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.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THERE WAS AMPLE EVIDENCE ON WHICH TO DETERMINE THE REASONABLENESS OF ATTORNEY'S FEES.

The Respondent's first argument is that no evidence about the "reasonableness" of the legal fees was offered into evidence and therefore the carrier should pay nothing for the benefits gained through the attorney's efforts.

Under South Carolina law, the reasonableness of an attorney's fee is based on a number of factors which include:

> 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. Layman v. State, 367 S.C. 434, 458, 658 S.E.2d 330, 333 (2008).

Contrary to Respondent's assertion, there was indeed direct evidence on a number of the factors recognized by South Carolina courts. Respondent's own expert characterized Appellant's counsel as "an excellent attorney" who "did an excellent job" in handling the case. (R. p. 99, line 41, p. 100, line 13). Appellant would submit that a contingency fee of 1/3 in a personal injury case is a standard, universally recognized fee for legal services. Workers' Compensation Commissioners routinely approve such fees without the requirement of an independent expert opinion. Furthermore, the applicable statute, S.C. Code Ann. § 42-1-560(b), specifically identifies a fee of 1/3 as reasonable. The case involved a number of complex medical issues as reflected in the medical bills and reports that were part of the record (over 500 pages were submitted pursuant to the Administrative Procedures Act). The case was not settled until after a lawsuit was filed and it was almost 3 years from the time of the accident to the time of settlement reflecting a significant period over which counsel spent time and efforts in developing the case.

When Respondent's own expert opined that Appellant's counsel "did an excellent job" in handling the case, it would hardly be equitable to assign a value of zero dollars to those efforts.

In sum, although there was no specific legal expert opinion offered to assert the fee was "reasonable" under the circumstances, there was ample evidence of the underlying factors recognized by law on which to base a fee of 1/3 of the amount recovered. There was certainly no justification that the efforts of Appellant's Counsel were valueless when those same efforts produced a significant monetary settlement that brought great benefit to the Carrier/Respondent. Lastly, the Commission never addressed any of the relevant factors outlined in the controlling case law. The Commission only focused on the lack of an expert witness using the word "reasonable" in his opinion. This is form over substance and in error.

II. THE COMMISSION DID NOT PROPERLY WEIGH THE EQUITIES IN DETERMINING THAT NO REDUCTION OF THE LIEN WAS "EQUITABLE TO ALL PARTIES CONCERNED" PURSUANT TO S.C. CODE ANN. § 42-1-560(f).

Appellant believes her original brief covers most of the relevant issues in regards to this assertion. There are several specific points Appellant would point out in reply.

A. Because the reduction of the lien is by its nature an equitable finding, then the substantial evidence rule may not apply.

When an appellate court reviews an equitable action tried by a judge alone, the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. This is a different standard than the "substantial evidence rule" that generally applies in a workers' compensation action. Of note is the fact that the determination of the appropriateness of a legal fee has been held to be an action in equity. Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1977). Appellant believes that under either scope of review there is clear error especially in light of the next two arguments.

B. The Commission never made a determination of the relationship of the settlement and the employee's total cognizable damages at law.

The Supreme Court has essentially stated that a reduction in a carrier's lien involves an equitable analysis and that it will vary on a case by case basis. Kirkland v. Allcraft Steel Co., Inc., 329 S.C. 387, 496 S.E.2d 624 (1998), Breeden v. TCW, Inc., 355 S.C. 112, 584 S.E.2d 379 (2003). On the other hand, the controlling statute implicitly requires that the first step in that analysis is to determine how the settlement compares to the total cognizable damages. That is the first step. The next step is to weigh that pro rata determination with other equitable considerations. The Commission never made the initial analysis which the statute envisions and, arguably, requires. Instead, it simply held that Appellant's failure to obtain written consent of the carrier of the proposed settlement operated as a forfeiture of any equitable consideration. It is of note that the alleged "written consent" failure of Appellant precedes the language "Notwithstanding other provisions of this item..." in S.C. Code Ann. § 42-1-560(f) after which the "formula" for equitably reducing the lien is set out.

C. The Respondent has demonstrated no prejudice in Appellant's alleged failure to investigate the personal assets of the at-fault third party.

Citing the case of Kimmer v. Murata of America, Inc., 372 S.C. 39, 640 S.E.2d 507 (Ct. App. 2006), Respondent argues that its rights to recover the personal assets of the at-fault party were lost and therefore no reduction in the amount of the lien was an equitable result under S.C. Code Ann. § 42-1-560. There are 3 errors in this argument.

1) Kimmer is not valid precedent for this case.

First, it is important to note that Kimmer involved a completely different set of factors and is not applicable to the facts of this case. In Kimmer, the Claimant settled the third party

action before attempting to pursue his workers' compensation action. This constituted an "election of remedies" meaning the Workers' Compensation Commission never even had jurisdiction over the claim. In this case, the third party case was settled after the Workers' Compensation claim. There is no "election of remedies" issue. The jurisdiction of the Workers' Compensation Commission is unquestioned.

Next, the Carrier in Kimmer never had notice that there was a third party action. Respondent/Carrier in this case was fully aware of the third party action as evidenced by a letter dated September 8, 2011 (R. p. 85).

Third, in Kimmer the third party claim was settled for less than 10% of the Carrier's outstanding lien. Thus, even if there was jurisdiction before the Workers' Compensation Commission, a specific written consent requirement would have been triggered. That same written consent requirement has been held to be inapplicable to cover a case like Appellant's (when the settlement amount exceeds the lien amount). Hardee v. Bruce Johnson Trucking Company, 293 S.C. 349, 360 S.E.2d 522 (Ct. App. 1987).

None of the most relevant factors in Kimmer are present in this case and the case therefore has no precedential weight.

2) Neither the Single Commissioner nor the Three Commissioner Panel relied on the Kimmer case or the arguments therein.

The only factor cited by the Workers' Compensation Commissions was a "written approval requirement". Although Kimmer does focus on a notice requirement, it is entirely different from the alleged "written approval" requirement relied upon by the Commission. In Kimmer, the lack of notice was about the very existence of the third party claim which is controlled by S.C. Code Ann. § 42-1-560(a). It is undisputed that the carrier in this case had

notice of the third party claim. As noted above, the lack of notice in Kimmer resulted in there never being jurisdiction before the Workers' Compensation Commission. In this case the "written approval" requirement relied on by the Commission does not arise from S.C. Code Ann. § 42-1-560(a) (existence of a third party claim) but rather that of the settlement of a known third party claim which is controlled by S.C. Code Ann. § 42-1-560(f).

In sum, neither the holding nor logic of Kimmer was relied upon by either the single Commissioner or the Commission Panel in their Order. Reliance on Kimmer is therefore not only misplaced as precedent, it is simply not a factor in the record.

3) In weighing the equities to all parties pursuant to S.C. Code Ann. § 42-1-560(f), it was improper for the Commission to assume the at-fault party had substantial assets when no evidence was introduced to support such a conclusion.

Citing the case of Kimmer, Respondent argues that its rights to recover personal assets of the at-fault party were lost as a result of the settlement. This is pure conjecture, however. Respondent has not shown that the at-fault third party had any assets. Such assets could easily have been discovered through the subpoena and deposition powers for the Workers' Compensation hearing regarding the reduction of lien. Respondent did not even attempt to discover whether or not the at-fault party had any such assets. Respondent simply asks this Court to assume that the at-fault third party would have had at least $250,000.00 of available assets (to satisfy the minimum value of the total cognizable damages) when common sense tells us that the vast majority of people do not have such substantial assets.

Consider, for instance, that the at-fault third party had $100,000.00 in a bank account that was readily available (which Appellant believes was not the case). Then if the total cognizable damages were set at $800,000.00, there should still be an equitable reduction of approximately

25% ($600,000.00 collectible[$500,000.00 liability insurance + $100,000.00 cash]/$800,000.00 value). The point is: even if substantial assets were available (which there is no evidence to support) that would still only be one factor in the overall equitable analysis; it would never preempt the requirement of an equitable weighing of all relevant factors.

Admittedly, the Court in Kimmer held that no prejudice need be proven. This holding, however, was in the context of a situation where the Workers' Compensation Commission had no jurisdiction and therefore no ability to investigate whether there was prejudice to the rights of the parties. This case is completely different because the jurisdiction of the Commission is absolute and S.C. Code Ann. § 42-1-560(f) directs that an equitable "investigation", i.e. hearing, be conducted. ("Any such reduction shall be based on a determination by the Commission that such reduction would be equitable to all parties concerned and serve the interest of justice." S.C. Code Ann. § 42-1-560(f) emphasis added).

In this case, the Respondent/Carrier had an opportunity to investigate and determine whether the at-fault party had any assets. It could have deposed the at-fault party and issued subpoenas for his financial records. It could have subpoenaed him to the hearing. But no evidence was discovered or presented in this regard. It was error for the Commission to assume hundreds of thousands of dollars of assets were available when there was no evidence to support such an assumption.

Summation of Subsections A, B & C Above:

In its brief, Respondent agrees S.C. Code Ann. § 42-1-560(f) controls and that an equitable analysis pursuant to that Section is appropriate. Respondent simply argues that the Commission properly evaluated the equities. Ironically, to justify the Commission's decision, Respondent asserts that it was proper for the Commission 1) to consider a written consent

requirement not present in the applicable Section of the statute (and ruled inapplicable by the courts) and 2) to ignore the one factor (the proportion of the settlement to the total cognizable damages) that the statute requires. Appellant submits this was an erroneous consideration of the equities as a matter of law.

III. THE COMMISSION ERRED IN NOT CONSIDERING THE REPORT OF THE PLASTIC SURGEON, PETER DEVITO, REGARDING FUTURE SURGERY COSTS AND DISFIGUREMENT.

Appellant's main brief addresses this issue to a great extent. Appellant would simply point out that Respondent's contention that no report was proffered is completely refuted by the Order of the Hearing Commissioner himself which states: "Claimant proffers the report of Peter C. DeVito, MD dated 10/12/10, pages 503-505" (R. p. 4, line 8-9). The report was part and parcel of the APA exhibits submitted at the hearing. It was simply excluded as relevant evidence by the Commission.

Lastly, in footnote 3 on page 9 of Respondents brief, Respondent asserts that Appellant never argued that the medical report was relevant to an equitable analysis and abandoned this as an appellate issue. This is simply incorrect. See Hearing Transcript Pages 5-6, Full Commission Transcript Pages 9-10, Appellants Brief to Full Commission ("Such future medical costs are highly relevant to the application of the equitable principles that should be applied in whether to reduce the lien." (Claimant's Brief, Page 5)).

Respectfully submitted,

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Aug 1, 2013

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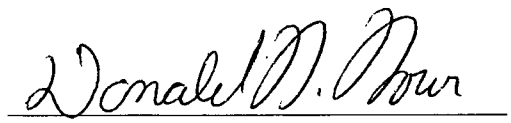
The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE OF REPLY BRIEF OF APPELLANT

I hereby certify that on the 2 day of August, 2013, I served a copy of the Reply 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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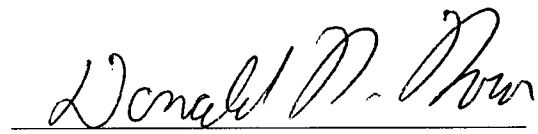

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