

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No: 2020-000053
W.C.C. Case No.: 1413115

RECEIVED
Aug 17 2020
SC Court of Appeals

Ex Parte: C. Daniel Vega of Chappell, Smith & Arden, P.A., Appellant,

v.

Kevin M. Barth of Barth, Ballenger & Lewis, LLP, Respondent,

In Re: Stephen Evans, Employee, Claimant,

v.

Nan-Ya Plastics Corp. America, Employer, and New Hampshire Insurance Company,
Carrier, Defendants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Appellant has standing to appeal an award of attorney's fees to a lawyer other than himself?

- II. Whether the South Carolina Workers' Compensation Commission erred in awarding attorney's fees to Respondent when the Respondent had a contractual agreement with the claimant that, upon termination of the attorney/client relationship, a lien for attorney's fees would attach to any recovery in the amount of the contingency fee to any offer made before termination of the relationship and where the fee requested was reasonable?

STATEMENT OF THE CASE

Respondent Kevin Barth filed a motion with the South Carolina Workers' Compensation Commission requesting the commission enforce his lien for attorney's fees. (Motion to Enforce Charging Lien dated November 13, 2018). It was Barth's position that the contract with Stephen Evans, the claimant in the underlying workers' compensation claim (hereinafter "the claimant"), provided that upon termination of the attorney/client relationship by the claimant, a lien existed on any proceeds recovered in the claim in an amount based on any offers received before termination of the relationship. Appellant Daniel Vega filed a motion on behalf of the claimant requesting attorney's fees for Vega be approved and requesting Barth's motion for fees be denied. (Motion for Payment of Attorney's Fee and Costs dated November 26, 2018). It was the claimant's position that he had terminated Barth's representation before any offers were made, that Barth agreed to settle his case without his permission and against his instructions, that Barth failed to comply with statutory and regulatory requirements governing the payment of attorney's fees, and that any fee for Barth was not reasonable.

The Single Commissioner held a hearing on February 7, 2019. On July 10, 2019, the Single Commissioner issued an order granting Barth's motion for attorney's fees and granting Vega's motion for attorney's fees, albeit at an amount less than the claimant requested. (Order of the

Single Commissioner dated July 10, 2019). The claimant appealed to the Full Commission (Request for Commission Review, dated July 19, 2019), and the Full Commission affirmed the Single Commissioner. (Order of the Full Commission dated December 13, 2019).

Thereafter, Vega, and not the claimant, timely appealed the decision of the Workers' Compensation Commission to this Court. (Notice of Appeal dated January 13, 2020).

FACTS

After discharging his previous attorney, the claimant hired Barth to handle his worker's compensation claim. (Transcript of Single Commissioner Hearing, p. 43, lines 4-10). Christina Graves, a paralegal for Barth, testified at the hearing. The Commission found her testimony to be credible. (Order of the Single Commissioner, Order of the Full Commission). On April 5, 2016, the defendants in the workers' compensation claim offered \$100,000 to settle the claim. (Tr. p. 18, lines 16-18). Ms. Graves testified the claimant agreed to settle his case because he needed the money. (Tr. p. 29, lines 1-6). The settlement paperwork and check did not arrive until early May. (Tr. p. 19, lines 12-14). During the time between the agreement to settle and arrival of the settlement documents, the claimant called the office numerous times asking about the status of the check and documents. (Tr. p. 18, lines 23-5, p. 19 lines 1-11). When the documents finally arrived, Ms. Graves showed all the documents to the claimant, and he stated it was not enough and did not execute the documents. (Tr. p. 20, lines 11-17).

At the end of May, the claimant called Ms. Graves and requested his file. (Tr. p. 21, lines 2-6). He picked up his file on May 31, 2016 and left a letter dated March 31, 2016 terminating the attorney/client relationship. (Tr. p. 22, lines 1-19). Ms. Graves testified that although the letter was dated March 31, 2016, it was delivered on May 31, 2016. (Tr. p. 22, lines 16-19).

At the hearing, the claimant testified. The Commission found his testimony lacked credibility. (Single Commissioner Order, Full Commission Order). He testified he terminated the attorney/client relationship by letter dated March 31, 2016. (Tr. p. 68, lines 1-5). He denied agreeing to settle his claim and testified he did not learn of the offer or purported settlement until he was called to Barth's office to sign the paperwork:

Q. Did you – when was the first time that you learned that your case had been settled for \$100,000?

A. Christy called me and told me she had some paperwork for me to sign, and I went up there. . . . Did I rip the check up? Did I tear the letter up? . . . No. I can't remember, I started to. I know I kind of went blank when I got there, and I started to rip the check up. I gave her a few choice words.

(Tr. p. 47 lines. 6-9, 20-22).

After terminating Barth's services, the claimant hired Vega. (Tr. p. 49, lines 1-3). The claimant received additional medical treatment and eventually settled his case for \$150,000. (Tr. p. 49, lines 17-18).

STANDARD OF REVIEW

“The Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the Commission.” Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This Court can “reverse or modify the decision only if the claimant's substantial rights 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 on the whole record.” Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012).

ARGUMENT

- I. The appellant has no standing to appeal the decision of the South Carolina Workers' Compensation Commission as it relates to an award of attorney's fees to another lawyer.

Vega has no standing to appeal an order awarding attorney's fees to Barth, and therefore, the appeal should be dismissed. In Powell v. Bank of America, 379 S.C. 437, 665 S.E.2d 237 (Ct. App. 2008), this court explained:

Standing refers to a “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right.” “Standing is . . . that concept of justiciability that is concerned with whether a particular person may raise legal arguments or claims.” It concerns an individual’s “sufficient interest in the outcome of the litigation to warrant consideration of [the person’s] position by a court.”

Standing is comprised of three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not 'conjectural' or 'hypothetical.’ ” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

“The party seeking to establish standing carries the burden of demonstrating each of the three elements.”

“As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.” “One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action.”

Id. (citations omitted)

The Notice of Appeal clearly states that attorney Vega, not the claimant, appealed the order of the Full Commission.¹ In his brief, the appellant states the issue is whether the Commission

¹ Barth certainly concedes the claimant would have standing to appeal the award of Barth's fees.

erred by awarding attorney's fees to Barth. The appellant has no personal stake in the amount of attorney's fees awarded to another attorney. He does not have to pay them. Any injury the appellant suffered will not be addressed by a favorable decision on the issue of Barth's fees. Vega will not receive Barth's fee, or any portion of the fee, if this appeal is successful. The Commission ruled on what fees Vega could receive. He only has standing to appeal that portion of the order. A review of the appellant's stated issue on appeal and the remainder of the appellant's brief reveals he did not appeal his award of attorney's fees, only Barth's award. Therefore, the appeal should be dismissed.

- II. Because the Respondent had a contractual agreement with the claimant that upon termination of the attorney/client relationship, a lien for attorney's fees would attach to any recovery in the amount of the contingency fee of any offer made before termination of the relationship and because the fee requested was reasonable, the South Carolina Workers' Compensation Commission correctly awarded attorney's fees to the Respondent.

The Commission correctly awarded attorney's fees to Barth based on the contract between the claimant and Barth. In Eleazer v. Hardaway Concrete, 281 S.C. 344, 315 S.E.2d 174 (Ct. App. 1984), this court held:

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. 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." Our courts will recognize an equitable lien created by contract in proper cases.

Id. at 348-9 (citations omitted). In Lester v. Dawson, 327 S.C. 263, 491 S.E.2d 240 (1997), the South Carolina Supreme Court agreed with the holding in Eleazer. ("We believe the holding in Eleazer is correct").

The contract between the claimant and the attorney provided:

If I [the claimant] 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 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**. Attorney will also be entitled to reimbursement for costs. To secure payment by me to the firm for all expenses, costs and attorney fees I am obligated to pay under this agreement, I hereby grant the firm a charging lien applicable to any and all recoveries in this matter whether by settlement, collection of a judgment or otherwise.

(Attachment to Motion to Enforce Charging Lien (emphasis in original)). The contract is clear that a lien attaches to any settlement in this matter in the amount spelled out in the contract, namely “the contracted contingency fee percentage on any offers that have been made at the time of termination.”²

There is no dispute an offer was made. The appellant may dispute the timing of the offer and whether the claimant accepted the offer, but he cannot dispute that the offer was made. At the hearing before the Single Commissioner, the claimant testified he was presented with settlement paperwork. He testified he almost tore up the paperwork and the check. Also at the hearing, the paralegal testified she showed the claimant all of the documents, and he did not sign the paperwork because the amount was not enough. At the very least, the claimant admitted he was presented with an offer he refused to accept.

Whether the claimant accepted the offer is irrelevant. The contract did not require an acceptance, only the receipt of an offer. Also, any argument that the claimant did not authorize the offer is without merit. An offer comes from an opposing party. Only the opposing party

² Appellant’s argument that Barth failed to produce a billing invoice is without merit. The contract provides Barth is entitled to either his hourly rate or a percentage of any offer, whichever is greater. The Commission’s regulations provide for no more than 33 1/3 in attorney’s fees on an amount of compensation. Either the hourly rate would have been less, entitling Barth to the contingency percentage on the offer, or it would have been more, and the Commission would not have allowed the fee based on his hourly rate pursuant to Regulation 67-1205(C). Therefore, there was no need to supply billing records.

authorizes an offer. An opposing party can make an offer at any time without “authorization” from the claimant. Whether the claimant wants the offer or accepts the offer or is interested in negotiating settlement does not change the fact that it is an offer.

Furthermore, the motion for enforcement of the lien was properly before the Commission. The lien arose by contract when the claimant terminated the attorney/client relationship. Regulation 67- 215 provides “[t]he Commission will accept motions including . . . a motion . . . (3) [r]elating to an attorney’s appearance, withdrawal, or fee.” S.C. Code Ann. Regs. 67-215. Respondent could have filed a Form 61 when he was released from the case “[a] Form 61, Attorney Fee Petition, may accompany the motion [to withdraw as counsel]” S.C. Code Ann. Regs. 67-1203(C)(1)(emphasis added), but he could also file a motion regarding attorney’s fees pursuant to Regulation 67-215. Respondent filed a motion, and the Commission was within its power to enforce the lien.

In addition, the finding of the Commission that fee was reasonable is supported by substantial evidence in the record. In Glasscock v. Glasscock, 304 S.C. 158, 403 S.E.2d 313 (1991), the supreme court outlined 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; (6) customary legal fees for similar services.” Id. The Commission “carefully considered the Glasscock factors” and found the fee to be reasonable.

Substantial evidence supports this finding. The record reveals the case involved an out of work claimant with an injury requiring spinal surgery. The record reflects Barth followed up on back payment of temporary total disability benefits, received and followed up on the recommendation for surgery, sent a letter regarding unpaid medical bills, attended the deposition

of a doctor, requested medical treatment pursuant to an opinion by Dr. Storick, filed for a hearing, engaged in settlement negotiations, and presumably settled the case for \$100,000, all indications of the time devoted to the case. The contract between the claimant and Barth was on a contingency basis as is customary for workers' compensation cases. Barth was able to obtain an offer to settle for \$100,000 before the relationship was terminated. This constitutes substantial evidence to support the finding of the Commission.

Finally, if this appeal can be construed as an appeal of the Commission's award of Vega's fee, and Barth is required to respond, the Commission correctly awarded Vega a fee on the amount in excess of the offer already presented to the claimant before Vega was hired. Regulation 67-1205(C)(7) provides that an attorney must base his fee on the amount of compensation secured in excess of a written settlement offer. There was a written offer of \$100,000 before Vega was hired, and his fee must be based only on the excess.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision and order of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

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August 17, 2020

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Respondents.

In re: Stephen Evans, Employee,

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Nan-ya Plastics Corp. America, Employer and New Hampshire Insurance
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Defendants.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on Desa Ballard, Esquire and Harvey M. Watson III, Esquire via electronic mail, on August 17, 2020, addressed to desab@desaballard.com & harvey@desaballard.com.

August 17, 2020

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August 17, 2020

Reply to: Columbia Office

Via Electronic Mail: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
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RECEIVED

Aug 17 2020

SC Court of Appeals

RE: Stephen Evans v. Nam-YaPlastics Corp.
Appellate Case No. 2020-000053

Dear Ms. Kitchings:

Please find enclosed for filing the Respondent's Initial Brief, Designation of Matter pursuant to Rule 209, SCACR and Proof of Service. After both have been filed please send me a clocked copy back via electronic mail to aroche@mickleandbass.com and aharmon@mickleandbass.com.

Please do not hesitate to contact my office if you should have any questions.

With Kindest regards,

Sincerely,

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