

**DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS= COMPENSATION COMMISSION**

WCC FILE NUMBER: 1413115

Stephen Evans,
Employee/Claimant,

vs.

Nan-Ya Plastics Corporation of America,

Employer/Insured,

and

New Hampshire Insurance Company,

Carrier/Defendants.

RECEIVED
JAN 14 2020
SC Court of Appeals

HEARING CONDUCTED:

HELD IN HARTSVILLE, SOUTH CAROLINA ON 7TH OF FEBRUARY 2019

APPEARANCES:

C. Daniel Vega, Esquire of Chappell Smith & Arden, P.A., of Columbia, South Carolina, for Claimant.

Defendants represented by John C. Bruton, Jr., Esquire of Haynsworth Sinkler & Boyd, P.A., of Columbia, South Carolina, but who did not appear at the hearing.

Kevin M. Barth, Esquire of Barth Ballenger & Lewis, L.L.P. of Florence, South Carolina, appearing as Claimant's former attorney.

SUBJECT OF THE HEARING:

To determine the issues as set forth in the Motion to Enforce Charging Lien filed by Kevin M. Barth, and Motion for Payment of Attorney's Fees filed by C. Daniel Vega.

OPINION AND ORDER:

Aisha Taylor, Commissioner

FILED:

July 10, 2019

STIPULATIONS:

Counsel for all parties stipulated at the hearing to the following issues:

1. The purpose of the hearing is to determine those issues as set forth in the Hearing Notice and issued raised in the Motion to Enforce Charging Lien and the Motion for Payment of Attorney's Fees.

2. Notice of the hearing on this file was timely and properly served upon all parties in interest.

3. The venue was properly set in Hartsville, South Carolina.

4. Claimant's former attorney, Kevin M. Barth, is seeking to enforce a lien upon the settlement proceeds in the sum of \$33,333.33, plus costs in the sum of \$427.97.

5. The attorney for Claimant, C. Daniel Vega, is seeking to have a fee approved pursuant to the Form 61 wherein he is requesting a fee of \$40,000.00 plus costs from the total settlement in this matter.

6. The South Carolina Workers= Compensation Commission has jurisdiction over this case.

SUBMISSIONS

1. SUBMISSIONS BY KEVIN M. BARTH:

- A. Contract for Legal Services between Kevin M. Barth and Stephen M. Evans;
- B. April 6, 2016 email from John Bruton to Kevin M. Barth;
- C. May 9, 2016 email from Kevin M. Barth to John Bruton;

- D. File Release signed by Stephen Evans dated May 31, 2016;
- E. June 1, 2016 letter from Kevin Barth to John Bruton advising of attorney fee lien;
- F. September 11, 2018 letter from Daniel Vega to Kevin Barth;
- G. Letter from Stephen Evans dated March 31, 2016 to Kevin M. Barth terminating representation;
- H. April 5, 2016 email from Kevin M. Barth to John Bruton regarding meeting with the client.2.

SUBMISSIONS BY C. DANIEL VEGA:

EX. #	Date	Description
1	9/25/2014	Form 12A
2	9/25/2014	LOR from Gerald Malloy
3	9/27/2014	Claimant's handwritten notes
4	10/29/2014	Letter from Nan Ya Safety, Health and Environmental Dept. to claimant
5	11/4/2014	LOR from John Bruton to Gerald Malloy
6	11/11/2014	Form 15
7	11/24/2014	Notice of Hearing
8	11/25/2014	Letter from Gerald Malloy to John Bruton
9	11/25/2014	Letter from Gerald Malloy to claimant
10	11/26/2014	Claimant's Form 58 and APA
11	12/2/2014	Employer's Form 58 and APA
12	12/10/2014	Email from John Bruton to Elaine Boyd
13	12/22/2014	Letter from claimant to Gerald Malloy
14	12/22/2014	Letter from Gerald Malloy to claimant
15	12/22/2014	Letter from Gerald Malloy to claimant enclosing a copy of file
16	12/28/2014	Letter from claimant to Gerald Malloy
17	12/28/2014	Gerald Malloy's Motion to Relieve Counsel
18	12/29/2014	Contract for Legal Services between Kevin Barth and claimant
19	6/8/2015	Letter from Barth to SCWCC enclosing Form 50
20	6/24/2015	Letter from Bruton enclosing Form 51
21	8/28/2015	Form 18
22	7/16/2015	Letter to claimant from Barth advising of hearing date
23	10/30/2015	Letter to claimant from Barth enclosing IME report
24	2/10/2016	Email from Nurse Case Manager
25	3/1/2016	Email from Nurse Case Manager to adjuster requesting approval for surgery
26	3/3/2016	Form 18
27	3/3/2016	Claimant letter to Kevin Barth
28	5/13/2016	Letter from Barth to Bruton returning settlement documents
29	6/1/2016	Letter from Barth to Bruton enclosing Motion to Be Relieved
30	1/1/2017	Letter from claimant to Vega

31	1/5/2017	Letter from Vega to claimant
32	1/9/2017	Letter from claimant to Vega
33	7/26/2018	Form 18
34	8/13/2018	Letter from claimant to Vega
35	9/4/2018	Email from Bruton to Vega
36	9/20/2018	Letter from Barth to Vega with enclosures
37	10/1/2018	Vega letter submitting Fee Petition
38	10/12/2018	Final Lump Sum Agreement
39	9/28/2018	Form 19
40	9/28/2018	Questionnaire completed by claimant
41	9/17/2018	Phone call history
42	1/11/2017	Claimant's handwritten notes

The parties stipulated that all of the documents submitted to the Commission as attachments to the two Motion are admitted into evidence. These documents are the ones listed above.

STATEMENT OF THE CASE

This matter is before the Commission to determine the appropriate distribution of attorney's fees and costs that relate to the Claimant's total settlement of \$150,000.00.

Kevin M. Barth contends that the Claimant authorized him to settle this case for the sum of \$100,000.00. Pursuant to the Contract for Legal Services executed by the client and attorney, Mr. Barth, if terminated by the client, would be entitled to receive 33.3% of any settlement offers made in the case, plus costs. Mr. Barth contends that the parties agreed to settle the matter for \$100,000.00 in early April of 2016, and that he should be entitled to 33.3% of that amount plus costs. He further contends that the Claimant declined to execute the settlement documents in May of 2016, and that on May 31, 2016 Claimant retrieved his file from Mr. Barth and handed his office a letter

purporting to have terminated Mr. Barth's representation two months earlier, on March 31, 2016.

Claimant contends that Mr. Barth was never authorized to settle the case and that he knew nothing about any settlement discussions. He further claims that he terminated Mr. Barth's representation on March 31, 2016, the date shown on the letter of termination.

Claimant alternatively contends that Mr. Barth should not be entitled to receive any fee for his services, basing that contention on the factors outlined in the *Glasscock* case.

Mr. C. Daniel Vega was retained as claimant's counsel once Mr. Barth was terminated. Mr. Vega ultimately settled Claimant's case for \$150,000.00. Mr. Vega is requesting that the Commission approve his fee request for \$40,000.00 plus costs.

EVIDENCE OF THE CASE

1. Christina Graves: Ms. Graves testified that she has been the civil paralegal for attorney Kevin M. Barth for approximately 20 years and that she handled all of his civil matters and workers' compensation claims. She further testified that the Claimant hired Mr. Barth to represent him in his workers' compensation claim. She further testified regarding the difficulty surrounding the approval of Claimant's requested surgery.

Ms. Graves then testified that the Claimant agreed to settle his claim for \$100,000.00 on April 5, 2016 because he needed the

money, but that the settlement check and settlement documents were not received from defense counsel until early May 2016. In the month between the settlement and the arrival of the settlement documents, Ms. Graves testified that the Claimant called the office numerous times asking about the status of the settlement check and documents. Once the documents arrived, Ms. Graves testified that she contacted the Claimant to come sign the settlement check and documents. When Claimant arrived to execute the documents and settlement check, he met with Ms. Graves, as Mr. Barth was not in the office. She testified that while he was reviewing the documents, Claimant indicated that he was not going to settle the case for that amount of money as it was not sufficient "for what he had been through" and because he had "lost everything".

Ms. Graves testified that Mr. Barth notified defense counsel that the Claimant would not sign the documents and he ultimately returned the check and settlement documents to the defense attorney. She then testified that in late May, Claimant called the office and wanted his file. The file was copied, and the Claimant appeared at the office on May 31, 2016 to retrieve his file and sign a File Release. She then testified that when Claimant retrieved his file, he handed in a white envelope with a letter enclosed. The letter was a letter terminating Mr. Barth's services and was dated March 31, 2016 (two months earlier). However, Ms. Graves testified that the letter was not received by the office

until May 31, 2016, when it was hand delivered and the file was retrieved.

2. C. Daniel Vega: Mr. Vega testified that he assumed representation of the Claimant and that he represented him through the settlement of his claim. Mr. Vega testified that the Claimant said he had never authorized Mr. Barth to settle his case and as a result, no offer had been made to the Claimant prior to him assuming representation of the Claimant.

3. Stephen Evans: Mr. Evans testified that he is the Claimant in this matter and originally retained attorney Gerald Malloy to represent him. The Claimant then testified that he terminated Malloy's representation in December of 2015 and did so by certified letter.

He then hired Mr. Barth to represent him in his workers' compensation claim in January or February of 2015.

The Claimant also testified that he was in severe pain at the time and that he needed surgery. His surgery was not approved in a timely fashion and the Claimant testified that as a result he was losing faith in Mr. Barth's ability to handle the claim and losing faith in the system. He noted that the insurance carrier "cut off his checks" a number of times causing he and his family to lose everything they had and forced them to live in a motel.

Claimant testified that he never authorized Mr. Barth to engage in settlement discussions with defense counsel and that he never was aware a settlement offer had been made. Claimant also

testified that he never would have authorized settlement discussions until he had received the surgery he needed.

Claimant then testified that the first time he heard that his case had been settled for \$100,000.00 was when Mr. Barth's paralegal contacted him to come and sign the settlement documents.

Claimant testified that he did not know what the documents were, but he went to Mr. Barth's office and met with Ms. Graves, the paralegal, to go over the documents as Mr. Barth was not in the office.

Claimant testified that he had not authorized the settlement and refused to sign the settlement documents. He also testified that because of the purported settlement, his weekly TTD checks were cut off for a number of weeks.

Claimant then testified that he wrote a letter to Mr. Barth terminating his representation and that the letter was written and dated March 31, 2016. He also testified the letter was sent to Mr. Barth by certified mail. In his testimony, Claimant denied delivering the termination letter on May 31, 2016 and denies backdating the letter for March 31, 2016. He testified that he retrieved his file on May 31, 2016 but did not deliver the termination letter at that time. He testified that the letter had been sent on March 31, 2016. Claimant testified that he then contacted attorney John Etheridge about representing him and Mr. Etheridge referred him to Mr. Vega, whom he hired. After retaining Mr. Vega, Claimant testified that his TTD checks were reinstated

and surgery was approved and completed. Claimant testified that in January of 2017, he terminated Mr. Vega's representation of him and did so by certified letter. He testified that he later wrote Mr. Vega and requested that he continue representing him and that Mr. Vega agreed to do so.

He also testified that when Mr. Vega discussed the value of his claim, he was very disappointed. However, Claimant testified that he appeared at a hearing with his attorney and agreed to settle his claim. Claimant then later wrote Mr. Vega indicating that he was dissatisfied with the settlement that had been agreed to. After further discussions between the two, Claimant testified that he agreed to the settlement because his only choices were to settle the claim for that amount or appear at a hearing "and get nothing".

Claimant then testified that he signed the settlement documents and the Form 61. He also testified that he signed a document in Mr. Vega's presence that was designed to ensure that Mr. Barth would not be paid for his services on this claim. Claimant testified that he believes Mr. Vega's paralegal prepared the document and that it was executed in the presence of Mr. Vega and his paralegal.

Claimant testified that even though the case has settled, he believes he is entitled to receive additional surgeries under the workers' compensation claim and that he is going to file an appeal in an attempt to have the future surgeries approved.

FINDINGS OF FACT

Based upon the testimony of Claimant, Christina Graves and C. Daniel Vega and the documentary evidence submitted pursuant to the Administrative Procedures Act, and the Commission file in this matter, I find as facts:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers= Compensation Law, as amended, with Nan-Ya Plastics Corporation of America, as the employer, and New Hampshire Insurance Company, as the carrier.

2. That Stephen Evans was an employee of Nan-Ya Plastics Corporation of America at the time of the accident giving rise to the within claim.

3. That the Claimant was initially represented in this claim by attorney Gerald Malloy. Attorney Malloy filed a Form 50 on Claimant's behalf (Vega Exhibit 7-2), but the issues were resolved, and a hearing was never held. Vega Exhibit 12-7. Claimant fired attorney Mallory and did so by sending him a certified letter dated December 22, 2014. Vega Exhibits 13-1 through 13-11.

4. That Claimant subsequently retained attorney Kevin Barth to represent him. Claimant signed a Contract for Legal Services. Exhibit A to the Motion to Enforce Charging Lien. This Contract for Legal Services provided as follows: "If I terminate the services of my attorney at any time prior to settlement, then I

agree to pay said attorney \$175.00 per hour for all attorney services rendered in this matter, and \$75.00 per hour for all paralegal services rendered in this matter or the contracted contingency fee percentage on any offers that have been made at the time of termination, **whichever is greater.**" (emphasis in original).

The contracted contingency percentage is 33.33%, and Claimant agreed to be responsible for the costs incurred in the prosecution of this claim.

5. Attorney Barth filed a Form 50 on Claimant's behalf requesting additional medical treatment for the Claimant. Vega Exhibits 22-1 and 22-2. The Defendant's attorney, John Bruton, filed a Form 51 (Vega Exhibit 20-1) which included a partial acceptance of the claim and a partial denial. The issues raised in the Form 50 were resolved and a hearing was never held.

6. After a medical deposition was taken, the Claimant submitted to an IME and after receiving recommendations for treatment, Claimant and attorney Barth began discussing the possibility of settling the claim because, as the Claimant testified, he had "lost everything". Transcript p. 61.

7. During the months of March and April of 2016 settlement discussions took place between Barth and Bruton. Claimant contends that these discussions took place without his knowledge or permission. Ultimately, the matter was settled for \$100,000.00 on April 6, 2016. The undersigned bases these findings on a number of

documents verifying this finding, including Barth's Exhibit B and the April 5, 2016 email from Mr. Barth to Mr. Bruton which was submitted to the undersigned at the hearing. These findings are also based on the testimony of Christina Graves, Barth's long-time civil paralegal. I find her to be credible and knowledgeable about dates, times and discussions regarding this claim. She testified that the matter was settled in "late March, early April 2016... I believe it was April the 5th of 2016". Transcript p. 18.

8. Over the course of the next month there were numerous communications between Barth and Bruton requesting that the settlement documents be expedited. Vega Exhibits 36-9 through 36-13 and Barth's Exhibit B.

9. Christina Graves also testified that between the time the claim was settled and early May when the settlement check and documents were sent to Barth, the Claimant contacted the firm numerous times asking about the status of his settlement check and documents. I find this testimony to be credible. Transcript p. 19.

10. When the settlement documents arrived, Ms. Graves contacted the Claimant to come in and sign the settlement documents. He appeared at the office to sign the settlement documents "around May the 8th, 9th." Transcript p. 19. The Claimant confirms that he received a call to come to the office to sign documents, which he did. Transcript pp. 68-69. When asked why he appeared to sign documents in May if he had fired Barth on

March 31, 2016, his response was "I don't know. I don't know why she called and told me I had to settle - I mean, had to come and sign a paper." Transcript p. 69.

11. Claimant refused to sign the settlement documents (confirmed by Vega Exhibit 36-9), and they were ultimately returned by Barth to Bruton by letter of May 13, 2016. Vega Exhibit 28-1. Claimant indicated when he began reading the settlement documents that "he had thought about it, and it just wasn't enough for what he had been through". Transcript p. 20. The undersigned specifically finds that the Claimant knew of the settlement offer, appeared at the attorney's office to sign the settlement documents, and then changed his mind. The undersigned notes that the Claimant did the very same thing to Mr. Vega later in the case. He authorized attorney Vega to settle his claim for \$150,000.00 on July 26, 2018 but changed his mind and notified Vega in writing on August 13, 2018 that he disavowed the settlement and would prefer to have a hearing. Vega Exhibits 34-1 through 34-3.

12. In late May of 2016, Claimant called Barth's office and requested a copy of his file. It was made available to him the next day, May 31, 2016. Claimant appeared at the office the next day, where he picked up his file and signed a File Release. Vega Exhibit 27-1. Transcript p. 21.

13. Claimant prepared a letter terminating Barth from representing him in this claim. This letter is dated March 31,

2016 and indicates that the Claimant is not ready to settle his case as he needs more medical attention. Vega Exhibit 27-1.

14. The crux of this matter is when this letter was delivered to Mr. Barth's office. Claimant says it was sent certified on March 31, 2016, although he could produce no evidence that it was.

Mr. Barth's office contends that it was hand delivered to the office on May 31, 2016 when Claimant picked up his file. Transcript p. 22-23. The undersigned was put in the very difficult position of weighing the testimony of the Claimant against the testimony of an attorney and paralegal.

15. After carefully considering the credibility of the witnesses, the undersigned gives great weight to the testimony of Mr. Barth's paralegal, Christina Graves. She was very knowledgeable about the dates, times and discussions surrounding Claimant's termination of Mr. Barth's representation. Specifically, the undersigned finds Ms. Graves' testimony regarding her receipt of the letter of termination on May 31, 2016 to be very credible. Claimant's letter dated March 31, 2016 was not delivered to Mr. Barth until May 31, 2016. Thus, Mr. Barth's services to Claimant were terminated on May 31, 2016.

16. The undersigned does not find Claimant's testimony regarding an earlier delivery date to be credible, particularly in light of the fact that the record contains numerous references to

it being sent by certified mail, but Claimant could produce no evidence of certified mailing or delivery. Transcript p. 67-68.

17. Based on the foregoing findings, Mr. Barth's representation of Claimant was terminated after the settlement offer of \$100,000.00 was made to the Claimant and Mr. Barth. His Contract for Legal Services provides for a 33.33% contingency fee on all settlement offers made, plus costs. Mr. Barth's Motion to Enforce Charging Lien is granted and he is entitled to receive the sum of \$33,333.33, plus costs of \$427.97 from the proceeds of this settlement.

18. Claimant further contends that Mr. Barth should not be awarded any attorney's fees in this matter because he allegedly did nothing for the Claimant. Transcript p. 57. The undersigned has carefully considered the *Glasscock* factors and finds that Mr. Barth satisfies those factors and is entitled to the fee requested.

19. As it pertains to the Claimant and Vega's Motion for Payment of Attorney's Fees and costs, the undersigned grants the same in part and finds that Mr. Vega is entitled to an attorney's fee up to 33.33% of the additional settlement amount secured by him of \$50,000.00 plus costs pursuant to R. 67-1205(C)(7) upon his submission of a Form 61 and a proposed Order reflecting same.

20. No hearing costs are assessed in this matter.

CONCLUSIONS OF LAW

In view of these findings and facts, I conclude as matters of law:

1. That the parties to this proceeding are subject to and bound by the South Carolina Workers= Compensation Act.

2. That this is dispute over attorney's fees to be paid from the \$150,000.00 settlement of Claimant's claim. Attorney's fees in workers' compensation cases are subject to approval of the Commission. Additionally, no attorney may receive a fee in a workers' compensation claim until it has been approved by the Commission. S.C. Code Ann. § 42-15-90 (A) and (B).

3. A Claimant and attorney can agree on a contingency fee arrangement. However, "an attorney may charge up to, but not more than, 33.3% of the total amount of compensation..." R. 67-1205(C).

4. "When an attorney is employed after the employer's representative makes a written offer of settlement to the claimant, the attorney shall base his or her fee on the amount of compensation secured in excess of the settlement offer. The fee shall not exceed 33.3% of the difference between the offer of settlement and the amount of compensation secured." R. 67-1205(C) (7).

5. "A lien for the payment of an attorney's fee out of the proceeds of a judgment obtained as a result of an attorney's efforts, however, may be created by an express agreement between an

attorney and his client. 7 Am. Jur. 2d *Attorneys at Law* § 326 at 338 (1980); 7A C.J.S. *Attorney & Client* § 360 at 717 (1980). Indeed, an agreement between an attorney and his client "that the attorney shall have a lien on the judgment, is decisive as to the existence of the lien and its amount, and constitutes a valid equitable assignment *pro tanto* which attaches to the judgment as soon as it is entered." *Adair v. First National Bank*, 139 S.C. 1, 6, 137 S.E. 192 (1924); see also 7A C.J.S. *Attorney & Client* § 360 at 717-18 (1980). Our courts will recognize an equitable lien created by contract in proper cases. (citations omitted) *Eleazer v. Hardaway Concrete*, 281 S.C. 174, 315 S.E. 2d 174 (Ct. App. 1984)

6. In *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997), in discussing the Court of Appeals decision in *Eleazer v. Hardaway Concrete*, the Supreme Court stated first that "an attorney's charging lien is an 'equitable right to have the fee and costs due an attorney for services rendered in a legal proceeding secured to him out of any judgment or recovery obtained therein.' Observing that this kind of lien protects only costs and disbursements, the Court nevertheless found that '[a] lien for the payment of an attorney's fee out of the proceeds of a judgment obtained as a result of an attorney's efforts, however, may be created by an express agreement between an attorney and his client.' Because the attorney and client in *Eleazer* had specifically agreed that the attorneys' fee would be secured by a

lien upon the proceeds of any judgment the attorney obtained for the client, the Court found there was an equitable lien. ... We believe the holding in *Eleazer* is correct."

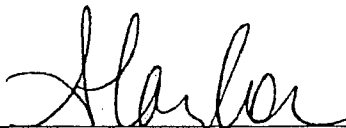
7. In *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (S.C., 1991), the Court outlined the six factors to be considered in determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel;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

ORDER

Accordingly, it is therefore ordered as follows:

1. Kevin M. Barth's Motion to Enforce Charging Lien is granted, and he is entitled to receive from the settlement proceeds the sum of \$33,333.33, plus \$427.97, for a total of \$33,760.97.

2. C. Daniel Vega's Motion for Payment of Attorney's fees and costs is granted and upon the submission of a Form 61 as outlined above will be entitled to receive 33.3% of \$50,000.00, plus costs incurred.



Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States certified mail addressed to any unrepresented party.

July 11, 2019

By: Renee Smith, Administrative Assistant to Commissioner
Taylor

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