

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKER'S COMPENSATION COMMISSION

The Honorable Susan S. Barden, Melody L. James and Avery B. Wilkerson, Jr.

WCC File No. 0902416

JOHN HART, APPELLANT,

v.

OWEN STEEL COMPANY, INC., AND
OLD REPUBLIC INSURANCE COMPANY C/O
GALLAGHER BASSETT SERVICES, INC., RESPONDENTS.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

- I. WHETHER THE COMMISSION CORRECTLY HELD THAT, DUE TO CLAIMANT'S FAILURE TO APPEAL THE AMOUNT OF ATTORNEY'S FEES AWARDED BY THE SINGLE COMMISSIONER, THE LAW OF THE CASE DOCTRINE PREVENTED IT FROM INCREASING AN AWARD OF ATTORNEY'S FEES?

STATEMENT OF THE CASE

This appeal arises out of contempt proceedings held by the South Carolina Worker's Compensation Commission pursuant to S.C. Code Ann. § 42-3-175(A)(1). On September 1, 2010, a Single Commissioner issued an Order and Decision requiring the Carrier to pay temporary total disability compensation, and to pay for all medical and surgical treatment prescribed or recommended by the authorized treating physicians ... until Claimant has reached maximum medical treatment and thereafter so long as such post-MMI treatment tends to lessen Claimant's period of disability." Single Commissioner Decision and Order, p. 8 (Sept. 1, 2010). This Order also directed the Carrier to "promptly and without delay reimburse Claimant for travel expenses at the current statutory mileage rate for medical treatment to and from his home in Georgia to authorized medical providers." ("Mileage Provision"). *Id.*

Weeks later, Claimant moved on October 14, 2010 for an Order and Rule to Show Cause pursuant to S.C. Code Ann. § 42-3-175(A)(1) seeking to enforce the Single Commissioner's directive that the Employer/Carrier pay the Order's Mileage Provision because Employer/Carrier had not yet paid all mileage reimbursement requests in full. Claimant's Mot. Order and Rule to Show Cause (Oct. 14, 2010). In addition, Claimant sought to require the Carrier to pay Claimant's attorney's fees associated with bringing the Motion. *Id.* A hearing on the matter was held on November 19, 2010, which was not transcribed. Single Commissioner's Decision and Order (Jan. 4, 2011). Single Commissioner Beck ordered, among other things not relevant to this appeal, that the Carrier reimburse the Claimant for travel expenses as required under the Mileage Provision and pay the Claimant's attorney's fees in an amount of \$1,000.00. Single Commissioner Decision and Order (Jan. 4, 2011). No appeal was taken.

On April 16, 2012, Claimant filed a motion for an Order and Rule to Show Cause pursuant to S.C. Code Ann. § 42-3-175(A)(1) to enforce the prior contempt order. Claimant's Mot. for Order and Rule to Show Cause (April 16, 2012). A hearing was held on August 23, 2012 before Commissioner Beck. Single Commissioner Decision and Order, p. 1 (Oct. 10, 2012). No transcript was taken of the hearing. *Id.* at p. 5. The Single Commissioner found the Carrier to be in willful contempt of his prior order, and imposed a penalty. *Id.* at pp. 6, 7 and 10.

Additionally, the Single Commissioner ordered the Carrier to pay attorney's fees to Claimant in the amount of \$1,500.00. *Id.* at p. 10. The Order's finding of fact concerning attorney's fees stated:

Defendants shall pay the Claimant's attorney's fees in the amount of \$1,500.00, pursuant to § 42-3-175. I find Claimant's attorney's representation of the amount of time he and his staff spent on enforcing this order to be accurate and reasonable. His efforts are amply documented by the e-mails and letters submitted to the Commission. The Commission has explicit authority to order a Defendant to "pay the Claimant's attorney's fees and costs of enforcing the order." Payment of attorneys fees and costs is mandatory whenever the Commission finds an insurer, a self-insured employer, a self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits when ordered to do so. Single Commissioner Decision and Order, p. 7, ¶ 7 (Oct. 10, 2012).

Claimant merely made verbal representations to the Single Commissioner. *Id.* at p. 7. Because the hearing was not transcribed, those representations were not evident in the record.

On October 22, 2012, the Carrier filed a Form 30 for Commission review, asserting procedural and evidentiary errors in imposing a penalty upon the Carrier and lack of evidentiary support for the \$1,500.00 award of attorney's fees. The Carrier asserted that the Single Commissioner's award of attorney's fees lacked sufficient findings of fact as to the hourly rate of Claimant's counsel, and "failed to provide any basis as to how the Single Commissioner settled on \$1,500.00 as the proper attorney's fee." App. Brief to Full Comm., p. 5 (Jan. 3, 2013). Claimant did not seek review of the Order.

A hearing was held on February 20, 2013. Appellate Panel Decision and Order, p. 1 (April 16, 2013). At the hearing, the Carrier withdrew its challenge to the penalty but maintained that the attorney's fees awarded were not supported by any evidence in the record. H'rg Tr. p.9, line 1 – p. 10, line 13, p. 14, lines 1-10 (Feb. 20, 2013). Claimant's counsel offered to submit to the Commission an affidavit documenting his time spent in bringing the Motion. H'rg Tr. p. 16, lines 12-15. Claimant's counsel went on to state that he did not think Commissioner Beck "ordered enough [attorney's fees] given the time involved, but I'm not appealing it. I didn't dispute it." H'rg Tr. p. 17, lines 17-20. As the hearing continued, Claimant's counsel renewed his argument that he should receive more compensation than \$1,500.00, but when questioned by the Commission as to whether he appealed the amount of attorney's fees awarded, he conceded that he did not appeal the amount. H'rg Tr. p. 21, line 4-18.

The Carrier did not object to Claimant's submittal of an affidavit should the Commission request it; however, Employer/Carrier asserted that the affidavit should only be accepted for the purpose of determining whether the Single Commissioner's award of \$1,500.00 was reasonable. H'rg Tr. p. 19, lines 13-20, p. 27, lines 2-11. The Commission concluded the hearing without requesting an affidavit. *Id.* at pp. 19-28.

After the hearing was held, the Commission requested that Claimant's counsel submit an affidavit concerning attorney's fees. *See* Appellate Panel Decision and Order, p. 8 (April 16, 2013). On February 25, 2013, Claimant's counsel submitted to the Commission an affidavit showing fees and costs amounting to \$6,407.50. Electronic Mail Message from Stephen Samuels to Commission (Feb. 25, 2013); Affidavit of Stephen Samuels (Feb. 25, 2013). Counsel for the Carrier objected to the affidavit in that it detailed attorney's fees in excess of the \$1,500.00 in

attorney's fees awarded by the Single Commissioner. Electronic Mail Message from Jason Lockhart to Commission (Feb. 25, 2013). Additionally, counsel for the Carrier objected to the affidavit's documentation of fees for activities performed after the hearing before the Single Commissioner. *Id.* Claimant's counsel admitted that the affidavit did state attorney's fees higher than \$1,500.00; however, he argued that "the risk one takes in appealing any award is that the Appellate Panel is free to increase or decrease the amount as it interprets the law and evidence." Electronic Mail Message from Stephen Samuels to Commission (Feb. 26, 2013). Claimant's counsel also conceded that his affidavit included time spent after the Rule to Show Cause hearing. *Id.*

In its order dated April 16, 2013, the Appellate Panel accepted Claimant's affidavit and made specific findings of fact concerning the reasonableness of Claimant's attorney's fees as required under *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). Appellate Panel Order, pp. 8-9 (April 16, 2013). It then affirmed the Single Commissioner's award of \$1,500.00 in attorney's fees. Although the affidavit documented attorney's fees and costs amounting to \$6,407.50, the Appellate Panel concluded that, because Claimant did not appeal the award amount of \$1,500.00, this amount constituted the law of the case. *Id.* at p. 14. Thus, the Commission saw the issue before it as only whether sufficient evidence and findings of fact supported the Single Commissioner's award of \$1,500.00. *Id.* Claimant timely filed a notice of appeal to this Court.

STANDARD OF REVIEW

“The decision to award or deny attorneys’ fees under a state statute will not be disturbed on appeal absent an abuse of discretion.” *Sloan v. Friends of the Hunley, Inc.*, 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011). “An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions.” *Id.*

ARGUMENT

The Single Commissioner ordered the Carrier/Employer to pay Claimant \$1,500.00 in attorney’s fees. The only basis for the Single Commissioner’s determination of attorney’s fees apparently was Claimant’s counsel’s oral representations to the Single Commissioner. The Carrier brought an appeal of the Single Commissioner’s Order based upon lack of factual findings to substantiate the Single Commissioner’s award of \$1,500.00 in attorney’s fees. *See* App. Brief to Full Commission, pp. 4-6 (Jan. 3, 2013); Hearing Tr. p. 9, lines 10-14 (“We think that the Commissioner’s order lacks specific information as to the basis for the fees that were awarded in this particular basis.”). In its Brief to the Full Commission, the relief Employer/Carrier sought was to vacate the award due to lack of evidentiary support. App. Brief to Full Commission, p. 6 (Jan. 3, 2013).

“The findings of fact and law by the hearing commissioner become and are the law of the case, unless within the scope of the appellant’s exception to the full commission” *Green v. Columbia*, 311 S.C. 78, 80, 427 S.E.2d 685, 686 (Ct. App. 1993). Here, the scope of the Carrier’s exceptions to the Commission did not include any argument that the amount of the award should have been something different. The Carrier sought Commission review of the Single Commissioner’s Order based upon lack of factual findings to substantiate the Single

Commissioner's award of \$1,500.00 in attorney's fees and asked the Commission to vacate the award. *See* Hearing Tr. p. 9, lines 10-14 ("We think that the Commissioner's order lacks specific information as to the basis for the fees that were awarded in this particular basis."); App. Brief to Full Comm. (Jan. 3, 2013). The Carrier did not challenge the award of \$1,500.00 as excessive. Indeed, because of the lack of evidence in the record as to the number of hours Claimant's attorney spent or the Claimant's attorney's hourly rate, Carrier had no means by which to even bring an appeal on that basis. Thus, the scope of Employer/Carrier's appeal to the Commission solely concerned how the Single Commissioner arrived at the \$1,500.00 award. The Carrier's appeal to the Commission did not preserve for Commission review any question as to whether the amount of the award should be different.

Claimant did not appeal the \$1,500.00 award as too low. "Unappealed findings of fact and law made by the Single Commissioner is the law of the case." *Brunson v. Am. Koyo Bearings*, 367 S.C. 161, 165-166, 623 S.E.2d 870, 872 (Ct. App. 2005). "A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case." *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 378, 597 S.E.2d 181, 184 (Ct. App. 2004). Therefore, the Commission properly held that the \$1,500.00 in attorney's fees awarded by the Single Commissioner was the law of the case.¹

In his Initial Brief, Claimant argues that the Commission erred as a matter of law in accepting Claimant's affidavit showing \$6,407.50 in attorney's fees yet concluding that, because Claimant failed to appeal the amount of the Single Commissioner's award of attorney's fees, it "lack[ed] authority to reverse an unappealed finding of a Single Commissioner." Appellate

¹ The Commission made this statement both as a finding of fact and a conclusion of law. *See* Appellate Panel Decision and Order, p. 10, ¶ 11 and p. 14, ¶ 5 (April 16, 2013).

Panel Decision and Order, p. 10 (April 16, 2013). Claimant asserts that once the Commission took the affidavit as additional evidence, the amount of the Single Commissioner's award was subject to review and reconsideration by the Commission. Claimant's argument misses the point. In asking for the affidavit, the Commission was simply seeking to make findings to support the Single Commissioner's award in a manner consistent with the test set forth in *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993). See Appellate Panel Decision and Order, p. 9 (April 16, 2013). Contrary to Claimant's arguments, the Commission did not vacate the Single Commissioner's award and engage in a new fact-finding proceeding to ascertain the proper amount of attorney's fees.

The Commission asked for an affidavit from the Claimant's attorney after the Commission hearing had concluded. It did so merely to complete the record so that it could make full and complete findings of fact substantiating the Single Commissioner's award of \$1,500.00. The findings of the Commission can be set aside only if unsupported by substantial evidence. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 185, 414 S.E.2d 162, 163 (1992). Appellant's affidavit set forth Claimant's attorney's hourly rates and also described his time spent preparing for the contempt hearing, which supported the Commission's findings of fact required under *Blumberg v. Nealco*, 310 S.C. 492, 427 S.E.2d 659 (1993).

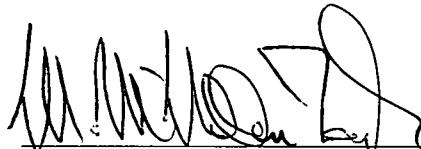
Had the Commission engaged in fact-finding to the extent that Claimant argues, in all fairness, there would have been notice of a subsequent hearing, and an opportunity for the Carrier to present countervailing evidence and argue against Claimant's eleventh-hour attempt to increase his attorney's fees. See *Adams v. H.R. Allen, Inc.*, 397 S.C. 652, 657, 726 S.E.2d 9, 12 (Ct. App. 2012) (stating that, under the APA, all parties must be afforded the opportunity for a hearing and to "respond and present evidence and argument on all issues involved."). The

Commission did not abuse its discretion in affirming the Single Commissioner's award of \$1,500.00 in attorney's fees to the Claimant.

CONCLUSION

For the reasons stated above, this Court should affirm the Commission's Order.

Respectfully submitted,



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