

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

CASE NO. 2012-213707

LATIKA
BROWN,.....APPELLANT,

v.

THE PANTRY,
INC.....EMPLOYER,

AND

ACE AMERICAN INSURANCE COMPANY C/O
RISK ENTERPRISE MANAGEMENT, LTD,RESPONDENTS.

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

- I. Pursuant to Section 42-1-150 of the South Carolina Code of Laws: Did the South Carolina Workers' Compensation Commission err in ruling that the Appellant forfeited her right to a reduction of the Carrier's lien because no written notice of settlement was sent to the Carrier?

- II. Did the South Carolina Workers' Compensation Commission err in refusing to reduce the Carrier's lien when the Appellant's recovery was significantly less than her cognizable damages pursuant to Section 42-1-560(f) of the South Carolina Code of Laws thereby resulting in the insurance carrier's rate of reimbursement for its loss being four times greater than the rate of reimbursement that Appellant received for her loss?

- III. Did the South Carolina Workers' Compensation Commission err in failing to admit medical evidence regarding potential future plastic surgery based on the fact that the doctor's evaluation did not occur until after the settlement of the third-party claim?

STATEMENT OF THE CASE

This is an appeal of the Order of the South Carolina Workers' Compensation Commission. A hearing was held on April 20, 2012, before Commissioner McCaskill pursuant to a Form 50 filed by Claimant/Appellant who sought to reduce the Carrier's lien on a third-party settlement pursuant to Section 42-1-560. Commissioner McCaskill issued an Order on June 21, 2012 denying any reduction of the lien. Claimant/Appellant filed a Form 30 on June 29, 2012, requesting review by a three member panel of the South Carolina Workers' Compensation Commission. The case was argued before Commissioners Beck, Williams and Wilkerson on October 23, 2012. The panel affirmed the rulings of the single commissioner in an Order dated December 3, 2012. Notice of Appeal was filed on December 21, 2012. This appeal follows.

STANDARD OF REVIEW

This case is governed by the concept that the decision of the Workers' Compensation Commission should be affirmed if it is supported by substantial evidence, Lark v. Bi-Lo Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

STATEMENT OF FACTS

Latika Brown was injured at work on November 19, 2008, when struck by a car. She suffered injuries to both knees requiring numerous surgeries, a protracted recovery, and significant permanent disability. It was an admitted claim. It was settled on a Clincher on March 11, 2011.

Appellant Brown also pursued a tort action against the driver of the car that hit her. A Summons and Complaint was filed in the Court of Common Pleas for Charleston County on June

13, 2011. The Carrier had a total lien of \$219,486.90. There was a total of \$525,000.00 of liability coverage available. The case was settled for \$505,000.00. The Carrier's expert, Jon Austen, opined that cognizable damages of Claimant ranged from \$750,000.00 to \$1,000,000.00. (APA 603-605). The Appellant's expert, Ed Buckley, opined that the cognizable actual damages of Appellant ranged from \$1.5 to 2.0 million dollars. (APA - included in Commissioner's Order but unnumbered).

The South Carolina Workers' Compensation Commission ruled that the Claimant was entitled to no reduction in the lien and that the Carrier should be reimbursed in full for \$219,486.90. It awarded no reduction for attorney's fees, expenses or for pro rata reduction based on equitable principles as allowed by Section 42-1-560(f) based on the fact that Claimant had failed to give written notice to the Carrier prior to settlement of the third-party action.

ARGUMENT

I. The South Carolina Workers' Compensation Commission erred in holding that Claimant's Failure to give the Carrier prior written notice of the proposed settlement acted as a forfeiture of the Claimant's right to a reduction in the Carrier's lien.

In its Conclusions of Law, the South Carolina Workers' Compensation Commission held "Pursuant to Section 42-1-560, Claimant did not obtain written approval from Defendants prior to entering into the settlement with the third-party." (R. p. 11, lines 8-9). In its finding of Fact #12, the Commission stated: "Based on the evidence submitted by the parties, a reduction in the third party lien would not be equitable to all parties concerned in this matter given that Claimant did not obtain written approval prior to settlement of the third party claim and given that the strength of her case and likelihood of third party liability was so great." (R. p. 10, lines 19-22).

Contrary to the Commission's finding and ruling, Section 42-1-560 only requires prior written approval in instances when the case is settled "for an amount less than the total of the compensation to which he or they are entitled under this Title because of such injury or death..."

In this case the total settlement of \$505,000.00 exceeded the total amount which Ms. Brown was entitled to under the Workers' Compensation Act, i.e., the \$219,486.90 of medical and all other benefits settled by Clincher Agreement. As held in Hardee v. Bruce Johnson Trucking Company, 293 S.C. 349, 360 S.E.2d 522 (Ct. App. 1987):

...The [Workers Compensation] Act does require the Carrier's consent when settlement is for less than the claimant's total compensation settlement; however, this provision is inapplicable to the present case since the settlement was for more than the total entitlement to compensation. And we so hold.

The Carrier's argument and the Commission's ruling that the failure to obtain prior written approval affected Claimant's right to a reduction in the lien is therefore a clear error of law. The statute has no such requirement. Indeed, even in cases in which written notice is required, the statute does not provide for any penalty or forfeiture in regard to the lien. Rather, the statute provides that the settlement is invalid as against the Carrier. The Commission was incorrect in both its findings of a need for written notice and the remedy it selected, which was a forfeiture of lien reduction.

II. The South Carolina Workers' Compensation Commission erred in failing to apply equitable principles to reduce the lien when the Appellant's recovery was significantly less than her cognizable damages pursuant to Section 42-1-560(f) of the South Carolina Code of Laws thereby resulting in the insurance carrier's rate of reimbursement for its loss being four times greater than the rate of reimbursement that Appellant received for her loss.

There are two primary cases that discuss the factors to be determined when deciding whether or not to reduce a Carrier's lien, Kirkland v. Allcraft, 329 S.C. 389, 496 S.E.2d 624 (1998) and Breeden v. TCW, Inc. Tennessee Express, 355 S.C.112, 584 S.E.2d 379. (S. Ct. 2003).

Essentially the decision is an equitable one to be decided on a case by case basis.

As noted above, in this case, the South Carolina Workers' Compensation Commission cited only two reasons for not reducing the Carrier's lien. The first reason, Appellant's failure to give prior written notice of settlement is not a legal requirement. The second reason, the strength of the case of liability, is certainly a legitimate factor, but there were numerous other legitimate factors which the Commission failed to consider in coming to an equitable decision.

In this case, although the liability of the third-party case was strong and the damages of the Claimant substantial, the collectability of a full judgment was limited by the amount of liability coverage available. The total coverage available was \$525,000.00. The case was settled for \$505,000.00 or 96% of the full amount of money recoverable. The settlement, as all settlements, allowed expenses to be kept down, legal fees to be limited, and possible appeals to be avoided. As noted by Jon Austen, the Carrier's expert witness: "Donald Howe did an excellent job for his client in obtaining a settlement of \$505,000.00 out of a \$525,000.00 potential recovery of available insurance." (R. p. 99, line 41; p. 100, lines 1-2). The statute itself says that the first reduction is for reasonable attorney fees and expenses. The total attorney fees were \$165,000.00 or 32.6%. Reducing the lien proportionally the Carrier would be entitled to \$147,934.63.

Each side introduced an expert's evaluation of the "cognizable damages." Claimant's expert opined a figure of 1.5 - 2.0 million dollars. The Carrier's expert opined a range of \$750,000.00 to 1,000,000.00 but added "I would note that Donald Howe is an excellent attorney. I would anticipate he would be able to render a verdict closer to the higher end of the scale." (R. p. 100, lines 12-14).

The total cognizable damages ranged from \$750,000.00 to 2.0 million. Claimant would point out that even if one were to use the lowest figure suggested by the Carrier's expert, the following breakdown would be applied.

Total Cognizable Damages	\$750,000.00
Amount Recovered	\$505,000.00
Pro Rata Percentage of Recovery	67.3%
Total Lien	\$219,486.90
Pro Rata Attorney Fees (32.6%)	\$71,552.27
Balance	\$147,934.63
Pro Rata Recovery	\$99,560.00

The lowest figure suggested by the Carrier's expert would therefore reduce the lien from \$219,486.90 to \$99,560.00.

Admittedly, 42-1-560(f) states that the Commission "may" (as opposed to "shall") reduce a carrier's lien. In deciding whether there should be a reduction, the statute also states that the Commission should analyze 1) the proportion that such settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law 2) the equity of the final result to the parties and 3) whether the result serves the "interests of justice".

Appellant would point out that the Commission never considered the proportion that the settlement of the workers' compensation case bore to the liability settlement. As for the equity to the parties, the Commission placed huge emphasis on Appellant's failure to provide prior notice of the settlement despite the fact that a) such notice was not required and b) no prejudicial effect was demonstrated. As for the "interests of justice", the Commission's final resolution is that the Carrier will be reimbursed for 100% of its loss while the Appellant, after attorney fees, costs, and the

carrier lien, will be reimbursed approximately 24% of her losses. (\$505,000.00-\$165,000.00 (attorney fees)-\$219,486.90 (carrier lien) = \$120,513.10 which is approximately 24% of \$505,000.00 and 16% of \$750,000.00 as compared to the 100% reimbursement of the Carrier.) Appellant submits such a gross disparity satisfies neither the interests of justice nor an equitable treatment of the parties.

In sum, the following is a list of considerations the South Carolina Workers' Compensation Commission should have considered:

- 1) The strength of the liability case
- 2) The amount of liability coverage available
- 3) The additional costs/expenses going to trial
- 4) The additional delays of going to trial
- 5) The additional risks of going to trial
- 6) The proportion the final settlement had to Appellant's cognizable damages at law
- 7) The relative rate of reimbursements to the parties
- 8) The attorney's fees and expenses incurred by Appellant.

Of the eight legitimate factors listed above, the South Carolina Workers' Compensation Commission considered only one. In addition, the Commission specifically relied heavily on a factor that the South Carolina Courts have held to be improper. As a result, of the final ruling cannot be said to be supported by substantial evidence and should be overturned.

III. The Commission erred in failing to consider the medical report of Doctor Peter DeVito regarding potential future plastic surgery based on the fact that the doctor's evaluation did not occur until after the settlement of the third-party claim.

After the settlement of the Workers' Compensation case by a Clincher Agreement in March, 2011, Claimant was evaluated by a plastic surgeon, Peter DeVito (R. p. 107) concerning the nature and extent of possible scar revision and its possible costs. The Carrier

objected to its introduction into evidence based on the fact that the report was obtained after the settlement of the third party claim and that objection was sustained.

Claimant submits the exclusion of the evidence was error. It is very relevant that the Claimant has future medical expenses that would not be covered by Workers' Compensation. Such future medical costs are highly relevant to the application of the equitable principles that should be applied in whether to reduce the lien. It is certainly worth considering that if Claimant wants her scars fixed that it will cost her \$13,000.00 - \$21,000.00 of the money she receives. It is also relevant to the extent of "cognizable damages" which need to be determined pursuant to Section 42-1-560(f). The fact that the information was not obtained before the third party settlement is simply not relevant.

CONCLUSION

Based on the clear errors of law by the South Carolina Workers' Compensation Commission, Appellant asks that this Honorable Court 1) rule on the admissibility of the medical report of Doctor Peter DeVito and 2) remand the matter for a new hearing and reconsideration of the reduction of the Carrier's lien.

Respectfully submitted,



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The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE OF BRIEF OF APPELLANT

I hereby certify that on the 2 day of August, 2013, I served a copy of the Brief of Appellant upon opposing counsel by mailing a copy of the same in the United States Mail, with sufficient postage affixed as follows:

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A handwritten signature in cursive script that reads "Donald H. Howe". The signature is written in black ink and is positioned above a horizontal line.

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