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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Ex Parte: C. Daniel Veg of Chappell, Smith & Arden, PA., ... 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

I. The Workers Compensation Commission erred in granting attorney's fees to Respondent Barth based on his failure to provide sufficient evidence and documentation in the record in order to allow his contract with Claimant to be applied under the facts presented here.

STATEMENT OF THE CASE

While this purports to be an appeal in a workers' compensation case, it is in reality a dispute between lawyers regarding division of a fee in a workers' compensation case.

The issues were presented to the Single Commissioner as competing Motions for Payment of Attorney's Fees. Instead, the Single Commissioner framed the order as one "to determine the appropriate distribution of attorney's fees and costs that relate to the Claimant's total settlement of $150.000.00.[1]" The Single Commissioner "granted" both motions, but her order actually granted the first lawyer[2]'s motion for attorney's fees (and costs) based on her erroneous belief that the first attorney held a lien on $100,000.00 of the final settlement.

She also "granted" current counsel's motion, but allowed him to collect a fee based solely on the funds leftover after she enforced the fee agreement between Claimant and the first lawyer. (R. p. 6; R. p. 20[3]). The Full Commission reviewed the matter *de novo* and made independent findings of fact which affirmed the Single Commissioner. (R. pp. 22-42).

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[1] The parties stipulated that "[t]he purpose of the hearing is to determine those issues as set forth . . . in the Motion for Enforce Charging Lien and the Motion for Payment of Attorney's Fees." (R. p. 4).

[2] There was a prior lawyer before Claimant hired attorney Kevin Barth, but the prior lawyer did not assert a claim for attorney's fees. References herein to "the first lawyer" are to Barth, who represented Claimant before his present counsel, Vega.

[3] The effect of the Single Commissioner's order is confusing, as discussed *infra*.

STATEMENT OF FACTS

Claimant Stephen Evans (hereafter "Claimant") sustained several compensable on-the-job injuries while employed by Nan-ya Plastics (hereafter "the employer"). (R. p. 290, lines 16 – 23.) Claimant encountered difficulty obtaining benefits from his employer. (R. p. 291, lines 2 – 7). Claimant retained attorney Kevin Barth (hereafter "Barth") to represent him in January or February, 2015. (R. p. 294, lines 6-12). Claimant saw a physician, who recommended surgery and sought "authorization" to obtain the surgery. (R. p. 295, line 23 – p. 296, line 10). Claimant's injury was severe; medical records reflect he had a "loss of sensory function with 'no feeling' to his left leg and buttocks. . . and a tendency to 'loose [*sic*] the feeling in his left arm." (R. p. 129). The recommended surgery was an "anterior cervical discectomy and disc arthroplasty C6-7. . . and since replacement instead of a fusion[4]." *Id*.

Claimant attempted to obtain assistance from Barth and his office regarding the surgery but was unsuccessful in having meaningful communication with them or obtaining the surgery. (R. p. 296, lines 11 – 18). Medical records confirm that the case manager was attempting to obtain "surgery for disc replacement. . . for C6-7" while Claimant was still represented by Barth. (R. p. 130). There is no evidence Barth followed up with this request. It is undisputed that Claimant did not obtain any surgery while he was represented by Barth.

Claimant was "losing faith in them. . . [and] in the system, because they kept cutting my checks off. . . didn't offer me no surgeries" and he and his family "lost everything . . . and . . .

[4] Claimant's condition was complicated by his high blood pressure; Claimant reported he did not have funds to pay for the blood pressure medication, and had been advised to call him primary care physician to "obtain free samples or a cheaper drug. [Claimant]'s BP will need to be controlled prior to surgery." *Id.*

ended up in motel. . . for 11 months. . ." (R. p. 296, line 21 – p. 297, line 3). Claimant testified that he did not authorize Barth to settle his case. (R p. 297, lines 4 – 11).

Claimant testified that he was called by "Christy" at Barth's office to come sign documents for a settlement, but he refused to sign the documents or accept the settlement. (R. p. 298, line 8 – p. 299, line 4). Evidence of record contains a letter from Claimant to Barth on March 31, 2016 where he terminated Barth as Claimant's counsel. (R. pp. 467-468).

After Claimant terminated Barth, the employer stopped paying benefits, and Claimant hired his current counsel, C. Daniel Vega (hereafter "Vega"). (R. p. 300, lines 1 – 16). Vega was able to get Claimant's checks restarted, his surgery was approved, and he has had several subsequent surgeries. (R. p. 300, line 1 – p. 301, line 15). At one point, Claimant discharged Vega as well, but changed his mind and asked Vega "Will you take my case back? . . You were the only one with knowledge at the time . . . and I said. . . the best thing I can do is go ahead and let [Vega] take care of it." (R. p. 301, line 25 - p. 302, line 18). Claimant wrote a letter to Vega stating, "I feel that you are the only person I can depend on to handle my case." (R. pp. 133-134).

Vega did, in fact, obtain the surgery that Claimant needed. Additionally, Vega was able to explain to Claimant the "value" of the case." (R. p. 302, lines 17 -22). Claimant was unhappy that the case took so long to resolve and thought if "stuff should have happened a whole lot sooner and I probably wouldn't even be disabled. I may have been able to go back to work and stuff." (R. p. 303, lines 1-5). However, with Vega's explanation, Claimant understood the "value" of the case, which "disappointed" him, and the case was eventually settled, after a delay in a determination of the "Medicaid set aside." (R. p. 303, line 23 – p. 305, line 4). However, Claimant received the needed surgery.

Claimant said Vega was able to help him understand the factors involved in a settlement, and Claimant voluntarily signed the settlement memorandum." (R. p. 305, lines 4-13). Claimant also understood the costs involved, and his decision to settle was a voluntary decision on his part. (R. p. 305, lines 11-22; p. 306, line 1 – p. 307, line 18). Claimant was critical of Barth not getting surgery for him earlier, because "I would have been in better shape if I had my surgery when I was supposed to have them." (R. p. 307, lines 3-8). Claimant testified it was his position that Barth should not receive any fee. (R. p. 307, line 19 – p. 308, line 10). On cross, Claimant testified he did not reject the settlement Vega obtained for him, he had actually received $50,000.00 more than what Barth had negotiated, and he had surgery that he had not been able to get while represented by Barth. (R. p. 308, line 11 – p. 309, line 6)[5].

At the time of the hearing before the Single Commissioner, Claimant was still not happy about "jumping through hoops for workman's comp and [employer] not doing what he's supposed to do." (R. p. 309, lines 6 – 15). Claimant acknowledged he had some of those problems when Barth still represented him. (R. p. 309, lines 16-20[6]). Claimant vigorously denied authorizing Barth to settle his case or advised him of a hearing that had been scheduled while Barth was his lawyer[7]. (R. p. 62, line 5 – 17; p. 61, lines 4 – 16; p. 64, lines 2 – 19).

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[5] The settlement was 100% of the value of the permanent and total disability award plus lifetime medical care and treatment. In other words, Vega obtained 100% of the compensation available to Claimant.

[6] Claimant's testimony was, in part, unintelligible and was not fully transcribed by the court reporter. (R. p. 309, line 20).

[7] Barth's questions to Claimant tried to establish that Claimant had authorized Barth to settle the case for $150,000.00, which Claimant denied. (R. p. 314, line 25 – p. 315, line 2). Barth attempted to authenticate letters purportedly sent to Claimant by Barth's office, but Claimant looked at the letters and said the incorrect address was on the letters and he had not received them. (R. p. 310, lines 5-20). Barth also attempted to ask Claimant about a meeting between the two of them on April 4, 2015, but Claimant said no meeting had occurred.) (R. p. 312, lines 19-21). Barth's position now is that he settled the case for $100,000.00 and was authorized to do so. (R. p. 269, lines 4-18).

Claimant did authenticate a letter he had written to Barth telling Barth not to settle his case, but repeatedly denying telling Barth to settle his case. (R. p. 314, lines 1 – 24). Claimant said Barth's office called him and he "came in to sign a paper" and when he read it he "got pretty upset" and asked for his file because Barth "was not doing [his] job." (R. p. 315, line 20 – p. 316, line 21). Claimant said he wanted a lawyer who could help him "instead of already bumping into two propel who hadn't helped me no surgeries, made stuff worse, made stuff prolonged." (R. p. 316, lines 13-21).

Barth's position was that Claimant had not fired him before May and he had instead continued to work on Claimant's case, which led to the meeting with Barth's paralegal where Claimant refused to sign settlement documents and [again] terminated Barth. (R. p. 320, lines 1 – 17). Claimant called Barth's office several times trying to obtain his file. *Id.* Claimant "know I made the best decision" in terminating Barth, after discovering notes in Barth's file that called Claimant a "loose cannon and things like that." (R. p. 322, lines 18-23).

Barth did not testify, but instead called his paralegal Christina "Christy" Graves, who testified that a settlement offer of $100,000.00 had been made by the employer's counsel on April 5, 2016. (R. p. 269, lines 4 – 18). She testified that Claimant called the office "a number of times" asking "when his settlement paperwork would be in." (R. p. 270, lines 2-11). Christy testified that she called Claimant to come in "around May the 8th, 9th" and told him "the documents were in." (R. p. 270, lines 19-20). She also said that when Claimant came in, he "said that it just wasn't enough, he had thought about it, and it just wasn't enough for what he had been through." (R. p. 271, lines 8-17). Christy verified that the settlement documents and check were returned to employer's counsel. (R. p. 271, lines 18-22). She testified she had no knowledge of the firm being

terminated before the day she met with Claimant after "the documents were in." (R. p. 270, line 23 – p. 272, line 1). Christy never said Claimant accepted the proposed settlement amount.

Christy testified that Claimant called "the end of May" and requested a copy of his file, which she provided "the same day or at the very latest it would have been the following day." (R. p. 272, lines 2-12). Claimant picked up his file and signed a file release on May 31, 2016. (R. p. 272, line 13 – p. 273, line 6). Christy was unable to confirm any specific testimony about the handling of the case by Barth, but remembered "we asked and begged. . . trying to get the surgery" and she verified that the doctor had recommended surgery for Claimant. (R. p. 277, line 9 – p. 278, line 13; p. 291, line 13 – p. 282, line 3; R. pp. 462-463). Exhibit 24.

Barth introduced into evidence a series of emails dated April 6, 2016 where the employer's attorney stated, "does not have authority to settle for $100,000.00, but will request $100,000.00 if the client will accept that amount." (R. p. 161; R. p. 48). That same day, Barth emailed the employer's counsel and said, "if you can pay $100k, it's a done deal." *Id.* Paragraph 33; (R. p. 161). The emails further reflect that a month later, on May 3, 2016, employer's counsel said the check was in the mail. (R. p. 157). *Id.* Paragraph 42. Barth presented <u>no</u> evidence that Claimant had authorized the settlement of $100,000.00.

Barth sent employer's counsel an email dated May 9, 2016, notifying employer's counsel that Claimant had come into the office "to sign the settlement documents" while he, Barth, was out of the office. In the email, Barth states Claimant 'Blew a gasket' and advised Claimant would not sign the documents because Claimant wanted Barth to file a Form 50 requesting surgery. Barth further told employer's attorney that he [Barth] is going to hold the documents for a day or two to see if Claimant will change his mind. (R. p. 50; R. p. 157).

Barth wrote to employer's counsel returning the settlement check on May 13, 2016. (R. p. 469). Claimant signed an acknowledgement receiving his file from Barth on May 31, 2016. (R. p. 486). Barth did not notify Claimant he was asserting a lien at that time. *Id.* Barth signed a substitution of counsel order appearing for Claimant on January 6, 2015, which made no reference to Barth's intention to assert a lien. (R. p. 345). The order relieving Barth was signed on July 6, 2016. (R. p. 2).

Barth filed nothing with the Workers' Compensation Commission seeking to assert a lien in 2016 when he was relieved as counsel or at any time until after Vega had settled Claimant's case.

> Q. [By the Commissioner] "Was a notice of the lien ever filed with the Commission?"
>
> A. [By Mr. Barth] ". . . No, ma'am. I don't think anything was filed with the Commission."

(R. p. 260, lines 6-9).

In fact, other than signing the consent order naming him as Claimant's counsel on July 16, 2016, Barth filed nothing with the Commission at all, until he filed the instant motion two years after being relieved as counsel. The Commission file reflects that Barth only represented Claimant for a few months, from July to September, 2016. In contrast, Vega represented Claimant for two years, obtained needed surgery, lifetime medicals and 100% of the compensation to which Claimant was entitled.

Barth did not notify Vega he was claiming a lien in any amount until more than two (2) years later, after Vega had settled Claimant's case and was awaiting disbursement of the proceeds from employer's counsel. On September 20, 2018, Barth wrote a letter to Vega disputing

Claimant's assertion that Barth had not been authorized to settle the case and addressing "my lien" but he did not expressly state the amount of the lien he was asserting. (R. pp. 149- 151[8].)

Enclosed with the letter from Barth to Vega was an invoice for "services rendered" in the amount of "0.00" dollar, showing "0.00" hours devoted to the case, and itemizing costs in the total amount of $452.97. (R. pp. 153-154).

Vega filed a Form 61 and settlement ledger signed by Claimant on October 1, 2018; Claimant and Vega sought approval of a $40,000.00 attorney fee[9], plus cost reimbursement in the amount of $7,291.65. (R. pp. 162-166). Barth filed a Motion to Enforce Charging Lien with the Commission on November 14, 2018, asserting a lien of $33,333.33 (one-third on what he contended was a settlement offer in the amount of $100,000.00 asserted while he served as Claimant's counsel) plus costs in the amount of $452.97. (R. pp. 43-52). Vega and Claimant filed an opposition to Barth's motion on November 26, 2018.

Following a hearing on February 7, 2019, Commissioner Aisha Taylor issued an order dated July 10, 2019 granting Barth's motion in full, granting Barth's request for $33,333.33 in attorney fees and $427.97 in costs. She also granted Vega's motion for attorney fees, but permitted him to recover a fee only as $50,000.00 "plus costs incurred" once he filed a Form 61[10]. (R. pp. 3-21).

Under the Commissioner's order, Claimant would have netted far less than Vega proposed when Vega submitted his Form 61, which proposed a net of $102,708.35 to Claimant. *See* footnote

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[8] Barth requested that Vega "at least the sum of $33,333.33, plus costs . . . of $452.97 be held in . . . escrow. . ." *Id.*

[9] Vega's request for fee included a fee reduction of $9,500.00. A full one-third fee on $150,000.00 would be $49,500.00. Vega requested a reduced fee of $40,000.00, in order to maximize Claimant's recovery, netting Claimant $102,708.35. (R. p. 166). Barth made no similar concession.

[10] Vega had already submitted a Form 61, with Claimant's agreement, on October 2, 2019.

7. The Single Commissioner's order granted Barth $33,333.33 plus costs of $497.97, and Vega $16,500,00 plus costs of 47,291.65. Under the order as it stands, the Single Commissioner would have netted Claimant less money than he received via Vega's proposed disbursement.

Vega and Claimant appealed to the Full Commission, which affirmed.

ARGUMENT

I. THE WORKERS COMPENSATION COMMISSION ERRED IN GRANTING ATTORNEY'S FEES TO RESPONDENT BARTH BECAUSE BARTH FAILED TO PROVIDE SUFFICIENT EVIDENCE AND DOCUMENTATION IN THE RECORD IN ORDER TO ALLOW HIS CONTRACT WITH CLAIMANT TO BE APPLIED UNDER THE FACTS PRESENTED HERE.

If we assume the Workers' Compensation Commission has the statutory authority to address attorney's fee issues in workers' compensation cases, and we further assume it has the statutory authority to construe the validity and enforceability of liens, attorney fee agreements, fee-division rules between law firm, and to make a *quantum merit* analysis of an attorney's contribution to the outcome in a particular case, the inquiry here is governed by Regulations enacted by the Commission[11].

Article 12 of Regulation 67 of the South Carolina Code addresses the Commission's procedures required to seek or obtain attorney's fees in workers compensation actions. The Regulations spell out the requirements for presenting questions regarding an award of attorney's fees in a worker's compensation case. *See* Reg. 67-1201 through 1207.

Regulation 67-1203 governs the ability of a lawyer who is discharged during the handling of a workers' compensation case to request attorney's fees from the Commission. An attorney representing a party before the Commission "may withdraw as counsel on showing of good cause." *Id.* (B). The precise method of withdrawing and of seeking to assert a claim for a portion of an attorney's fee is spelled out in Reg. 67-1203(C). The withdrawing attorney may file a Form 61 (attorney fee petition) with the motion, and the Commissioner may relieve an attorney and rule

[11] An agency created by statute only has "the authority granted it by the legislature." *Medical Society of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 513 S.E.2d 352 (1999). For purposes of this argument, Claimant and Vega assume the Commission's regulations are within the Commission's statutory authority.

upon a request for fees that is submitted with the motion, which order would become effective "upon the final resolution of the claim."

As noted, Barth filed nothing with the Commission asserting a lien on Claimant's case when he sought to be relieved as counsel, and was granted the right to be relieved as counsel. Barth admitted at the hearing he did not notify the Commission that he would be asserting a lien when he was relieved as counsel.

Reg. 67-1205 sets forth the requirements for any agreement between an attorney and a lawyer regarding payment of a contingency fee for services. The Commission requires a client to approve any contingency fee to a lawyer, which the lawyer can establish by filing a Form 61 showing that the client "agrees to the fee". . . Reg. 67-1205(B)(2).

> If the parties agree to a contingent fee contract, the fee is deemed reasonable when the following requirements are met. . . [and other requirements]:. . .
>
> (2) The client agrees to the fee by signing a completed Form 61; . . .

Id.

Barth did not seek to assert a lien against Claimant's settlement until more than two (2) years after he was relieved as counsel. He did <u>not</u> obtain the Claimant's consent to the fee; in fact, Claimant opposed Barth's 2018 request for approval of an attorney's fee and explained in full his reasons for doing so. (R. pp. 53-178).

The Regulation provides for a circumstance when a client refuses to sign a Form 61, but Barth did not comply with that section either. Reg. 67-1205(D).

Moreover, when Barth did file a motion with the Commission, it was to ". . Enforce Charging Lien." (R. pp. 43-52). The motion did not seek to determine if a charging lien existed;

to the contrary, the motion stated that a charging lien existed on "$100,000.00 of the settlement proceeds in this action." *Id.* page 1.

Barth quoted his fee agreement with Claimant, and said his charging lien was based on an agreement by the Claimant to pay a fee based on " $175.00 per hour for all attorney services. . . and $75.00 per hour for all paralegal services rendered. . . or the contracted contingency fee. . . on any offers that have been made at the time of termination, **'whichever is greater.'** " (emphasis in original). (R. p. 43).

There were numerous defects in Barth's filing. He did not attach a billing invoice which would enable the Commission to determine the fee he was claiming using the formula set forth by his fee agreement with Claimant. (R. p. 46). Barth simply elected to assert a fee on what he claimed was an "offer" of $100,000.00 (supposedly accepted by Claimant with no evidence to support it) made before Barth was relieved as counsel for Claimant. *Id.*

Moreover, when attempting to negotiate with Claimant and Vega, Barth *did* provide a billing sheet, which reflected "0.00" hours billed by Barth and his staff. (R. pp. 153-154). Barth's motion and the document submitted, read together, establish that Barth did not attempt to calculate a fee under the terms of the contract, but simply elected to decide to charge a fee based on what he claimed was a settlement offer authorized by Claimant while Barth was representing Claimant.

Reg. 67-1205(A) provides that a fee agreement between an attorney and client "is deemed reasonable" if it complies with the applicable rules. Reg. 67-1205(B) sets forth the presumptions required in order to establish a fee is reasonable. Barth made no effort to establish that the fee he was charging was reasonable, nor did he introduce evidence that the he had "fully explain[ed] the

fee agreement to the client and inform[ed] the client of the total dollar amount of the fee that will be deducted from client's benefits; . ." as required by Reg. 67-1205(B).

The applicable regulation contains no formula by which the attorney's fee of an attorney discharged prior to the conclusion of a fee is to be calculated. Reg. 67-1205(C)(7) provides a method for calculating a fee for a successor attorney, but not for the first attorney.

The only guidance provided by the Reg for an attorney seeking to recover fees is set forth in Reg. 67-1204.

> Section B. "When the parties agree to a fee based on an hourly rate and/or retainer the total amount of the fee shall be reported on the Form 19, filed according to R.67-414."
>
> Section C. "When the parties agree to a contingent fee contract, the attorney shall report the fee by filing the original and one copy of a Form 61, Attorney Fee Petition, and an Order, along with a stamped self-addressed envelope. . ."

Barth did neither[12]. Instead, he filed a "Motion to Enforce Charging Lien", which presupposed a lien existed. The Single Commissioner and Full Commission assumed this to be true. It was not true.

Vega, however, complied in full with the requirements of Reg.67-1204 regarding a request for attorney fees. Vega's filing, on October 1, 2018, contained a proposed order, a properly-executed Form 61 with Claimant's signature authorizing the fees requested, and a detailed ledge of expenses, showing the net amount Claimant would receive if the fee was approved per the request. (R. pp. 162-166). Vega's filing reflected a reduction in the contracted amount of attorney's fees which Vega claimed, in order to maximize recovery for Claimant. *See* footnote 17.

[12] Barth's filing, entitled "Motion to Enforce Charing Lien", contained no evidence that Claimant had ever accepted the supposed $100,000.00 offer. (R. pp. 43-52).

Vega also submitted a fully executed[13] "Final Lump Sum Agreement and Release as to Indemnity, temporary Total Compensation and Permanent Disability Compensation" agreement. (R. pp. 167-171).

Moreover, Vega's supplemental filings (all of which were filed prior to Barth's Motion to Enforce Charging Lien) included a notarized Questionnaire completed by Claimant, which reflected Claimant's statements in Claimant's own handwriting. (R. pp. 167- 171; R. p. 172). This was completed in response to Barth's letter to Vega claiming a lien.

1. Do you feel attorney Kevin Barth provided competent representation, legal knowledge, skill, thoroughness and preparation necessary to represent you after you retained his services? **Answer: No.**
2. Do you feel attorney Kevin Barth consulted with you concerning the objectives of representation? **Answer: No.**
3. Do you feel attorney Kevin Barth was diligent and prompt in his representation? **Answer: No.**
4. Do you feel attorney Kevin Barth communicated with you reasonably and promptly in order to keep you informed of the status of the claim? **Answer: No.**
5. Do you feel attorney Kevin Barth abide with your request to seek authorization for surgery as requested by Dr. Gunter? **Answer: No never discussed this issue.**
6. Did you terminate attorney Kevin Barth by providing him written notice of termination on March 31, 2016? **Answer: Yes because I felt he was incompetent.**
7. Did attorney Kevin Barth withdraw from representation within a reasonable time when you discharged him? **Answer: No.**
8. Did attorney Kevin Barth seek authorization on your behalf to negotiate settlement of the claim? **Answer: Never discussed – no.**
9. Do you feel attorney Kevin Barth consult with you regarding settlement of the claim? **Answer: Never consulted or signed any document supporting settlement."**
10. Do you feel attorney Kevin Barth provide you an explanation of the commuted value of the claim ($217,100.39) and future medical and treatment? **Answer: Never discussed this monetary value.**
11. Did you authorize attorney to settle your claim for $100,000.00? **Answer: No.**
12. Do you feel attorney Kevin Barth request for a fee of $33,786.30 is reasonable? **Answer: He deserves no fee, he should not have retained a settlement.**
13. Did attorney Kevin Barth inform you that he intended to assert a lien against your claim in the amount of $33,786.30? **Answer: Never heard of such.**

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[13] Vega's filing contained his own signature as counsel for Claimant, the signature of Claimant, and the signature of counsel for the settling employer.

14. Do you feel attorney Kevin Barth settling the claim without your authorization was harmful to you and your claim for benefits? **Answer: He not only was harmful to my claim but also to my health and well-being, knowing I needed surgeries and never offered them to me. Was not surgeries had been requested until after the fact.**
15. Did the carrier suspend your benefits as a result of the actions taken by attorney Kevin Barth when he settled your claim without your authorization? **Answer: Yes. 12 weeks with no compensation.**
16. Did the carrier postpone approval of your surgery as a result of the actions taken by attorney Kevin Barth when he settled your claim without your authorization? **Answer: Yes.**

(R. pp. 173-174[14]).

As noted above, the Single Commissioner posted the question for consideration as "determine[ing] the appropriate distribution of attorney's fees and cost that relate to the Claimant's total settlement of $150,000.00." (R. p. 6). In fact, the issue before the Single Commissioner was competing motions for approval of attorney fees.

The Single Commissioner relied upon the testimony of Barth's paralegal in order to conclude ". . . the Claimant agreed to settle his claim for $100,000.00 on April 5, 2016 because he needed the money. . ." (R. pp. 7-8). However, no such testimony was given. The transcript reflects the following:

Q. Do you remember Mr. Evans?
A. I do.
Q. All right. And you remember when **we settled** his case?
A. I do.
Q. Can you tell me when that was?
A. It would have been late May, early April of 2016.
Q. Late – early April?
A. I mean late March, early April 2016.
Q. . . . At that point in time when the case was settled. . .
Q. . . . Do you know what day we actually received a $100,000 offer from John Bruton?
A. I believe it was April the 5th of 2016.

(R. p. 269, lines 2 -18) (emphasis added).

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[14] The reproduction of Claimant's answers includes misspellings in order to be accurate.

The paralegal also testified that Claimant called the office repeatedly because he "wanted to know when his settlement paperwork and check would be in[15]." (R. p. 270, lines 1-11). She further testified that Claimant came to the office in response to her telephone call to him to review the settlement papers, "around May the 8th, 9th." (R. p. 270, lines 21-25). The paralegal testified that, when she showed Claimant the settlement paperwork,

> "He came in, and we sat down. I showed him all the documents, and he said he that it just wasn't enough, he had thought about it, and it just wasn't enough for what he had been through. . ."

(R. p. 271, lines 11-14)).

The paralegal never said that Claimant authorized the settlement at $100,000.00. She responded to Barth's question about when "we" settled Claimant's case. (R. p. 269, line 4). There was no testimony that Claimant authorized the settlement.

She also testified "we actually received a $100,000 offer from John Bruton . . . [on] April the 5th of 2016." (R. p.269, lines 17-18). There is no testimony that Claimant was consulted before or after the offer was made, or that he authorized the settlement. To the contrary, when Claimant came to Barth's office to review the paperwork, he refused to sign the paperwork. (R. p. 271, lines 11-14).

It seems likely that Barth authorized opposing counsel to send paperwork and a check which he then presented to Claimant as a proposed settlement, and Claimant refused it. This is consistent with Barth's notification to opposing counsel that Claimant had refused the tender of "documents". (R. p. 50).

> [Claimant] came to the office to sign the documents. I was out at the time. He blew a gasket . . . He will not sign it and want me to file a 50 for his surgery. I'm terribly

[15] None of this testimony discussed what the amount of the expected "check" was going to be.

> sorry. I was afraid this would happen, and it did. . . I'm going to hold the settlement documents a day or two and maybe he'll change his mind.

(R. p. 50).

Instead of allowing himself to be lured by a settlement for an insufficient amount, Claimant picked up his file from Barth several weeks later. (R. p. 51). Barth notified opposing counsel in a letter dated June 1, 2016 that he "ha[s] a lien on any recovery he may receive in the amount of $33,7761.30 ($33,333.33 as my 1/3 of the $100,000 offer plus $427.97 in costs." *Id.* However, Barth notified <u>no one</u> else; not his former client, not the Commission, and not his former counsel's new attorney.

The Single Commissioner fell precisely where Barth intended; an offer was made to <u>Barth</u>, and it was presented to Claimant once a check arrived at Barth's office, but the proposal was rejected by Claimant. The conclusion Barth sought (and obtained) was that the settlement was authorized by Claimant. However, no testimony reflected that.

Similarly, Barth's Motion to Enforce Charging Lien presented <u>no</u> evidence that a settlement of $100,000.00 was authorized by Claimant. (Motion to Enforce Charging Lien).

Based on the Single Commissioner's mistaken belief that Barth had presented evidence which supported his position, *i.e.,* that Claimant had authorized a $100,000.00 settlement, the Single Commissioner ordered that she was enforcing Barth's lien. (R. p. 13, ¶ 4, R. p. 17, ¶ 17).

The Single Commissioner appeared to base her decision, which she termed "the crux of this matter"" on whether a letter from Claimant was delivered to Barth's office firing him and when that occurred. (R. p. 16). The date on which Barth was terminated has no relevance to the issue presented, which is whether the record supports the finding that <u>Claimant</u> authorized a settlement of $100,00.00. There is no evidence to support the finding. The Single Commissioner

citation to the paralegal's testimony refers to when opposing counsel offered the settlement, and has no bearing whatsoever to establish the Claimant had authorized the settlement at $100,000.00. Single Commissioner's order.

While the Single commissioner's order appears to also grant Vega's motion for a one-third attorney's fee, what she actually did is allow Vega to take a fee of "up to $33.33% of the additional settlement secured by him" of $50,000.00. (R. p. 17).

The fallacy of the single Commissioner's order is most clearly illustrated by the effect of the awards to Barth and Vega. The order granted Barth "$33,333.33, plus costs of $427.97." (R. p. 17 ¶ 17). It also granted Vega one-third of the additional $50,000.00 "plus costs pursuant to R. 67-1205(c)(7)[16]." *Id.* ¶ 19.

Per the Single Commissioner's order, the money to be distributed is:

Barth fee	$33,333.33
Barth costs	$427,97
Vega fee	$16,500.00[17]
Vega costs	$7,291.65

Total per Single Commissioner's order: $160,261.30 (from $150,000.00 in settlement)

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[16] The Single Commissioner's order required Vega to submit a Form 61 in accordance with R. 67-1205(c)(7). *Id.* She apparently intended that Vega submit a request for approval of a fee on a settlement of $50,000.00. However, Vega had already submitted a Form 61 for approval of the amount of attorney's fee he requested at that time and still requests on appeal. Vega's proper Form 61 submission reflected his request, and Claimant's consent, for reimbursement for costs in the amount of $7,291.65, which were detailed in the ledger which accompanied Vega's Form 61 filing. (R. pp. 497-500). Had Vega submitted an "amended" Form 61, per the Single Commissioner's order, he would have waived his right to relieve in this appeal.

[17] As indicated the Vega and Claimant's Form 61, Vega proposed a reduced attorney's fee to benefit Claimant.

The total amount paid in settlement was $150,000.00. Either the Single Commissioner didn't notice or decided it didn't matter. The Single Commissioner ordered a payout of $160,261.30 from the $150,000.00 settlement.

Claimant signed a Form 61 agreeing to a net payout of $102,708.35 on September 28, 2018 and in accordance with Vega's fiduciary obligation to Claimant, Claimant has received those funds. (R. p. 164). Vega continues to hold the total attorney's fee proposed to the Commission and consented to by Claimant, of $40,000.00, plus the costs advanced by Vega in the amount of $7,291.65. If the Single Commissioner's order is upheld, Vega will be penalized for protecting his client. If Barth receives $33,333.33 plus $427, Vega's total recovery for attorney's fee and costs will be $13,530.35.

The Single Commissioner's order, as confirmed in full by the Full Commission, allocates 84.23% of the attorney's fee to Barth, leaving an attorney's fee of 15.77% for Vega, who undisputedly obtained the relief Claimant needed. Claimant testified he wanted no fee to go to Barth, and he approved of Vega's reduced attorney's fee request.

Assuming the Commission has the statutory authority to divide attorney's fees among original and successor attorneys, the Commission has prescribed that "[t]he combined fee of all attorneys for one party may not total more than $33.3% of the compensation. . . The Commissioner assigned the claim shall indicate the portion of the fee approved for each attorney." Reg. 67-1205 (C)(6). The Single Commissioner here not only granted Barth an attorney's fee in excess of the total attorney's fee authorized by the applicable Regulation[18], she disproportionately divided the

[18] The attorney's fee awarded to Barth was 33.33%, which is a higher number/percentage than 33.3% as permitted by regulation.

attorney's fee by granting Barth 100% of what he requested, and allowing Vega to collect the leftovers.

The South Carolina Administrative Procedures Act (APA) "establishes the standard for judicial review of decisions of the Appellate Panel of the Workers Compensation Commission." *Rabon v. Arrow Exterminating Company*, 393 S.C. 510, 713 S.E.2d 347, 349 (Ct. App. 2011). The Appellate court "may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error or law or is 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.*, citing S.C. Code Ann. Section 1-23-380(5) (1976 as amended). *See also Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

As demonstrated above, Barth failed to prove that he was authorized by Claimant to settle the workers' compensation claim for $100,000.00. The factual findings of the Single Commission and the Appellate Commission are erroneous.

Similarly, the appellate court may reverse when the decision is affected by an error of law. *Hamilton v. Martin Color-Fi, Inc.*, 405 S.C. 478, 748 S.E.2d 76 (Ct. App. 2013).

The Single Commission and Appellate Panel got the facts wrong. They got the law wrong. In light of Claimant's testimony that Barth should recover nothing, and the undisputed evidence that Vega obtained the relief Claimant sought and maximized the recovery available, the decisions on appeal are "clearly erroneous in view of the reliable, probate and substantial evidence on the whole record." Additionally, they are affected by an error of law, in that the assertion of a "lien" by Barth, and the decision to enforce the lien, was error. There was no lien to enforce.

CONCLUSION

The statutory and regulatory structure for approval of an attorney's fee in a workers' compensation case usually works well. As here, however, when the first attorney claims a lien and the Commission simply assumes a lien exists, the resulting decision is unsupported by the evidence and constitute an error of law. In such circumstances, reversal is required.

Appellants Vega and his client Claimant respectfully seek an order of this Court reversing the decision of the Single Commissioner and Full Commission, and remanding with instructions to deny Barth's motion in total. No other resolution is possible from the record.

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October 26, 2020

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STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

Ex Parte: C. Daniel Veg of Chappell, Smith & Arden, PA., ... 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.

CERTIFICATE OF COUNSEL

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

Respectfully submitted,

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