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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No.: 2015-001561

Jeffrey D. Allen, on behalf of Jane Doe ..... Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program ..... Respondent.

APPELLANT'S INITIAL REPLY BRIEF

October 9, 2015

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Appellant submits this Reply to the Respondent's Initial Brief.

1. The Court should find that the ALJ erred in concluding that the State Health Plan was substantially justified.

Respondent argues that the state action attorneys' fee status is not "loser pays" but requires something more. Appellant does not disagree. However, the characterization of this statutory interpretation matter as the State's reasonable reading of a statute ignores the reality of the State's position in this case. The State Health Plan's first explanation for why it was refusing to comply with a statute that, by its plainest terms, applied to "*every* health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State . . ." see S.C. Code Ann. § 38-71-46(A) (emphasis added), neither relied on case law nor statutory law, but summarily concluded that "the Committee [EIP] also observed the Department of Insurance and the General Assembly *historically have acknowledged* the Department [of Insurance] has no jurisdiction over EIP." (Allen v. S.C. PEBA, S.C. Supreme Court App. Case No. 2012-213186, Record on Appeal Vol. I, R.p. 212-13). Later, the State Health Plan attempted to bolster that position with reference to what it now describes as "complicated grammatical structure" and future legislative "history" -- both positions which were plainly rejected by the South Carolina Supreme Court. The only thing complicated about the "grammatical structure" of the statute was the State Health Plan's effort to fit a square peg into a round hole.

This is an instance where the State Health Plan initially took a jurisdictional position that the General Assembly's plain language in Title 38 – The Insurance Code did not apply to it because it was part of the executive branch (State Budget and Control Board, at the time), yet said position had little support in case law or statute. The myriad

attempts to locate support for that erroneous and unreasonable positon failed. ERISA had no application. The grammatical structure was not actually complicated if one read it in a plain and reasonable manner, and there existed no legislative history (i.e. prior to the enactment of the diabetes mandate) which supported the State Health Plan's claims.

Further, Respondent's argument that multiple decision makers agreed with its unsupported position cannot be the basis to deny a motion for attorneys' fees, or no motion for attorneys' fees under the state action statute would ever be granted. The only way a dispute such as this one gets upon on appeal is because decision makers in the lower courts disagree.

The State also inexplicably makes reference on pages 23-24 of its Initial Brief to Medicare requirements and an alleged interpretation of the same. Appellant submits that this argument should be ignored, as it appears irrelevant and is unsupported speculation about an issue not previously raised.

Despite the State's characterization that this only affected a single $560 claim, such is not accurate. The State Supreme Court's decision clearly applies to any and all claims under the State Health Plan, and therefore the impact of the Appellant prevailing is much larger than the single claim. Lastly, the State Health Plan, like all other State agencies, is funded by taxpayer dollars, and the possibility of having to pay the attorneys' fees of a prevailing party within the parameters of the state action attorneys' fees statute is also intended to discourage the unreasonable use of taxpayer money to maintain unsupportable legal positions.

2. The Court should award the Attorneys' Fees requested.

The State Health Plan's argument that there was no fee agreement should be disregarded. It is undisputed that this ALJ action arose directly out of the Circuit Court

Case, which was dismissed on the grounds that the claim should be litigated within the ALC. Further, Appellant's Motion for Attorneys' Fees addressed the intertwined nature of the two cases, and proposed 50% reduction in the total amount of fees based on the time actually contemporaneously recorded.

The record does not support the State Health Plan's argument the Appellant should be treated as *pro se*. While Christy Allen was employed as an attorney at the firm of Wills & Massalon, LLC when this case began, and did substantial work on the matter, the case was originally taken on both by the law firm of Wills & Massalon, LLC and Richardson, Patrick, Westbrook & Brickman, LLC as a contingency case. It is without dispute that other attorneys worked on the cases. The award of attorneys' under a statute providing for attorneys' fees is not barred because the fee agreement was contingent.

Even if a portion of the fee request were deemed *pro se*, the cases of Hopkins v. Hopkins, 343 S.C. 301, 540 S.E.2d. 454 (2000) and Calhoun v. Calhoun, 339 S.C. 96, 592 S.E.2d 14 (2000) are distinguishable, and do not bar the award of attorneys' in this instance. Both cases are family court cases for which S.C. Code Ann. § 20-3-130 (H) provides the statutory basis for the court to order a reasonable amount of attorneys' fees "incurred." The court in Calhoun specifically based its holding not to allow *pro se* attorneys' fees under section 20-3-130 (H) on the inclusion of the word "incurred" in the family court statute.

The authority for the court award attorneys' fees in this case arises not from section 20-3-130(h), but from section 15-77-300 which does not include reference to any language indicating that the legislative intent was that the attorneys' fees be actually "incurred." The version of section 15-77-300 in effect at the time this action was commenced states, in relevant part:

> (A) In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party *to recover reasonable attorney's fees* to be taxed as court costs against the appropriate agency if:
>
> (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
>
> (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.

(emphasis added). Id. (Law Co-op 2005). See also Hall v. Laroya, 238 P.2d 714, 722 (Haw. Ct. App. 2010) (addressing similar issue in context of statute without the term "incurred," and commenting that to the extent there is a concern that the recovery of attorneys' fees in these types of situations will be subject to abuse, the limitation to a "fee that the court determines to be reasonable" addresses that concern).

Appellant has submitted adequate support for the award of attorneys' fees sought in this matter, and has addressed all elements as required by the statute in question in support of his request for an award of reasonable attorneys' fees.

The Order should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Reply Brief on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2015 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

I certify that I have served Appellant's Initial Reply Brief on the Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on October 9, 2015, addressed to The Honorable Shirley C. Robinson, Administrative Law Judge, South Carolina Administrative Law Court, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, SC 29201.

October 9, 2015

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Jeffrey D. Allen v. SCBCB
Appellate Case No.: 2015-001561
Our File No. 595-1

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Appellant's Initial Reply Brief and Proof of Service in regard to the above-referenced matter. Please file the originals, file-stamp the copies, and return the file-stamped copies to me in the self-addressed, stamped envelope provided.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC

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JAM/cb
Enclosures

cc: The Honorable Shirley C. Robinson
Theodore D. Willard, Jr., Esquire
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