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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

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.

South Carolina Workers' Compensation Commission, Respondent.

RESPONDENT'S INITIAL BRIEF

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COUNTER-STATEMENT OF ISSUES ON APPEAL

I. Can a party who is aggrieved by a decision of the Judicial Department of the South Carolina Workers' Compensation Commission ("the Commission") name the Commission as a party-Respondent in an appeal from that decision when the Commission was not a party to the underlying dispute?

II. Did the Commission commit reversible error in denying Appellants' request for an additional $13,461.76 in attorneys' fees when the Commission's decision was based on an interpretation of Regulation 67-1205(C)(2) that is textually sound, supported by the legislative purpose of the South Carolina Workers' Compensation Act, and afforded "great deference" by this Court?

COUNTER-STATEMENT OF THE CASE

On July 28, 2016, Respondent South Carolina Workers' Compensation Commission first awarded Pamela Cartee ("Claimant") a lump sum payment of $29,600.93 in back-owed Temporary Total Disability. (Decision and Order of the Commission p. 3 (June 6, 2022)). On September 12, 2016, the Commission awarded Appellants a $9,866.98 contingency fee on that payment of compensation. (*Id.*) In April 2017, the Single Commissioner "awarded Claimant permanent and total disability benefits under § 42-9-10 and lifetime medical care under § 42-15-60." (*Id.*). The Single Commissioner found that Claimant reached Maximum Medical Improvement ("MMI") on October 12, 2016. (Order and Award p. 21 (April 13, 2017)).

The S.C. Judicial Department ("Employer") and State Accident Fund ("Carrier") appealed the Single Commissioner's award to the Commission. (Motion Order at 1 (Jan. 4, 2023)). Claimant also appealed the Single Commissioner's decision. (*Id.*). "While on appeal, Claimant remained on a running award of weekly total disability benefits." (Decision and Order of the Commission p.3 (June 6, 2022)). The Appellate Panel affirmed the Single Commissioner's award on October 17, 2017, and the Employer and Carrier did not appeal to the Court of Appeals. (*Id.*; Decision and Order of the Appellate Panel (Oct. 17, 2017)). Therefore, the Commission's award "became the

law of the case on or about November 16, 2017." (Decision and Order of the Commission p. 3 (June 6, 2022)).

On or about December 13, 2017, the Employer filed a Form 19 with the Commission, "showing that it had paid the award to Claimant in a lump sum in the amount of $179,077.14." (*Id.*; Form 19 (Dec. 11, 2017)). This payment "represented the commuted value, calculated in accordance with Reg. 67-1605, of the remaining weeks of total disability under § 42-9-10 that were due and payable at the time the award of the Full Commission became final." (Decision and Order of the Commission p. 3 (June 6, 2022)).

On December 8, 2017, Appellants filed a Form 61 with the Commission, asking for a second contingency fee award of $73,094.45. (Cover Letter, Form 61, Disbursement Sheet, and Form 61A (December 8, 2017)). According to Appellants' Disbursement Sheet, which was attached to the Form 61, the claimed $73,094.45 contingency fee award was to be withheld from the $179,077.14 lump sum payment.[1] (*Id.* at 3). This fee award would have been 40.82% of the lump sum payment. (Decision and Order of the Commission p. 4 (June 6, 2022)).

On January 9, 2018, the Single Commissioner sent the following email to Appellants:

> I have reviewed your fee petition in Pamela Cartee v. SC Judicial Department several times. I have also reviewed the law I believe to be applicable. I can only find justification for a fee of $59,632.69. If you wish to amend your Form 61 to reflect this amount as your fee, I will approve the fee petition. Otherwise, I am glad to set the matter for a hearing pursuant to the Act. I am happy to hear your position.

(January 9, 2018 Email from Kellie Lindler to Sabrina Kelley at 9:22 AM). The Single Commissioner set the matter for a hearing on February 12, 2018. (Notice of Hearing (January 17, 2018)).

[1] The Form 61 was later amended on March 2, 2018; however, Appellants sought the same contingency fee award. (*See* Transmittal Email, Cover Letter, Form 61, and Disbursement Sheet (March 2, 2018)).

After the hearing, on February 21, 2018, the Single Commissioner issued an Interim Order approving the disbursement of $59,632.69, which is 33.3% of the lump sum payment. (Interim Order of Commissioner McCaskill (Feb. 21, 2018)); *see* S.C. Code Ann. Regs. 67-1205(C) ("An attorney may charge up to, but not more than, 33.3% of the total amount of compensation . . . ."). On February 21, 2018, in response to this Interim Order and while the remaining fee request was still under consideration, Appellant Preston McDaniel sent the Single Commissioner a letter in which he threatened to file an action in the Supreme Court of South Carolina. (Letter from Preston McDaniel to Commissioner McCaskill p.1 (Feb. 21, 2018)). The following day, Appellant McDaniel sent the Single Commissioner another letter, which again threatened litigation and stated that the Interim Order was "a slander on [his] name" and "a personal affront."[2] (Letter from Preston McDaniel to Commissioner McCaskill p. 2 (Feb. 22, 2018)).

On March 6, 2018, the Single Commissioner issued a Decision and Order denying Appellant's request for the additional $13,461.76 in attorneys' fees. (Single Commissioner's Order p. 1 (March 6, 2018)). The Single Commissioner analyzed the issue under S.C. Code Ann. Regs. 67-1205(C)(2), which reads, in pertinent part: "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." (*Id.*). Although the Single Commissioner awarded the Claimant permanent and total disability in April 2017, he noted that his decision was appealed and "[t]he determination of the award with finality could not be reached until [his] Order became the law of the

[2] This letter also insinuated, without any support, that the Single Commissioner was improperly discussing the legal issue with others. (*See* Letter from Preston McDaniel to Commissioner McCaskill p. 1 (Feb. 22, 2018) ("I have refrained from saying this but as a reminder, it is improper for any judicial officer whether that be a Judge or Commissioner or otherwise to confer with anybody else or to seek legal advice on any matter pending before them without notifying the parties.")).

case." (*Id.*). Once the award became final, the Employer paid the commuted value of the award, $179,077.14, which entitled Appellants to 33.3% of that total award—$59,632.69. (*Id.*). The Single Commissioner had previously awarded this amount to Appellants; therefore, Appellants' request for additional attorneys' fees was denied. (*Id.* p. 2).

From March 7 through March 23, 2018, Appellant McDaniel sent letters and emails to the Single Commissioner, the Commission's Judicial Director, and the Commission's General Counsel. (Letter from Preston McDaniel to Commissioner McCaskill (March 7, 2018); Transmittal Email and Letter from Preston McDaniel to Amy Bracy (March 13, 2018); Email from Sabrina M. Kelley to Amy Bracy (March 15, 2018 at 4:49 PM); Email from Amy Bracy to Sabrina Kelley (March 15, 2018 at 11:14 AM); Email from Sabrina Kelley to Keith Roberts (March 23, 2018 at 12:21 PM)). Appellant McDaniel repeatedly sought legal advice and threatened civil litigation in these communications. (*See Id.*). Additionally, on March 20, 2018, Appellants filed a Form 30 Request for Full Commission Review. (Form 30 (March 20, 2018)). The Single Commissioner requested that the appeal be heard *en banc* "since the appeal involved novel issues of law and regarded attorneys' fees." (Decision and Order of the Commission p. 5 (June 6, 2022)).

On April 17, 2018, Appellants filed a Declaratory Judgment Complaint ("the DJ Action") against the Commission in the Court of Common Pleas for Darlington County. (Summons & Complaint, *Preston F. McDaniel, Esquire & John Milling, Esquire v. South Carolina Workers' Comp. Comm'n*, Case No. 18-CP-16-0334 (Darlington Cnty. Common Pleas April 17, 2018). The Complaint collaterally attacked the Single Commissioner's March 6, 2018, Order and sought a declaration that Appellants were entitled to $13,461.76 in additional attorneys' fees. (*See id.*). Less than an hour after Appellants' Complaint was filed, Circuit Judge Paul H. Burch issued an *ex parte* Temporary Restraining Order ("TRO") (*Id.* p. 15; Temporary Restraining Order Issued Without

Notice, *Preston F. McDaniel, Esquire & John Milling, Esquire v. South Carolina Workers' Comp. Comm'n*, Case No. 18-CP-16-0334 (Darlington Cnty. Common Pleas April 17, 2018)). Appellants served the Commission with the *ex parte* TRO on April 19, 2018.[3] (Decision and Order of the Commission p. 5 (June 6, 2022)). "Despite the prohibition by the court on the Commission taking any action on the Appeal, [Appellants] filed a Brief of Appellant on April 22nd, 2018." (*Id.*).

On May 30, 2018, the Commission issued a Decision and Order affirming the Single Commissioner. (Decision and Order of the Commission (May 30, 2018)). A majority of the Commission held that "[t]he amount of compensation that is to be awarded cannot be determined until the Decision and Order making that award is final." (*Id.* p. 7). Furthermore, the Commission held "that it is not appropriate to allow an attorney to take back benefits that have *already been paid* to a Claimant to satisfy an attorney's fee." (*Id.* (emphasis added); *see also id.* p. 8 ("It would be unconscionable to require Claimants to pay to their attorneys the weekly benefits they were receiving before the attorney had successfully defended an appeal.")). The Commission emphasized that S.C. Code Ann. Reg. 67-1205(C)(2) only permits attorneys' fees to be awarded when an attorney "secures the payment of permanent disability." (*See id.* pp. 8–9). Thus, the Commission held that an attorney "secures" that payment when the 30-day period to file an appeal from the Commission expires. (*Id.* pp. 8–13). The Commission directed Appellants to "certify in writing to the Commission that [they have] paid $13,461.76 to Claimant within thirty (30) days" of its Order. (*Id.* p. 14).

[3] The Attorney General's Office represented the Commission in the civil action. (*See* Joint Stipulation of Dismissal, *Preston F. McDaniel, Esquire & John Milling, Esquire v. South Carolina Workers' Comp. Comm'n*, Case No. 18-CP-16-0334 (Darlington Cnty. Common Pleas June 29, 2022)). Eventually, the civil action was resolved pursuant to a confidential settlement agreement, which Appellants breached in their Initial Brief. (*See* Appellants' Br. at 10 (discussing the terms of the settlement)).

Two Commissioners concurred in part and dissented in part and would have held that an attorney "secures" the payment of permanent disability on the date of the Commission's final Decision and Order rather than the date the 30-day period to appeal expired. (*See id.* pp. 14–20). Therefore, these two Commissioners would have permitted Appellants to recover attorneys' fees as of October 17, 2017—the date of the Full Commission's Decision and Order. (*See id.* p. 16). These two Commissioners would have awarded Appellants $996.73 in additional attorneys' fees,[4] which is far less than the $13,461.76 that Appellants requested. Importantly, however, no Commissioner adopted Appellants' argument that they were entitled to attorneys' fees on a running award that had already been paid. (*See id.* pp. 7–13, 19).

The following day, May 31, 2018, Appellant McDaniel wrote the Commission a letter in which he stated that Appellant John M. Milling was not served with the May 30, 2018, Decision and Order and that Appellants would be filing a Petition for Rehearing. (Letter from Preston McDaniel to Eugenia Hollmon (May 31, 2018)). On June 1, 2018, the Commission's Judicial Director responded that Appellant "Milling was not served with a copy of the Decision and Order as he was neither a party to the December 8th, 2017 Form 61 Fee Petition nor the March 20th, 2018 Form 30 Request for Full Commission Review." (Email from Amy Bracy to Preston McDaniel (June 1, 2018 at 4:25 PM)). However, the Judicial Director stated that the Commission would be "happy to send [Mr. Milling] a copy of the Decision and Order." (*Id.*).

More than three weeks later, on June 25, 2018, Appellants filed a Motion for Rehearing with the Commission. (Transmittal Letter and Motion for Rehearing (June 25, 2018)). The Motion

[4] Claimant received $698.41 in weekly payments. (Decision and Order of the Appellate Panel p. 19 (Oct. 17, 2017)). Thus, during the 30-day period between October 17, 2017 and November 16, 2017, Claimant received $2,993.19. (*See id.*) A 33.3% contingency fee on this amount is $996.73.

was denied the following day as it was not made within five days of the Commission's Decision and Order, as is required by S.C. Code Ann. Regs. 67-215(B). (Letter from Eugenia C. Hollmon to Preston McDaniel (June 26, 2018)).

On July 2, 2018, Appellants filed a Notice of Appeal in the Court of Appeals; however, they eventually withdrew the appeal. *See In Re: Preston F. McDaniel, Esquire, and John M. Milling, Esquire v. South Carolina Workers' Comp. Comm'n*, Case No. 2018-001234 (S.C. Ct. App.). Over the next few years, Appellants and the Commission litigated the civil Declaratory Judgment action. On June 29, 2022, the parties filed a Joint Stipulation of Dismissal. (Joint Stipulation of Dismissal, *Preston F. McDaniel, Esquire & John Milling, Esquire v. South Carolina Workers' Comp. Comm'n*, Case No. 18-CP-16-0334 (Darlington Cnty. Common Pleas June 29, 2022)).

On June 6, 2022, the Commission re-filed the May 30, 2018, Decision and Order affirming the Single Commissioner's ruling on Appellants' request for attorneys' fees. (Decision and Order of the Commission (June 6, 2022)). Appellants filed a timely Motion for Rehearing on June 10, 2022. (Motion for Rehearing (June 10, 2022)). The Commission held a hearing on September 19, 2022, and denied the Motion for Rehearing on January 4, 2023. (Motion Order (Jan. 4, 2023)). Appellants then filed a Notice of Appeal, which was only served on the Commission's Judicial Director, Amy Bracy; General Counsel, J. Keith Roberts; and Staff Attorney, Kristen McRee. Moreover, the Notice of Appeal omitted the Claimant, Employer, and Carrier from the caption.

On February 9, 2022, the Court of Appeals sent a letter to counsel, which re-captioned the appeal to include the Claimant, Employer, and Carrier. On February 22, 2022, Appellant McDaniel sent a letter to the Court of Appeals, stating that "the re-captioning is not correct and [he] believe[s] it is also in violation of State law." In response, the Court of Appeals informed Appellants that no

action would be taken on a letter. *See* Rule 240, SCACR. Appellants then filed a "Motion to Determine the Correct Caption of the Case Pursuant to SCACR" on March 15, 2023.

On March 21, 2023, the Commission filed a Motion to Dismiss and Motion for Relief of Counsel. The Commission argued, *inter alia*, that it is not a proper party to the appeal, has never held or retained the disputed funds, and cannot be represented on appeal by its General Counsel and Staff Attorney.

On May 26, 2023, Chief Judge H. Bruce Williams denied the Motions[5] in a brief Order without addressing the merits of the Commission's arguments.

On August 29, 2023, the Commission filed a Motion for Certification to the Supreme Court of South Carolina. That Motion was denied on October 24, 2023.

ARGUMENTS

I. The Commission is not the proper party-Respondent in this appeal.

Appellants have appealed the Commission's decision denying their request for an additional $13,461.76 in attorneys' fees. In the caption of their Notice of Appeal, Appellants designated the Commission as the Respondent. However, the Commission has *never* been a party to Appellants' fee dispute. Rather, the Commission has always served in a judicial capacity and is now the Administrative Tribunal from which the appeal is taken. *See* Rule 202(b)(2), SCACR. Because the Commission is not a party to this case, the Commission should be dismissed. *See* Rule 202(a), SCACR (defining the respondent as "the adverse party").

[5] The caption was modified to remove the word, "Defendants."

A. Standard of Review

"Questions of law involving subject matter jurisdiction and statutory interpretation are reviewed de novo . . . ."[6] *Seels v. Small*, 437 S.C. 167, 172, 877 S.E.2d 351, 353 (2022).

B. The Commission served in a judicial capacity as the Administrative Tribunal that adjudicated Appellants' attorneys' fee petition.

The South Carolina Workers' Compensation Act[7] ("the Act") "is a comprehensive scheme created 'to provide compensation to employees injured by accidents arising out of and in the course of their employment.'" *Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 562, 738 S.E.2d 251, 253 (2013) (quoting *Parker v. Williams & Madjanik, Inc.*, 275 S.C. 65, 69–70, 267 S.E.2d 524, 526 (1980)). The General Assembly created the "Commission," which is "composed of a judicial and administrative department." S.C. Code Ann. § 42-3-10; *see also id.* § 42-1-90 ("Whenever the word 'commission' is used in this title, it shall refer to the administrative department in matters relating to administration and the judicial department in matters relating to the judicial function of the commission."). The Commission is comprised of "seven members appointed by the Governor with the advice and consent of the Senate . . . ." *Id.* § 42-3-20(A). The Act vests the Commissioners with the responsibility to "hear and determine all contested cases, conduct informal conferences when necessary, approve settlements, hear applications for full commission reviews, and handle such other matters as may come before the department for *judicial disposition*." *Id.* § 42-3-20(C) (emphasis added).

The Act grants the Commission the authority to approve attorneys' fees. S.C. Code Ann. § 42-15-90. Indeed, the approval of petitions for attorneys' fees is a matter that comes before the

[6] The Commission has not located any cases where an Appellant improperly named the underlying Administrative Tribunal as a Respondent to an appeal. Moreover, for this issue, there is no ruling from the Administrative Tribunal to review. Therefore, the Court should review this issue *de novo*.

Commission "for judicial disposition." *See id.* § 42-3-20(C). The Commission's Regulations expressly vest the approval of petitions for contingent attorneys' fees to the Commission's Judicial Department. *See* S.C. Code Ann. Regs. 67-1204. A claimant's attorney seeking contingent attorneys' fees must "fil[e] the original and one copy of a Form 61, Attorney Fee Petition, and an Order . . . with the Commission's Claims Department." *Id.* 67-1204(C). The Commissioner can approve the Order or issue an Amended Order. *Id.* 67-1204(D), (E). "If the attorney disagrees with the Amended Order, the attorney may file a motion according to R. 67-1205 with the Commission's Judicial Department." *Id.* 67-1204(E). If, as here, the Form 61 and Order do not comply with Regulation 67-1205,[8] "the Commissioner reviewing the Form 61 and Order shall immediately schedule a hearing to consider argument of counsel and testimony, if any." *Id.* 67-1204(F). These processes are fundamentally judicial in nature.

Here, on January 9, 2018, the Single Commissioner determined that Appellants' Form 61 did *not* comply with Regulation 67-1205. (*See* Email from Kellie Lindler to Sabrina Kelley (Jan. 9, 2018 at 9:22 AM)). In his email to Appellant Preston McDaniel, the Single Commissioner stated:

> I have reviewed your fee petition in Pamela Cartee v. SC Judicial Department several times. I have also reviewed the law I believe to be applicable. I can only find justification for a fee of $59,632.69. If you wish to amend your Form 61 to reflect this amount as your fee, I will approve the fee petition. Otherwise, I am glad to set the matter for a hearing pursuant to the Act. I am happy to hear your position.

(*Id.*). Appellant Preston McDaniel responded by attempting to explain his requested attorneys' fees. (Email from Sabrina Kelley to Kellie Lindler (Jan. 9, 2018 at 2:21 PM). Sixteen minutes

[7] *See* S.C. Code Ann. § 42-1-10 *et seq.*

[8] Regulation 67-1205 governs the Commission's determination of whether attorneys' fees are reasonable.

later, a Commission employee responded, "I will begin to secure a hearing location." (Email from Kellie Lindler to Sabrina Kelley and John Milling (Jan. 9, 2018 at 2:37 PM)). Eight days later, on January 17, 2018, the Commission scheduled a hearing "[t]o resolve the dispute of Attorney Fees" on February 12, 2018.[9] (Notice of Hearing (Jan. 17, 2018)). The Commission provided notice to counsel for Claimant, Employer, and the Carrier. (*Id.*).

After the hearing,[10] the Single Commissioner made a judicial determination that Appellants were entitled to $59,632.69 in attorneys' fees, which is 33.3% of Claimant's lump sum payment. (Interim Order of Commissioner McCaskill (Feb. 21, 2018); Single Commissioner's Order p. 1 (March 6, 2018)). Thereafter, Appellants appealed to the Full Commission and, eventually, to this Court. Put simply, the Commission was—at all times—acting in its judicial capacity when reviewing and adjudicating Appellants' request for attorneys' fees.

C. The Commission was not a party litigant to its own judicial proceedings and was improperly named as the Respondent in this appeal.

The Commission was not a party to Appellants' request for an additional $13,461.76 in attorneys' fees. Rather, it was the Administrative Tribunal that denied Appellants' request. *See*

[9] Appellants claim that the Commission did not comply with Regulation 67-1204(F) because "no decision was made on the Fee Petition in any regard until January 9, 2018." (Appellants' Br. p. 7). However, Appellants misread Regulation 67-1204(F), which only requires the Commissioner to "immediately schedule a hearing" once he determines that the Form 61 and Order do not comply with Regulation 67-1205. Here, the Commission began the scheduling process the same day that the Commissioner determined Appellants' Form 61 did not comply with Regulation 67-1205, and a hearing notice was issued eight days later. (*See* Email from Kellie Lindler to Sabrina Kelley and John Milling (Jan. 9, 2018 at 2:37 PM); Notice of Hearing (Jan. 17, 2018)). *See Sligh v. Pacific Mills*, 207 S.C. 316, 319, 35 S.E.2d 713, 714 (1945) (holding that the word "immediately"—as used in the Act—is an "elastic term[]" that "should not be construed as the equivalent of the word 'instantaneous'").

[10] Counsel for the Employer and Carrier did not appear at the hearing and took no position on Appellants' petition for attorneys. (*See* Tr. of February 12, 2018 Hearing p. 2).

Rule 202(b)(2) (defining "Administrative Tribunal" as "the administrative law court or agency from which the appeal is taken"). At all times, the Commission has served as the judicial arbiter of Appellants' claims. *See* S.C. Code Ann. §§ 42-3-10 (establishing the Commission, which is "composed of a judicial and administrative department"), 42-3-20(C) (detailing the types of matters that may come before the Commission "for judicial disposition").

Appellants improperly and unilaterally named the Commission as the Respondent in their Notice of Appeal. The Commission was not a party in the proceedings below[11] and is not the "adverse party" in this appeal. *See* Rule 202(a), SCACR ("The party appealing shall be known as the appellant and the adverse party as the respondent."). Respectfully, Appellants fundamentally misunderstand the role of the Commission in resolving petitions for attorneys' fees. In their brief, Appellants state:

> [A]t 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.

(Appellants' Br. p. 14). The Commission is *not* a party who supports or opposes a claimant's attorney's application for attorneys' fees. Rather, the Commission is the Administrative Tribunal that is responsible, by statute and regulation, for the "judicial disposition" of petitions for attorneys' fees. *See* S.C. Code Ann. § 42-3-20(C); S.C. Code Ann. Regs. 67-1204.

[11] Appellants never sought to join the Commission as a party before the Single Commissioner or the Full Commission. Notwithstanding the fact that the Commission *cannot* be a party to its own judicial proceedings, Appellants' failure to seek joinder before the Commission is fatal to their attempt to join the Commission on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Indeed, Appellants' improper joinder of the Commission to this appeal is unprecedented and lacks any legal support. In their Return to the Commission's Motion to Certify, Appellants cited to six appellate cases where the Commission was a named party. But each of these cases is readily distinguishable, and none involve a dispute about attorneys' fees. A brief summary of each case follows:

- *S.C. Indus. Comm'n v. Progressive Life Insurance Co.*, 242 S.C. 547, 131 S.E.2d 694 (1963): The Industrial Commission affirmatively issued an order to show cause why Progressive Life Insurance Company "should not be required to conform to the provisions of the South Carolina Workmen's Compensation Act." *Id.* at 549–50, 131 S.E.2d at 694. These enforcement actions are initiated by the Commission's administrative department and are authorized by statute and regulation. *See, e.g.*, S.C. Code Ann. § 42-5-40; S.C. Code Ann. Regs. 67-1404.

- *Blue Cross and Blue Shield v. S.C. Indus. Comm'n*, 274 S.C. 204, 262 S.E.2d 35 (1980): Blue Cross and Blue Shield of South Carolina—a health insurer—filed a declaratory judgment action against the Industrial Commission in the Circuit Court, seeking "a determination that it is entitled (1) to participate in proceedings before the Commission when the employee-claimant holds one of its policies, and (2) that it has a right of access to records within the control of the Commission." *Id.* at 205, 262 S.E.2d at 36.

- *S.C. Workers' Comp. Comm'n v. Ray Covington Realtors, Inc.*, 318 S.C. 546, 459 S.E.2d 302 (1995): A real estate broker appealed an order of the Commission, which awarded benefits to a salesperson. *Id.* at 547, 459 S.E.2d at 302. The Supreme Court reversed the Commission and Circuit Court and found that the salesperson was an independent contractor and, thus, not entitled to benefits under the Act. *See id.* The Commission was named as a Respondent in the appeal. However, the Commission was only a party in this appeal because the Commission's Division of Coverage and Compliance issued an Order to Show Cause as to the real estate broker's failure to maintain workers' compensation coverage.[12] (*See* Excerpts of Record of Appeal from *S.C. Workers' Comp. Comm'n v. Ray Covington*

[12] The Division of Coverage and Compliance is a part of the Commission's administrative department. *See* S.C. Code Ann. § 42-3-90. The Act and the Commission's regulations permit the Division of Coverage and Compliance to commence enforcement actions and assess fines and penalties. *See* S.C. Code Ann. § 42-5-40; S.C. Code Ann. Regs. 67-1402. The Commissioners—who are tasked with resolving these contested enforcement matters—are strictly prohibited from having any *ex parte* communications with the Commission's administrative department. *See* S.C. Code Ann. § 1-23-360 (prohibiting "members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case" from communicating with "any person or party . . . except upon notice and opportunity for all parties to participate").

Realtors, Inc., No. 24265 (S.C. Sup. Ct.), p. 20).[13] By order of the Commission, this compliance action was consolidated with the salesperson's claim for benefits, and the Commission and the South Carolina Workers' Compensation Uninsured Employers' Fund were "joined as parties in the adjudication of the claim." (*Id.* p. 19). Because the Supreme Court held that the salesperson was an independent contractor, the enforcement action was mooted.

- *Lester v. S.C. Workers' Comp. Comm'n*, 328 S.C. 535, 493 S.E.2d 103 (Ct. App. 1997), *aff'd in part and rev'd in part*, 334 S.C. 557, 514 S.E.2d 751 (S.C. 1999): The Commission affirmatively issued an order to show cause "direct[ing] Lester to appear and show cause why he should not be found in violation of the provisions of the Act for failing to maintain workers' compensation insurance . . . ." *Id.* at 538, 493 S.E. 2d at 105. These enforcement actions are initiated by the Commission's administrative department and are authorized by statute and regulation. *See, e.g.*, S.C. Code Ann. § 42-5-40; S.C. Code Ann. Regs. 67-1404.

- *Morris v. S.C. Workers' Comp. Comm'n*, 370 S.C. 85, 634 S.E.2d 651 (2006): A group of court reporters brought a Circuit Court action against the Commission, "challenging their termination as full-time State employees . . . ." *Id.* at 86, 634 S.E.2d at 651.

- *S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n*, 389 S.C. 380, 699 S.E.2d 146 (2010): "[S]everal ambulatory surgery centers and their trade association . . . challenged the revised schedule for maximum allowable payments to outpatient medical providers approved by the Commission." *Id.* at 382, 699 S.E.2d at 148. This case was filed in Circuit Court under the Administrative Procedures Act ("APA") and sought injunctive relief. *Id.* at 385, 699 S.E.2d at 149.

Contrary to Appellants' arguments, these cases provide *no support* for joining the Commission as the Respondent in this appeal. In each of the cases discussed above, the Commission was properly named as a party in the lower court. More importantly, *none* of the cases named the Commission, in its judicial capacity, as a party. Rather, each case involves the Commission as an employer, an administrative enforcement body, or an agency subject to an action under the APA or for declaratory relief.

Put simply, a party who loses a judicial proceeding before the Commission or any other Administrative Tribunal cannot name the Administrative Tribunal as a party-Respondent on

[13] Out of an abundance of caution, the Commission has filed a Motion for Judicial Notice with excerpts of the Record on Appeal from *Ray Covington Realtors, Inc.*

appeal. To allow such conduct would be unprecedented and would improperly require the Commission to defend its final judicial decision *as a party* on appeal to the courts. *Cf. McEachern v. Black*, 329 S.C. 642, 647, 496 S.E.2d 659, 661–62 (Ct. App. 1998) ("Without judicial immunity, losing parties would vent their ire on the presiding judge. Court dockets would explode and those willing to expose themselves to the lawsuit-prone job of judge would cower under the constant threat of legal retribution for good-faith errors."). This would frustrate the Commission's statutory requirement to approve attorneys' fees. *See* S.C. Code Ann. § 42-15-90.

D. The Commission has no legally cognizable interest in the outcome of this appeal.

As an objective judicial decisionmaker, the Commission has no vested interest in Appellants' attorneys' fees dispute. The Employer and Carrier have already paid the award, including the $13,461.76 in disputed attorneys' fees, to Appellants. Those funds are not—and never have been—in the possession of the Commission. If the Court affirms the Commission's decision, Appellants will disburse those funds to the Claimant or Claimant will retain the funds if they have already been disbursed.[14] If Appellants prevail, they will retain the funds or Claimant will be required to remit the funds if they have already been disbursed.[15] But there is *no relief* that can be awarded to Appellants from the Commission, as the Commission has never possessed the disputed funds. The Commission, as the judicial body in this case, takes no position as to what party Appellants should have named in their Notice of Appeal. However, in another case pending before

[14] It is unclear whether Appellants have already disbursed the disputed funds to the Claimant. (*See* Decision and Order of the Commission p. 14 (June 6, 2022) (ordering Appellants to certify in writing that the funds have been paid to Claimant)).

[15] This highlights the inherent conflict of interest that this case raises between Claimant and Appellants.

this Court involving entitlement to contingency attorneys' fees, the claimant named the employer and carrier as Respondents. *See* Final Br. of Appellant, *Starnes v. Meritage Asset Mgmt., Inc. d/b/a Century Glass & Insurance Co. of the West*, No. 2022-001595 (S.C. Ct. App. April 12, 2023).[16]

E. The Commission is ethically prohibited from being a party to this appeal.

Finally, the Commission is ethically prohibited from being a party to this appeal. By statute, the Commissioners "are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules . . . ." S.C. Code Ann. § 42-3-250(A). While acting in a judicial capacity, a Commissioner shall "hear and decide matters assigned to the judge except those in which disqualification is required." Rule 3B(1), CJC, Rule 501, SCACR. The Code of Judicial Conduct specifically requires a judge to disqualify himself when the judge is a party to the proceeding. *See* Rule 3E(1)(d)(i), CJC, Rule 501, SCACR. If, as Appellants argue, the Commission was a party to petitions for attorneys' fees, every Commissioner would be ethically disqualified from hearing these proceedings.[17] *See id.* This would prevent the Commission from complying with its statutory requirement to approve fees following independent and impartial review. *See* S.C. Code Ann. § 42-15-90.

[16] "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984).

[17] Moreover, Appellants named the Commission's General Counsel and Staff Attorney as counsel for the Respondent in their Notice of Appeal. These attorneys did not represent the Commission, as a party, below. Rather, they were "court personnel," as defined in the Code of Judicial Conduct, who served in a judicial law clerk role to assist the Commission. *See* Terminology, CJC, Rule 501, SCACR; Rule 3B(7)(c), CJC, Rule 501, SCACR. It is unprecedented to call upon a judge's law clerk to defend that judge's decision on appeal.

II. The Commission correctly denied Appellants' request for an additional $13,461.76 in attorneys' fees.

Before the Commission, Appellants claimed that they were entitled to 33.3% of all benefits paid to the Claimant after she reached MMI on October 12, 2016, including weekly benefits that she received during the pendency of the parties' cross-appeals of the Single Commissioner's April 13, 2017, decision. The Commission disagreed. The Commission held that Claimant's "award of compensation was not 'secure' until [Appellants] successfully defended the award to finality." (Decision and Order of the Commission pp. 9–10 (June 6, 2022) (citing S.C. Code Ann. Regs. 67-1205(C)(2)). The Commission found that finality occurred when the Employer and Carrier's time to appeal the Full Commission expired—i.e., November 16, 2017.[18] (*Id.* p. 3). Two Commissioners dissented in part and would have concluded that Appellants' attorneys' fees are calculated from the date of the Full Commission's decision—October 17, 2017. (*See id.* pp. 14–15). Thus, *every Commissioner* rejected Appellants' argument.[19]

Appellants raise three arguments on appeal. First, Appellants contend that the Commission committed an error of law by failing to approve Appellants' petition for an additional $13,461.76 in attorneys' fees. Second, Appellants argue that the Commission's decision is contrary to the reliable, probative, and substantial evidence in the record. Finally, Appellants contend that the Commission committed an error of law by changing its interpretation of the Act and the Commission's regulations.

[18] A party may file an appeal from the Commission to the Court of Appeals "within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not after, whichever is longest . . . ." S.C. Code Ann. § 42-17-60.

[19] The Commission's split decision highlights another reason why it *cannot be* a party to this appeal.

As detailed above, the Commission is *not* a party to Appellants' petition for attorneys' fees and is legally and ethically prohibited from defending its decision on appeal. However, if the Court reaches the merits of the Commission's decision, the Court should affirm. The Commission's decision faithfully applies the Act and the Commission's regulations and is well-supported by the evidence in the record.

A. Standard of Review

"Judicial review of a Workers' Compensation decision is governed by the substantial evidence rule of the Administrative Procedures Act."[20] *Pratt v. Morris Roofing, Inc.*, 353 S.C. 339, 344, 577 S.E.2d 475, 477 (Ct. App. 2003). "In an appeal from the Commission, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.* In determining whether there was an error of law, this Court must give the Commission's interpretation of its own regulations "great deference." *Earl v. HTH Assocs., Inc./Ace Usa Ins. Co. of N. Am.*, 368 S.C. 76, 81, 627 S.E.2d 760, 762 (Ct. App. 2006); *see* S.C. Code Ann. § 42-3-180 ("All questions arising under [the Act], if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in [the Act].").

B. The Commission's decision is correct under the Act, the Commission's regulations, and governing caselaw.

All attorneys' fees in workers' compensation matters must be approved by the Commission. *See* S.C. Code Ann. § 42-15-90. The Commission has the authority to implement policies and procedures as to the approval of attorneys' fees. *See* S.C. Code Ann. § 42-3-185. However, those policies or procedures "shall become effective only when such implementation is

[20] *See* S.C. Code Ann. § 1-23-380(5).

accomplished by regulations promulgated in accordance with the Administrative Procedures Act, which proposed regulations shall have before promulgation received approval of the Judiciary Committees of the Senate and House of Representatives and also by concurrent Resolution of the General Assembly." *Id.*

The Commission enacted, with the appropriate legislative approval, Regulation 67-1205, which governs the approval of contingent attorneys' fees. *See* S.C. Code Ann. Regs. 67-1205. A contingent fee contract is deemed reasonable when the following requirements are satisfied, and the requested fee is not in conflict with the Rules of Professional Conduct:

> (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 [Regulation 67-1205(C).]

S.C. Code Ann. Regs. 67-1205(B). Regulation 67-1205(C) states that "[a]n attorney may charge up to, but not more than, 33.3% of the total amount of compensation" except as provided in Regulation 67-1205(C)(1)–(7). "The term 'compensation' means the money allowance *payable* to an employee or to his dependents as provided for in [the Act]." S.C. Code Ann. § 42-1-100 (emphasis added).

The Commission held that Appellants did not satisfy the third requirement, as their Form 61 did not comply with Regulation 67-1205(C)(2). (Decision and Order of the Commission pp. 10 (June 6, 2022)). Regulation 67-1205(C)(2) provides:

> If the attorney secures temporary compensation for a client on a Form 15, the attorney shall calculate the fee on the number of weeks that are past due at the time that the Form 15 is approved. The attorney may not charge a fee on temporary compensation that is due in the future. 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*.

(emphasis added). Thus, in order to be entitled to a contingency fee under Regulation 67-1205(C)(2), an attorney must "secure[] the payment of" compensation—i.e., "the money allowance payable to an employee." S.C. Code Ann. § 42-1-100; S.C. Code Ann. Regs. 67-1205(C)(2). As the Commission held, "[t]he award of compensation was not 'secure' until [Appellants] successfully defended the award to finality." (Decision and Order of the Commission pp. 9–10 (June 6, 2022)).

Here, the Commission's award became final on November 16, 2017—thirty days from the Full Commission's October 17, 2017, decision. At the time the award became final, the Employer paid the commuted value of the award—$179,077.14. (*Id.* p. 10). The Commission then approved attorneys' fees of 33.3% of this amount—$59,632.69. (*Id.* p. 12).

Appellants, however, contend that they are entitled to an additional $13,461.76 in attorneys' fees, which represents 33.3% of the running award of weekly payments that had *already been paid* to Claimant between the date of MMI (October 12, 2016) and the expiration of the time to appeal the Full Commission's decision (November 16, 2017). Appellants' argument is based entirely on a misreading of two Supreme Court of South Carolina cases—*Curiel v. Env't Mgmt. Servs. (MS)*, 376 S.C. 23, 655 S.E.2d 482 (2007) and *Smith v. S.C. Dep't of Mental Health*, 335 S.C. 396, 517 S.E.2d 694 (1999). Both cases stand for the proposition that, "if an employee has reached MMI and remains disabled, then his injury is permanent" and temporary benefits should be terminated in lieu of permanent benefits. *Smith*, 335 S.C. at 399, 517 S.E.2d at 695–96; *see also Curiel*, 376 S.C. at 29, 655 S.E.2d at 485 ("Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits.").

Neither *Curiel* nor *Smith* involved a dispute over the award of attorneys' fees, and "we are not concerned with whether the benefits paid to Claimant post-MMI were temporary or permanent disability benefits." (Decision and Order of the Commission p. 7 (June 6, 2022)). Rather, the pertinent inquiry is when counsel "secures the payment of permanent disability." S.C. Code Ann. Regs. 67-1205(C)(2). As the Commission correctly held:

> The Act recognizes the hardship that would be placed on a Claimant if she were to lose the weekly disability payments she was receiving prior to an award of permanent disability benefits being finalized. While the award of permanent disability benefits is pending on appeal, Claimant is not secure in her award of permanent disability benefits. Her weekly payment of disability benefits are her only source of living wages prior to the appeal being finalized. It would be unconscionable to require Claimants to pay to their attorneys the weekly benefits they were receiving before the attorney had successfully defended an appeal.

(Decision and Order of the Commission p. 8 (June 6, 2022)).

Indeed, adopting Appellants' argument "would create the absurd result where an attorney could force his own client to pay back to the attorney weekly benefits the Claimant had already received." (*Id.* p. 9). This would render "the Claimant a debtor and her attorney her creditor," which is contrary to Regulation 67-1205 and the legislative purpose of the Act.[21] *See Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 14 S.E.2d 889, 893–94 (1941) ("Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages . . . and to prevent the burden of injured employees and their dependents becoming charges on society."); *see also* 1986 Op. S.C. Att'y Gen. No. 86-60, 1986 WL 192020, at *3 (May 23,

[21] As the Commission correctly noted, Appellants have collected more than $69,000 in attorneys' fees. (Decision and Order of the Commission p. 10 (June 6, 2022)). "Claimant, meanwhile, is permanently and totally disabled, and the balance of the award is all the money that can be provided by the Act for her to live on for the rest of her life." (*Id.*).

1986) (noting that "the principal purpose of § 42-15-90 is to protect the workman from the charging of excessive fees").

Finally, both this Court's precedent and the Commission's legislatively approved regulations support the Commission's interpretation of Regulation 67-1205(C)(2). Regulation 67-201(B) states, "[i]n doubtful cases, the application of [the Commission's] regulations shall be construed in favor of the injured employee." And, in reviewing the Commission's interpretation of its regulations, this Court must give the Commission's interpretation "great deference." *Earl*, 368 S.C. at 81, 627 S.E.2d at 762. Accordingly, the Court should defer to the Commission's interpretation of Regulation 67-1205(C)(2), which inures to the benefit of claimants, and affirm the Commission's decision.

C. The Commission's decision is supported by reliable, probative, and substantial evidence in the record.

Next, Appellants contend that the Commission's decision is not supported by reliable, probative, and substantial evidence in the record. Appellants' argument is based on the fundamentally flawed premise that the Commission was a party-in-interest to their attorneys' fee dispute. (*See* Appellants' Br. at 19 (stating that the Commission did not submit any briefs, memoranda of law, or arguments before the Commission)). But, as detailed above, the Commission was the judicial body tasked with resolving Appellants' petition for attorneys' fees. Respectfully, Appellants' argument is flatly belied by the Act and the Commission's regulations. *See* S.C. Code Ann. § 42-15-90 (requiring the Commission to approve attorneys' fees); S.C. Code Ann. Regs. 67-1204 (establishing the procedure for the Commission's Judicial Department to review contested requests for contingent attorneys' fees).

Moreover, throughout the proceedings in the Commission, Appellants claimed that the Commission regularly approved petitions for attorneys' fees that were identical to the fee petition in this case. (*See, e.g.*, Affidavit of Preston F. McDaniel pp. 2–4 (June 27, 2022)). Again, on appeal, Appellants claim "that the fee petition was identical to hundreds that [Appellant McDaniel] had presented to the Commission over the years." (Appellants' Br. p. 15). Yet, Appellants have offered no exemplar cases supporting this contention. Indeed, the Commission properly found that "[t]he record is devoid of any evidence showing Commission policy is to award an attorney 33.3% of all post-MMI benefits when the Claimant continues to receive weekly benefits before the award is finalized." (Decision and Order of the Commission p. 10 (June 6, 2022)).

D. The Commission did not change its interpretation of the Act and its regulations.

Finally, Appellants argue that the Commission committed legal error by changing its interpretation of the Act and the Commission's regulations. Contrary to Appellants' assertions, the Commission did not change its interpretation or application of its regulations. Rather, Appellants' petition for attorneys' fees was unlike any petition ever received by the Commission. Appellants have not pointed to any cases where the Commission applied Regulation 67-1205(C)(2) differently than it did here. Respectfully, Appellants' bare assertions are insufficient to erode the deference afforded to the Commission's interpretation of its regulations.

CONCLUSION

For the foregoing reasons, the Commission should be dismissed from this appeal. Alternatively, if the Court determines that the Commission is a proper party to this appeal, it should affirm the Commission's decision.

[Signature Page Follows]

November 1, 2023

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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.

South Carolina Workers' Compensation Commission, Respondent.

PROOF OF SERVICE

The undersigned employee of Law Office of Bill Nettles, attorney for Respondent South Carolina Workers' Compensation Commission, does hereby certify that service of Respondent's Initial Brief was made upon all counsel of record by electronic mail to:

- Preston F. McDaniel: preston@pfmcdlaw.com
- John M. Milling: johnmilling@bellsouth.net

By: _____ November 1, 2023
John L. Warren

From: **John Warren** jw@billnettleslaw.com
Subject: Cartee v. SCJD - Initial Brief, Designation of Matter, and Motion for Judicial Notice
Date: November 1, 2023 at 10:57 PM
To: preston@pfmcdlaw.com, John Milling johnmilling@bellsouth.net
Cc: Greg Harris greg@harrisgasserlaw.com

JW

Preston and John,

Please find attached the following documents, which will be filed with the Court of Appeals this evening:

- Respondent's Initial Brief
- Respondent's Designation of Matter to be Included in the Record on Appeal
- Respondent's Motion for Judicial Notice and Memorandum of Law in Support

Best,

-John Warren

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Motion for Judicial Notice, Memorandum in Support, Exhib...
6.5 MB

Respondent's Designation of Matter and Proof of Service.pdf
190 KB

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