

DECISION AND ORDER  
OF  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO.: 1307922

Pamela O. Cartee,

Claimant,

v.

S.C. Judicial Department,

Employer,

&

State Accident Fund

Carrier,

Hearing held in Richland County,  
South Carolina on May 21<sup>st</sup>, 2018.

Appearances: Mr. Preston F. McDaniel, on his own behalf.  
No appearance was made by the Claimant.  
No appearance was made by Defendants.

Purpose of Hearing: To resolve the dispute of Attorney Fees and Costs.

Filed:

May 30, 2018

**RECEIVED**  
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SC Court of Appeals

## STATEMENT OF THE CASE

This matter comes before the Workers' Compensation Commission on appeal from a Decision and Order of the single Commissioner dated March 6<sup>th</sup>, 2018, denying the Petition for Additional Attorneys' Fees requested by Claimant's attorney, Preston McDaniel ("Counsel") on his Form 61. The purpose of this Hearing is to determine an appropriate award of attorneys' fees. The merits of the underlying claim were decided by Decision and Order of the Appellate Panel dated October 17<sup>th</sup>, 2017.

## ORDER OF THE SINGLE COMMISSIONER

On March 6<sup>th</sup>, 2018, the single Commissioner made the following Findings of Fact and Rulings of Law:

1. The question at bar is whether Claimant's Counsel is entitled to additional requested attorney's fees.
2. Determination of this question rests in the plain reading of Regulation 67-1205(c)(2) which reads in 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."
3. I cannot find any persuasive authority for an award beyond that amount. I awarded the Claimant permanent and total disability on 04/13/17. While that award was on appeal, the case was not final and, as such, it would be premature to determine an award. Additionally, while on appeal, that Order could have been awarded to a greater award or a lesser award. The Full Commission could have vacated my Order and remanded the case for a hearing de novo. The determination of the award with finality could not be reached until my Order became the law of the case.
4. Once my order was the law of the case, The Defendants then paid the Claimant the commuted value of the award - \$179,077.14. The Form 19 reflects this payment. Based on the payment, Claimant's counsel is entitled to an attorney's fee of 33.3% of that amount which is \$59,632.69. I have previously ordered payment of that amount. I cannot find and counsel has not submitted any authority which supplants Regulation 67-1205(c)(2). As such, the payment of any additional attorney's fees must be consistent with 67-1205(c)(2).

Therefore, the petition for additional attorney's fees is denied.

## DECISION OF THE COMMISSION

Based on our review of the record and consideration of the position of Counsel, we make the following Findings of Fact and Rulings of Law:

### FINDINGS OF FACT

1. Counsel first secured compensation payable to the Claimant in the form of a lump sum payment of back-owed Temporary Total Disability by Order dated July 28<sup>th</sup>, 2016. Counsel secured the payment of compensation in the amount of \$29,600.93. On September 12<sup>th</sup>, 2016, the Commission awarded contingency attorneys' fees to Counsel in the amount of \$9,866.98, to be withheld from the amount awarded to Claimant in accordance with Reg. 67-1205(C)(2).
2. Counsel continued to represent Claimant. On April 17<sup>th</sup>, 2017 the single Commissioner awarded Claimant permanent and total disability benefits under § 42-9-10 and lifetime medical care under § 42-15-60. Defendants appealed the award to the Commission. While on appeal, Claimant remained on a running award of weekly total disability benefits. On October 17<sup>th</sup>, 2017, the Appellate Panel fully affirmed the award of the single Commissioner. Defendants did not seek an appeal of the award in accordance with § 42-17-60, and the award of the Full Commission became the law of the case on or about November 16<sup>th</sup>, 2017.
3. On or about December 13<sup>th</sup>, 2017, Defendants filed a WCC 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. The Form 19 showed that Claimant had received 230 weeks of total disability benefits, paid weekly, that terminated on December 1<sup>st</sup>, 2017. The \$179,077.14 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.
4. On December 8<sup>th</sup>, 2017, Counsel filed a Form 61 attorney fee petition, asking for the Commission to award him a second contingency fee in the amount of \$73,094.45. According to the disbursement statement provided by Counsel, this amount was to be

withheld from the \$179,077.14 awarded to Claimant, purportedly pursuant to Reg. 67-1205(C)(2). \$73,094.45 represents 40.82% of \$179,077.14. Counsel asserts he is entitled to an award of attorneys' fees of 33.3% of all benefits paid to Claimant post-maximum medical improvement.

5. On January 9<sup>th</sup>, 2018, the single Commissioner sent an email to Counsel stating the following

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.

6. On January 8<sup>th</sup> or 9<sup>th</sup> 2018, Counsel sent a letter to the single Commissioner wherein he averred that he had come in person to the Commission three times without notice in an attempt to initiate communication with the Commissioner regarding the Petition for Attorneys' Fees currently pending before the Commissioner for adjudication. The single Commissioner declined to communicate with him about the matter under review.
7. On January 17<sup>th</sup>, 2018, the single Commissioner issued a Hearing Notice, setting the matter for the next available date, which was February 12<sup>th</sup>, 2018.
8. The Hearing was conducted on February 12<sup>th</sup>, 2018. Counsel was given the opportunity to submit evidence and argue his position.
9. On February 21<sup>st</sup>, 2018, the single Commissioner issued an Interim Order approving disbursement to Counsel of the amount of fees not in dispute.
10. On February 21<sup>st</sup>, 2018, Counsel sent a letter to the single Commissioner threatening to "take this matter up with the Supreme Court".
11. On February 22<sup>nd</sup>, 2018, Counsel sent a letter to the single Commissioner stating that he would hold off on filing anything with the courts if the Commissioner would engage in communication with him about the matter under review.
12. On March 2<sup>nd</sup>, 2018, Counsel sent a revised Form 61 that changed the amount of the final award listed from the total amount of all benefits, both temporary and permanent, paid, to only the amount of benefits paid post-MMI, but asked for the same amount, \$73,094.45, to be awarded as attorneys' fees.

13. On March 6<sup>th</sup>, 2018, the single Commissioner issued his Decision and Order Denying the Petition for Additional Attorneys' Fees.
14. On March 7<sup>th</sup>, 2018, Counsel sent a letter to the single Commissioner reiterating his threat to file litigation with the courts.
15. On March 13<sup>th</sup>, 2018, Counsel sent a letter to the Commission's Judicial Director, asking her for legal advice.
16. On March 15<sup>th</sup>, 2018, the Commission's Judicial Director sent an email to Counsel stating "If you file a WCC Form 30 appealing an award of attorneys' fees, the Commission will set the matter for a Hearing in accordance with Section 42-17-50. All parties of record, and the Claimant individually, should be served with any appellate documents."
17. On March 20<sup>th</sup>, 2018, Counsel filed a WCC Form 30 Request for Full Commission Review, raising seven grounds for appeal.
18. In accordance with longstanding Commission policy, the single Commissioner requested that the appeal be heard En Banc in accordance with Reg. 67-709(B)(1), since the appeal involved novel issues of law and regarded attorneys' fees.
19. On March 23<sup>rd</sup>, 2018, Counsel sent an email to Commission's General Counsel asking for a legal opinion, and again threatening civil litigation.
20. On April 19<sup>th</sup>, 2018, Counsel served the Commission with a Temporary Restraining Order Issued Without Notice Pursuant to Rule 65(B), SCRCF, restraining the Commission from taking further action on the Appeal filed by Counsel, that was issued by the Court of Common Pleas for the 4<sup>th</sup> Judicial Circuit. Despite the prohibition by the court on the Commission taking any action on the Appeal, Counsel filed a Brief of Appellant on April 22<sup>nd</sup>, 2018.
21. Also on April 19<sup>th</sup>, 2018, Counsel served the Commission with a Summons and Complaint, listing Counsel in his personal capacity as the Plaintiff and the Commission as Defendants. That matter was referred to the South Carolina Attorney General's Office for defense, and, as of the date of this Decision and Order, is currently pending before the Court of Common Pleas for the 4<sup>th</sup> Judicial Circuit on Defendant's Motion to Dismiss.
22. On April 27<sup>th</sup>, 2018, the Temporary Restraining Order expired pursuant to its terms and has not been extended. The Commission is unaware at the time of drafting of any legal prohibition on its issuance of this Decision and Order.

## CONCLUSIONS OF LAW

1. Attorney fees, physician fees, and hospital charges for services under this title are subject to the approval of the commission. S.C. Code Ann. § 42-15-90 (1976).
2. Any policies or procedures implementing the provisions of Section 42-15-90 shall become effective only when such implementation is 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. S.C. Code Ann. § 42-3-185 (1976).
3. Pursuant to 42-1-100 "compensation" is the money allowance *payable* to an employee or to his dependents.
4. Pursuant to Regulation 67-1205(B) "If the parties agree to a contingent fee contract, the fee is deemed reasonable when the following requirements are met and the requested fee does not conflict with the South Carolina Supreme Court Disciplinary Rule on determining a reasonable fee." S.C. Code Regs. 67-1205(B).
5. The Act requires that "as used in this Title, unless the context otherwise requires, the terms dealt with in §§ 42-1-30 to 42-1-190 shall include the categories or shall have the meanings severally ascribed to them in said sections." S.C. Code Ann. § 42-1-20.
6. The first sentence of R.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 in the following situations, where the attorney shall set the fee as instructed." Reg. 67-1205(C) (Emphasis added).
7. "The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439,445 (2009). "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.*<sup>1</sup>

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<sup>1</sup> The abuse of discretion standard is the standard of review to be followed by the courts on appeal; it is not the standard followed by the Commission in this review. The standard of review on Review and Rehearing by the Commission is set forth in § 42-17-50, which is the standard of review applied by the majority in this decision.

8. The single Commissioner held "The determination of the award with finality could not be reached until my order became the law of the case." We concur. This is a Conclusion of Law that the single Commissioner made, as he is authorized to do under § 1-23-350. The amount of compensation that is to be awarded cannot be determined until the Decision and Order making that award is final.
9. In a footnote to its Decision, the South Carolina Court of Appeals held

Essentially, worker's compensation benefits accrue along a time continuum: TTD benefits are available from the date of injury through the date of MMI and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. See S.C.Code Ann. §§ 42-9-10, -20, -30 (1976); S.C.Code Ann. § 42-9-260 (1996); 25A S.C.Code Ann.Reg. 67-507 (1990) (repealed by 21 S.C.Reg., No. 6, Part 2 at 439, effective June 27, 1997); *O'Banner v. Westinghouse*, 319 S.C. 24, 27-8, 459 S.E.2d 324, 326 (Ct.App.1995). To require an employer to prove a claimant's disability ended before terminating TTD benefits dilutes the distinction between temporary and permanent disability payments, and it dilutes MMI as the definitive moment when a transition between the two different types of payments is accomplished.

*Hendricks v. Pickens County*, 335 S.C. 405, 517 S.E.2d 698 (S.C. App. 1999).

10. The language cited from *Hendricks*, above, makes it clear that we cannot award attorneys' fees in the manner requested by Counsel. Post-MMI benefits may be awarded as permanent disability benefits. However, Credit paid to the Employer/Carrier for benefits overpaid is not money allowance payable as described in section 42-1-100, and any funds allocated from the award for the payment of such credit may not be reduced to collect attorneys' fees. The footnote Counsel relies upon was favorably cited by our Supreme Court in *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2006). *Curiel* involved a dispute over the Commissioner's findings regarding maximum medical improvement and temporary total disability. *Curiel v. Environmental Management Services*, 376 S.C. 23, 30, 655 S.E.2d 482, 486 (2006). Neither *Hendricks* nor *Curiel* involved a dispute over an award of attorneys' fees. In the present case, we are not concerned with whether the benefits paid to Claimant post-MMI were temporary or permanent disability benefits. Our concern is 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. *Hendricks* and *Curiel* do not provide guidance on this issue.

11. Once a Claimant has begun receiving weekly payment of disability for more than 150 days, Defendants cannot terminate payment of those benefits without an order of the Commission. S.C. Code Ann. § 42-9-260 (1976). This is true whether the weekly payments represent temporary or permanent disability benefits. 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. Further, such a result is not permitted by the provisions of law that, unlike *Curriel* and *Hendricks*, deal directly with attorneys' fees.
12. Reg. 67-1205(C)(2) does not entitle Counsel to 33.3% of all benefits paid to Claimant post-MMI; it entitles him to 33.3% of the "settlement or award". The award was not finalized until the time for appeal of the Full Commission's Decision and Order had run pursuant to § 42-17-60. The amount awarded at the time the award became final, \$179,077.14, is the amount of compensation from which Reg. 67-1205(C)(2) allows Counsel to claim a contingency fee.<sup>2</sup>
13. "Compensation" means "the money allowance *payable* to an employee . . ." S.C. Code Ann. § 42-1-100. (Emphasis added). The use of the adjective "payable" to modify "money allowance" limits the definition of "compensation" as used in Reg. 67-1205 to include only "money allowance" that is "payable", and not "money allowance" that has already been "paid" in the past.<sup>3</sup>

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<sup>2</sup> The Majority disagrees with the Dissent that the "award" became finalized on the date the Full Commission issued its Decision and Order, October 17<sup>th</sup>, 2017, and that any benefits paid subsequent to this date are subject to be reduced to pay attorneys' fees. Workers' Compensation is unique in that certain circumstances, present in this case, allow a Claimant to be on a running award of weekly benefits while a decision and appeal are pending. It is the Majority's position that the benefits paid weekly to Claimant while the time for appeal had not been exhausted were still not "secure". The Full Commission's Decision and Order did not become the law of the case until the time for appeal had been exhausted. It was not until the Decision and Order became the law of the case that Defendants paid the full award and could properly terminate weekly payments of compensation, thus finalizing the award.

<sup>3</sup> The Dissent raises the concern that our analysis overly narrows the definition and application of "compensation" in a manner that could impact our interpretation of this term as it is used in other parts of the Act. We are only analyzing

14. Counsel would have us award attorneys' fees from the "money allowance" that has already been "paid" to the Claimant. We decline to adopt this interpretation. Doing so 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. In this particular instance, the amount of permanent disability benefits awarded in the lump sum exceeded the amount of weekly benefits Claimant received from the date of MMI through the date the award was finalized. However, it is possible for the number of weeks in which a Claimant is receiving weekly benefits while the matter is pending on appeal to exceed the number of weeks awarded as permanent disability. Were we to adopt Counsel's position that all compensation paid post-MMI is subject to attorneys' fees, this would create instances where a Claimant would owe her attorney a portion of the benefits already "paid" to her, thus rendering the Claimant a debtor and her attorney her creditor. We hold that such an interpretation is not consistent with Reg. 67-1205 or the purpose of the Workers' Compensation Act. *See Cokeley v. Robert Lee, Inc.*, 197 S.C. 157, 14 S.E.2d 889, 893-4 (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, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results.")

15. Reg. 67-1205(C)(2) provides "If the attorney *secures* the payment of permanent disability later, the attorney may charge up to, but not more than 33.3% of the *settlement or award*." Subsection (C)(2) does not entitle Counsel to 33.3% of the "permanent disability", it entitles him to 33.3% of the "award". In order for an attorney to be entitled to a contingency fee under subsection (C)(2), he must "secure" the payment of the compensation. The award of compensation was not "secure" until the attorney successfully defended the award to

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"compensation" as it is used in Reg. 67-1205(C)(2) for the purposes of determining an award of attorney's fees. The term as it is used elsewhere in the Act will be analyzed as the context requires, consistent with § 42-1-20.

finality. At the time the award became final, the Defendants paid the commuted value of the outstanding benefits in the amount of \$179,077.14. It is this amount from which Reg. 67-1205(C)(2) allows Counsel to claim a contingency fee.

16. While Counsel advocates that Reg. 67-1205 entitles him to an award of attorneys' fees of 33.3% of the value of the permanent and total disability award at the time Claimant reaches MMI, we hold that Reg. 67-1205 only allows an award of attorneys' fees of 33.3% of the value of the permanent and total disability award remaining at the time the attorney "secures the payment of compensation."
17. We cannot apply Reg. 67-1205 in the strained manner advocated by Counsel. Reg. 67-1205 does not state that an attorney is entitled to 33.3% of the "permanent disability", it states the attorney is entitled to 33.3% of the "settlement or award".
18. "In doubtful cases, the application of these regulation shall be in favor of the injured employee." S.C. Code Ann. Regs. 67-201(B) (2014 Supp.) Should a court construe any terms in Reg. 67-1205 as doubtful, we find it is objectively in Claimant's favor to have the amount in dispute paid to her instead of her lawyer. Her lawyer has already collected \$69,499.57, and continues to practice law. 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.
19. The 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. Counsel has the burden of proving he is entitled to the fee he is requesting. It is not the Commission's policy to grant a contingency fee to be deducted from all benefits paid post-MMI without taking into consideration when the award becomes final and when payment of the compensation is secured by the attorney's representation.
20. The Commission is prohibited by law from making any change to its policies or procedures regarding the approval of attorneys' fees without approval of the General Assembly. See S.C. Code Ann. § 42-3-185. If Counsel wants the policy changed to allow attorneys' fees to be deducted from all benefits paid post-MMI, he must secure such a change through the General Assembly.

21. The General Assembly gave sole authority to approve fees for attorneys to the Commission. See S.C. Code Ann. § 42-15-90. Section 42-15-90 reads, in pertinent part, "Attorney fees . . . for services under this title are subject to the approval of the commission . . . ." Section 42-15-90 must be read in context with § 42-3-185. Section 42-3-185 provides

Any policies or procedures implementing the provisions of Section 42-15-90 shall become effective only when such implementation is 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.

S.C. Code Ann. § 42-3-185 (1976, as amended).

It is clear from the two statutes, read together, that it is the intent of the General Assembly that changes in the manner in which the Commission approves attorneys' fees must be done with approval by the General Assembly in the method prescribed.

22. There is sound reasoning behind the General Assembly's decision to allow limitations not present in tort cases on the amount of the injured worker's benefits that could be taken to pay attorneys' fees. Benefits available under the Workers' Compensation Act are limited to those expressly provided in the Act. Remedies available at common law such as general damages, pain and suffering, loss of consortium, punitive damages, etc., are not available to the workers' compensation claimant. Thus a limitation on attorneys' fees is appropriate. The South Carolina Attorney General has long been of the opinion that § 42-15-90 protects society "from the wrongs to injured employees and their dependents that would likely follow if some restrictions were not placed on the costs of legal services rendered injured workers in the prosecution of their claims for compensation". S.C. Op. Atty. Gen. 185 (1986).

23. "The principal purpose of [§ 42-15-90] is to protect the workman from the charging of excessive fees". See S.C. Op. Atty. Gen. 185 (1986), *citing* 1936-37 S.C. Op. Atty. Gen., p. 299.

24. The requested fee in this particular case is unreasonable under Rule 1.5 of the South Carolina Rules of Professional Conduct. The Commission requires that requested attorneys' fees comply with the South Carolina Supreme Court Disciplinary Rules on

determining a reasonable fee. See S.C. Code Ann. Regs. 67-1205(A) and (B). Rule 1.5(a)(3) of the Rules of Professional Conduct and *Glasscock v. Glasscock* require when considering approval of an attorney's fee for the tribunal to consider "customary legal fees for similar service" and "the fee customarily charged in the locality for similar legal service". Counsel has not entered into the record or cited one single example of a fee similar to the one in which he is requesting having ever been awarded by the Commission. As such, we find his request is not for "customary legal fees for similar service".

25. Counsel asserts that it was somehow improper for the Commission to notice certain parties of the Hearings in this matter. We find no error, as Commission Hearings are open to the public in accordance with § 42-3-170. Defendants are clearly a party to the underlying claim.
26. Counsel implies that the single Commissioner somehow acted improperly by consulting with court personnel to aid the Commissioner in carrying out his adjudicative responsibilities. First, we hold that the record is devoid of any evidence that the single Commissioner did so in this instance. Second, we hold that, had the single Commissioner consulted with court personnel to aid the Commissioner in carrying out his adjudicative responsibilities, such action would have been wholly proper, as it is expressly permitted by the Code of Judicial Conduct. See Canon(3)(B)(7)(c), CJC, Rule 501 SCACR.
27. Counsel asserts that the single Commissioner did not handle his fee petition in a timely manner consistent with Reg. 67-1204(F) by not "immediately" scheduling a hearing. The single Commissioner found that the Form 61 did not comply with Reg. 67-1205 on January 9<sup>th</sup>, 2018. The Hearing Notice was issued eight days later on January 17<sup>th</sup>, 2018, the Hearing was held on February 12<sup>th</sup>, 2018, and the decision of the single Commissioner was issued on March 6<sup>th</sup>, 2018. We do not see how the single Commissioner could have disposed of the matter in a timelier manner, and hold that the single Commissioner fully and timely complied with the provisions of Reg. 67-1204(F).
28. We hold that Counsel has received adequate remuneration for his services in this case. Counsel was retained in April of 2014 and the award became final in November of 2017. On September 12<sup>th</sup>, 2016, he received \$9,866.88, and this Decision and Order awards him an additional \$59,632.69, for a total of \$69,499.57.

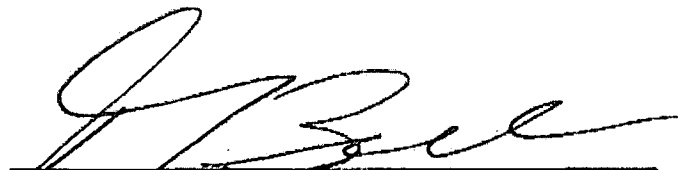
29. In Counsel's correspondence, briefs, and oral statements, Counsel repeatedly refers to the single Commissioner as a "lay commissioner." We find as a fact and rule as a matter of law that the Honorable H. Gene McCaskill is a Workers' Compensation Commissioner appointed and qualified in accordance with § 42-3-20. The Honorable H. Gene McCaskill has been appointed as a Workers' Compensation Commissioner on three occasions by two different Governors, and has been approved unanimously by the Senate on all three occasions. The Honorable H. Gene McCaskill is fully and lawfully qualified, competent, and capable of serving as a Workers' Compensation Commissioner.

**ORDER**

IT IS ORDERED that Counsel's request for attorneys' fees above and beyond \$59,632.69 is DENIED.


IT IS ORDERED that Counsel shall certify in writing to the Commission that he has paid \$13,461.76 to Claimant within thirty (30) days of the date of this Order.

IT IS SO ORDERED!



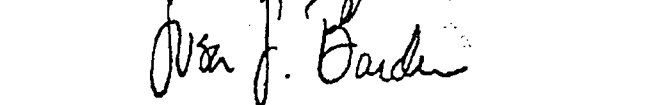
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Commissioner T. Scott Beck, Chairman




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Commissioner Avery B. Wilkerson, Jr.



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Commissioner Susan S. Barden



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Commissioner R. Michael Campbell, II

**CONCURRING IN PART AND DISSENTING IN PART**

We concur in part with the majority opinion and would affirm the Single Commissioner's finding that Claimant's award of benefits could not be determined with finality until the date of the Full Commission's Decision and Order on October 17, 2017, when the award became the law of the case. We respectfully dissent from the majority opinion and would reverse the Order of the Single Commissioner in this case on the issue of whether the attorney fees at issue are calculated from the date that the appeal time ran on the Full Commission Decision and Order and the commuted value of the remaining benefits were paid in a lump sum. We find that the attorney's fees in this particular matter are instead calculated from the date of the final order of the

Commission, which is the Full Commission Decision and Order dated October 17, 2017. We base our opinion on the following analysis below.

Supporting case law holds that, essentially, workers' compensation benefits accrue along a time continuum: temporary total disability benefits are available from the date of injury through the date of maximum medical improvement; post-MMI benefits may then be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006); *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d. 482 (2007). Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits. Maximum medical improvement terminating right to temporary total disability benefits is a factual determination by the Workers Compensation Commission. *Id.*

In this case, MMI was a controverted issue and the Single Commissioner's determination of MMI on October 17, 2016 signaled the end of Claimant's temporary benefits. While Claimant continued to receive weekly total disability benefits after the date maximum medical improvement as determined by the Single Commissioner. Claimant's determination of total and permanent disability was not awarded until October 17, 2017, the date of the Full Commission Decision and Order.

Counsel's argument that the date for the calculation of his attorney's fee award should be the date of maximum medical improvement, October 12, 2016, fails. In this case, Counsel had previously secured additional payment of temporary compensation for his client on a Form 15. Regulation 67-1205(c)(2) states, "If the attorney secures the payment of permanent disability later, the attorney may charge...up to but not more than 33.3% of the settlement or award."

The definition of award is set forth in Black's Law Dictionary. An award is "[a] final judgment or decision." The Full Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. *See Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (1989); *see also Hoxit v. Michelin Tire Corp.*, 304 S.C. 461, 405 S.E.2d 407 (1991).

S.C. Code Ann. Section 42-17-50 provides for an "application for review" of a single commissioner's decision. Pursuant to the statute governing review, the Full Commission shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and if proper, amend the award. *Id.* The Full

Commission shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *Pack v. State Dept. Of Transp.*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009). Although it is logical for the Full Commission to give weight to the Single Commissioner's opinion, the Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992); see also *Brayboy v. Clark Heating Co.*, 306 S.C. 56, 409 S.E.2d 767 (1991) (Full Commission may review an award of a single commissioner and make its own findings of fact and conclusions of law).

We find Counsel is entitled to attorney's fees as of October 17, 2017, the date of the Full Commission Decision and Order and is not subject to the 30 day appeal period. S.C. Code Ann. Section 42-17-60 states, "an award of the commission upon the review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact. However, either party to the dispute, within thirty days from the date of the award ..., may appeal from the decision of the commission to the court of appeals." Section 42-17-50 goes on to state, "In case of an appeal from the decision of the commission on questions of law, the appeal does not act as a supersedeas and, after that time, the employer is required to make weekly payments of compensation... ." The thirty-day supersedeas provision of this section should be construed as requiring weekly payments provided for in the award of the Commission to continue pending determination of the employer's appeal. *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960). The legislature intended that weekly payments ordered in an award are to be made until the question at issue is fully determined upon appeal. *Bagwell v. Ernest Burrell, Inc.*, 227 S.C. 168, 87 S.E.2d 583 (1955).

In the present case, there was no appeal from the Decision and Order of the Commission granting Claimant permanent and total disability benefits. As such, the issue of whether or not there was a thirty (30) day supersedeas pending outcome of an appeal is moot. As there was no appeal from the Full Commission Decision and Order, the Findings of Fact and Conclusions of Law of the Full Commission were final and "fully determined" as of the date of the Full Commission Order on October 17, 2017. An award of the Commission is not effectuated until the final Decision and Order of the Full Commission is entered. In this particular matter, Counsel's attorney's fees should be calculated as of the date of the Commission's final Order.

“Every state has some type of provision for subjecting the claimants' attorneys' fees to the supervision of a commission or court handling compensation administration.” Lex K. Larson, *Larson's Workers' Compensation* § 133.01(1) (Matthew Bender, Rev. Ed.) Attorney's fees in South Carolina are "subject to the approval of the Commission." S.C. Code Section 42-15-90. The South Carolina Legislature has directed the Commission to supervise both medical payments and attorney's fees. In addition, the Workers' Compensation Commission has promulgated Regs. 67-1204 and 1205 in governing supervision of attorney's fees.

Regulation 67-1205(c) is applicable to this case and states an attorney may charge up to 33.3% of the total amount of compensation. As noted in the majority opinion, the definition of compensation includes the word “payable”. The majority interprets this definition to limit the term “compensation” to only those payments that have not yet been paid. This interpretation strictly narrows the definition and practical application as to what compensation is. We find the term “payable” in the definition of compensation is broad and applies to any and all payments that were “payable” at their inception, even if at the time of the award some had already been paid.

We also look to case law governing statutory construction to define the term compensation as defined in S.C. Code Ann. Section 42-1-100. Statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000). Should compensation only be that payable in the future, it would change the characterization of payments of compensation that have already been paid, essentially creating a third class of compensation payments. There would be temporary compensation, permanent compensation previously paid, and permanent compensation to be paid in the future. There is no statutory or case law authority for such a designation. An example of a statute that could not be reconciled under the majority's interpretation is found in Section 42-9-10. This section provides that in no case may the period covered by the compensation exceed five hundred (500) hundred weeks (with exception). If compensation payments are only compensation when they are payable in the future, then the period of compensation under this statute would be indefinite. In addition WCC Forms 18 and 19 designate and report permanent compensation paid, not compensation payable in the future.

As noted above, the statutes governing review of a Single Commissioner's decision places the Full Commission in the same posture as the Single Commissioner for purposes of the review. The Full Commission is the ultimate fact finder. As such, any finding as to whether the Single

Commissioner abused his discretion would not be the applicable standard for the Full Commission, but rather the Court of Appeals or a higher court. See *Kiriakides v. School Dist. of Greenville County*, 382 S.C. 8, 675 S.E.2d 439 (2009). As the ultimate finders of fact, the Full Commission must analyze the application of the traditional factors of review of an attorney's fee award.

The factors that should be reviewed in determining a reasonable attorney's fee in any matter are: (1) The nature, extent, and difficulty of the case; (2) The time necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the beneficial results obtained; and (6) the customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

With regard to the first *Glasscock* factor, the nature, extent and difficulty of the case, this case involved the pursuit and obtainment of a finding of "permanent and total disability." This is the maximum benefit that can be obtained in a workers' compensation matter, except for matters involving catastrophic injuries such as severe brain damage. In addition, the contested issues included whether Claimant was at maximum medical improvement and whether she was entitled to lifetime medical treatment despite competing medical opinions. Although the Record does not indicate the presentation of any novel issues, the parties' APA Submissions totaled 249 pages in addition to the deposition transcripts of Dr. Lembo and Dr. Healy.

As to the second *Glasscock* factor regarding time, Workers' Compensation attorneys are traditionally engaged with contingency contracts that are subject to Commission approval, so the factor of the number of hours expended by an attorney is not usually directly considered by the Commission. However, it may be relevant in the aspect of considering the complexity of a matter. Counsel cites in his Form 61A that he has hundreds of hours in this case. It is unknown how many hours may have been performed by Counsel for the increase in temporary compensation. It is noted that Counsel previously obtained a tangible result for the Claimant in increasing her compensation rate; a fee has already been approved by order of the Commission for that pursuit. It was calculated from the back payment of the increase in award. As indicated herein, future payments of temporary total are not subject to an award of attorney's fees by custom which is codified in Regulation 67-1205.

As to professional standing and experience of counsel, the third *Glasscock* factor, Counsel (McDaniel) regularly appears before the Workers' Compensation Commission exclusively

representing injured workers. His Form 61A filed with the Commission indicates that he has been practicing for over 41 years.

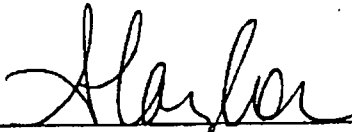
This matter involves that of a contingency contract as outlined in *Glasscock* factor number four. This is the method of payment customarily and traditionally before the Commission.

The determining factors in this matter involve what beneficial results were obtained and what is the customary legal fees/calculation applied by the Commission, which are the fifth and sixth *Glasscock* factors. The benefit obtained in this matter was not secured until the final award of the Commission. The award of attorney's fees is customarily calculated from the amounts that are secured by counsel in a case pursuant to an award. In most circumstances, including the facts of this underlying claim, amounts from a running award of weekly payments are not customarily subject to attorney's fees, as they are automated. The pivotal issue in the workers compensation award of attorney fees is what is customary. No matter what the characterization of the compensation is, temporary or permanent, the fees are granted to the amount of the award that is obtained by the efforts of the attorney. Attorney's fees are not traditionally granted to an amount based on a running award under the facts of this case. The Regulations cite specific situations in which the Commission notes that fees are not payable on a running award. For example, an award of attorney's fees are not made on continuing temporary total benefits or where a Claimant's attorney has defeated the termination of a running award. In this case, a fee was allowed on back temporary total disability benefits as the Claimant's attorney successfully obtained a beneficial increase; but, although the attorney obtained the increased, running award for the Claimant, he is not entitled to a fee of the continuing temporary compensation. This particular custom is cited within Regulation 67-1205(c)(2), itself. Again, R. 67-1205(c)(2) allows a fee of 33.3% of a later award or settlement. In this case, the benefit was not obtained until Counsel effectuated and secured the final award as stated above.

We find that due to the factors reviewed that the award of attorney's fees in this matter should be calculated as 33.3% of the amount awarded to Claimant as of the date of the final award of the Commission, which is the Full Commission Decision and Order dated October 17, 2017. For the reasons as set forth above, we would affirm in part and reverse in part the Order of the Single Commissioner.



Commissioner Melody L. James



Commissioner Aisha Taylor

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

**By Eugenia on May 30, 2018**