THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

CASE NO. 2012-213707

LATIKA BROWN, ... APPELLANT,

v.

THE PANTRY, INC., AND ACE AMERICAN INSURANCE COMPANY C/O
RISK ENTERPRISE MANAGEMENT, LTD, ARE THE..... RESPONDENTS.

FINAL BRIEF OF RESPONDENTS

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2. DID THE COMMISSION COMMIT REVERSIBLE ERROR IN DECLINING TO REDUCE THE CARRIER'S THIRD-PARTY LIEN PURSUANT TO ITS DISCRETIONARY AUTHORITY UNDER S.C. CODE ANN. § 42-1-560(F)?

3. IS CLAIMANT'S ARGUMENT THAT THE COMMISSION ERRED IN FAILING TO CONSIDER A MEDICAL REPORT PRESERVED FOR REVIEW, AND IF SO, DID THE COMMISSION COMMIT REVERSIBLE ERROR IN EXCLUDING THIS REPORT?

STATEMENT OF THE CASE

On November 19, 2008, Claimant Latika Brown was struck by a vehicle as she walked across the premises of her employer, The Pantry. Appellate Panel Decision and Order, p. 5 (Dec. 3, 2012); R. p. 79. Video from the security camera at The Pantry showed a driver ("Driver") cutting through two parking lots to avoid traffic, ignoring a stop sign between the two parking lots, and striking Ms. Brown at a high rate of speed as she was crossing The Pantry's parking lot to help a customer at the gas pumps, throwing her 15-20 feet in the air. R. p. 79. Claimant suffered severe injuries to her knees as well as a minor closed head injury. R. pp. 89-90. After four knee reconstruction surgeries followed by physical therapy, she reached maximum medical improvement on November 20, 2009. R. p. 76 and p. 78. On March 11, 2011, Claimant settled her worker's compensation claim on a full and final clincher in the amount of $60,000.00. R. pp. 88-91.

On June 13, 2011, Claimant filed a Summons and Complaint asserting tort claims against the Driver who struck her on the day of the injury. R. pp. 81-84. Claimant sought recovery of actual and punitive damages against the Driver. *Id.* at p. 84. On September 21, 2011, Claimant's counsel informed Respondent that Claimant's tort claims were settled for $505,000.00. R. p. 87. The Driver had automobile liability coverage in the amount of $525,000.00. R. p. 85. No further discovery was undertaken to identify any other assets from which a larger judgment could be satisfied. R. pp. 59-60.

On January 20, 2012, Claimant filed a motion for payment of its lien. R. p. 19. A hearing was held on April 20, 2012 before Commissioner McCaskill. Claimant sought to introduce an evaluation by a plastic surgeon ("Medical Report") for costs associated with

scar reconstruction that was prepared after the Clincher Agreement was entered. R. pp. 23-24. The Single Commissioner excluded the Medical Report as irrelevant. R. p. 23-25.

Claimant sought to reduce the lien based upon payment of a pro rata share of attorney fees and a pro rata reduction in proportion to the difference between the total cognizable damages and the settlement amount. R. pp. 25-27. The Carrier argued that, pursuant to the factors identified in *Kirkland v. Allcraft Steel Co.*, 329 S.C. 389, 496 S.E.2d 624 (1998), as well as the fact that Appellant did not provide notice of the settlement nor seek Respondent's approval of the settlement prior to settling the third party claim, the third-party lien should be paid in full. R. pp. 29-32. In an order issued June 21, 2012, the Single Commissioner declined to reduce the Carrier's lien. R. pp. 1-12. Claimant appealed to the full Commission. After a hearing held on October 23, 2012, an appellate panel affirmed the Single Commissioner's decision in an order dated December 3, 2012. R. pp. 13-18.

STANDARD OF REVIEW

"This Court can reverse or modify the decision of the Commission where the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence considering the record as a whole." *Trotter v. Trane Coil Facility*, 393 S.C. 637, 644, 714 S.E.2d 289, 293 (2011). The exercise of the Commission's discretion in deciding whether to reduce a carrier's lien upon a third-party settlement "will not be disturbed on appeal absent clear abuse." *Garrett v. Limehouse & Sons, Inc.*, 293 S.C. 539, 544, 360 S.E.2d 519, 522 (Ct. App. 1987). "An abuse of discretion occurs where the ruling is based on an error of law or, where the ruling is grounded upon factual findings, is without evidentiary support." *Trotter*, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011).

ARGUMENT

I. THE COMMISSION COMMITTED NO ERROR IN DECLINING TO REDUCE THE CARRIER'S LIEN IN AN AMOUNT EQUAL TO A PRO RATA SHARE OF THE CLAIMANT'S ATTORNEY'S FEES.

Under S.C. Code Ann. § 42-1-560(b), "the carrier shall have a lien on the proceeds of any recovery from the third party ... to the extent of the total amount of compensation, ... less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier." The Commission possesses discretion in establishing an amount of attorney's fees that are reasonable and necessary, so long as the amount does not "exceed one third of the total claim amount paid by the carrier to the injured employee." *Id.*

Claimant's counsel argued that he was entitled to a reduction in the Carrier's lien

in the amount of $71,552.27. Appellant's Final Brief, p. 5. However, Claimant failed to submit any evidence to the Commission supporting his claim for $71,552.27, including whether this amount was reasonable under the circumstances. Claimant failed to submit her fee agreement with her counsel or other evidence of legal fees incurred. Claimant's counsel argued the basis of his attorney fee; however, argument of counsel is not evidence. *See, e.g., Bowers v. Bowers*, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991). "Statements of fact appearing only in argument of counsel will not be considered." *Id., citing to McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933). Accordingly, the Commission found that "Claimant did not submit any evidence to support reasonableness of attorney's fees and assessment thereof." R. p. 17. Without any evidence by which to establish the amount of attorney fees, much less to determine whether Claimant's attorney's fees were "reasonable and necessary," the Commission committed no error in declining to reduce the Carrier's lien by a pro rata share of Claimant's attorney fees.

II. THE COMMISSION COMMITTED NO ERROR IN DECLINING TO REDUCE THE CARRIER'S LIEN PURSUANT TO ITS DISCRETIONARY AUTHORITY UNDER S.C. CODE ANN. § 42-1-560(F).

Pursuant to S.C. Code Ann. § 42-1-560(b), Claimant is entitled to pursue action against a third party liable for her personal injury. A carrier having paid worker's compensation benefits to a Claimant "shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation ...." This section gives the Carrier an absolute lien on the proceeds of a third party recovery. *Vaughn v. Eddins*, 272 S.C. 238, 240, 251 S.E.2d 187, 188 (1979). The Carrier's lien on the Claimant's third-party recovery amounted to

$219,486.90. R. p. 16.

However, "[n]otwithstanding any other provisions of this item, where an employee or his representative enters into a settlement less than the amount of the employee's estimated total damages, the commission may reduce the amount of the carrier's lien on the proceeds of such settlement in the proportion that such settlement or judgment bears to the commission's evaluation of the employee's total cognizable damages at law." S.C. Code Ann. § 42-1-560(f). Here, Claimant's estimated total damages ranged from $750,000 to $2,000,000; therefore, the Commission was empowered to consider a reduction of the Carrier's lien. R. pp. 98-104. Even so, Claimant is not automatically entitled to a reduction in the carrier's lien. *Kirkland v. Allcraft Steel Co., Inc.*, 329 S.C. 389, 394, 496 S.E.2d 624, 626 (1998). "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 interests of justice." *Id.*

"In considering whether or not to reduce the lien, the commission may consider factors such as the strength of the claimant's case, the likelihood of third party liability, claimant's desire to settle, and whether carrier is unreasonably refusing to consent to settlement." *Kirkland*, at 394, 626. The Commission is not required to specifically follow the *Kirkland* factors, nor take into consideration each and every *Kirkland* factor. *Breeden v. TCW, Inc.*, 355 S.C. 112, 121, 584 S.E.2d 379, 384 (2003). Instead, the Commission "is free to consider different factors ... if implicated by the facts." *Id.* The question of whether or not to reduce the carrier's lien should be determined on a case-by-case basis consistent with the policy behind subrogation. *Id.* The Commission enjoys "wide discretion" in making this determination, including the determination of which

factors to consider and the weight given to each factor. *Id.* at 122, 384; *Garrett v. Limehouse & Sons, Inc.*, 293 S.C. 539, 544, 360 S.E.2d 519, 522 (Ct. App. 1987).

The Commission considered the relevant *Kirkland* factors. The Commission found that the Driver was unquestionably liable. R. p. 16. It found that Claimant had a very strong case against the Driver for actual damages and possible punitive damages. R. pp. 16-17. In addition, it found that Claimant had not obtained the carrier's approval of the settlement prior to entering into the settlement. R. p. 16. Furthermore, the Claimant made no effort to put forward evidence relevant to the *Kirkland* factor of her desire to settle for financial or other reasons. *See Breeden*, at 122, 384 (holding that third Kirkland factor of claimant's desire to settle due to family financial strain weighed in favor of reducing the lien). The Commission concluded that the Carrier was entitled to repayment of its lien in full. R. p. 18. In so doing, Carrier would be compensated $219,486.90 out of the third party settlement of $505,000 and Claimant would recover $285,513.10 from the settlement.

The Commission's decision was equitable to all parties. *See Fisher v. S.C. Dep't of Mental Retardation*, 277 S.C. 573, 575, 291 S.E.2d 200, 201 (1982) ("The object of § 42-1-560 is to effect an equitable adjustment of the rights of *all* the parties."). Claimant received over half of the proceeds. Given that the Claimant's injuries were caused by the negligence of the Driver, full compensation of the Carrier's lien serves the goal of subrogation "to place the burden of the debt or loss upon the person who should bear it." 73 AM JUR 2D *Subrogation* § 2. "Other goals and purposes include restitution; doing justice, including 'essential justice;" and to prevent unjust enrichment at the expense of another, as well as avoiding double recoveries." *Id.* In *Breeden*, the South Carolina

Supreme Court explained that "the central objective [of a subrogation statute] is to provide the mechanics that will achieve...the third party paying what it would normally pay if no compensation question were involved; the employer and carrier 'coming out even' by being reimbursed for their compensation expenditure; and the employee getting any excess of the damage recovery over compensation." 355 S.C. 112, 118; 584 S.E.2d 379, 382 (2003). The Commission's decision achieved this objective.

Claimant argues that the Commission committed reversible error in considering the fact that Claimant did not obtain the Carrier's approval prior to settlement of the third-party claim. The Carrier conceded below that S.C. Code Ann. § 42-1-560(f) does not require Claimant to obtain approval of a proposed settlement if the settlement amount is above the amount of compensation paid by the Carrier. R. pp. 48-49. It is clear from the transcript of the appellate hearing before the Commission that the Commission understood this as well. *Id.* However, the Commission "is free to consider different factors ... if implicated by the facts." *Breeden*, at 121, 384.

Here, the Commission's consideration of the fact that approval from the Carrier of any settlement amount was not sought prior to settlement was an appropriate factor under the facts of this case. It is undisputed that Claimant's counsel did not include the Carrier in any settlement negotiations with the Driver.[1] Consequently, the Carrier was not afforded the opportunity to investigate whether the Driver had other assets, offer assistance in evaluating the tort claim, or otherwise bring its resources to bear in settlement negotiations or any litigation of the third-party claim. *C.f. Kimmer v. Murata*

[1] Claimant's counsel wrote to Respondent Risk Enterprise Management on September 8, 2011, asking if the carrier would agree to a reduction of its lien from $219,486.90 to $48,799.25, assuming a settlement of $475,000. R. pp. 85-86. On September 21, 2011, Claimant's counsel informed the carrier that he had settled the third party action for $505,000 and asked again for a reduction of the lien. R. p. 87.

of America, Inc., 372 S.C. 39, 51-52, 640 S.E.2d 507, 513 (Ct. App. 2006).

A carrier's lien may be reduced "in the proportion that [the settlement] bears to ... total cognizable damages at law." S.C. Code Ann. § 42-1-560(f). Therefore, the amount of settlement is of interest to the Carrier. A higher settlement amount in relation to the cognizable damages would, under this statutory formula, result in a smaller potential reduction in the Carrier's lien. Under the facts of this case, where Claimant had a strong case for recovery of damages exceeding $1 million dollars, it is fair to take into account the fact that the Carrier had no input into a settlement amounting to only a third of Claimant's potential damages. The Commission committed no error.

Claimant argues that the Commission's decision was unjust because it did not consider the settlement amount in relation to the Driver's automobile liability insurance coverage as evidencing an "excellent job" of obtaining a favorable result for Claimant and keeping litigation expenses down. Appellant's Final Brief, p. 4-5. The Commission did make a finding of fact that the settlement amount was $505,000 and the Driver's policy limit was $525,000. R. p. 16. However, in determining whether to reduce the Carrier's lien, the Commission is entitled to decide what factors to consider and the weight given to those factors, as guided by the goals of subrogation. *Breeden,* 355 S.C. 112, 122, 584 S.E.2d 379, 384 (2003). Consideration of whether counsel did a good job in obtaining a settlement close to the Driver's policy limit and avoiding costs of litigation does nothing to further the goal of subrogation, that is, to require the actual wrongdoer to pay for Claimant's medical expenses and wage loss, have the Carrier come out even through reimbursement of its expenditures, and the Claimant receive a ny remaining damage recovery. *See id.* at 112, 382. The Commission did not abuse its discretion by

concluding that the Carrier was entitled to repayment of its entire lien.

Similarly, Appellant argues that the interests of justice are not served by the Commission allowing the Carrier to recover 100% of its costs from the third party settlement while the Claimant is left with the remaining amount of $120,513.10, or 24% of the total settlement amount after payment of attorney's fees. The question of fairness and justice in this context is not whether the Claimant retains at least the same percentage of recovery as the Carrier; instead, fairness in a subrogation context involves shifting the costs of injury or harm upon the wrongdoer such that the Carrier is reimbursed for bearing those costs. Claimant asserts that it is fair that the Carrier recover less than half of the expenses of Claimant's medical care and other compensation, and that she retain $311,992.27 after paying the remainder of asserted attorney's fees.[2] In other words, Claimant, who received the benefit of $219,486.90 in medical and other costs shouldered by the Carrier, also wants to recover $311,992.27 in cash at the expense of the Carrier. These amounts suggest double recovery by the Claimant, which subrogation seeks to avoid. *See Breeden*, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) ("The policy issues surrounding subrogation in a workers' compensation setting include imposing the burden of payment upon the actual wrongdoer, and avoiding double recovery for the injured employee."). Claimant's argument is unavailing.

To the extent that the Commission's Order mistakenly stated that consent of the carrier was required prior to entering into the settlement, such a finding or conclusion is harmless error. Because the Commission's decision not to reduce the lien rested upon additional factors besides this misapplication of the law, Claimant cannot show that she was prejudiced therefrom. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 172, 470 S.E.2d 397,

[2] $505,000 - $99,560 to carrier - $93,447.73 to attorney = $311,992.27.

401 (Ct. App. 1996) *citing to JKT, Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980) (holding that an error not shown to be prejudicial does not constitute grounds for reversal). Even if the issue of prior consent was not considered by the Commission, other factors properly considered by the Commission would yield the same conclusion. Thus, the Commission's error does not constitute reversible error. *See Conner v. City of Forest Acres*, 363 S.C. 460, 476, 611 S.E.2d 905, 913 (2005) ("An error may be harmless when the aggrieved party fails to establish a claim or defense even when both the admitted and excluded evidence are considered."); *Sturkie v. Sifly*, 280 S.C. 453, 460, 313 S.E.2d 316, 320 (Ct. App. 1984) ("... we fail to see how the receiver was prejudiced by the court's consideration of the extraneous issues.").

III. CLAIMANT'S ARGUMENT THAT THE COMMISSION ERRED IN FAILING TO CONSIDER THE MEDICAL REPORT OF DR. DE VITO IS NOT PRESERVED FOR APPEAL, OR IN THE ALTERNATIVE, THE COMMISSION COMMITTED NO ERROR IN NOT CONSIDERING THIS MEDICAL REPORT.

Before the Single Commissioner, Respondents argued that Claimant's medical evaluation by Dr. de Vito providing a cost estimate for scar reconstruction ("Medical Report") was irrelevant for purposes of considering any reduction in the third party lien, and thus, should be excluded. R. pp. 23-24. The Single Commissioner excluded the evidence and instructed the Claimant "to proffer it so it's preserved for appeal." R. p. 25. However, nowhere in the hearing transcript does Claimant proffer Dr. de Vito's evaluation. *See* R. p. 23, p. 25, p. 29, p. 34, p. 35. Consequently, Claimant's argument is not preserved for review. *Ellis by Ellis v. Oliver*, 323 S.C. 121, 132, 473 S.E.2d 793, 799 (1996).

In the alternative, the Commission committed no error. Claimant's Medical Report was intended to document expenses associated with scar revision as part of her

cognizable damages at law. R. pp. 24-25.; *see* S.C. Code Ann. § 42-1-560(f). The Single Commissioner, exercising his discretion, excluded the Medical Report. Pursuant to S.C. Code Ann. § 1-23-330(1), "irrelevant, immaterial or unduly repetitious evidence shall be excluded." The Single Commission had the discretion to exclude the Medical Report. *See Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 498, 494 S.E.2d 630, 636 (Ct. App. 1997) ("Clearly, section 1-23-330 gives the commissioner discretion to limit or exclude irrelevant testimony."). The Single Commissioner properly excluded the Medical Report as either irrelevant or immaterial.

Claimant argued that the Medical Report was relevant to the determination of cognizable damages and wanted the cost estimate for scar revision to be added to the total cognizable damages.[3] R. p. 24. Claimant's cognizable damages at law would include medical expenses. However, Claimant settled her workers' compensation claim in March of 2011 and settled her third party claim in September of 2011. It wasn't until March of 2012 that her attorney sent her for an evaluation with Dr. de Vito for scar revision. By that time, Respondents had already filed a Motion for Payment of the Lien in Full to which Claimant responded by filing a Form 50 seeking a reduction of the lien. It is only logical that Claimant be limited to the medical evidence which was available to her at the time of the third party settlement in seeking to establish her total cognizable damages. The Single Commissioner properly excluded the Medical Report as irrelevant or immaterial.

[3] In her Final Brief filed with this Court, Claimant also argues that the Medical Report is relevant in the Commission's equitable consideration of reduction of the carrier's lien. Appellant's Final Brief, p. 7. Because Claimant did not argue this below, it is not preserved for review. *See Fop v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("Generally, claims or defenses not presented in the pleadings will not be considered on appeal.").

To the extent that this Court finds the Medical Report to be relevant, the exclusion of this Report constitutes harmless error. In Claimant's evaluation of her cognizable damages, the future medical expense of scar revision was taken into consideration. R. p. 104. Thus, the costs of scar revision were factored into Claimant's estimated cognizable damages. Claimant cannot show prejudice from the Single Commissioner's evidentiary ruling. *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996) *citing to JKT, Co. v. Hardwick*, 274 S.C. 413, 265 S.E.2d 510 (1980) (holding that an error not shown to be prejudicial does not constitute grounds for reversal).

CONCLUSION

For the reasons stated above, the Commission's decision should be affirmed as properly denying any reduction in the Carrier's lien by a pro rata share of Claimant's attorney's fees due to lack of evidence, and denying any reduction of the Carrier's lien after properly considering applicable factors consistent with *Kirkland v. Allcraft Steel Co., Inc.*, 329 S.C. 389, 496 S.E.2d 624 (1998). Further, the Single Commissioner properly excluded the Medical Report as irrelevant or immaterial. Any error of the Commission is harmless which does not warrant reversal.

Respectfully submitted,

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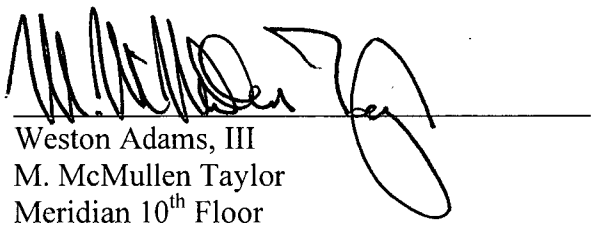

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PROOF OF COMPLIANCE

The undersigned certifies that the Final Brief and Final Reply Brief of Respondents comply with Rule 211(b), SCACR. The undersigned further certifies that the Final Brief of Respondents comply with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

August 29, 2013

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PROOF OF SERVICE

I certify that on the 29th day of August 2013, I served Final Brief of Respondents upon opposing counsel, by depositing a copy of it in the United States Mail, with sufficient postage affixed as follows, as follows:

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