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SC Court of Appeals

**DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
*en banc*, THE HONORABLE MELODY L. JAMES, CHAIR,**

**SCWCC FILE NO.: 2001117**

Timothy Starnes,

Claimant,

v.

MERITAGE ASSET MANAGEMENT, INC. d/b/a Century Glass,

Employer, and

INSURANCE COMPANY OF THE WEST,

Carrier,

Defendants.

Hearing held in Richland County,  
South Carolina on May 16, 2022

Per notice timely and properly served upon all Parties of Interest.

Appearances: Richard C. Alexander, Esquire of Shelly Leeke Law Firm of North  
Charleston, South Carolina, attorney for the Claimant, appeared on his own  
behalf.

Timothy Starnes, Respondent, *pro se*

Filed: October 12, 2022

## I. STATEMENT OF THE CASE

This matter came before the Commission pursuant to an Attorney Fee Petition filed attendant to a Settlement Agreement and Final Release (Clincher) on July 12, 2021. According to the terms of the Clincher, Claimant received \$85,000.00 representing \$40,781.88 as compensation for indemnity and \$44,218.12 "in exchange for the Clincher and future medical treatment." The entire \$85,000.00 was allocated as follows: \$56,600.92 as net proceeds to Claimant, \$28,333.33 as attorney fees, and \$65.75 as cost reimbursement.

Claimant's entitlement to these benefits arose out of an admitted injury by accident that occurred on January 6, 2020 while he was climbing down a ladder injuring his back and right knee. Defendants provided treatment with Dr. Schaaf for his right knee and Dr. Robert Alexander for his back. Dr. Schaaf released Claimant at maximum medical improvement on December 20, 2020 opining that he sustained 20% impairment to the right lower extremity. According to Dr. Schaaf, Claimant would require future treatment in the form of physical therapy, injections, NSAIDS, topicals, and eventually an arthroplasty. He also opined that Claimant was permanently restricted from squatting, crawling, climbing, or traversing ladders. Claimant also presented for an independent medical evaluation with Dr. Lowery. Dr. Lowery agreed with Dr. Schaaf's 20% impairment rating but opined that Claimant's current impairment was caused by a pre-existing knee condition. Dr. Alexander released Claimant at Maximum medical improvement on February 2, 2020 opining that the work accident caused 5% impairment to the back. In his opinion, Claimant required future treatment in the form of injections, physical therapy, and pain medication as needed.

Counsel first appeared before the Single Commissioner arguing on behalf of his attorney fee petition on September 8, 2021. This initial hearing was ultimately continued to allow Claimant the opportunity to be present and to allow Counsel to call Defendant's Attorney as a witness. Prior to the September Hearing, the Single Commissioner requested an itemization of the \$44,218.12 representing the amount reserved for future medical treatment. Counsel responded requesting clarification on the relevant statutory authority restricting attorneys from taking a fee on sums allocated towards future medical treatment, informing the Commission that the agreement did not include a formal set-aside for sums dedicated to medical care, and objecting to venue.

The September proceeding was rescheduled for October 21, 2021 in Walterboro, South Carolina. In the interim, Counsel submitted an Amended Fee Petition on September 17, 2021

allocating \$1,000.00 towards Claimant's future medical treatment and reducing his fee to \$28,000.00. The October 21, 2021 Hearing was also continued and reset to allow Claimant an opportunity to retain separate legal counsel.

This matter was re-set for a Hearing before the Single Commissioner on January 5, 2022 in Richland County, South Carolina to resolve the dispute of attorney fees. Richard C. Alexander, of Shelly Leeke Law Firm, Claimant's counsel, appeared on his own behalf. Mr. Starnes, Claimant, appeared *pro-se*. After a hearing on the record, the Single Commissioner issued a Decision & Order on February 17, 2022 denying both Counsel's Form 61 Fee Petitions and awarding attorney's fees based upon 1/3 of the portion of the settlement received as compensation for indemnity benefits and costs reimbursement. Counsel timely filed the instant appeal alleging 26 errors of fact and law disputing the Single Commissioner's calculation of the fee on multiple grounds. The matter was heard before the Appellate Panel, sitting *en banc*, on May 16, 2022.

#### FINDINGS OF FACT

On February 17, 2022, the Single Commissioner issued his Decision and Order Containing the following findings of fact and conclusions of law:

#### FINDINGS OF FACT

1. *This matter arose from Claimant's January 6, 2020 work-related accident in which he sustained injuries to his back and right knee while descending a ladder during his employment with Defendants, Meritage Asset Management, Inc. (d/b/a/ Century Glass). (Commission File).*
2. *Claimant's average weekly wage is \$497.31. His corresponding compensation rate is \$331.56. (Commission File; Clincher).*
3. *Defendants provided treatment for Claimant's right knee with Dr. Adam Schaff. Dr. Schaff released Claimant at maximum medical improvement on December 21, 2020 and issued a 20% impairment rating for his right lower extremity. (Clincher; Counsel's APA 1).*
4. *During Claimant's physical exam, Dr. Schaff noted the presence of a mildly antalgic gait and assigned the following permanent work restrictions: Light Duty work assignments requiring no squatting, no crawling, no climbing, and no use of ladders. (Counsel's APA 1).*

5. *In Dr. Schaff's medical opinion, stated to a reasonable degree of medical certainty, Claimant requires future treatment in the form of "physical therapy, injections, NSAIDS, topicals, and eventually an arthroplasty." These modalities tend to decrease the period of disability. (Counsel's APA 1; Hr. Tr. p. 7, ln. 24-25; p. 8, ln. 1).*
6. *Claimant also presented to Dr. Robert Lowery for an independent medical evaluation of his right knee on April 1, 2021. (Counsel's APA 3). In his medical opinion, stated to a reasonable degree of medical certainty, he agreed with Dr. Schaff's 20% impairment rating but disagreed that the 20% impairment could be attributed to the January 1, 2020 work injury. (Counsel's APA 3). In his treatment notes, he states that Claimant suffered no additional impairment because of the work injury and does not mention the need for future treatment. (Counsel's APA 3).*
7. *Defendants also provided treatment for Claimant's back with Dr. Robert Alexander. Dr. Alexander released Claimant at maximum medical improvement on January 8, 2021 and issued a 5% impairment rating to the lumbar spine. (Clincher, Counsel's APA 2).*
8. *In his medical opinion, stated to a reasonable degree of medical certainty, Claimant sustained no physical limitations because of his back injury but would require future treatment in the form of period injections, therapy, and topical medications as needed. (Counsel's APA 2).*
9. *Though Counsel originally argued that Claimant was entitled to a knee replacement during negotiations, he reversed course during the hearing when questioned about how he arrived at the \$1,000.00 valuation for future medical treatment stating that "none of the medical care was guaranteed." (Hr. Tr. p. 8, ln. 18-21; p. 10, ln. 20-22).*
10. *The parties entered into an Agreement and Final Release on July 8, 2021 agreeing that Claimant sustained an injury by accident arising out of his employment but disagreeing on Claimant's entitlement to future medical treatment, additional temporary indemnity benefits, and the extent of causally related permanent disability. (Clincher).*
11. *The agreement states in relevant part: "Claimant fully understands and acknowledges that the payment of [\$85,000.00] represents [40%] permanent partial disability to Claimant's right leg, [15%] permanent partial disability to the lumbar spine, and the remaining balance in exchange for the Clincher and future medical treatment." (Clincher)*

12. *According to the terms of the Agreement, the lump sum of \$85,000.00 is allocated as follows: \$40,781.88 for indemnity benefits and \$44,218.12 for future medical treatment. These calculations indicate an unusual scenario: Defendants agreed to pay more money for future medical care than for indemnity benefits.*
13. *Regardless of this calculation, the Agreement allocates \$56,600.92 in net proceeds to Claimant, \$28,333.33 in attorney fees, and \$65.75 in costs. (Clincher). Claimant's counsel calculated his fee on the entire \$85,000.00 settlement.*
14. *Counsel's initial Attorney Fee Petition, received by the Commission on July 12, 2021, sought approval of 1/3 of the entire \$85,000.00 settlement (\$28,333.33) in fees and \$65.75 in costs. (Commission File).*
15. *By e-mail correspondence, the Commission requested an itemization of \$44,218.12, the portion of the settlement representing the sum paid for future medical care. Counsel responded seeking clarification on the relevant statutory authority restricting attorneys from taking a fee on sums allocated towards future medical treatment, informing the Commission that the agreement did not include a formal set-aside for sums dedicated to medical care, arguing that provisions of the Act relating to attorney fees do not apply to settled claims, settlements are not "an Order of the Commission." (Commission File).*
16. *Counsel filed an Amended Attorney Fee Petition on September 17, 2021. The revised fee petition specifically allocated \$1,000.00 for Claimant's future medical care, making the total sum received for indemnity compensation \$84,000.00. Counsel then calculated his fee by taking the statutory maximum of 33 and 1/3% of \$84,000.00 (\$28,000.00). His cost calculations have remained static.*
17. *At the Hearing, Counsel failed to provide any rationale supporting his calculations for Claimant's future medical needs. He simply stated: "We agreed to just take out a thousand dollars to see if that would suffice for [sic] approval of the settlement." (Hr. Tr. p. 10, ln. 17-20). There was no evidence offered to explain how the parties determined the \$1,000.00 figure accurately represented the amount necessary to adequately compensate Claimant for the possibility of "physical therapy, injections, NSAIDS, topicals, and eventually an arthroplasty in the future." (Counsel's APA I; Hr. Tr. p. 7, ln. 24-25; p. 8, ln. 1).*

18. Claimant testified that he initially agreed with allocating only \$1,000.00 towards his future medical care, but that he later disagreed with this calculation at the hearing and continues to disagree with this valuation. (Hr. Tr. p. 12, ln. 17-24).
19. Claimant further testified that, based on Dr. Schaff's opinion, he agreed that his knee condition will eventually require a knee replacement. (Hr. Tr. p. 13, ln. 9-14).
20. Claimant was unsure if he would be entitled to more of the settlement funds. (Hr. Tr. p. 13, ln. 15-18).
21. At the start of the hearing, Claimant advised of his difficulties in obtaining legal representation prior to the Hearing and, despite these difficulties, he desired to proceed with the hearing arguing on his own behalf. (Hr. Tr. p. 5, ln. 8-15).

#### CONCLUSIONS OF LAW

1. Because "compensation" does not include funds paid for future medical care, any attorney fee calculated on a balance that includes sums due Claimant to compensate him for the costs of future medical care is unreasonable under S.C. Code Reg. 67-1205B and the Rules of Professional Conduct.
2. The South Carolina Workers' Compensation Act requires the Commission to approve attorney fees. See S.C. Code Ann. § 42-15-90 (2021) and S.C. Code Ann. § 42-3-185 (2021). It also vests the Commission with the authority to promulgate regulations restricting the amount of attorney's fees received for services. See S.C. Code Ann. § 42-15-90 (2021). "The Commission has a duty to examine a requested attorney's fee for reasonableness even when the parties themselves have not challenged the validity of the fee agreement, the review of the fee being part of the Commission's authority under § 42-15-90. Stafford v. Greg's Indus. Constr., 2015 WL 851353 (S.C. Work Comp. Comm.). The contractual agreement between Counsel and his client is not binding upon the Commission.
3. South Carolina Workers' Compensation Commission Regulation 67-1205 provides guidance to attorneys when calculating a proposed fee for submission to the Commission for approval. "[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts. . . will defer to the agency's interpretation absent compelling reasons." An agency's interpretation of its own statutes and regulations will receive deference from the courts unless it is "arbitrary, capricious, or manifestly contrary to the

- statute." Kiawah Dev. Partners, II v. S. Carolina Dept. of Health and Envtl. Control, 411 S.C. 16, 34-35 (2014) (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., et al., 467 US 837, 844 (1984)).
4. At a minimum, S.C. Code Regs. 67-1205 requires that an attorney's fee for services must be reasonable. See S.C. Code Reg. 67-1205B (2021). If the parties agree to a contingent fee, it is deemed reasonable if "(1) the attorney fully explains the fee agreement to the client and informs the client of the total dollar amount of the fee that will be deducted from the client's benefits; and (2) the client agrees to the fee by signing a completed Form 61; and (3) the attorney calculates the fee according to subsection C unless the fee conflicts with the South Carolina Rules of Professional Conduct." S.C. Code Reg. 67-1205B (2021).
  5. The amount to be charged should also be considered when assessing the reasonableness of an attorney's fee. "An attorney may charge up to, but not more than 33 1/3% of the total amount of compensation. . . . When unusual circumstances exist, the attorney may attach to the Form 61 a short memorandum supporting approval of a fee calculated on an hourly rate or by quantum meruit." S.C. Code Reg. 67-1205C (2021).
  6. Pursuant to § 42-1-100, "compensation" is the money allowance payable to an employee or to his dependents. A Claimant's entitlement to medical care is separate from a Claimant's entitlement to compensation. "[L]iability for medical benefits should be not diminished by the fact that, . . . income benefits are not payable." Larson's Worker's Compensation Law § 94.01 [3]; See also Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 581 (Ct. App. 1999) (citing Rice v. Froehling & Robertson, Inc., 267 S.C. 155, 159 (1976) ("Section 42-15-60 'does not by its terms equate an employer's liability for medical treatment to another period of liability, for income compensation or otherwise.'"))
  7. Prior En Banc Orders of this Commission have held that "'Compensation' does not include monies paid to the Claimant for future medical care." Clark v. Pyramid Masonry, SCWCC Op. No. 0427461 (2017). In addition, "it is not customary or proper in cases before the Workers' Compensation Commission to charge an injured worker a contingency fee against benefits provided to an injured worker for medical treatment. Id. See also Stafford v. Greg's Indus. Constr., 2015 WL 851353 (S.C. Work Comp. Comm.) (explaining and affirming in full the Hearing Commissioner's denial of a requested attorney fee calculated upon the value of a settlement intended to compensate Claimant for future medical treatment). Bias v. Employee

- Frigidaire Foods*, 1999 WL 33224035 (S.C. Work Comp. Comm.)(Hearing Commissioner subtracted medical costs from settlement prior to calculating 1/3 attorney fee).
8. For decades, the South Carolina Attorney General has opined that § 42-15-90 protects society "from the wrongs to injured employees and their dependents that would likely follow if some restrictions were not placed on the costs of legal services rendered injured workers in the prosecution of their claims for compensation". S.C. Op. Atty. Gen. 185 (1986). "The principal purpose of [§ 42-15-90] is to protect the workman from the charging of excessive fees". See S.C. Op. Atty. Gen. 185 (1986), citing 1936-37 S.C. Op. Atty. Gen., p. 299.
  9. It is unclear that Claimant agreed to the fee Counsel purports to charge or that he was adequately informed as to the amount of his net settlement proceeds. As previously stated, it is settled law that an attorney may not take a fee from sums allocated for future medical care. All documentation prepared and offered to Claimant by Counsel includes a fee calculation based upon nearly the entire lump sum settlement, the exception being that the parties initially agreed to allocate \$1,000.00 towards Claimant's future medical care despite a medical opinion recommending a future knee surgery.
  10. Claimant's testimony is consistent with this documentation. He initially agreed that \$1,000.00 was sufficient to pay for his future medical treatment needs. However, he disagreed during the hearing that this amount would be sufficient and testified that he thinks he will require a knee replacement in the future. As a result, he was unsure whether he would be entitled to more of the settlement than what was previously explained. He may have been provided with the amount of his net settlement proceeds; however, he was provided with an incorrect calculation further complicating his understanding of the settlement terms.
  11. Assuming, in arguendo, that Counsel adequately explained the terms of the fee agreement, informed his client of the total amount to be deducted from his benefits, and Claimant agreed to the fee by signing two separate Forms 61, the fee is unreasonable because it was not based upon 33 1/3% of the total amount of compensation. Counsel incorrectly included sums intended for future medical treatment in his fee calculations.
  12. The terms of the Clincher clearly state that Claimant accepted the total sum of \$85,000.00 in satisfaction and complete release of his claim against Defendants. Of that lump sum, \$40,781.88 was compensation for permanent disability benefits. The parties clearly state in the Clincher that they agreed Claimant should be compensated for 40% permanent disability

to his right leg and 15% permanent disability to his back. The remaining sum, \$44,218.12 was intended as moneys paid "to clincher and future medical treatment." Claimant's authorized treating physicians set forth a laundry list of recommended additional treatments that would tend to lessen his period of disability, the most expensive of which is a right knee arthroplasty.<sup>1</sup>

13. During argument, Counsel relied on the Utica language in the Agreement to support his entitlement to an attorney fee calculated on the entire settlement amount. This argument is unpersuasive. The Settlement Agreement is not binding on the issue of attorney fees. The Commission has an independent duty to ensure attorney fees are reasonable to prevent exactly the injustice that has occurred here: A claimant sustains an injury to his knee while he is working, may require expensive future medical treatment, and will not receive enough of the benefit of his bargain to pay for the treatment because he is contractually bound to pay his attorney. The costs of his treatment inevitably will be shifted back to the Claimant himself, another insurer, or society at large. Holding that Counsel is entitled to take a fee on the entire settlement when more than half of it has been dedicated to future medical treatment<sup>2</sup> runs afoul of the purpose of the Act and contravenes public policy.
14. Counsel's Amended fee petition is likewise of little use in assuaging these concerns. The Amended petition simply allocates \$1,000.00 for future medical, bases the new calculation on roughly the same lump sum (\$84,000.00), and allocates an additional \$333.33 to Claimant's net proceeds. Despite his original position during settlement negotiations that Claimant will require a right knee arthroplasty in the future, during the hearing Counsel reversed course arguing that it was unclear whether Claimant would require the surgery in the future. There was seemingly no consideration given to any valuation of Claimant's future medical needs in arriving at this valuation. The only consideration given was to the Commission's burdensome inquiry and how to achieve an approval of the full fee. Counsel testified: "We agreed to just take out a thousand dollars to see if that would suffice for [sic] approval of settlement." (Hr. Tr. p. 10, ln. 17-20).

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<sup>1</sup> An independent medical evaluation of Claimant's right knee performed by Dr. Lowery partially contradicts Dr. Schaff's conclusions. In his opinion Claimant's knee problems are largely pre-existing and Claimant suffered no additional impairment to his knee as a result of the work accident.

<sup>2</sup> The undersigned has no choice but to allocate the entire remaining sum to future medical treatment neither the Clincher itself nor testimony at the hearing itemized how much was to be paid to "clincher" and how much was to be paid for "future medical."

15. *Therefore, because any judicial attempt to value Claimant's future medical treatment would be speculative and the Clincher does not specifically set forth the amount of the remaining \$44,218.12 that should be allocated towards future medical treatment, the entire sum must be excluded from the attorney fee calculation.*
16. *There is no adjustment to Counsel's requested cost reimbursement.*

#### ORDER

*IT IS ORDERED that Counsel's July 12, 2021 Form 61 Attorney Fee Petition is denied.*

*IT IS ORDERED that Counsel's September 17, 2021 Form 61 Attorney Fee Petition is denied.*

*IT IS ORDERED that Counsel is not entitled to include sums paid Claimant for future medical treatment in his fee calculation.*

*FURTHERMORE, IT IS ORDERED that Counsel shall receive an award of attorney's fees equal to 1/3 of the portion of the settlement received for indemnity ( $\$40,781.88 \times 0.33 = \$13,458.02$ ) and \$65.75 as costs reimbursement.*

*THEREFORE, IT IS ORDERED that Counsel shall, within 14 days of the date of this Order, disburse \$13,523.77 in attorney fees and costs to his firm and remit to Claimant any balances remaining in trust.*

*IT IS SO ORDERED!*

#### ISSUES OF APPEAL

Whether the Single Commissioner erred in misstating the Statement of the Case by stating that Claimant was entitled to future medical treatment when this fact was disputed.

Whether the Single Commissioner erred in finding as fact that Counsel argued for entitlement to a knee replacement and then reversed course when such facts were not evidence.

Whether the Single Commissioner erred in finding as fact the Clincher allocated \$44,218.12 "for future medical treatment" when the Clincher specifically stated the remaining amount included value for clincher of the claim.

Whether the Single Commissioner's finding of fact that the breakdown of the total amount of compensation "indicated an unusual scenario" was supported by the evidence.

Whether the Single Commissioner erred in relying upon e-mail correspondence that was a part of the Commission file.

Whether the Single Commissioner erred in misstating as fact an email from Counsel that provided rationale for his attorney fee?

Whether the Single Commissioner erred in finding as fact that Counsel is required to provide evidence for rational for how he and his client agreed to terms prior to submitting an Amended Form 61.

Whether the Single Commissioner erred in finding as fact that future medical treatment in an opinion from a medical provider is the determining factor for entitlement to future medical treatment.

Whether the Single Commissioner erred as a matter of law by inaccurately defining the term "compensation".

Whether the Single Commissioner erred as a matter of law by concluding Claimant was due any amount for future medical care when future medical care was disputed.

Whether the Single Commissioner erred as a matter of law by concluding Counsel's fee is unreasonable when it complies with S.C. Code Reg. 67-1205B and the Rules of Professional Conduct.

Whether the Single Commissioner erred as a matter of law by concluding Claimant was entitled to any medical care when future medical care was disputed and not ordered.

Whether the Single Commissioner erred as a matter of law by relying on prior *en banc* orders with facts distinguishable from this appeal.

Whether the Single Commissioner erred as a matter of law by concluding that it was unclear Claimant agreed to Counsel's requested attorney fee and unclear if Claimant was aware of the amount of his net settlement proceeds despite two signed Form 61 Fee Petitions in the record.

Whether the Single Commissioner erred as a matter of law by concluding that there is "settled law" based upon *en banc* orders of the Commission.

Whether the Single Commissioner erred as matter of law by relying on a medical opinion to, de facto, award Claimant entitlement to future medical care and concluding that \$1,000.00 was not enough for disputed future medical care.

Whether the Single Commissioner erred as a matter of law by relying on the lay testimony of Claimant that he will require a knee replacement to conclude that he is entitled to such when that future medical care was disputed and not a guaranteed entitlement.

Whether the Single Commissioner erred as a matter of law by concluding Claimant was provided an incorrect calculation and that his interpretation of the settlement terms was misunderstood when no such evidence exists.

Whether the Single Commissioner erred as a matter of law by concluding that Counsel's attorney fee is unreasonable and based on sums intended for future medical treatment.

Whether the Single Commissioner erred as a matter of law by concluding that because the authorized treating physician recommended future medical treatment that guarantees Claimant's entitlement to such treatment, especially when such treatment was clearly disputed and had not been ordered.

Whether the Single Commissioner erred as a matter of law by concluding that because Claimant "may require expensive future medical treatment" that somehow entitles him to a specific amount when no such evidence was provided to substantiate the cost of this disputed future medical treatment.

Whether the Single Commissioner erred as a matter of law by speculating that Claimant's future medical treatment will become the responsibility of himself, another insurer, or society at large.

Whether the Single Commissioner erred as a matter of law by concluding that more than half of the settlement was dedicated to future medical treatment when the Clincher clearly stated the money was also for the value of the clincher.

Whether the Single Commissioner erred as a matter of law by concluding that \$1,000.00 was not sufficient for future medical treatment when no evidence was submitted concerning future care costs and when no future medical treatment was guaranteed or ordered.

Whether the Single Commissioner erred as a matter of law by concluding that \$44,218.12 is only for future medical treatment when the Clincher specifically stated the money was also for the value of a clincher.

Whether the Single Commissioner erred as a matter of law in ordering Counsel is not entitled to a fee based upon the total amount of compensation.

The Form 30 is contained within the Commission File.

#### **DECISION OF THE APPELLATE PANEL**

The Appellate Panel has reviewed the Single Commissioner's Decision & Order and a majority hereby **AFFIRMS** the Decision & Order **IN FULL** and adopts the Single Commissioner's findings of fact and conclusions of law. An Appellate Panel minority dissents

and would reverse the Decision & Order. The Panel Majority adopts the findings of fact and conclusions of law of the Single Commissioner as its own in addition to the following findings of fact and conclusions of law:

#### APPELLATE PANEL FINDINGS OF FACT

1. This attorney fee matter originates from Counsel's representation of Claimant for accidental, work-related injuries to Claimant's back and right knee during Claimant's employment with Defendant Meritage Asset Management. (Commission File).
2. Defendants accepted the claim and provided treatment for Claimant's right knee with Dr. Adam Schaff and provided treatment for Claimant's back with Dr. Robert Alexander. *See generally* (Clincher).
3. At the conclusion of Claimant's treatment, the parties agreed to resolve the matter by Agreement and Final Release (Clincher). The Clincher states in relevant part: "Claimant fully understands and acknowledges that the payment of [\$85,000.00] represents [40%] permanent partial disability to Claimant's right leg, [15%] permanent partial disability to the lumbar spine, and the remaining balance in exchange *for the Clincher and future medical treatment.*" The value of the indemnity portion of the claim is \$40,781.88 (195 weeks X 0.40 X \$331.56 + 300 weeks X 0.15 X 331.56). Clincher agreement does not itemize the remaining \$44,218.12 reserved for medical treatment and clincher. (Clincher, p. 2) (emphasis added).
4. The Clincher also states that "disputes have now arisen concerning Claimant's entitlement to further medical care and treatment, further temporary total disability compensation and the extent of causally related permanent disability, if any." (Clincher, p. 1). The language of the Clincher does not state that the claim itself is doubtful and disputed, only that Defendants disagreed that Claimant was entitled to future medical care and other benefits.
5. During the Single Commissioner Hearing, Counsel could not testify as to why the carrier would pay more for future medical treatment and to clincher a claim than for indemnity or how the carrier valued the claim. Defense Counsel was not present at the Hearing. (Hr. Tr. p. 6; Hr. Tr. p. 7, ln. 1-5).
6. Furthermore, the Clincher states: "It is expressly understood Defendants take no position and make no representation as to the requested allocation of the settlement sum as set forth

above and that the proposed allocation in no way affects the absolute release of Defendants.” (Clincher, p.3).

7. Counsel and Claimant agreed to set aside \$1,000.00 for future medical treatment. (Hr. Tr. p. 10, ln. 17-20; Commission File). However, Counsel was unable to provide a rationale as to how he valued the additional medical treatment in the Amended Form 61. (Hr. Tr. p. 10, ln. 12-25; Hr. Tr. p. 11, on. 1-2).

#### APPELLATE PANEL CONCLUSIONS OF LAW

1. The majority affirms the Single Commissioner’s calculation of Counsel’s attorney fee. Counsel is not entitled to take a fee on sums paid Claimant for future medical treatment pursuant to the Act and Commission Regulations. S.C. Code Ann. § 42-15-90 requires Commission approval of attorney fees. S.C. Code Ann. § 42-15-90(A)(2012, as amended). S.C. Code Ann. § 42-3-185 permits the Commission to promulgate regulations to implement section 42-15-90. S.C. Code Ann. § 42-3-185 (1980). The Commission exercised this authority in the early 1990s and promulgated S.C. Code Regs. 67-1205 governing the approval of attorney fees. Regulation 67-1205, as all Commission regulations, are “entitled to a liberal construction in furtherance of the purpose for which the South Carolina Workers’ Compensation Law is intended” and “[i]n doubtful cases, the . . . regulations shall be construed in favor of the injured worker.” S.C. Code Regs. 67-201 A-B (2018, as amended); *See also Case v. Hermitage Cotton Mills*, 236 S.C. 515, 531 (1960). Were we to determine that the resolution of this matter on a clincher and subsequent execution of a Form 61 eliminates the Commissioner’s ability to approve what is a reasonable attorney’s fee, we would reach a conclusion that is inconsistent with the statutory role of the Commissioner in the settlement process which is set forth in Section 42-15-90 and render the legislative act authorizing the Commission to perform such an undertaking meaningless. *See Hodges v. Rainey*, 341 S.C. 79, 85 (2000) (“[I]t is not the court’s place to change the meaning of a clear and unambiguous statute. Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” (internal citations omitted)).

2. The finality of the clincher is its finality as to what each party is entitled to and/or obligated to do to resolve the claim. That finality does not extend to the attorney's fee which is statutorily subject to the approval of the Commission. This process cannot be viewed solely as contract law. It must be viewed and is correctly viewed as workers' compensation law and, as such is controlled by Title 42- the Workers' Compensation Act- which charges the Commissioner with this very specific responsibility in this case. The Single Commissioner discharged that responsibility in this case by applying the provisions of Regulation 67-1205 in light of the underlying purpose of the Act.
3. The Majority agrees that generally the Commission is not authorized to award medical costs pursuant to S.C. Code Ann. § 42-15-60.<sup>3</sup> Counsel speculated during the Single Commissioner Hearing regarding "if this had gone to a hearing and the knee had been found compensable." (Hr. Tr. p. 7, ln. 6-8). The Dissent, presumably, relies upon this testimony and reasons that the "causation of the right knee and medical treatment for the right knee were in dispute." By admitting the claim, providing treatment for the knee, and subsequently resolving the claim on a clincher, Defendants foreclosed the opportunity to seek a specific compensability finding by the Commission. The majority recognizes a distinction between a Commission finding of compensability and Defendants' acceptance of the body part; however, whether the basis for Claimant's receipt of treatment is a Commission finding or Defendants' acquiescence is of little import. The injury itself was not disputed, according to the Clincher, only the need for additional medical treatment and Defendants agreed to pay a sum to resolve the issue.
4. The Single Commissioner's Decision and Order did not award medical costs. The Single Commissioner's Decision & Order determined that the attorney fee requested was unreasonable and decreased the attorney fee. The additional sums remitted to Claimant, by the terms of the Decision & Order, were an unallocated amount to which he was already entitled by agreement. There is no additional award of benefits other than that which was agreed to by the parties. The amount Claimant receives because of the reduced fee, pursuant to the terms of the agreement, could also be allocated "to clincher." The Single Commissioner could not speculate as to the amounts reserved for clincher or for future

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<sup>3</sup> The Commission is authorized to award the costs of emergency medical treatment if the employer fails to provide such care. See S.C. Code Ann. § 42-15-60 (2007, as amended).

medical treatment and, likewise, it would be impermissible speculation for this Commission to determine that the sum remitted to Claimant was allocated only for future medical treatment and not also “to clincher.” Burnette v. City of Greenville, 401 S.C. 417, 428 (Ct. App. 2012)(“[W]hile a finding of fact of the Commission will normally be upheld, such a finding may not be based upon surmise, conjecture, or speculation...”).

5. The Single Commissioner found the requested attorney fee unreasonable because it was based upon a sum allocated for future medical treatment and, according to our Regulations, an attorney may only charge a fee on the “total amount of compensation.” See S.C. Code Regs. 67-1205 C (2021). As the Single Commissioner stated in his Decision & Order, “a Claimant’s entitlement to medical care is separate from a Claimant’s entitlement to compensation.” “[L]iability for medical benefits should be not diminished by the fact that, . . . income benefits are not payable.” Larson’s Worker’s Compensation Law § 94.01 [3]; See also Dodge v. Brucoli, Clark, Layman, Inc., 334 S.C. 574, 581 (Ct. App. 1999)(citing Rice v. Froehling & Robertson, Inc., 267 S.C. 155, 159 (1976)(“Section 42-15-60 ‘does not by its terms equate an employer’s liability for medical treatment to another period of liability, for income compensation or otherwise.’”)
6. This finding was based upon the following language in the Clincher: “Claimant fully understands and acknowledges that the payment of [\$85,000.00] represents [40%] permanent partial disability to Claimant’s right leg, [15%] permanent partial disability to the lumbar spine, and the remaining balance in exchange for the Clincher and future medical treatment.” The Dissent reasons that the estimated \$1,000.00 valuation for future medical treatment set forth on Counsel’s Amended, signed Form 61 is *ipso facto* satisfactory proof of future medical costs and would grant Counsel’s Amended Attorney Fee Petition. In another case with an alternate set of facts, perhaps this is true. However, the future treatment valuation in this case is speculative considering the other facts and circumstances. Defendants agreed to take no position regarding the allocation of the sums paid to clincher and for medical treatment and were not present before the Single Commissioner to testify. In addition, Counsel could not provide a rationale for how he arrived at the \$1,000.00 valuation despite Dr. Schaff’s (Claimant’s authorized treating physician for the knee) medical opinion stated to a reasonable degree of medical certainty that Claimant would eventually require a right knee arthroplasty. Underlying this

uncertainty is Claimant's admission during the Single Commissioner Hearing that though he initially agreed with the valuation and signed the Form 61, he did not agree with the calculation of the costs for his future medical treatment.

7. Furthermore, the requested fee is unreasonable because it is not a fee customarily charged in the locality for similar services. For an attorney's fee to be reasonable, it must meet the requirements of S.C. Code Regs. 67-1205 B. It must also conform to the Rules of Professional Conduct (Rule 1.5(a)(3)); The South Carolina Appellate Court Rules (Rule 407, SCAR), and the factors set forth by The South Carolina Supreme Court in Glasscock v. Glasscock. In Glasscock, the Supreme Court clarified the six factors to be considered when determining a reasonable attorney's fee: (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. Glasscock v. Glasscock, 304 S.C. 158, 160-161 (1991). As the Dissent correctly acknowledges, an attorney "would not be permitted to collect fees against the future medical treatment allocation." Therefore, a fee calculated on sums reserved for claimant's future medical treatment would be unreasonable as it is not a legal fee customarily charged for similar services.
8. Additionally, we find Mr. Alexander's request for payment of this mileage to be without foundation in the Act. Candidly, we were taken aback. We have never heard of such a request from an attorney before. As Commissioner Wilkerson correctly pointed out, the only source for such payment would be from Mr. Alexander's client whose best interest he is obligated to represent. Counsel cites to no statutory provision authorizing the Commission to reimburse him for mileage to attend hearings to support attorney fees. We are troubled by his request. The settlement funds, absent funds paid for approved attorney fees,<sup>4</sup> belong not to the state, the Commission, or the carrier, but to the Claimant. Accordingly, this request is denied.

## ORDER

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<sup>4</sup> The Commission has approved a fee in this claim of \$13,458.02 and costs of \$65.75. Claimant's accident occurred on January 6, 2020. His claim resolved before the hearing on Defendant's Form 21, on July 8, 2021, approximately 18 months later. There is no letter of representation in the Commission File indicating when Counsel was retained. Assuming Counsel represented Claimant from the date of injury, in 18 months he spent \$65.75 pursuing benefits for his client.

**IT IS ORDERED** that Counsel's July 12, 2021 Form 61 Attorney Fee Petition is denied.

**IT IS ORDERED** that Counsel's September 17, 2021 Form 61 Attorney Fee Petition is denied.

**IT IS ORDERED** that Counsel is not entitled to include sums paid Claimant for future medical treatment in his fee calculation.

**IT IS ORDERED** that Counsel is not entitled to reimbursement for mileage to attend hearings to support an attorney fee award.

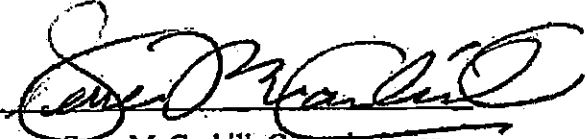
**FURTHERMORE, IT IS ORDERED** that Counsel shall receive an award of attorney's fees equal to 1/3 of the portion of the settlement received for indemnity ( $\$40,781.88 \times 0.33 = \$13,458.02$ ) and \$65.75 as costs reimbursement.


**THEREFORE, IT IS ORDERED** that Counsel shall, within 14 days of the date of this Order, disburse \$13,523.77 in attorney fees and costs to his firm and remit to Claimant any balances remaining in trust.

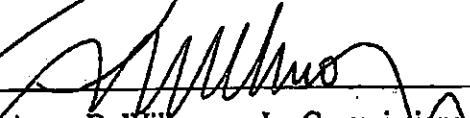
**IT IS SO ORDERED!**

\_\_\_\_\_  
DATE

Columbia, South Carolina

  
Gene McCaskill, Commissioner

  
R. Michael Campbell, II, Commissioner

  
Avery B. Wilkerson, Jr., Commissioner

**Tim Starnes v. Meritage Asset Management, Inc.**

**WCC File No.: 2001117**

**Minority Dissent Opinion**

We respectfully disagree with the majority Decision and Order in this case. The Claimant's Form 61 Fee Petition was submitted to the Single Commissioner requesting a fee of 33.33% of the total Settlement Agreement, which is permitted under the Act. The Settlement Agreement, upon which the Form 61 Fee Petition was based, specifically states there was a "bona fide dispute" as to whether the Claimant was entitled to additional medical treatment, temporary total disability compensation, and the extent of permanent disability, if any.

The Settlement Agreement sets forth a specific allocation of the \$85,000.00 that "represents Forty percent (40%) permanent partial disability to Claimant's right leg, Fifteen percent (15%) permanent partial disability to the lumbar spine, and the remaining balance in exchange for the Clincher and future medical treatment." (Emphasis added).

Initially, the parties did not agree to any specific allocation of the remaining balance of the settlement; however, after a Pre-Hearing Conference on the initial Fee Petition dispute, the parties agreed to set aside \$1,000.00 of the remaining balance towards medical treatment. The parties did not agree to any other allocation of the remaining balance beyond the \$1,000.00 and we do not believe the Commission has the authority to go behind a filed and approved Agreement & Release and make additional allocations of settlement funds beyond the specific terms of the Settlement Agreement or any Addendums as agreed to by the parties.

In this case, the causation of the right knee and the medical treatment for the right knee were in dispute in the underlying matter. To determine the medical costs, the actual underlying case would have to be tried, which is not before us. The medical treatment to the back was outlined; however, the Commission does not have a method to determine and award medical costs, as the Commission is only authorized by statute to award or deny medical treatment. The Commission is not authorized to determine amounts of medical treatment and award those amounts.

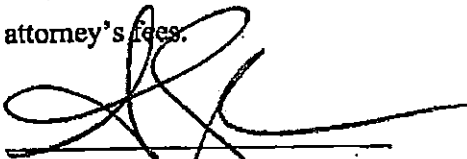
Regulation 67-1205 (B) states, that if the parties agree to a contingent fee contract, the fee is deemed reasonable when the following requirements are met and the requested fee does not conflict with the South Carolina Supreme Court Disciplinary Rule on determining a reasonable fee: (1) The attorney fully explains the fee agreement to the client and informs the client of the

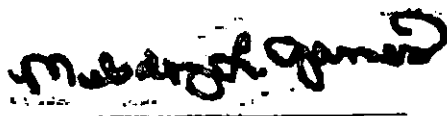
total dollar amount of the fee that will be deducted from the client's benefits; (2) The client agrees to the fee by signing a completed Form 61; and (3) The attorney calculates the fee according to Reg. 67-1205 (C), which allows an attorney to charge up to, but not more than, 33.3% of the total amount of compensation, provided no enumerated exceptions or unusual circumstances exists.

We find there are no unusual circumstances or exceptions present in the underlying attorney fee petition dispute that would warrant an alternative calculation of attorney's fees. The Claimant signed a contingency fee contract in this instance and the Settlement Agreement did not specifically allocate or enumerate an amount of the settlement proceeds to be allocated towards future medical treatment. If it had, we agree that attorney would not be permitted to collect fees against the future medical treatment allocation, but because it did not, any allocation determined by the Hearing Commissioner would have been based on surmise, conjecture, or speculation, as the parties did not litigate the issue of future medical treatment.

For the reasons set forth above, we respectfully disagree with the Majority and would REVERSE the Decision and Order and would award attorney's fees based on the full clincher agreement less \$1,000 as agreed to by the parties.

We would concur with the majority's decision denying mileage. This issue was not before the single commissioner. And even so, we decline to award mileage to attend hearings to support attorney's fees.

  
\_\_\_\_\_  
Commissioner Aisha Taylor

  
\_\_\_\_\_  
Commissioner Melody L. James

**Order Served via USPS:**

Richard Charles Alexander Shelly Leeke Law Firm, LLC 3614 Ashley Phosphate Road North Charleston, SC 29418	Timothy Starnes 100 Bloomsbury Place Summerville, SC 29485
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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Eugenia Hollmon on October 12, 2022***