, ¶ 15). The South Carolina Workers' Compensation Act is in derogation of the common law, and therefore must be strictly construed. South Carolina Code Section 42-9-390 states:

> "Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The employer must file a copy of the settlement agreement with the commission if each party

> is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission." (§ 42-9-390).

The statute states that a settlement agreement must only be filed with the commission if the employee is represented. Id. The statute does not require that settlement agreements (clinchers) must be approved by a commissioner if the employee is represented. Id. Since both parties to this claim were represented, the Agreement, was not reviewed or approved by a commissioner, and the Agreement was not signed by a commissioner, and thus cannot be considered an order of the Commission or any other kind of order. (Id.; See generally The Agreement).

B. Statutory construction dictates the Agreement is not an order.

The legal maxim in statutory construction, Expressio Unius Est Exclusion Alterius, stands for the proposition that to express or include one thing implies the exclusion of another. (Riverwoods, LLC v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (2002) citing Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000); see also *Expressio Unius Est Exclusion Alterius*, Black's Law Dictionary (7th ed. 1999)). Section 42-9-390 explicitly requires settlement agreements involving an unrepresented Respondent to be reviewed and signed by a commissioner to become binding on the parties. (§ 42–9–390). Therefore, using this well recognized principal of statutory construction, we can conclude, the legislature deliberately excluded the condition for represented parties to have their settlement agreements reviewed, approved, and signed by a commissioner to become binding. Id.

C. The Agreement is not an order pursuant to the 2007 Workers' Compensation Reform Act.

In addition, when considering legislative intent, we must also consider the 2007 Workers' Compensation Reform Act. (Code of Law of South Carolina 1976 Annotated Title 42 Workers' Compensation). Prior to the 2007 revisions, Section §42-9-390 stated the following:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with provisions of this title. A copy of the settlement agreement must be filed by the employer with **and approved by one member of the commission if the employee is represented by an attorney.** If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with and approved by four members of the commission. (S.C. Code Ann. § 42–9–390 (1976) Prior to 2007 Work Comp Reform Act).

Thus, prior to the 2007 reforms, all settlement agreements between represented parties required approval of at least one member of the commission. Id. Conversely, all settlement agreements in which the Respondent was not represented required approval of at least four members of the commission. Id. Therefore, the 2007 changes to Section 42-9-390 demonstrate very clear legislative intent. (§ 42–9–390). It is very obvious in viewing Section 42-9-390 prior to the 2007 changes and the current version of the statute that the legislature intended to remove Commission review and approval from the settlement process between represented parties. (§ 42–9–390.; Black's Law Dictionary 602 (7th ed.1999)).

D. 2017 Advisory Notice Requests Settlement Agreements not be titled as "Orders."

An Advisory Notice from the Workers' Compensation Commission from February 24, 2017, (the "Advisory Notice") regarding submission of consent orders and settlement agreements and releases clearly distinguishes settlement agreements and releases from consent orders. (S.C. Work. Comp. Comm. Advisory Notice Submission of Consent Orders and Settlement Agreements and Releases (2017) (hereinafter the "Advisory Notice")). The Advisory Notice states, "when preparing a settlement or "clincher" agreement, title the document "Settlement Agreement and Release." The title should not contain the word "Order."" Id. The clear and obvious reason for this Advisory Notice was to ensure that practitioners were not trying to make clincher settlement agreements orders when it was not necessary. The Commission was trying to remove any ambiguity from the process.

Unless this Court reverses the Appellate Panel's findings, there will now be documents which are explicitly requested not to be called orders which are now orders. (See generally, R. pp. 207-214).

E. 2017 Advisory Notice details the procedural difference between the Commission's handling of consent orders versus settlement agreements.

The Advisory Notice also discusses how consent orders and settlement agreements are treated differently by the commission. (The Advisory Notice). The Advisory Notice also states, "Consent Orders, pursuant to S.C. Code Ann. § 42-17-10, are signed and served by each Commissioner's office. Agreement and Releases, pursuant to S.C. Code Ann. § 42-9-390, are stamped received by Claims and returned to the parties once they are properly filed." Id. Therefore, consent orders and settlement agreements and releases are distinctly different. Id. Consent orders are required to be sent into the commission for approval while settlement agreements and releases are only required to be sent in for proper filing. Id.

Although the Advisory Notice discusses only the distinction between consent orders and settlement agreements, this supports the broader argument that settlement agreements are not orders of the commission. (The Advisory Notice). As discussed in the Advisory Notice, the commission does not want settlement agreements to be titled as "Orders" nor does the commission process a settlement agreement the same as a Consent Order. Id.

Thus, it is clear "orders" are those that are required to be reviewed and approved by the commission. Id. According to Section 42-9-390 settlement agreements by represented parties do not have to be reviewed for approval by the commission. (§ 42-9-390). At the time of the Agreement both parties were represented by counsel. (See generally, R. pp. 207-214). Therefore, the Agreement was not reviewed for approval by the commission and not signed by a commissioner, and therefore is not an order. (§ 42-9-390; See generally, R. pp. 207-214).

Additionally, while it is clear under Section 42-9-390 that the Agreement was not an order. It is also clear that Section 42-9-390 controls the issue before this Court. It is well settled law that statutes control and take precedence over regulations. Thus, since Section 42-9-390 is on point and controls this issue, the Appellate Panel erred by using South Carolina Regulations 67-801 and 67-803 as a basis for any portion of its ruling. (§ 42-9-390; S.C. Code of Regulations 67-801 and 67-803; R. p. 7, ¶5 ¶9; R. p. 9 ¶¶ 3-6; R. p. 10 ¶ 7).

Therefore, the Appellate Panel's decision that settlement agreements between represented parties are "orders" should be reversed. (R. p. 7, ¶ 15).

4. SOUTH CAROLINA CODE SECTION 42-3-175 APPLIES ONLY TO ORDERS OF THE COMMISSION, AND THE APPELLATE PANEL DOES NOT HAVE AUTHORITY TO ISSUE SANCTIONS PURSUANT TO THIS CODE SECTION.

According to South Carolina Code Section 42-3-175(A)(1),

> If a claimant brings an action before the commission to enforce an order authorizing medical treatment or payment of benefits and the commission determines that an insurer, a self-insured employer, a self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits when ordered to do so by the commission, the insurer, the self-insured employer, the self-insured fund, or the adjuster must pay the claimant's attorneys' fees and costs of enforcing the order. The commission may impose sanctions for willful disobedience of an order, including, but not limited to, a fine of up to five hundred dollars for each day of the violation. (§ 42-3-175(A)(1)).

As you can see the plain language of Section 42-3-175(A)(1), requires there be an Order. (§ 42-9-390; § 42-3-175(A)(1)). As discussed above, the South Carolina Workers' Compensation Act is in derogation of the common law, and must be strictly construed. Section 42-3-175(A)(1) is unambiguously clear and the statue must be given effect to its plain language, which requires an order.

As established above, if a settlement agreement executed by two represented parties is not an "order" pursuant to Section 42-9-390, then Section 42-3-175(A)(1) cannot apply. (R. p. 162,

lines 3-4). Section 42-3-175(A)(1) is in place for the purpose of providing a means for parties to enforce orders of the commission. (§ 42-3-175(A)(1)).

For the purpose of guidance only, we can look to the Appellate Panel's decision in *Shore v. Aiken City Govt.,* which stated that South Carolina Code Section 42-3-175(A)(1) only applies when there exists an order from the Commission. (See *Paul J. Shore, Respondent Claimant Aiken County Government, Employer and Hewitt, Coleman & Associates, Inc., Carrier Defendants/Appellants* 2014 WL 7649050 (S.C. Work.Comp.Comm.)). In the *Shore* case the Appellate Panel held without a valid order §42-3-175(A)(1) does not apply. Id. In the case at bar, the parties were represented by legal counsel and the Agreement was effective without the review, approval and signature of a commissioner. (See generally, R. pp. 207-214). Therefore, if a clincher agreement must be reviewed, approved and signed by a Commissioner in order to be considered an "order", then the Agreement does not constitute an order. (§ 42-9-390; R. pp. 3-14; See generally, R. pp. 207-214). Thus, without a valid order, Section §42-3-175(A)(1) does not apply. (§ 42-3-175(A)(1)). Therefore, sanctions against Appellants and any attorney's fees awarded are completely improper. (R. p. 10, ¶ 26,27, 28).

5. IF SOUTH CAROLINA CODE SECTION 42-3-175 APPLIES, THEN THE APPELLATE PANEL FAILED TO MAKE SPECIFIC FINDINGS OF FACT THAT APPELLANTS ACTED WITHOUT GOOD CAUSE.

South Carolina Code Section 42-3-175 specifically calls for a finding that Appellant acted without good cause. (§ 42-3-175(A)(1)). Not only does Section 42-3-175 require an order, but this section also requires proof Appellant acted without good cause. Id. If a claimant can show that an insurance carrier has failed to pay medical benefits pursuant to an order and without good cause, then the Claimant is entitled to the payment of his attorney's fees and costs for enforcing the order. Id. However, in the Appellate Order the Panel did not provide any evidence or findings of fact as

to whether Appellant had good cause as required by the statute. (*See* §42-3-175(A)(1); See generally, R. pp. 3-14). Without any facts to support the allegation Appellant acted without good cause, the Appellate Panel's decision must be reversed.

A. The Appellate Panel failed to conduct any analysis as to what Respondent's attorney's fees should be and what a reasonable rate should be.

Even if the award for attorney's fees were proper, the Appellate Panel failed to specify Respondent's counsel's hourly rate. (R. p. 10, ¶ 26; R. p. 12, ¶ 10). Furthermore, the Appellate Panel failed to conduct any analysis as to what a reasonable hourly rate would be. Id. Therefore, the Appellate Panel erred in its determination of attorneys' fees. Id.

According to the South Carolina Supreme Court in Jackson v. Speed, the following six factors should be considered when determining attorneys' fees, which are: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. (Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997) citing Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993)). The Appellate Order does not provide any analysis regarding attorneys' fees. (See generally, R. pp. 3-14). Therefore, the Hearing Commissioner erred in his determination of attorneys' fees by not conducting any analysis whatsoever as to whether or not Claimant's attorneys' fees were reasonable. Id.

6. THE APPELLATE PANEL MADE NO SPECIFIC FINDINGS OF FACT THAT AN ORDER EXISTED, AND THAT APPELLANT ACTED IN WILLFUL DISOBEDIENCE OF THAT ORDER; AND THUS, SANCTIONS CANNOT BE ENFORCED AGAINST APPELLANT.

Likewise, as it pertains to sanctions, pursuant to Section 42-9-390, even if an order existed, then, Claimant must prove Appellant acted in willful disobedience of that order. (R. pp. 12-13, ¶ 11). In part, Section 42-3-175(A)(1) states, "The commission may impose sanctions for willful

disobedience of an order, including, but not limited to, a fine of up to five hundred dollars for each day of the violation." (See §42-3-175(A)(1)). Similar to the discussion of attorney's fees, the Appellate Order does not contain any facts or evidence of willful disobedience. (R. p. 12-13, ¶ 11). Therefore, even if §42-3-175 did apply, without a finding of willful disobedience the imposition of sanctions is improper. (See §42-3-175(A)(1); See generally, R. pp. 3-14). Therefore, the Appellate Panel erred in its imposition of sanctions on Appellant.

7. THE HEARING COMMISSIONER'S ORDER VIOLATED APPELLANTS RIGHTS TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION AND SOUTH CAROLINA LAW.

According to the United States Constitution Amendment VIII, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S.C.A. Const. Amend. VIII). The United States Supreme Court in Timbs v. Indiana, held the Eighth Amendment Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. (Timbs v. Indiana, 139 S. Ct. 682, 687 (2019)).

The Appellate Panel imposed sanctions on Appellant of $30.00 per day for 386 days, which amounts to $11,580.00, for an inadvertently unpaid $200.00 medical bill. (R. p. 10, ¶ 27). The imposition of sanctions at the rate of $30.00 per day, for 386 days, which amounted to $11,580.00 when the amount in question is $200.00 is unconscionable and penal in nature. Id. Thus, even if Appellants were subject to sanctions under §42-3-175, the amount Appellants were sanctioned is improper as it is grossly disproportionate to the amount in question. (See generally, R. pp. 3-14). This grossly disproportionate result is a violation of Appellant's right to due process. Moreover, the imposition of sanctions without a finding of willful disobedience violates Appellant's right to due process under South Carolina Law and the United States Constitution. (Atkinson v. Orkin Exterminating Co., 361 S.C. 156, 604 S.E.2d 385 (2004); U.S.C.A. Const. Amend. VIII).

Furthermore, in Atkinson v. Orkin Exterminating Co., Inc., the South Carolina Supreme Court held the jury verdict for punitive damages, at a ratio of 127 to 1, was so excessive it violated Defendants rights to due process. (Atkinson v. Orkin Exterminating Co. (2004)).

The amount in controversy in this claim is $200.00. (See generally, R. pp. 3-14). Therefore, a fine of up to $30.00 per day for 386 days, which amounts up to $11,580.00 is wholly excessive. (R. p. 10, ¶ 27). The amount the Hearing Commissioner has sanctioned Appellants represents a ratio of 58 to 1. As noted above, in Orkin the South Carolina Supreme Court held that the ratio of 127 to 1 was unconstitutional. Id. Therefore, the amount of sanctions imposed upon Appellant by the Appellate Panel should be considered unconstitutional as well. (R. p. 10, ¶ 27; Atkinson). Further, Appellants have the right against excessive fines under the United States Constitution. (U.S.C.A. Const. Amend. VIII). Thus, pursuant to the Eighth Amendment of the United States Constitution, the imposition of sanctions by the hearing commissioner is unconstitutional. (R. p. 10, ¶ 27; U.S.C.A. Const. Amend. VIII).

CONCLUSION

For all of the foregoing reasons, the Appellate Panel's decision should be reversed in its entirety.

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/s/ Michael E. Patterson, Jr.
Michael E. Patterson, Jr.
Christopher C. Mingledorff
245 Seven Farms Drive, Suite 310, Box 13
Charleston, SC 29492
(843) 471-1015
Attorney for Appellant