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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No.: 1122484
Appellate Case No.: 2014-002070

William W. Huggins, Jr. .....Respondent,

v.

City of Mullins and South Carolina Municipal Trust ..... Respondents,

Rakesh Chokshi, M.D. .....Appellant.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

1. **Whether the Full Commission Appellate Panel correctly ordered Dr. Chokshi to provide his deposition pursuant to the South Carolina Workers' Compensation Fee Schedule, or alternatively, properly compelled him to give his deposition for $400.00 an hour.**

2. **Whether the Appellant's appeal should be dismissed.**

STATEMENT OF THE CASE

Dr. Rakesh Chokshi is a non-party appellant who has appealed the Decision and Order of the Full Commission Appellate Panel dated September 3, 2014, wherein it upheld the Decision and Order of Commissioner Roche granting the defendant's Motion to Compel Dr. Chokshi to provide his deposition pursuant to the South Carolina Workers' Compensation Fee Schedule.

The underlying workers' compensation case involves an admitted work-related accident on September 19, 2011, resulting in an injury to the claimant William Huggins' low back. The claimant received authorized medical care for his low back injury with Dr. Odom. Dr. Odom diagnosed the claimant with a low back sprain and eventually released the claimant to return to work full-duty on September 28, 2011.

The Respondents authorized a follow-up visit with Dr. Odom due to the claimant's complaints of continued low back pain. The claimant at this time alleged a new complaint of right-sided neck pain. Dr. Odom opined that the claimant's neck spasm was not directly-related to the admitted accident. As such, the Respondents denied the neck was related to the admitted accident and declined to provide additional medical care.

The claimant then sought unauthorized medical care with his family care provider, Dr. Carroll, for neck and low back problems allegedly related to the admitted accident. Dr. Carroll eventually referred the claimant for an unauthorized evaluation with Dr. Chokshi for the alleged cervical problems only. Dr. Chokshi treated the claimant on October 28, 2011, and November 20, 2011. Dr. Chokshi billed the claimant's health insurance for these visits.

On or about January 18, 2013, approximately one and a half years after the accident, the claimant issued a questionnaire to Dr. Chokshi, asking that he complete it with regards to the claimant's back and neck problems. Dr. Chokshi completed the questionnaire. A second

questionnaire was completed by Dr. Chokshi on May 16, 2013. In this questionnaire, Dr. Chokshi opined that the claimant's neck injury was caused by the September 19, 2011, incident. This questionnaire was submitted by the claimant to support his workers' compensation claim. In fact, Commissioner Barden found the claim compensable, though the issue is currently on appeal to the Full Commission.

In further defense of the claim, Respondents scheduled Dr. Chokshi's deposition. On July 26, 2013, defendants contacted Dr. Chokshi's office to confirm the deposition date and time. In addition, counsel for defendants sought to confirm that payment for same would be in the amount of $400.00 for the first hour, and $100.00 for each additional fifteen minutes thereafter as required by the SCWCC 2010 Medical Services Provider Manual Fee Schedule ("fee schedule").

Dr. Chokshi's office manager issued a letter to counsel for the defendant on July 26, 2013, requesting $1,000.00 per hour and each additional hour for $500.00 as Dr. Chokshi did not treat the claimant under workers' compensation. According to a follow-up email, the difference would be refunded if the case settled as a workers' compensation claim.

Respondents subsequently filed a Motion to Compel Dr. Chokshi's deposition with the Commission. On January 27, 2014, after an earlier hearing on the matter, Commissioner Roche issued an order granting the Motion to Compel. Dr. Chokshi appealed the Order to the Full Commission. On March 10, 2014, Dr. Chokshi gave his deposition in this matter. On September 3, 2014, the Full Commission affirmed the decision of Commissioner Roche. This appeal followed. Dr. Chokshi now argues that because he was not authorized by the defendants or the Commission to perform any service under the jurisdiction of the Workers' Compensation Act, he is not bound by the fees mandated under the fee schedule.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") governs review of decisions of the South Carolina Workers' Compensation Commission by the Court of Appeals. S.C. Code Ann. § 1-23-380 (Supp. 2006); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). Under the APA, the decisions of the South Carolina Workers' Compensation Commission may be reversed, modified or remanded if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by error of law. S.C. Code Ann. § 1-23-380(A)(6)(d)(Supp. 2006). A decision may be reversed or modified if arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(A)(5)(f).

ARGUMENT

I. THE FULL COMMISSION APPELLATE PANEL CORRECTLY ORDERED DR. CHOKSHI TO PROVIDE HIS DEPOSITION PURSUANT TO THE SOUTH CAROLINA WORKERS' COMPENSATION FEE SCHEDULE OR ALTERNATIVELY, CORRECTLY ORDERED HIM TO GIVE HIS DEPOSITION FOR $400.00 AN HOUR.

A. Dr. Chokshi failed to preserve his arguments that (1) only physicians who have been an issued a Form 14A are subject to the fee schedule and (2) unauthorized treating physicians should be treated as IME physicians and should be exempt from the fee schedule.

For the first time, Dr. Chokshi argues that in order to be subjected to the fee schedule, a physician must be issued a Form 14A authorizing his services. Additionally, Dr. Chokshi argues for the first time that under the Provider Manual, he should be equated to an independent medical examiner/physician. Neither of these arguments, however, should be considered by this Court because they were never raised to and ruled upon by the Full Commission.

At the Full Commission, Appellant argued that Title 42 was not applicable to him because Title 42 and its fee schedules only apply to "claims under Title 42." Moreover, while Appellant cited the Provider Manual as being applicable to accepted claims, he did not make the same arguments regarding his interpretation of the Provider Manual with its CPT codes, and that under the codes he should be considered equivalent to an independent medical examiner/physician, who he alleges is "exempt" from the fee schedule.

It is axiomatic that for an issue to be considered on appeal, it must be raised to and ruled upon by the trial court. *Stogsdill v. South Carolina Dept. of Health and Human Services*, 410 S.C. 273, 763 S.E.2d 638 (Ct. App. 2014) (noting that issue was not preserved for appellate review under the APA because it was not raised to and ruled upon by the trial court). *See also Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("[A]n issue cannot be raised

for the first time on appeal, but must be raised to and ruled upon by the trial court to be preserved for appellate review."). Because, the Appellant did not raise these arguments to the SCWCC, they should not be considered by this Court.

B. The Full Commission Appellate Panel correctly held that Dr. Chokshi was subject to the SCWCC fee schedule for purposes of giving his deposition in the underlying workers' compensation matter, as Appellant was not an IME physician and was required to give his testimony for the same fee all treating physicians are required to accept.

Even if the Appellant's new arguments are considered, they must be rejected. Appellant argues that without authorization by an employer via a Form 14A, a physician's services, including the giving of a deposition, are not controlled by the fee schedule. This argument is erroneous.

Appellant wants to paint the issue as one where the issue of authorized treatment is the equivalent to the issue of whether the fee schedule is applicable to a physician's deposition where the physician has injected himself into a workers' compensation claim. These issues cannot be resolving by using such logic.

As support for his proposition he is not bound by the fee schedule, Dr. Chokshi cites South Carolina Code section 42-15-95(A), which states in relevant part: "Fee schedules established through regulations of the Workers' Compensation Commission shall apply only to claims under Title 42." S.C. Code § 42-15-95(A) (emphasis added). Assuming that this section provides some guidance regarding the applicability of Title 42 to depositions of medical care providers, this section supports the position that Dr. Chokshi is bound by the fee schedule. As noted above, Title 42's fee schedule applies to claims under Title 42. Thus, the only question the Full Commission needed to concern itself with was this: *has a claim been made by an employee pursuant to Title 42 for compensation to a body part for which Dr. Chokshi rendered care*? The answer is

undeniably "yes" because the claimant in this matter had a pending claim seeking compensation for a neck injury for which Dr. Chokshi treated him.

In South Carolina, words in a statute are given their plain, ordinary meaning. "When interpreting a statute, our primary role is to ascertain the intent of the legislature." *State v. Johnson*, 343 S.C. 693, 695, 541 S.E.2d 855, 857 (Ct. App. 2001). When a statute's language is plain and unambiguous and conveys a clear and definite meaning, the appellate court will not look for or impose another meaning. *State v. Jihad*, 342 S.C. 138, 142, 536 S.E.2d 79, 81 (Ct. App. 2000); *see also Adkins v. Varn*, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993) (noting when the statute contains terms which are clear and unambiguous, the court must apply those terms according to their literal meaning).

The word "claim" is defined as "to say that something is true, even though there is no definite proof" or "to say that someone's actions are the cause of something, especially in a court of law." South Carolina Code section 42-15-95(A) does not state that only admitted claims are governed by Title 42, but rather any "claim" made by an employee is governed by Title 42. Title 42 specifically gives employers and carriers the right to deny claims made by their employees for numerous reasons set forth within the Title. It would be absurd to say that admitted claims are governed by one set of rules while denied claims are governed by an entirely different set of unwritten rules. Title 42 makes no such distinction.

Dr. Chokshi's position is further undermined by the next subsection in S.C. Code § 42-15-95. Subsection B states in relevant part that a "health care provider who provides examination or treatment for any injury, disease, or condition *for which compensation is sought under the provisions of this title* may discuss or communicate an employee's medical history . . . ." S.C. Code § 42-15-95(B). Again, had the legislature only intended Title 42 to cover those cases in

which compensation was admitted, it could have easily said so. Rather, the legislature recognized that merely seeking compensation or filing a claim is what invokes the rights, remedies, and requirements of Title 42.

Dr. Chokshi goes on to assert that where an employer denies the claim or does not authorize the medical practitioner's medical services, the employer denies that a claimant has a compensable claim under Title 42. Dr. Chokshi continues to confuse the fact that there must be "a claim" with the idea that the "claim" must be compensable in the first instance for Title 42 to apply. The SCWCC jurisdiction is not so limited. For example, when a claim is denied by an employer as not being compensable, it does not provide the employee a right to file suit in circuit court. Rather, the claim is still governed by, and must be proved to be compensable or not, under the jurisdiction of the SCWCC under Title 42 and its attendant regulations. Under Dr. Chokshi's theory, the SCWCC's jurisdiction as established by Title 42 is limited to only those claims admitted to be compensable. Dr. Chokshi cites no authority for such a limited reading of Title 42, as no such authority exists.

Dr. Chokshi also attempts to portray this case as one involving a contract between an employer and a medical care provider, but fails to recognize that the underlying basis for this alleged "contract" are the statutory provisions which he agrees to be bound by when his care or treatment involves an employee *who asserts a claim under Title 42*. The fee schedule is not a negotiated contract between the employer and the health care provider but one which is uniform and set by the Commission to apply to all "claims" asserted by an employee. Dr. Chokshi's efforts to make this a matter of contract fly in the face of the fact that these provisions are statutorily mandated. Accordingly, this Court should affirm the SCWCC decision that Dr. Chokshi is bound by the SCWCC fee schedule or that his fee in any regard was appropriate.

Appellant also asserts that it is proper for him to be compensated as if he had performed an Independent Medical Exam ("IME"), citing CPT Code 99074 of the Special Reports and Services section of the schedule. Code 99074 states: "Testimony by deposition, all other providers." The fee for this is designated IC, individual consideration. Code 99072 states: "Testimony by deposition, physician." The fee for this is $400.00. Appellant argues that IMEs are specifically exempted from the fee schedule limitation by virtue of Code 99074. Appellant, however, cites nothing for this proposition. Respondents do not concede this point but note that the SCWCC has previously indicated that physicians who *perform IMEs* are not bound by the fee schedule in conducting their examination.[1] However, counsel for the Respondents has always paid an IME physician $400.00 for his deposition testimony pursuant to the fee schedule under Code 99072 because IME physicians are, in fact, physicians and governed by that provision. Respondents contend that Code 99074 applies to other providers who are not physicians, i.e. physical therapists, speech therapists, vocational experts, nurse practitioners, etc. Regardless, Appellant's argument does not change the result because the Appellant is not an IME physician in any event.

In an IME, the examiner is independent and must "arrive at his/her own diagnosis and opinions, independently of the referring source, remuneration, other's opinions, or personal bias. The [e]xaminer is a medical professional, who is not involved in the claimant's care. IMEs are [m]edical evaluations. They involve the essential elements of a medical assessment, including history, [e]xamination, and review of relevant records and applicable diagnostic studies. Usually, but not always, a physical examination is performed. If there is no physical exam component,

[1] This is believed to be as a result of the lack of physicians willing to do IMEs, as they typically involved extensive medical record review (not compensated under the fee schedule for normal physicians) and a lengthy physical exam of a claimant well in excess of what a typical doctor performs.

sometimes the term Independent Medical (Record) Review is used."[2] "The history in an IME is more comprehensive than the conventional history obtained by a treating physician [and] includes a comprehensive review of prior medical records, occupational and socioeconomic history, in addition to the usual subjective history of present illness. Records available for review to the IME examiner are usually more complete than those available to the treating physician."[3] An "IME needs to provide a complete, comprehensive, and objective description of the examinee's condition at that time, in the context of prior health, physical and vocational capabilities, and social functioning. In contrast, the treating physician's evaluations are based on multiple, shorter encounters over the course of time. Unlike the medical consultation that ends only with treatment recommendations, the IME is broader in scope. Often, the IME will answer specific questions posed by the referring source. Referring sources include insurers, attorneys, and others involved in the management of workers' compensation, personal injury, disability cases, and other similar issues."[4]

There is no question that Dr. Chokshi did not perform an IME. Based upon what is expected of an IME examiner and an IME report, it only makes sense that an IME physician is exempted from the confines of a fee schedule, as the IME physician is not treating the claimant in an admitted or denied claim. Dr. Chokshi's efforts to equate a deposition by a physician who treats a patient and offers opinions in a denied workers' compensation case fails because the role of a treating physician in an admitted or denied case is the same, whereas the role by an IME physician is vastly different.

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[2] "Standards for Independent Medical Examinations" American Medical Association, "The Guides Newsletter" November/December 2005 ed.
[3] Id.
[4] Id.

Even if Dr. Chokshi were correct in arguing he is not bound by the fee schedule due to the fact IME physicians are exempt, there was no error in compelling him to give his deposition at $400.00 an hour. Under the fee schedule, it states that the "payer will pay IC services based upon a review of the submitted documentation of the payer's medical consultant and/or the payer's review of prevailing charges for similar services." Thus, even the fee schedule recognizes that IC services may be limited to those of the prevailing charges for similar services. Assuming *arguendo* the Appellant is correct that he is not bound by the fee schedule, the same of which is denied, there is nothing erroneous about the SCWCC's decision to limit him to $400.00 per hour as those would be the prevailing charges for similar services—deposition testimony by a *treating physician* of a claimant—exactly what Dr. Chokshi was in this case. It is only logical therefore, that the prevailing charges for deposition testimony by a treating physician in admitted and denied cases ($400.00) would be a fair and reasonable rate as ordered by the SCWCC. The SCWCC always has the discretion to set what constitutes a reasonable fee for a deposition, as does any court, even where there is a disagreement, even under Rule 26, SCRCP.

C. Dr. Chokshi waived any right or is estopped to allege he was not aware he would be bound by the fee schedule because he knew his deposition was sought in response to an alleged workers' compensation claim.

Dr. Chokshi further alleges that he was never put on notice that his deposition would be controlled by the fee schedule. Dr. Chokshi asserts that because he was treating the claimant under his group health insurance, the appropriate fee would be a "reasonable fee" as established between the parties under Rule 26, SCRCP. This position is untenable.

On or about January 18, 2013, the claimant issued a questionnaire to Dr. Chokshi, asking that he complete it with regards to the claimant's back and neck problems. Dr. Chokshi's completed the questionnaire regarding the back and neck problems. A second questionnaire was

completed by Dr. Chokshi on May 16, 2013. In this questionnaire, Dr. Chokshi opined that the claimant's neck injury was caused by the September 19, 2011, work-related incident. This questionnaire was submitted by the claimant to support his workers' compensation claim. In fact, Commissioner Barden found the claim compensable, though that issue is currently on appeal to the Full Commission.

The fact that Dr. Chokshi may not have realized that *his treatment* of claimant was being done in connection with an alleged workers' compensation injury is irrelevant. Dr. Chokshi became subject to the fee schedule under the SCWCC when the claimant and his attorney alleged that Dr. Chokshi's treatment of the claimant was causally related to the claimant's work-related injury, and Dr. Chokshi chose to attempt to both causally relate the injury to claimant's workers' compensation claim and give an impairment rating that he knew was sought in connection to the workers' compensation proceeding. It is the claimant's workers' compensation claim under which Dr. Chokshi was subpoenaed and under which his testimony was sought. The SCWCC is the only forum from which a subpoena could be issued and in which Dr. Chokshi could be compelled to provide testimony. Thus, it is illogical to say that the deposition does not fall under the rules of Title 42 and the SCWCC.

Moreover, even if there were some doubt as to whether Dr. Chokshi was subject to the jurisdiction of the SCWCC merely because the claimant alleged the injury was work related, such doubts were resolved when Dr. Chokshi voluntarily inserted himself into the workers' compensation case. Prior to his deposition being scheduled, Dr. Chokshi chose to fill out and return two questionnaires from claimant's counsel, all related to claimant's alleged workers' compensation claim and relating the injuries to the initial injury.

Just because the employer did not decide at that point to accept the claim and authorize Dr. Chokshi's services did not negate the fact that Dr. Chokshi became subject to the fee schedule due to his own actions and waived any right to argue that his deposition was not subject to the fee schedule because his treatment had not been paid for by an employer under a workers' compensation claim. Had Dr. Chokshi wished to avoid being deposed pursuant to the SCWCC fee schedule, he should have simply refused to complete the Form 14B, refused to fill out any questionnaires, and refused to give any opinions related to the claimant and his workers' compensation claim. There would have then been nothing to depose him about.

D. If Dr. Chokshi is not subject to the SCWCC fee schedule, he is limited to the witness fee set forth under Rule 30, SCRCP, or $25.00 per day.

Dr. Chokshi contends that he was not subject to the fee schedule and is instead, entitled to a "reasonable fee" under Rule 26, SCRCP. This contention, however, is based upon his erroneous belief that he is an "expert witness" under Rule 26, SCRCP, as that term is defined. Accordingly, this Court should find, as the SCWCC did, that if Dr. Chokshi is not governed by the fee schedule, he is governed by Rule 30 of the South Carolina Rules of Civil Procedure, which limits fees for witnesses to $25.00 per day.

Under the South Carolina Rules of Civil Procedure, depositions are controlled by Rule 30. Rule 30 states, in relevant part:

> (a)(1) When Depositions May Be Taken. After commencement of an action any party may take the testimony *of any person*, including a party, by deposition upon oral examination....
>
> (2) Limitations. ...
>
> *A witness* attending any deposition held pursuant to these rules shall receive for each day's attendance and for the time necessarily occupied in going to and returning from the same, $25.00 per day, and mileage for going from and returning to his place of residence,

> in the same amounts as provided by law for official travel of state officers and employees.

Rule 30, SCRCP (emphasis added). Thus, under Rule 30, a witness is entitled only to $25.00 per day and mileage regardless of the witness's profession. Rule 30 makes no exceptions for treating physicians who happen to be witnesses. Accordingly, under the plain language of the Rule, Dr. Chokshi's alternative is to be paid $25.00 per day.

In an effort to avoid the limitation imposed by Rule 30, Dr. Chokshi argues that he is an "expert witness" and his fee should be governed by Rule 26, SCRCP. Dr. Chokshi fails to understand the difference between an "expert" and an "expert opinion." Because of the failure to understand the distinction, his argument is wholly without merit.

Rule 26(b)(4) states, in relevant part:

> (A) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and *acquired or developed in anticipation of litigation or for trial*, may be obtained by any discovery method subject to subdivisions (b)(4)(B) and (C) of this rule, concerning fees and expenses.
>
> (B) A party may discover facts known or opinions held *by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial* and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) ....
>
> (C) Upon the request of the party seeking discovery, unless the court determines otherwise for good cause shown, or the parties agree otherwise, *a party retaining an expert* who is subject to deposition shall produce such expert in this state for the purpose of taking his deposition, and the party seeking discovery shall pay the expert a reasonable fee for time and expenses spent in travel and in responding to discovery and upon motion the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Rule 26, SCRCP (emphasis added).

This issue appears to be a case of first impression in South Carolina. However, it is one that is easily decided by looking at the language of the Rules themselves. In interpreting the Rules of Civil Procedure, courts must use the same rules of construction as interpreting any statute or contract. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (citations omitted) ("In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes."). Additionally, the words of the Rules of Civil Procedure must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule. *Id.*

Rule 26, by its clear and unequivocal language, applies only to opinions that are developed by expert witnesses who have been *retained or employed specifically by a party and who are paid by that party for the purpose of generating opinions for use at trial.* See Rule 26(b)(4), SCRCP (noting the rule applies only to opinions acquired or developed in anticipation of litigation or for trial, that the rule applies only to an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial, and that a party retaining an expert must produce said expert for a deposition). By definition, the word "retain" means "to keep in one's pay or service; specifically to employ by paying a retainer."[5]

Dr. Chokshi is a treating physician. Dr. Chokshi admits this fact throughout his brief when he points out that he treated the claimant under the claimant's health insurance and did not treat the claimant pursuant to authorization by claimant' employer. There is no evidence that claimant retained Dr. Chokshi to develop opinions favorable to the claimant based on the anticipation of litigation. Dr. Chokshi, by his own admission, had no idea that his treatment was rendered in

[5] http://www.merriam-webster.com/dictionary/retain

conjunction with litigation so it defies logic that he could be a retained or specially employed expert for purposes of this claim when he had no idea a workers' compensation claim even existed.

Because he was not retained or employed by the claimant, the plain language of Rule 26 regarding fees for expert testimony does not apply to him; he is simply not entitled to compensation under Rule 26. Rather, Dr. Chokshi is merely a fact witness in this matter. He treated the claimant for a neck injury. It is his treatment of this injury that is at issue in this case and the reason for which his deposition was sought — not because of any opinions Dr. Chokshi was employed by claimant's counsel to give.

Dr. Chokshi has confused the fact that he may be qualified by reason of his training, education, or experience to offer an "expert opinion" at trial under Rule 702 of the South Carolina Rules of Evidence with what a retained "expert" for use in litigation is. Merely being a witness who is allowed to offer an opinion under the Rules of Evidence is not the standard set forth in Rule 26 when it speaks to retained or specially employed experts. An experienced plumber who repairs a faulty leak that results in property damage is entitled to give an opinion as to the cause of the leak. An experienced landscaper who repairs an irrigation ditch could likewise give an expert opinion about why the irrigation ditch failed. However, these opinions as to the cause of a failure or the cause of repairs do not convert either of them into a retained or employed expert on behalf of a party, entitling them to an expert fee under Rule 26. Dr. Chokshi is no different a witness—he both provided treatment and opined as to causation; that, however, does not convert him into a retained expert.

As noted, this is a question of first impression in South Carolina, and the issue can be resolved by the plain language of the rule without looking elsewhere. However, when looking

elsewhere, it becomes obvious this is the majority rule in other jurisdictions which have addressed the issue.

In *State ex rel. Montgomery v. Whitten*, 262 P.3d 238 (Az. Ct. App. 2011), the Arizona Court of Appeals was faced with the same decision and determined that treating physicians were entitled only to the same witness fee every other witness was entitled to. In that case, the court held that "[a] fact witness typically testifies about information he or she has acquired independent of the litigation, the parties, or the attorneys." Thus, the court concluded, a medical fact witness is one who did not have to perform additional work in order to answer questions other than reviewing his own records. The court further noted that merely because the treating physicians may "educate" the jurors by explaining terms and procedures in a manner more understandable for the trier of fact does not constitute expert testimony. *Id.* at 243. The court contrasted this with the testimony of a physician who has been asked to review records or testimony of another health care provider or to opine regarding the standard of care or treatment given by another provider. *Id.* at 242. This is exactly what Rule 26 and Rule 30 of the South Carolina Rules of Civil Procedure envision and under the facts of this case, there is no question that Dr. Choskhi's deposition fee is governed by Rule 30.[6]

Numerous other states have reached the same result. *McDermott v. FedEx Ground Sys., Inc.*, 247 F.R.D. 58, 60–61 (D.Mass. 2007) (holding that the treating physician is entitled to no more than that provided under the statutory witness compensation scheme); *Mangla v. Univ. of Rochester*, 168 F.R.D. 137, 139 (W.D.N.Y.1996) (deposition questions concerning treating

[6] Additionally, Dr. Chokshi's alleged entitlement to the witness fee under Rule 26 is not only inconsistent with the plain language of Rule 26, SCRCP, but also inconsistent with the Federal Rules of Civil Procedure, upon which our rules are based. The Advisory Committee Notes to Federal Rule of Civil Procedure 26(b)(4) recognized the distinction, stating, "[an] expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of this lawsuit ... should be treated as an ordinary witness."

physicians' opinions based on their examination of a patient are a necessary part of the treatment of a patient and "do not make the treating physicians experts"); *Baker v. Taco Bell Corp.*, 163 F.R.D. 348, 349 (D.Colo.1995) (treating physician "testimony is based upon their personal knowledge of the treatment of the patient and not information acquired from outside sources for the purpose of giving an opinion in anticipation of trial"); *Clair v. Perry*, 66 So.3d 1078, 1079 n.1 (Fla.Dist.Ct.App.2011) (citing *Frantz v. Golebiewski*, 407 So.2d 283, 285 (Fla.Dist.Ct.App.1981)) (a treating physician is not generally an expert witness because "a treating doctor ... while unquestionably an expert, does not acquire his expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well"); *Brandt v. Med. Def. Assocs.*, 856 S.W.2d 667, 673 (Mo. 1993) ("The treating physician is first and foremost a fact witness, as opposed to an expert witness. In personal injury litigation, the treating physician is likely to be the principal fact witness on the issue of damages...."); *Nesselbush v. Lockport Energy Assocs., L.P.*, 647 N.Y.S.2d 436, 437 (N.Y.Sup.Ct. 1996) (citing *Sipes v. United States*, 111 F.R.D. 59, 61 (S.D.Cal. 1986)) ("[I]t is improper to name treating physicians as expert witnesses where the information and opinions possessed by said physicians [were] obtained by virtue of their roles as actors or viewers of the transactions or occurrences giving rise to the litigation....") *Davoll v. Webb*, 194 F.3d 1116, 1138 (10th Cir.1999) (a treating physician "is not considered an expert witness if he or she testifies about observations based on personal knowledge, including the treatment of the party"); *Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 197 (N.D.Ohio 1998) ("Courts consistently have found that treating physicians are not expert witnesses merely by virtue of their expertise in their respective fields."); *Beaty v. St. Luke's Hosp. of Kansas City*, 298 S.W.3d 554, 559 (Mo.Ct.App.2009) (a treating physician "is first and foremost a fact witness"); *Donovan v. Bowling*, 706 A.2d 937, 941 (R.I.1998) (testimony by a treating physician is " entirely different

from that of an expert retained solely for litigation purposes because a treating physician is like an eye-witness to an event and will be testifying primarily about the situation he or she actually encountered and observed while treating the patient.").

Dr. Chokshi has given no rational basis why he, as a fact witness, is entitled to more than the same $25.00 witness fee that every other profession is entitled other than he has specialized training. The same could be said for nearly every skilled profession, and yet no exception is made for them within the Rules of Civil Procedure. Other professions aside from physicians provide an equal benefit to society as doctors and yet no court allows them to demand any fee outside of the one allowed by rule. Courts have no authority, and should not create a special class of fact witnesses who set their own fees for depositions while others cannot, as there is no basis for a court to weigh the burdens and costs of one profession versus another. This sentiment is best summed up in *Demar v. United States*, 199 F.R.D. 617, 619–20 (N.D.Ill. 2001) wherein the court held:

> While physicians certainly have significant over-head costs and a special expertise, so do a myriad of other professions. For instance, should fact witnesses who happen to be engineers, attorneys, accountants or consultants—professions also with special expertise and significant overhead costs—similarly be allowed more than the statutory fee prescribed by [the local rule]? If the answer is in the affirmative, then does [the local rule] merely apply to less prestigious professions? Who decides what professions fall under [the rule] versus the more lucrative "reasonable fee" under [Rule] 26(b)(4)(C)? This Court declines to set precedent in this jurisdiction that, essentially, singles out physicians for special treatment. Rather, the more prudent course of action is to follow the unambiguous tenets of [Federal Rule of Civil Procedure] 26(b)(4)(C) and [the local rule], which provide that expert witnesses—independent of their profession—obtain compensation at a "reasonable fee", while fact witnesses—independent of their profession—receive compensation at the statutory fee of $40.00. If Congress wishes to single out certain professions for higher compensation, that is certainly its prerogative, but this Court declines to enter that arena, which is, essentially, a slippery slope.

Id. at 619–20 (N.D.Ill.2001); *see also McDermott*, 247 F.R.D. at 61 (there is no "logical explanation as to why [a special] ... rule applies to physicians and no other class of professional or otherwise with 'specialized knowledge' about the testimony to be provided"); *Mangla*, 168 F.R.D. at 140 (physicians will "suffer no more inconvenience than many other citizens called forward to be deposed or testify as a trial witness in a matter in which they have first hand factual knowledge"); *cf. Irons v. Karceski*, 74 F.3d 1262, 1263–64 (D.C.Cir.1995) (holding that an attorney fact witness was not entitled to be paid his hourly billing rate and not unduly burdened by being compensated the statutory rate for an expected three day deposition).

Under both the plain language of the rule, and the intent of the rule, Dr. Chokshi is an ordinary witness, whose deposition was sought only for opinions that he developed out of his treatment of the claimant. Rule 30 does not make an exception for Dr. Chokshi or anyone in his profession to command a fee under Rule 26 when he does not meet the requirements of Rule 26. Accordingly, in the event the Full Commission erred in finding that Dr. Chokshi was required to accept the deposition fee as set forth in the fee schedule, the Court should find that under Rule 30, SCRCP, Dr. Chokshi is entitled to only $25.00 and Dr. Chokshi must therefore refund the overage paid to him by the Respondents in accordance with the SCWCC fee schedule.

Even if Dr. Chokshi could shoehorn himself into Rule 26 and thus be exempt from both the SCWCC fee schedule and Rule 30's witness fee provisions, this Court should still find that the decision to compel him to attend his deposition for $400.00 was reasonable. Under Rule 26(b)(4)(C), any fee charged by an expert must be reasonable. In this case, the Full Commission determined that a $400.00 per hour fee was a reasonable fee for Dr. Chokshi and that decision should not be disturbed on appeal, as there is no evidence the Full Commission abused its discretion in reaching that determination.

II. DR. CHOKSHI'S APPEAL MUST BE DISMISSED AS IT IS MOOT.

A. Dr. Chokshi's appeal is moot because he complied with the discovery order rather than being held in contempt.

Under South Carolina law, it is well established that a non-party suffers no legal injury when ordered to participate in discovery and that the necessary legal injury does not arise until the party is held in contempt for failing to comply with the discovery order. *Ex parte Whetstone*, 289 S.C. 580, 347 S.E.2d 881(1986)). In this case, because Dr. Chokshi was not held in contempt of the court, he has no legal injury and no basis to appeal.

In *Whetstone*, a non-party witness appealed an order directing him to attend a deposition and provide certain documents. The Court held that "an order directing a non-party to submit to discovery is not immediately appealable." *Id.* at 580, 347 S.E.2d at 881. In so holding, the Court outlined the appropriate procedure available to a non-party who wishes to appeal a discovery order. A non-party may either: (1) comply with the discovery order and waive any right to challenge it on appeal; or (2) refuse to comply with the order and appeal after being held in contempt for the failure to comply. *Id.*

In the present case, Dr. Chokshi chose to comply with the Commission's Order and give a deposition and accept the fee schedule rate rather than be held in contempt. While he "reserved the right" to contest the fee paid to him for his deposition, this is of no legal consequence because our Supreme Court has established the manner in which one can appeal a discovery order. Because Dr. Chokshi was not held in contempt of court with respect to the Order compelling his deposition in accordance with the fee schedule, he has no right to appeal said Order. Therefore, the appeal should be dismissed.

Additionally, in the present case, the underlying claim was found compensable by Commissioner Barden. Though that ruling is on appeal to the Full Commission, under Dr.

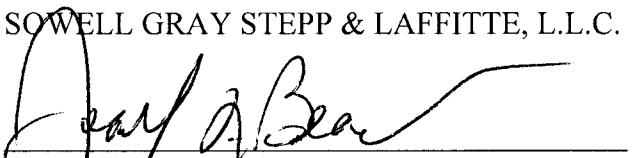
Chokshi's own theory of the case, he has been paid the appropriate fee as the case now stands. Accordingly, he should not be allowed to complain about the fee when the fee he received is currently the only fee to which he is entitled under his own theory of the law.

CONCLUSION

For the reasons set forth herein, the Respondents respectfully request that this Court affirm the Order of the Full Commission Appellate Panel in finding that Dr. Chokshi (1) was subject to the fee schedule; or (2) alternatively, the SCWCC did not abuse its discretion in compelling Dr. Chokshi to give his deposition for $400.00 per hour, as that was a reasonable fee; or (3) alternatively, the SCWCC did not err in compelling Dr. Chokshi to give his deposition for $400.00, as he was only entitled to $25.00 under the South Carolina Rules of Civil Procedure. Additionally, the Respondents would ask this Court to dismiss the appeal, as it is moot/not appealable, as the posture of the case is that it is currently compensable but that in any event, Dr. Chokshi was required to be held in contempt in order to properly appeal the discovery order.

Respectfully Submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.



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In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION
Appellate Panel

W.C.C. File No.: 1122484
Appellate Case No.: 2014-002070

William W. Huggins, Jr. .....Respondent,

v.

City of Mullins and South Carolina Municipal Trust ..... Respondents,

Rakesh Chokshi, M.D. .....Appellant.

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Matter to be Included in Record on Appeal on the following parties by depositing a copy in the United States Mail, postage prepaid, on February 11, 2015, addressed to:

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February 11, 2015

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February 11, 2015

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: William (Billy) W. Huggins, Jr. v. City of Mullins
Appellate Case No.: 2014-002070
WCC File No.: 1122484
Date of Accident: 09/19/11
Our File No.: 5682/8175

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of the Respondents' Initial Brief and an original and one (1) copy of the Respondents' Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. We would appreciate your filing the original Brief and Designation of Matter and returning a clocked-in copy of the same to us via our courier.

By copy of this letter and aforementioned documents to all other counsel and the SCWCC, we are serving them with a copy of the Respondents' Initial Brief and Designation of Matter.

Very truly yours,

Grady L. Beard

GLB/rmh
Enclosures
cc: Natalie S. Stevens-Graziani, Esquire (w/enclosures)
Carl E. Pierce, II, Esquire (w/enclosures)
Benjamin C. Smoot, II, Esquire (w/enclosures)
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Mr. Tony Deschamps (w/enclosures)
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