

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM THE WORKERS' COMPENSATION COMMISSION  
Judicial Conference Decision and Order

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W.C.C. File No.: 1009259  
Appellate Case No.: 2012-212278

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Jeffrey L. McFadden..... Claimant, Appellant,

v.

City of Lake City and South Carolina Municipal Insurance Trust,..... Respondents.

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**RESPONDENTS' FINAL BRIEF**

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### **STATEMENT OF ISSUES ON APPEAL**

1. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO AWARD THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANTS?
2. SHOULD THE APPELLATE PANEL ORDER DENYING THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANTS BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE § 1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED?
3. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL?
4. SHOULD THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE § 1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED?
5. WAS THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS AGAINST THE CLAIMANT'S ATTORNEY IN ERROR IN THAT IT VIOLATED § 1-23-320 AND DUE PROCESS IN THAT THE PANEL ISSUED A DECISION ON ASSESSING HEARING COSTS AGAINST CLAIMANT'S ATTORNEY WITHOUT NOTICE OR AN OPPORTUNITY FOR A HEARING?

### **STATEMENT OF THE CASE**

This is an appeal by the claimant of the Decision and Order of Full Commission dated May 23, 2012. (R. pp. 5-9). Specifically, the claimant contends the Commission erred in failing to award attorneys' fees and costs incurred as a result of the prosecution of an alleged frivolous defense pursuant to § 15-36-10 of the South Carolina Code. The claimant's counsel also contends the Commission erred in its assessment of Hearing costs against him for a

frivolous appeal. The defendants maintain they have asserted a good faith defense in this matter and the Appellate Panel properly declined to assess attorney's fees and costs. The defendants take no position on the assessment of costs against claimant's counsel.

By way of background, this claim involves an admitted workers' compensation claim that occurred on July 16, 2010. The defendants accepted the claim; authorized medical care for the claimant's injury; and began providing compensation for temporary total disability (TTD). In October 2010, the claimant's TTD checks inadvertently fell off auto-payment and a check issued to bring the claimant current was lost and had to be reissued. The claimant was aware at all times of the mistake and that the defendants were seeking to correct the problem. The defendants subsequently paid the claimant all TTD owed and continued payment of TTD. The claimant; however, filed a Form 50 with the Commission seeking fines and sanctions for improper termination of TTD. Prior to the Hearing date, the parties resolved the issues in dispute and the claimant withdrew the Form 50.

The following year the defendants discovered the claimant had been involved in a motor vehicle accident on February 17, 2011.<sup>1</sup> The defendants took the position that the motor vehicle accident constituted a subsequent intervening accident which broke the causal chain as set forth in *Sanders v. Wal-Mart Stores, Inc.*, 379 S.C. 554, 66 S.E.2d 297 (Ct. App. 2008), and began investigating the claim. During their investigation, the defendants filed a Petition for Hearing on April 7, 2011, pursuant to Section 42-17-20, requesting a Hearing be scheduled to determine whether they may stop payment of TTD benefits and medical care, as the claimant's current condition was the result of a subsequent intervening cause rather than

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<sup>1</sup> The subsequent intervening accident was specifically noted in a medical report of Dr. Anthony Alexander, the claimant's authorized treating physician, dated February 22, 2011. (R. p. 302).

the admitted accident. (R. p. 485). This position was based upon the medical report of Dr. Alexander dated February 22, 2011. (R. p. 302). On April 19, 2011, the claimant filed a Return to the Carrier's Request for a Hearing requesting the Petition be dismissed as same was contrary to the Act. (R. p. 490). On May 6, 2011, Commissioner Susan S. Barden issued an Order granting the defendants' Petition for a Hearing. (R. p. 1). The claimant did not appeal this Order but rather filed a Form 50 with the Commission on July 7, 2011, requesting a Hearing seeking additional medical care; compensation for permanent disability; and attorney's fees and costs associated with the prosecution of a frivolous defense pursuant to Section 15-36-10. (R. p. 10). The claimant also filed a Motion for Attorney's Fees and Costs pursuant to the Section 15-36-10. (R. p. 542).

A Hearing was scheduled in this matter before Commissioner Lyndon in Florence, South Carolina, on October 20, 2011, pursuant to the Forms 50 and 51, as well as the various Motions filed on behalf of the parties. Prior to the scheduled Hearing date, the parties and Commissioner Lyndon had an extensive office conference on October 10, 2011, regarding the issues in dispute. Upon his own motion and without holding a Hearing or addressing the merits of the case, Commissioner Lyndon cancelled the Hearing and ordered the defendants to schedule an appointment with Dr. Thomas J. Holbrook for a surgical evaluation and/or treatment for anything causally-related to the first motor vehicle accident, not the alleged intervening accident on February 17, 2011. Commissioner Lyndon denied the claimant's request for costs, fines or sanctions to be imposed upon the defendants. He also denied the defendants request for costs, fines, or sanctions to be imposed upon the claimant. (R. p. 3).

By way of Form 30 filed with the Commission on November 7, 2011, the claimant appealed the Order of Commissioner Lyndon to the Full Commission contending the Hearing

Commissioner erred in failing to award penalties, including attorney's fees and costs. By Order filed May 23, 2012, the Commission affirmed the Decision and Order of the Single Commissioner denying the claimant's request for costs, fines or sanctions to be imposed upon the defendants, while amending the order to fine the claimant for a frivolous appeal. The Commission further held that the claimant's attorney, not the claimant, must pay the fine. The claimant timely appealed the Full Commission Decision and Order to this Court. (R. p. 5).

### **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). Furthermore, decisions of the Workers' Compensation Commission may be reversed, modified or set aside if unsupported by reliable, probative or substantial evidence on the whole record. *Ellis v. Spartan Mills*, 276 S.C. 216, 218, 277 S.E.2d 590, 591 (1981); *Lark, supra.*; S.C. Code Ann. § 1-23-380(A)(6)(e). "Substantial evidence is 'not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.'" *Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002)(quoting *Miller v. State Roofing Co.*, 312 S.C. 452, 454, 441 S.E.2d 323, 324-25 (1994)); *Broughton v. South of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637

(Ct. App. 1999). As the South Carolina Supreme Court observed, a decision of the Workers' Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record. Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action. Quantitatively, substantial evidence is something less than the weight of the evidence. *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987)(internal citations omitted). Finally, 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**

1. **THE APPELLATE PANEL PROPERLY DECLINED TO ASSESS ATTORNEY'S FEES OR COSTS IN THIS CASE.**

The determination of whether attorney's fees should be awarded under the Act is treated as one in equity and in reviewing the award at issue the appellate court may take its own view of the preponderance of the evidence. *Hanahan v. Simpson*, 326 S.C. 140, 156, 485 S.E.2d 903, 912 (1997); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct. App. 2006). The reviewing court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded.' " *Rutland*, 371 S.C. at 97, 637 S.E.2d at 319 (quoting *Ex parte Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004)). The defendants maintain the preponderance of the evidence fails to establish the Commission abused its discretion in declining to sanction the defendants for a frivolous defense in this case.

In short, the claimant contends the defendants should be sanctioned for a frivolous defense in this case and that Full Commission erred in their discretion in failing to award attorney's fees and costs associated with same. Specifically, the claimant took the position that the defendants refused to authorize medical care recommended by Dr. Anthony Alexander without any reasonable belief that the intervening accident defense had any support in fact or law. To the contrary, the defendants maintain they asserted a good faith denial of the claim based upon the claimant's involvement in a subsequent intervening accident and in his failure to acknowledge his pre-existing disability during his deposition which first became known to the defendants after the claimant filed the recent Form 50. (R. pp. 53-56; 585-586; 592). Moreover, the claimant failed to establish the defendants' denial of the claim pending investigation was frivolous under Section 15-36-10 of the South Carolina Frivolous Proceedings Act.

The South Carolina Supreme Court has determined the South Carolina Workers' Compensation Commission generally lacks authority to award attorney fees unless authorized by contract or statute. *Baxter v. Martin Bros., Inc.*, 368 S.C. 510, 630 S.E.2d 42 (2006); *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). Simply put, there is no such statute for attorney fees under the Act. In our present case, the claimant contends the defendants should be responsible for attorney's fees and costs associated with his allegation of a frivolous defense as provided for in Section 15-36-10. Section 15-36-10 provides that an attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or
- (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code Ann. Section 15-36-10(C)(1). The moving party must establish the advancement of a frivolous claim or defense by the preponderance of the evidence. Otherwise, no sanction is warranted. S.C. Code Ann. Section 15-36-10(C)(2).<sup>2</sup> The defendants maintain their denial of medical care was appropriate in this instance and certainly did not warrant sanctions based upon the facts of the case.

In his brief, the claimant questions the defendants' refusal of medical care based upon the fact that the subsequent intervening accident was minor and that Dr. Alexander testified during his deposition that the intervening accident had no affect on his opinion with regard to the cause for continued treatment. Additionally, the claimant questions the defendants' discovery tactics following their learning of his pre-existing low back condition which the claimant had previously denied during his sworn deposition testimony. (R. pp. 53-56; 585-586; 592). What the claimant did not set forth in his brief; however, is any *credible evidence*

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<sup>2</sup> Section 15-36-10(J) provides "the provisions of this section shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law." S. C. Code Ann. 15-36-10(J).

*to support the defendants' denial of medical care was frivolous; intended for delay; or advanced to merely harass or injure the other party* as required by Section 15-36-10.

First, it is preposterous for the claimant or his counsel to base a frivolous denial claim on the allegation that the subsequent intervening accident was minor. As set forth above, the claimant's credibility came into question when he failed to disclose his pre-existing disability and low back injuries when asked about same under oath. (R. pp. 53-56; 585-586; 592). That alone was reason enough for the defendants to question the claimant's version of the significance of the accident. The extent of the actual accident is obviously in question as the medical report from Dr. Alexander dated February 22, 2011, (R. p. 302) and the claimant's own testimony confirmed the subsequent motor vehicle accident *worsened his condition*. (R. p. 48). In addition, the defendants questioned the credibility and reliability of Dr. Alexander's testimony which was provided during a deposition scheduled by the claimant's counsel. As a result of the inconsistencies found in Dr. Alexander's deposition testimony, the defendants were forced to subpoena him to testify live at the Hearing before Commissioner Lyndon. Furthermore, the additional discovery conducted by the defendants was made necessary by the claimant's own failure to acknowledge a pre-existing low back condition during his deposition. The claimant labeled this discovery process a so-called "fishing expedition." However, the claimant's own improper actions by failing to testify truthfully regarding his prior back condition forced the defendants to pursue further medical evidence and secure proper discovery given the revelations of the claimant's pre-existing low back issues. (R. pp. 563-586; 591-592). Taken together, the facts certainly warranted the defendants' continued denial of additional medical treatment at this point. In so doing, the defendants violated no law or regulation and were simply attempting to thoroughly investigate the claim. In fact, the

defendants specifically requested a Hearing to have the issue addressed by the Commission in an expeditious manner and claimant's counsel filed a response opposing same. (R. pp. 485-493). The defendants take the position that the claimant's objection to the Hearing only served to delay this matter. As such, the defendants moved for costs against the claimant in this action which were also denied by Commissioner Lyndon. (R. p. 3). The defendants did not appeal this determination.

The claimant has failed to put forth any credible evidence to support that the defendants' denial of medical care and/or their actions to date have been frivolous and worthy of sanctions pursuant to Section 15-36-10.<sup>3</sup> Therefore, the defendants maintain the preponderance of the evidence supports that the Full Commission properly declined to award such sanctions against the defendants, including attorney's fees and costs. There was no abuse of discretion in its determination.

**2. The defendants take no position with regard to the claimant's contention that the Appellate Panel violated §§ 1-23-320, 1-23-350, and due process.**

The defendants take the position that the Appellate Panel's Decision and Order included Findings of Fact and Conclusions of Law which were sufficiently detailed to enable a reviewing court to determine whether the findings are supported by the evidence in the record. The defendants decline; however, to address the claimant's argument related to the Full Commission's assessment of fines against the claimant's counsel for a frivolous appeal. The defendants take the position they are not proper parties to this particular portion of the claimant's appeal.

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<sup>3</sup> The defendants also point out that while the claimant fell off auto-pay for a short period of time in October 2010 and was fully compensated for TTD, the claimant has remained on a running award of TTD at all times in compliance with the Act.

**CONCLUSION**

Based upon the foregoing, the Decision and Order of the South Carolina Workers' Compensation Commission should be affirmed in its entirety as to the issues raised by the claimant against the Respondents.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE**

---

The undersigned counsels certify that the Respondents' Final Brief complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Respondents' Final Brief, or they have been redacted where necessary.



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**CERTIFICATE OF COUNSEL**

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The undersigned counsels certify that the Respondents' Final Brief complies with Rule 211(b) SCACR.



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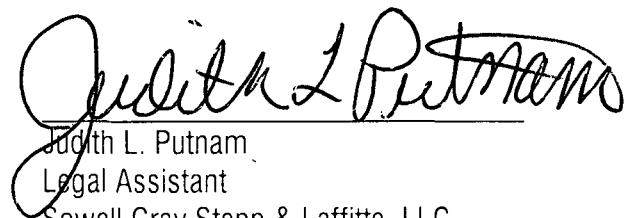
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**PROOF OF SERVICE**

I certify that I have served three copies of the Respondents' Final Brief, on Jeffrey L. McFadden by depositing a copy of same in the United State Mail, postage prepaid on November 15, 2012, addressed to his attorney of record, Stephen J. Wukela, Esquire, Wukela Law Firm, Post Office Box 13057, Florence SC 29504.



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