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**Nov 20 2023**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**APPEAL FROM SOUTH CAROLINA**  
SC Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2023-000187

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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.

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**INITIAL REPLY BRIEF OF APPELLANTS**

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**REPLY TO COUNTERSTATEMENT OF ISSUES ON APPEAL**  
**AND COUNTERSTATEMENT OF THE CASE**

As to the COUNTER-STATEMENT of Issues on Appeal, the COUNTER-STATEMENT OF ISSUES does not address the issues raised on appeal, particularly as to COUNTER-STATEMENT issue #1. The Respondent has every right to rephrase each issue as raised in Appellants' Brief and on appeal pursuant to Rule 208(b)(2), SCACR. Also under that same subsection they have the right to raise what is commonly referred to and captioned as "Additional Sustaining Grounds". Also, under Rule 203(c), SCACR, they had every right to file a cross-appeal within five (5) days of the filing of the Notice of Appeal by the Appellants and could have raised any issue they wanted raised in that cross-appeal. In their Brief, the Court will find that the Respondent have done neither. They have neither raised Additional Sustaining Grounds nor did they file a cross-appeal; instead, they have raised new issues not raised on appeal (actually again reargue issues). Therefore, under the Rules the COUNTER-STATEMENT OF ISSUES is not responsive to the issues raised in the appeal.

As for Issue #2 listed in the COUNTER-STATEMENT, that issue and argument appears to be responsive to the issues and arguments raised in the appeal, although it will present difficulty for the Court to address the various issues that have been raised by the

Appellants in correlation to the Briefs. The Court should require the Respondent to submit a revised Brief striking issue and divide the Argument to address each issue raised (restated as Respondent deems appropriate) to comply with Appellate Court Rules.

As to the COUNTER-STATEMENT OF THE CASE, Respondent has every right under the Appellate Court Rules, particularly 208(b)(2) to make a Counter-Statement of the issues and the Appellants have no objection except as to the terminology used in reference to threatening a Commissioner and asking for legal advice. The Appellants will leave the reading of those documents to the Court as to its interpretation, which the Appellants verily believes will be in accord with the Appellants' presentation in their Statement of the Case in the appeal.

#### **REPLY TO ARGUMENTS**

##### **I. THE COMMISSION IS THE PROPER PARTY-RESPONDENT IN THIS APPEAL.**

This issue has already been decided by this Court and by the Supreme Court and the Argument should be stricken. As the Court will note from the Motion to Dismiss filed 03/21/2023 and the Reply to the Motion to Dismiss filed 03/29/2023 that the Commission as a party filed with this Court; and the Motion for Certification and the Response filed to the Motion for Certification with the Supreme Court and copied to this Court, and

in the recent Response Appellants had to file yet again in response to the Motion to Take Judicial Notice, Appellants noted/argued in all three (3) Responses that this issue was never brought up until the Motion to Dismiss in this Court and therefore the issue as to the Commission being a proper party is not preserved for review. Further, in reference to the Motion to Dismiss the Commission as the party Respondent to this appeal, this Court has ruled and denied that Motion. Further, in response to the Motion filed in the Supreme Court for Certification in which the Respondent again argued that it was not the proper party, the Supreme Court denied that Motion. In the recent Motion still pending, the Appellants again argue that the Respondent is not the proper party.

As argued repeatedly not only because this issue is not preserved for appeal, but because this issue has already been decided the principles of res judicata and collateral estoppel the Argument should be stricken and declared frivolous. SC Public Interest Foundation v. Greenville County, 401 S.C. 377, 737 S.E.2d 502 (SC App. 2012).

However, to again respond neither the Appellants nor the Respondent were or are parties to the original workers' compensation claim that gave rise to this ancillary proceeding which is part of the administrative functions of the Commission.

The Appellants, based on their Fee Contract with the claimant, Ms. Cartee, became and were her Attorneys of Record throughout the workers' compensation claim. Freedom of contract is one of our most cherished rights and the parties to that contract normally are the attorneys, in this case the Appellants, and their client or clients, in this case Ms. Pamela Cartee. Of course, that Fee Contract must comply with the ethical requirements of the Attorney's Code of Ethics in reference to contingency fee contracts. However, except by Statute, those are the only parties to that contract. The Workers' Compensation Act provides under SC Code §42-15-90 that all attorney's fees charged in a workers' compensation case are subject to approval by the Commission. SC Code §42-3-185 puts further requirements on implementing the provisions of §42-15-90 and requires that any policies or procedures necessary to implement the provisions of that section only become effective when such implementation is accompanied by "Regulations promulgated in accordance with the Administrative Procedures Act". In accordance with that Statutory provision, the Supreme Court ruled in Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1995) that while the Commission was granted the statutory authority to approve attorney's fees in a workers' compensation case they lacked the authority to do so until they had implemented Regulations in accordance with §42-3-185. Further, SC Code §42-3-

30 provides the Commission's authority to promulgate Rules and Regulations and provides that the Commission shall "promulgate all Regulations relating to the administration of the workers' compensation laws of this State ...".

Under promulgated SCWCC Regulation 67-1204 **Reporting Attorney's Fees for Approval**, subsection (B) where the fee is based on an hourly rate or retainer it only needs to be "administratively" reported on a Form 19. No approval whatsoever is necessary. [Query: does this violate the Statutes, equal protection and openness in government?] Subsection (C) provides that when the parties agree to a contingency fee contract, attorneys shall report the fee by filing a Form 61 and an Attorney Fee Petition, and an Order for approval along with a self-addressed stamped envelope with the "Commission's Claim Department". As noted previously and as is set out above, the Commission is the party charged with the responsibility of regulating and approving doctor's fees and attorney's fees. This case is on all fours with SC Ambulatory Surgery Center Assn. v. SC Workers' Compensation Commission, Respondent, 389 S.C. 390, 699 S.E.2d 146 (2010). As in this case, that decision involved questions of law and the Commission's authority granted to it by Statute under SC Code §42-15-90 and the Regulations adopted thereunder as the party charged with regulating medical fees

charged a claimant by physicians and hospitals and their authority to approve those fees and charges. The Commission is the party Respondent under its authority to approve attorney's fees and this Argument should be stricken as being non-responsive to the issues on appeal for the reason that issue preservation, res judicata, and because the Commission, again, is the proper party Respondent charged with the administrative responsibility of approving attorney's fees.

Note: Appellants would bring to the attention of the Court that as cited in the opinion in South Carolina Ambulatory Surgery Center Ass'n. v. South Carolina Workers' Compensation Commission, supra, in addressing the policies and procedures over the years in reference to the interpretation of the Regulations in question that the Commission relied upon the "Affidavit of its Executive Director" as to the practice of the Commission under the language of the Regulation over the nine (9) years since its adoption.

**II. THE COMMISSION CORRECTLY DENIED APPELLANT'S REQUEST FOR AN ADDITIONAL \$13,461.76 IN ATTORNEY'S FEES.**

The Respondent in their Brief have combined all three of the issues for argument under Argument II. The Appellants will briefly point out or reiterate certain key points to the Court.

First, under **A. Standard of Review**, the Respondent recites that this Court will give great deference to the Commission's own

interpretation of its Regulation. As cited in their Brief and Appellants', where an interpretation is contrary to the plain language of the Statute or Regulation, the Court will reject the Agency's interpretation. Sierra Club v. SC Dept. of Health and Environmental Services, 426 S.C. 236, 826 S.E.2d 596 (2019). Further, the Court will not give deference to an Agency's interpretation of a Regulation when that interpretation has changed to a new and "current interpretation". Where that occurs, as here, the Court will not give deference to the Commission's interpretation. Jack's Custom Cycles, Inc. v. SC Dept. of Revenue, 439 S.C. 35, 885 S.E.2d 433 (SC App. 2023). Appellants believe this is the appropriate case to address and has requested that the Court address the situation where an everchanging Agency or Commission changes the interpretation of a Regulation without formal procedure or notice, a changed interpretation. Counsel refers to the current Commission because that is exactly what it is, the current Commission. None of the Commissioners that are currently serving on the Workers' Compensation Commission were Commissioners when the Regulations concerning attorney's fees were passed in 1991, and the longest tenured Commissioner currently sitting on the Commission came to the Commission in 2008. The Court will find nothing in the Record to establish that the Appellants' interpretation as set forth in its Brief is not the

interpretation of the Statutes, case law and Regulations of the Commission at any time in the past and that the current Commission has clearly changed its interpretation without notice to anyone or a change in the reading of the Regulation. See South Carolina Ambulatory Surgery Center Ass'n, supra.

Next, under Section B, the Court will find that the argument mirrors the argument of the Appellants until, on page 20, the Respondent attempts to morph or have a separate meaning applied to "attorney's fees" in reference to the date the "Award" becomes permanent. After properly setting out the decisions and the finding that the "date of maximum medical improvement" is the date that the "Award" of compensation transitions from being temporary weekly compensation benefits to a permanent "Award", the Appellants would simply point out that there is no bifurcation or different meaning applied to the "date of maximum medical improvement" in different contexts. It is what it is.

The date that Commissioner McCaskill declared that the Claimant had reached maximum medical improvement and made his "Award" of permanent total disability from that date, which is the appropriate date for the permanent "Award", the attorneys' fees attached on that date.

Further, in reference to this argument, the Appellants would also point out that the Commission's position prior to their

Brief, has always been that when the "Award" is final at the Commission that that is the date on which the attorneys' fees attach. However, in their Brief, the Respondent argues that because the Defendants did not appeal, the Order became final. In other words, it tends to state that if the Defendants had appealed, then the attorneys' fees would not attach until all appeals are over, which would mean a further ever-ending and ever-shifting date for the attachment of attorneys' fees. Again, as is pointed out by the Appellants in their initial Brief, that fluid date places the Claimant's Counsel in an ethical situation of their best interests versus their client's. Simply put, Claimant's Counsel could be paid more by settling the case during Appeal and taking less or giving up various benefits for his client in his best interests, because he would get paid more by doing so.

Finally, in reference to Section **B**, the Appellants would point that SC Code §42-9-240 dates the payment of compensation back to the date of the original "Award". The Court should not countenance a floating date at which time the attorneys' fees attach, nor a varying definition of maximum medical improvement and the date that a permanent Award attaches depending on for what purpose a party wants to use that date.

Under Section **C** of the Brief, the Respondents try to assert that there is substantial evidence in the Record but yet point to

none, and also attempt to believe the accuracy of the Counsel's Affidavit. Further, there is nothing in the Record to establish that the Commission at any time ever presented any policies or procedures and interpretation as set forth in the Affidavit or questioned the accuracy of the Affidavit or even questioned the specific cases referred generically by occupation in the Affidavit that were heard and approved by currently sitting Commissioners. Unlike South Carolina Ambulatory Surgery Centers Ass'n v. South Carolina Workers' Compensation Commission, supra, there is no Commissioner nor Staff Affidavit challenging or contrary to Appellants' Affidavit.

Further, as to the interpretation and also what the Commission's policy has been as far as giving a credit for weekly payments made after maximum medical improvement against the permanent "Award", the Commission's own Stop Payment Form, SCWCC Form 21, specifically provides that the Defendant(s) seeking to stop payment may set forth when the claimant reached maximum medical improvement, and under V, "request credit for overpayment of temporary compensation pursuant to §42-9-210." Thus the Commission's own form provides for a credit, for the Commission to give a credit to the insurance carrier and/or self-insured employer for temporary total disability benefits paid after the date of maximum medical improvement and against the permanent

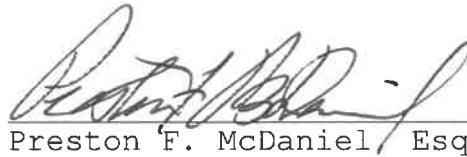
Award made in the case.

**CONCLUSION**

For the foregoing reasons, Argument I should be stricken as the Commission is the proper party as has been previously decided by this Court, and the Court should determine that the Appellants' interpretation of the Statutes and Regulations applying the case law of our Appellate Courts is correct and award them the remaining portion of the attorneys' fees originally requested.

Note: not as incorrectly referred to by Respondent as "additional" attorneys' fees of \$13,461.76.

Respectfully submitted:



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Attorneys and Appellants

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IN RE:

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Milling, Esquire, .....Appellants,

v.

SC Workers' Compensation Commission, .....Respondent.

---

**PROOF OF SERVICE**

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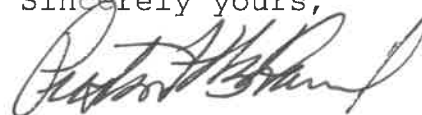
**RE: Pamela Cartee v. SCJD (Preston F. McDaniel) (2)  
Appellate Case No. 2023-000187**

Dear Ms. Kitchings:

Enclosed please find for filing with the Court our **INITIAL  
REPLY BRIEF OF APPELLANTS** in the above-referenced matter. By copy  
of this letter, I am serving Counsel of Record with a copy of  
same.

I hope this is sufficient for filing but should you need any  
additional information, please let us know.

Sincerely yours,



Preston F. McDaniel

PFM/kth  
Enclosures

cc: John M. Milling, Esquire (Via electronic mail only)  
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Greg Harris, Esquire (Via electronic email only)