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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2023-000187

Pamela Cartee, Claimant,

v.

SC Judicial Department, Employer,
and State Accident Fund, Carrier,

In Re:

Attorney's Fee Petition of Preston F. McDaniel,
Esquire, and John M. Milling, Esquire,Appellants,

v.

SC Workers' Compensation Commission, Respondent.

INITIAL BRIEF OF APPELLANTS

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Attorneys and Appellants

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STATEMENT OF ISSUES ON APPEAL

- I. Did the current Commission err as a matter of law by failing to approve that portion of the attorney's fees as requested by the Appellants in their Fee Petition filed with the Commission, which Fee Petition was submitted in accordance with Statute, Regulations, and case law, and in accordance with the contingency fee agreement entered into by and between the Appellants and their client, Ms. Pam Cartee?

- II. Did the Commission err as a matter of law and fact based on the reliable, probative and substantial evidence in the Record that the fee contract submitted in this matter was in accordance with the Statutes, Regulations of the Commission, and case law, and in accordance with hundreds of other Fee Petitions that the Appellants had filed before the Commission prior to this Fee Petition, all of which had been approved by the Commission, including multiple members of the current sitting Commission, thus making the Decision in this case contrary to the reliable, probative and substantial evidence in the Record and also a legal and Commission precedent?

- III. Did the current Commission err as a matter of law by changing the interpretation of the Statutes and Regulations, particularly without notice to the parties and the Bar that its interpretation had changed?

STATEMENT OF THE CASE

This Appeal arises out of the refusal of the Commission to approve a portion of the attorney's fees requested in the Fee Petition signed by the parties December 8, 2017, and submitted to and received by the Commission for approval on December 11, 2017. (Fee Petition, 12/08/17; WCC Report, 12/12/17). It does not involve a dispute between the parties to the fee contract, Ms. Cartee and her attorneys, but instead involves a dispute between Claimant's Counsel and the current Commission as to the fee that is appropriate under the Statute, Regulations, case law, and the Commissioner's Award filed April 13, 2017, and affirmed by the Full Commission October 17, 2017.

At the time Ms. Cartee retained Counsel, only carpal tunnel injuries to both hands had been accepted, but for which further medical care was not being provided. Of note as to the issue of Claimant's Counsel Fees before the Court, Ms. Cartee at that time was being paid at the weekly compensation rate of \$514.39. Immediately upon retention, Counsel determined that the weekly compensation rate was incorrect and obtained an increase in the compensation rate from \$514.29 to \$698.41, a difference of \$184.02 per week. Over the period of the claim and final Award for total and permanent disability, the increase resulted in a difference in compensation to the Claimant of \$92,010.00. If approved, the total

fees to Claimant's Counsel including fees approved based on the underpayment of previously paid weekly benefits and the full amount requested out of the final Award would total \$82,961.43. The total value of the case prior to Counsel's involvement was \$257,195.00; whereas Ms. Cartee received in her pocket \$266,243.57. (Email to Kellie Lindler, Commissioner AA, 01/09/2018, Commissioner McCaskill Hearing Packet, hereinafter referred to as "Packet").

Due to the efforts of Counsel, including obtaining additional medical care and medical opinion and a Functional Capacity Evaluation, the entirety of the Claimant's hands/arms was accepted, and it was determined that her hands were almost unusable; that she was qualified for less than sedentary work; and in addition, it was determined that her cervical spine was also involved and awarded.

After hearing on September 6, 2016, the Commissioner filed his Award awarding Ms. Cartee total and permanent disability on April 13, 2017 wherein the Hearing Commissioner found that she had reached maximum medical improvement on October 12, 2016 **and** was entitled to the Award for total and permanent disability as of that date, to include the residual value of all weekly compensation benefits, and lifetime medical care for all causally related medical care including the cervical spine, and both arms

and hands. In addition, Claimant's Counsel requested that the "Award" be paid in a lump sum which the Commissioner "awarded", and which was to be calculated and with weekly payments to continue until such calculation was made with such weekly payments constituting payment towards the "Award" which attached as of October 12, 2016 for total and permanent disability representing the residual value of 500 weeks of compensation as of that date. (Order, 04/13/17). (Emp. add.).

The "Award" was appealed to the Full Commission which was not heard until August 22, 2017 with an Order affirming the Commissioner's "Award" totally being filed October 17, 2017 (emp. add.). After the thirty (30) day appeal time ran, on December 8th the Appellants submitted their Fee Petition which forwarded to the Commissioner for review/approval December 11th. (Attorney Fee Petition, 12/08/17; WCC Report, 12/12/17).

In their Fee Petition, the Appellants requested approval of a fee based on the "Award" of total and permanent disability as of the date of the "Award" on October 12, 2016, which "Award" totaled \$220,283.33 (weekly checks is greater than 10/12/16 and the lump sum). While Claimant's Counsel could have requested a Fee of 1/3rd of that amount, \$73,427.78, the Appellants requested approval of a fee of \$73,094.45. Although Reg. 67-1204(F) mandates immediate approval/disapproval of a Fee Petition or that the Commissioner

shall immediately schedule a hearing ..."; no decision was made on the Fee Petition in any regard until January 9, 2018. (emp. add.). Between December 8th and January 9th numerous emails and telephone calls, and actually three (3) personal visits to the Commission were made to determine the status of approval of the attorney's fees as requested. (Packet, 01/09/18). Without explanation on January 9th by email the Commissioner approved a fee of \$59,632.69 (Packet, 01/09/18). After attempts were Appellants had to request the hearing that was supposed to have been scheduled immediately upon the submission of a Fee for approval if there were any questions. (Packet, 01/09/18). That hearing was not set until February 12, 2018. The Hearing Notice for that hearing, although being an ancillary proceeding involving a statutory/regulatory requirement of Commission of approval of attorney's fees, in addition to the Claimant and Appellants, was served on the Defendants and their attorney who waived appearance as they were not involved in this issue. In addition, Ms. Cartee wrote a letter and waived her appearance and in her January 25th letter, after laudatory praise of her attorneys and noting full knowledge, explanation and understanding of the Fee, in part stated:

"Personally, I do not see a reason for this hearing. This hearing should be dismissed, and attorney's fees approved." (Packet, 01/09/18).

At the hearing after accepting Counsel's statements made as an

Officer of the Court and hearing argument reviewing the case law and Regulations, the Commissioner did not give or state on the Record any reason for disapproving a portion of the attorney's fees. (Hrg. Tr., 02/12/18).

Subsequent to a request for the Commissioner to put his position on the Record, on February 21st he entered an Interim Order stating that the request for the balance of the attorney's fees in the amount of \$13,461.76 was under review. (Interim Order, 02/21/18). On March 6, 2018, the Commissioner issued an Order again denying the contested part of the attorney's fees and citing as a reason the Regulation and his interpretation of the Regulation and setting out his interpretation. (Order, 03/06/18). The Appellants then filed both an appeal to the Full Commission to review the attorney's fees requested for approval and a Declaratory Judgment action in the Circuit Court asking for a declaration of rights under law interpreting the Statute, Regulations and case law in reference to when the "Award" of total and permanent disability became the permanent "Award", and questioning whether the process before the Commission was in accordance with law. After a Temporary Restraining Order, a hearing, and the Temporary Restraining Order was lifted, the matter was remanded to the Full Commission so the Commission could rule on the Request for Review.

Subsequently, the Appellants filed their Brief to the Full Commission and a hearing was held on May 21, 2018. No Brief was filed by the Commission, Commission Counsel, or any other party nor was any appearance made at the hearing held on May 21st which was held en banc. (Brief of Appellants, 04/23/18). The Vote Sheets reflect that four (4) Commissioners voted to "affirm" the Hearing Commissioner's Decision as written, and two issued a separate opinion concurring in part and dissenting in part. Although simply voting to affirm, Commissioner T. Scott Beck and General Counsel for the Commission were assigned to write the Order for the Full Commission.

Although Commission Regulations (Reg. 67-709(E)(2)) require that any modifications to a Hearing Commissioner's Decision are to be entered on the Vote Sheets, and while four (4) Commissioners simply voted to affirm the Hearing Commissioner's Decision, a totally separate Full Commission Order was issued setting out twenty-two (22) Findings of Fact, twenty-eight (28) Conclusions of Law, and an separate Order affirming the Hearing Commissioner's Decision with a separate Opinion concurring and dissenting in part being entered by two (2) Commissioners. That Order was served on Mr. McDaniel via email on May 30th but was not served on Mr. Milling. (Order, 05/30/18). On May 31st, the Appellants notified the Commission of that and their intent to file for Rehearing and

filed a request for rehearing on June 25, 2018. (Email, 05/21/18; Votes Sheets w/ Email, 06/01/18; Motion, 06/25/18).

Subsequently in the Declaratory Judgment Action after the filing of an Amended Complaint to include the Full Commission Decision after Remand with the same case law, statutes, and Regulations; and after Motions by the Commission to dismiss were denied, an Order was entered granting the Appellants full discovery to include depositions and all documentation from the Commission; after which the parties entered into mediation.

(Amended and Supplemental Complaint, 08/28/18). As a result of the Mediation and based on Mr. Milling having not been served with the original Order on May 30, 2018, it was agreed that proper service of the May 30, 2018 Full Commission Order would be made and the Defendant, SC Workers' Compensation Commission, would accept a timely filed Motion for Rehearing pursuant to Regulation 67-215 for disposition en banc before the Commission and the parties agreed the issue on rehearing would be confined to the Plaintiffs' request for attorney's fees. The Plaintiffs, Appellants in this Court, agreed to voluntarily dismiss the Circuit Court action with prejudice.

A timely Motion for Rehearing was served on June 10th to the Order served June 6th. (Order, 06/06/22; Motion, 06/10/22). The Appellants relied on their original Brief submitted both to the

Full Commission for review in 2018, and as set forth in the Motion for Rehearing filed at that time; and in addition, submitted an Affidavit of Appellant Preston F. McDaniel in support of facts contained in the original Brief, Motion filed in 2018, and in the rehearing Motion. No Brief or any other documentation was submitted to the Commission on behalf of the Commission or any party, and at the hearing held en banc September 19th, the only appearance that was made was by the Appellants who again made argument in support of their request for approval of attorney's fees as to the remaining portion of the attorney's fees that had not been approved. (Hrg. Tr., 09/19/22). The Decision, of the Full Commission on the Petition and Motion for Rehearing, with again four (4) members voting to affirm the original Hearing Commissioner's Decision with the same two (2) other Commissioners entering the same separate Opinion dissenting in part and concurring in part.

When the Notes for the Decision of the Commission were entered, the Order was assigned to Staff Counsel to write, although this was a matter involving approval or disapproval by the Commission under its Statutory authority over attorney's fees, which is an exception to the Code of Professional Conduct and contrary to general contract law. The Order was entered on January 4, 2023 and this appeal follows.

STATEMENT OF FACTS

In addition to the facts and procedural history in the Statement of the Case, to reiterate briefly, Ms. Pamela Cartee was on a running Award, meaning that she was receiving weekly compensation checks in the amount of \$698.41 per week at the time of the hearing at which she was awarded total and permanent disability. Those checks in the amount of \$698.41 had been increased due to the efforts of Counsel from \$514.39, for a difference of \$184.02, thus resulting in an overall difference over the 500 weeks of the Award of \$92,010.00. In the Hearing Commissioner's Award entered on April 13, 2017, based on a hearing held on September 6, 2016, the Hearing Commissioner entered a Finding of Fact #25:

"I find the Claimant reached maximum medical improvement on October 12, 2016" (Order, Finding of Fact #25, 04/13/17),

and he also found that as of that date that she was entitled to an Award for total and permanent disability and awarded her lifetime medical care for all causally related medical care. In the Award, he specifically held that the Claimant was entitled to an Award for total and permanent disability, and

"the Claimant is entitled to the payment of continuing weekly compensation benefits in the amount of \$698.41 and continuing until 500 weeks of compensation have been paid." (emp. add.).

The Commissioner also granted the Claimant's request for the Award

to be paid in a lump sum and ordered that the:

“residual lump sum Award shall be calculated by the Commission pursuant to this Award”.

He further ordered that a Supplemental Order would be issued confirming that:

“said lump sum is being paid in lieu of the Claimant’s entitlement to weekly compensation benefits being paid to the Claimant for the remainder of her life.”

Weekly payments continued after September 6, 2016 through the date of the Award on April 13, 2017, and until the lump sum was paid. The Award was appealed to the Full Commission on which a hearing was held on August 22, 2017 and on October 17, 2017 the Full Commission Panel issued an Order affirming the Hearing Commissioner’s decision in total. The Commission specifically affirmed all of the Findings of Fact and Conclusions of Law of the Hearing Commissioner in its Order. (Full Commission Order, 10/17/17). The Defendant did not appeal that Order and in the Fee Petition, Form 61, and accompanying Itemized Disbursement Statement the Appellants noted that the date of the “Award” of PTD/MMI (permanent total disability and maximum medical improvement) was October 12, 2016. The Appellants then noted in their Petition that payment on the Award had been made from October 12, 2016 through December 1st in the approximate amount of \$41,206.19, and that the commuted value as calculated by the

Commission was \$179,077.14, thus resulting in a total and permanent disability, "Award" totaling \$220,283.33, of which the Claimant's Counsel requested less than 1/3rd and requested a fee of \$73,094.45.

As noted in the Statement of the Case, at no hearing either before the Hearing Commissioner, the Full Commission, or before the Full Commission on Reconsideration and Rehearing was any Brief, legal memorandum, or even an appearance made by a member of the Commission Staff or any party on behalf of the Commission setting forth a contrary legal opinion and legal interpretation of the Statutes, Regulations, and case law of that of the Appellants.

In addition, submitted into the Record was an Affidavit from the Appellant, Preston F. McDaniel, noting that he had been a participant at the Wampee Conference on workers' compensation in the 1980s; and that he had served as a Claimant's Representative on the Review Committee of the newly adopted SC Workers' Compensation Regulations which were adopted in 1990 which resulted in the Attorney's Fees Regulations, currently Reg. 67-1201-1207. Additionally, in his capacity in reference to the SC Trial Lawyers Association, and SC Claimant Lawyers Association, now the SC Association for Justice and SC Injured Workers Advocates, respectively, Appellant McDaniel had served on every legislative review committee since 1990, including the 2007 Workers'

Compensation Reform Act. He also had served as the only Claimant's Representative to Governor Sanford's Workers' Compensation Reform Committee.

Additionally and importantly, he set forth in the Affidavit that the Fee Petition submitted in this matter and the basis of calculation of the contingency fee agreement and the date on which the attorney's fees attached under the Award and under the Statutes, Regulations, and case law was the date of maximum medical improvement, which is the date that the Award transitioned from that of being a temporary weekly compensation Award to being an Award of permanent compensation. That Affidavit also set forth that the fee petition was identical to hundreds that he had presented to the Commission over the years including fee petitions that had been submitted to and approved by current members of the current Commission, and specifically noting that identical fee petitions had been approved by Commissioners McCaskill, Wilkerson, James, Campbell and Barden. (Affidavit, 6/27/22).

ARGUMENTS

- I. THE CURRENT COMMISSION ERRED AS A MATTER OF LAW BY FAILING TO APPROVE THAT PART OF THE CONTESTED ATTORNEY'S FEES WHICH WAS SUBMITTED IN ACCORDANCE WITH LAW, INCLUDING THE STATUTES, COMMISSION REGULATIONS, AND CASE LAW DEFINING THE DATE OF A PERMANENT AWARD AND WHEN ATTORNEY'S FEES ATTACH.

While there are several cases on point, the Supreme Court in the case of Smith v. SC Dept. of Mental Health & State Accident

Fund, 335 S.C. 396, 517 S.E.2d 694 (1999), Justice Waller writing for a united Court held as to when the payment of temporary disability benefits transitions to that of an "Award" of permanent disability benefits, quoting:

"The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent Award. See: Hines v. Hendrix Canning Co., 263 S.C. 399, 211 S.E.2d 220 (1975) (noting that degree of permanent disability cannot be determined prior to MMI). Clearly, if an employee has reached MMI and remains disabled, then his injury is permanent. This is precisely the reason to terminate temporary benefits in favor of permanent benefits upon the finding of MMI."

The Supreme Court went on to note that this Court had repeatedly held the same that once the Commission makes a Finding of maximum medical improvement it is appropriate to terminate temporary disability benefits in favor of an Award of permanent disability benefits. Then in the case of Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007) and quoting from the Court:

"Essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of the injury through the date of maximum medical improvement; post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. Smith v. NCCI, Inc., 369 S.C. 336, 631 S.E.2d 268 (SC App. 2006). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits." (emp. add.)

Thus, the date of maximum medical improvement is the date that benefits transition from being the payment of temporary disability benefits to that of payment of a permanent Award if one is justified. This is also in accord with the numerous cases addressing the date back to which benefits are payable in reference to penalties, fines and judgment interest under an "Award" of the Commission. Those cases and dates are best summarized in Supreme Court's decision in Case v. Hermitage Cotton Mills, 336 S.C. 515, 115 S.E.2d 57 (1960). Payments are due to be paid back to and from the date of the "Award".

SC Code of Regulations, Reg. 67-1205 (which Appellants would note has not been amended since its original implementation in 1990), under subsection (C) of that Regulation provides that an attorney may charge up to but not more than a 33.3% of the total amount of compensation; and subsection (C)(2) in pertinent part provides that:

"If the attorney secures the payment of permanent disability later, the attorney may charge, according to these Regulations, up to but not more than 33.3% of the settlement or Award." (emp. add.)

Thus, under the Supreme Court decisions, the date of maximum medical improvement is the date that benefits transition from being the payment of temporary total disability benefits to being an "Award" for permanency and permanent disability benefits. In this case, the Hearing Commissioner determined that the claimant

had reached maximum medical improvement on October 12, 2016, and as of that date Ms. Cartee was entitled to an Award for total and permanent disability benefits and all benefits paid after that date constituted payment towards that Award. Under the Supreme Court and this Court's decisions, that is the date upon which the Award of permanent and total disability attaches, and it is from that date and on that date to which a claimant's attorney is entitled to a fee because it is on that date that the attorney secured, "the payment of permanent disability".

This date also coincides with the cases decided under SC Code §42-17-60 as to the date back to which weekly benefits are payable under the Award. Those benefits date back to, and the benefits are payable from the date of the "Award". This also coincides with the requirements of SC Code §42-9-90 and §42-9-240, both of which in reference to penalties and interest refer back to and require the payment of the penalties and interest back to the date of the "original date of the Award". The Fee Petition submitted in this matter and the Appellants' legal interpretation of the case law, Statutes and Regulations in reference to the fee which they requested are in accordance with the Statutes, Regulations and case law, and the disputed part of the fee should be ordered to be paid to the Appellants in accordance with law.

II. THE COMMISSION ERRED AS A MATTER OF LAW BASED ON THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE IN THE RECORD BEFORE THE COMMISSION BY NOT AWARDING THE DISPUTED PART OF THE ATTORNEY'S FEES AS REQUESTED IN THE APPELLANTS' FEE PETITION.

As noted above and in the Statement of Facts, neither before the Hearing Commissioner, nor before the Full Commission in 2018, nor after the Commission granted reconsideration at the hearing held on that in 2022 was any Brief or legal interpretation or Memorandum of Law or argument made by the Commission, the Commission Staff, or any other party appearing on behalf of the Commission, nor were any facts submitted into evidence other than those submitted by the Appellants. In addition to all the emails, letters, and arguments made in the Record in reference to the Attorney Fee Petition and the Revised Attorney Fee Petition that were submitted to the Commission for consideration and approval by the Appellants, the Appellant Preston F. McDaniel submitted an Affidavit in support of the request for approval of the disputed portion of the attorney's fees.

In that Affidavit in addition to noting that he had attended the Wampee Conference in the 1980s and had served on the Claimants Review Committee reviewing the initial 1990 Regulations wherein the attorneys fee Regulations were submitted and approved by the Legislature; in addition to serving on every Committee as a claimant's representative since that time in reference to workers'

compensation legislation and/or reform legislation and also noting the interpretation given to the "Award" for years and the date upon which attorney's fees attached in reference to every Commission prior to the current Commission, that factually uncontested Affidavit also stated that the Fee Petition submitted in this case was identical to hundreds of other fee petitions which the Appellant had submitted to the Commission for approval.

Not only that, but the Affidavit set forth that the current members of the Commission that heard this matter on appeal and also the Hearing Commissioner had approved identical fee petitions to the one submitted for approval in this matter. There is simply no contradictory evidence in any way, shape, or form to the Affidavit submitted by Preston F. McDaniel into the Record in support of and as part of the request for approval of the disputed portion of the attorney's fees.

Without citation, the Commission is duty bound to make its decision based on the facts in the Record and also to consider only those legal arguments and legal positions as cited to the Commission. Under the undisputed evidence within the Record in this matter and based on the reliable, probative, and substantial evidence in the Record that this Fee Petition was identical to numerous other fee petitions that have been submitted to, and that the basis for the calculation of the attorney's fees in this

matter was identical to that submitted in other cases and that Claimant's interpretation was in accordance with the prior determination of every Commissioner who has heard cases and decided fee petitions and awards made before those Commissioners, this Court should order and find that the Commission's Decision is contrary to the substantial evidence and Award the attorney's fees as requested based on reliable, probative, and substantial evidence in the Record.

III. THE CURRENT COMMISSION ERRED AS A MATTER OF LAW BY CHANGING THE INTERPRETATION OF THE STATUTES AND REGULATIONS, PARTICULARLY WITHOUT NOTICE TO THE PARTIES AND THE BAR THAT ITS INTERPRETATION HAD CHANGED.

The Affidavit filed by Appellants sets forth the interpretation that has been given to the Regulation over the years and for many, many years by the Commission. Our Federal Courts, this Court, and the Supreme Court have all held that a Commission or Agency may not change its interpretation especially without giving notice to the parties that it is changing or has changed its interpretation. G.G. ex rel. Grimm v. Gloucester County School Bd., 822 F.3d 709 (4th Cir., 2016), (An Agency's interpretation that is not a result of the Agency's fair and considered judgment will not be accorded Auer deference when the interpretation conflicts with a prior interpretation, when it appears that the interpretation is no more than a convenient litigating position, or when the interpretation is a post hoc

rationalization.); Sierra Club v. SC Dept. of Health & Environmental Services, 426 S.C. 236, 826 S.E.2d 595 (SC 2019) (where the plain language of the Statute or Regulation is contrary to the Agency's interpretation, the Court will reject the Agency's interpretation ... the Court is not required to give deference to an Agency's interpretation of a Regulation when that very interpretation has changed and we do not give deference to DHEC's 'current interpretation'); Jack's Custom Cycles, Inc. v. SC Dept. of Revenue, 439 S.C. 35, 885 S.E.2d 433 (SC App. 2023) (an administrative construction affords no basis for the perpetuation of a patently erroneous application of a Statute or Regulation).

Also, this Court and the Supreme Court have held that where an Agency gives an interpretation of a Regulation that is contrary to the plain language of the Regulation that Decision will not be sustained and will be reversed on appeal. Brown v. Bi-lo, Inc. 354 S.C. 436, 581 S.E.2d 836 (SC 2003). For this reason and there being no evidence or law to show that the interpretation as given to the Regulation by the attorneys in this case under the Fee Petition submitted is contrary to the interpretation that has been given by the Commission to the Regulation over many years, and there being nothing submitted by the current Commission showing that it has changed its interpretation and that it had notified the parties and the Bar of that change in interpretation of its

own Regulation, the disputed part of the attorney's fees in this matter should be awarded to the Appellants as a matter of law. SC Code Ann. §1-23-380(A)(6); Brown v. Bi-lo, Inc., supra; Jack's Custom Cycle's, Inc. v. SC Dept. of Revenue, supra.

CONCLUSION

For all the foregoing reasons, the Fee Petition which was submitted in accordance with Statute, Regulations, and case law, the interpretation by the Commission and the denial of the disputed part of the attorney's fees should be overturned and the attorney's fees as requested should be awarded to the Appellants as being in accordance with law.

Respectfully submitted:



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August 1st, 2023