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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

SC Court of Appeals

Shirley C. Robinson, Administrative Law Judge

Appellate Case No. 2018-001868

South Carolina Department of Health and
Environmental Control, ... Appellant-Respondent,

v.

James W. Davenport, ... Respondent-Appellant.

FINAL BRIEF OF RESPONDENT-APPELLANT ON CROSS APPEAL

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STATEMENT OF ISSUES ON APPEAL

(1) Did the Administrative Law Judge err in denying Respondent attorney's fees under S.C. Code Ann. § 15-77-300(a) for work performed after the date of the trial of the contested case, specifically including preparing the proposed order, reviewing DHEC's proposed order, reviewing the final order, preparing and arguing Respondent's petition for attorney's fees and costs, reviewing the attorney fee order, and responding to DHEC's motion for reconsideration?

(2) Did the Administrative Law Judge err in refusing to award costs to Respondent pursuant to Rule 54, SCRCP, and S.C. Code Ann. §§ 15-37-10 et seq., in a contested case where the Judge awarded attorney's fees pursuant to S.C. Code Ann. § 15-77-300(a) and specifically found that Appellant agency acted without substantial justification?

(3) Did the Administrative Law Judge err in reducing Respondent's attorney fee award on Appellant's Motion for Reconsideration, where during the hearing on Respondent's Petition for Attorney's Fees and Costs, Appellant's counsel expressly waived any arguments regarding the reasonableness of the amount of respondent's attorney's fees requested, and where Respondent's counsel traveled to and from trial with Respondent each day and actually used the travel time to work on the case?

STATEMENT OF THE CASE

This is an appeal from an award of attorney's fees by the Administrative Law Court following a Contested Case Hearing in which Appellant-Respondent, South Carolina Department of Health and Environmental Control ("DHEC"), unsuccessfully attempted to revoke the paramedic certification of Respondent-Appellant, James W. Davenport ("Mr. Davenport"). The underlying contested case was tried before the Hon. Shirley C. Robinson, Administrative Law Court, from July

24-28, 2017, after extensive discovery that included numerous witness depositions, document requests, and third-party subpoenas. On March 20, 2018, Judge Robinson entered a Final Decision and Order vacating DHEC's Administrative Order that had revoked Mr. Davenport's paramedic certification. Judge Robinson found that "there is insufficient evidence that Respondent committed misconduct . . . such that revocation of his South Carolina EMT certification is warranted." (R. p. 11). DHEC did not appeal the underlying Order disposing of the Contested Case.

On March 21, 2018, the undersigned counsel for Mr. Davenport filed a Petition for Attorney's Fees and Court Costs, pursuant to Rule 54(d), SCRCP, and S.C. Code Ann. § 15-77-300(A). On April 5, 2018, Appellant filed a Memorandum in Opposition to the Petition for Attorney's Fees. On April 16, 2018, the undersigned counsel for Mr. Davenport filed a Reply Brief, along with a Supplemental Affidavit of Respondent's Counsel, including additional time and expenses incurred since the filing of the fee petition, including the cost of obtaining a copy of the trial transcript, which was approximately \$3,900.00. After briefs were submitted by both parties, Judge Robinson conducted an in-person hearing on the attorney's fee petition on June 13, 2018.

On June 22, 2018, DHEC attempted to file a Supplemental Memorandum of Law, which the undersigned counsel for Mr. Davenport objected to by letter of June 25, 2018, to Judge Robinson. (R. pp. 1728-29).

On August 1, 2018, Judge Robinson entered an Order Granting Respondent's Petition for Attorney's Fees in the amount of \$91,120.00. Judge Robinson specifically found that "DHEC lacked reasonable grounds in law and fact to pursue revocation of Respondent's EMT Certification." (R. p. 78). The Court declined to award fees for any post-trial matters and also declined to make an award of costs as requested under Rule 54(d), SCRCP. (Id.).

On August 8, 2018, DHEC filed a Motion to Alter or Amend (Reconsider) Order Granting Petition for Attorney's Fees. On August 27, 2018, Respondent filed a Memorandum of Law in Opposition to DHEC's Motion for Reconsideration of Attorney Fee Order. On September 20, 2018, Judge Robinson entered an Order on Petitioner's Motion to Alter or Amend, affirming the award of attorney's fees under the statute, but reducing the amount of attorney's fees by \$3,450.00 as allegedly unnecessary and unreasonable travel time. (R. p. 119).

Respondent-Appellant's counsel received notice of the entry of the Order on September 20, 2018. Appellant-Respondent timely filed and served its Notice of Appeal on October 17, 2018, which the undersigned counsel for Respondent-Appellant received on October 22, 2018. Respondent-Appellant timely served and filed his Notice of Cross Appeal on October 22, 2018, pursuant to Rule 203(c), SCACR, within five (5) days of receipt of Appellant's Notice of Appeal.

FACTS

Respondent-Appellant will include a more detailed statement of facts in his responsive brief to Appellant's main appeal. For purposes of the cross-appeal, the facts are fairly straightforward.

The undersigned counsel for Respondent submitted an Affidavit in support of Respondent's Petition for Attorney's Fees and Court Costs, which included as an Exhibit a detailed print-out from counsel's case management software itemizing all contemporaneous attorney time entries and expenses related to this matter. (R. pp. 19-37). Respondent's counsel submitted a Supplemental Affidavit with his Reply Brief in Support of his Petition for Attorney's Fees and Costs, detailing additional attorney's fees and costs incurred since the filing of the original Petition. (R. pp. 62-70). The most substantial expense was the cost of obtaining a copy of the entire trial transcript, which was required to address some of the arguments raised in Appellant's opposition to the attorney's fee

petition. (R. p. 69).

During the in-person hearing on the attorney's fee petition, the Court specifically asked Appellant's counsel the following: "Now, also, Mr. Wicevic, do you have any argument that you wanted to place on the record with respect to the reasonableness of the hourly fees that's - - ."

Appellant's counsel responded, "I think he - - Mr. Rothstein included an affidavit. We would appreciate it - - if the [court is agreeable] to it, we'd be appreciative of being able to research that. At this time, no, we have no reason to dispute Mr. Rothstein's affidavit." (R. p. 1567, 50, ll. 16-25) (emphasis added). Appellant did not submit any additional briefing or argument regarding the reasonableness of Respondent's counsel's fees prior to the Court's Order of August 1, 2018.

ARGUMENTS

1. THE ADMINISTRATIVE LAW JUDGE ERRED IN DENYING RESPONDENT ATTORNEY'S FEES FOR WORK PERFORMED ON THE CASE AFTER THE DATE OF THE TRIAL OF THE CONTESTED CASE.

It is well established under South Carolina law that "[t]he decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion." Maybank v. BB&T Corp., 416 S.C. 541, 579–80, 787 S.E.2d 498, 518 (2016). The South Carolina Supreme Court in Maybank recognized that "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id. at 580, 787 S.E.2d at 518 (quoting Kiriakides v. School Dist. of Greenville Cty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009)). Where the Court's decision on attorney's fees or costs depends on the interpretation of a statute, that becomes a question of law reviewed on appeal under a de novo standard. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

Judge Robinson limited her award of attorney's fees from the time of the filing of the contested case on January 6, 2017, until the end of the trial on July 28, 2017. In her attorney's fee order, Judge Robinson stated, "Mr. Rothstein has provided an itemized invoice of billable hours. Included in the invoice are fees prior to the inception of this contested case¹ and fees earned for post-trial matters, neither of which I believe are recoverable pursuant to McDowell [v. South Carolina Department of Social Services], 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991)]." (R. p. 78). In other words, Judge Robinson excluded all post-trial time from the attorney's fee award.

By refusing to include in the attorney's fee award any time following the conclusion of the trial, the Administrative Law Judge erroneously excluded 19.3 hours in attorney time from July 30, 2017 through March 20, 2018 (R. pp. 30-31), plus another to 19.2 hours of attorney time spent on the fee petition itself, not counting the time arguing the petition on June 13, 2018 or thereafter. (R. pp. 63, 68-69). At the specifically approved rate of \$300 per hour for attorney time, the 38.5 hours excluded from the attorney's fee award would have been worth at least an additional \$11,550.00.

It is well established that an award of attorney's fees under S.C. Code Ann. § 15-77-300 can include post-trial time. In Layman v. State, 376 S.C. 434, 658 S.E.2d 320 (2008), the South Carolina Supreme Court awarded attorney's fees under Section 15-77-300 for a class action on behalf of working retirees under the Teachers and Employee Retention Incentive program, based on the reasonableness factors from Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). Layman, 376 S.C. at 458, 658 S.E.2d at 333. In a Supplemental Order, the Layman Court awarded

¹ In his Reply Brief, Respondent conceded that attorney time spent at the agency level, prior to the filing of the contested case, is not properly compensable under the holding of the McDowell case. (R. pp. 59-60). Accordingly, Respondent agreed that his fee petition should be reduced by 40.7 hours or \$12,210.00 for time entries prior to December 10, 2016, the date of the final agency decision. (R. p. 60).

an additional \$1.075 million in attorney's fees for time spent by class counsel after the entry of the Court's June 1, 2006 Order. Id. at 463-65, 658 S.E.2d at 335-37. The Layman Court concluded, "in the interest of fairness and in ending this litigation without further accrual of fees by either side, we modify our original award of attorney's fees to include this additional time by counsel." Id. at 463, 658 S.E.2d at 336. The Layman Court expressly recognized that a prevailing plaintiff under S.C. Code Ann. § 15-77-300 can recover fees for work performed after trial, including work on the attorney's fee petition itself.

The Administrative Law Court's reliance on the McDowell case sua sponte to deny attorney's fees for any time spent after the trial date was plainly erroneous and was an abuse of discretion. The McDowell case only limited attorney's fees on the front end of administrative proceedings at the agency level, not on the back end after the trial of the contested case. Accordingly, this Court should increase the attorney's fees awarded to Respondent by at least \$11,550.00.

2. THE ADMINISTRATIVE LAW JUDGE ERRED IN REFUSING TO AWARD COSTS TO RESPONDENT PURSUANT TO RULE 54, SCRPC AND S.C. CODE ANN. §§ 15-37-10 ET SEQ., IN AN ACTION WHERE THE JUDGE AWARDED ATTORNEY'S FEES PURSUANT TO S.C. CODE ANN. § 15-77-300(A) AND SPECIFICALLY FOUND THAT THE AGENCY ACTED WITHOUT SUBSTANTIAL JUSTIFICATION.

Judge Robinson's denial of Respondent's request for court costs in this case contained exactly one sentence: "In addition, § 15-77-300 only allows for the recovery of attorney's fees, not court costs or expenses." (R. p. 78). Unfortunately, Judge Robinson disregarded Respondent's invoking of Rule 54, SCRPC, as a basis for Respondent's request for attorney's fees and costs in addition to S.C. Code Ann. § 15-77-300.

Section 15-77-300 of the South Carolina Code actually states, in relevant part, "the court may

allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency." S.C. Code Ann. § 15-77-300 (emphasis added). As the highlighted language shows, the attorney's fee award under Section 15-77-300 is expressly included as type of recoverable court costs. The additional components of recoverable court costs are found in Rule 54, SCRCP,² as well as in S.C. Code Ann. §§ 15-37-10 et seq.

Rule 54(e)(2), SCRCP, specifically allows for the recovery of filing fees paid to the clerk of court. Thus, the ALC's award of costs should have included the \$200.00 filing fee for the contested case on January 6, 2017, and the \$25.00 filing fee for the attorney's fee petition in this matter.

Next, Section 15-37-40 specifically allows for the recovery of "the reasonable compensation of commissioners in taking depositions." S.C. Code Ann. § 15-37-40. Thus, the ALC's award of costs should have included the following deposition costs: (1) \$530.00 for the deposition of Dr. Kickham (expense paid June 20, 2017); (2) \$1,344.40 for the depositions of Scott Stoller and Craig Lawless (expense paid June 22, 2017); (3) \$666.98 for depositions of Kim Aiken and Sheila Kaiser (Garber Reporting invoice paid July 14, 2017); and (4) \$770.01 for deposition of James Davenport (Garber Reporting invoice paid July 14, 2017) (R. p. 32). See Peterson v. National R.R. Passenger Corp., 365 S.C. 391, 402, 618 S.E.2d 903, 908 (2005) (approving award of costs under S.C. Code Ann. § 15-37-40 for "the fees of witnesses" and "the reasonable compensation of commissioners in taking depositions").

²Although Rule 54(d), SCRCP states, "but costs against the State, its officers, and agencies shall be imposed only to the extent permitted by law," Section 15-37-200 of the South Carolina Code specifically allows costs to be recovered against the State in a civil action. Section 15-37-200 provides, in relevant part, "In all civil actions prosecuted in the name of the State by an officer duly authorized for that purpose the State shall be liable for costs in the same cases and to the same extent as private parties." S.C. Code Ann. § 15-37-200.

Section 15-37-40 also allows for the recovery for “the expense of printing the papers for any hearing when required by a rule of the court.” S.C. Code Ann. § 15-37-40. Thus, the ALC’s award of costs should have included the \$3,938.20 to obtain the copy of the trial transcript, excerpts of which were quoted in the Reply Brief. In addition, the following copying costs for trial notebooks, exhibits, and briefs should have been awarded: (1) \$20.20 (July 9, 2017); (2) \$3.80, \$73.20, and \$72.60 (July 10, 2018); and (3) \$29.40 (July 23, 2017) (R. pp. 32-33).

Finally, Section 15-37-120 allows costs for mileage to be “taxed for the number of miles actually traveled.” S.C. Code Ann. § 15-37-120. Thus, the ALC should have allowed Respondent’s round-trip mileage to and from Columbia for the following dates: (1) July 20, 2017, for pre-trial motions hearing; (2) July 24-28, for trial; and (3) June 13, 2018, for attorney’s fee hearing. (R. p. 33). Seven separate trips to Columbia would be reimbursed at the rate of \$112.35 per trip (210 miles @ \$0.535 per mi.), or a total of \$786.45 for all of the trips. See Maybank, 416 S.C. at 582, 787 S.E.2d at 519 (citing with approval Trimper v. City of Norfolk, 58 F.3d 68, 75 (4th Cir. 1995), which held that litigation costs include litigation expenses such as secretarial costs, copying, telephone costs, and necessary travel).

In sum, the ALC should have awarded Respondent at least \$8,460.24 in costs, as detailed above. The ALC’s refusal to award Respondent any costs beyond the attorney’s fee award under S.C. Code Ann. § 15-77-300 was erroneous and should be reversed.

3. THE ADMINISTRATIVE LAW JUDGE ERRED IN REDUCING RESPONDENT'S ATTORNEY FEE AWARD ON APPELLANT'S MOTION FOR RECONSIDERATION, WHERE APPELLANT EXPRESSLY WAIVED ANY ARGUMENTS REGARDING THE REASONABLENESS OF THE AMOUNT OF RESPONDENT'S ATTORNEY'S FEES REQUESTED.

On Appellant's Motion for Reconsideration of the Attorney Fee Order, the Administrative Law Judge reduced Respondent's attorney's fee award by 11.5 hours, or \$3,450.00, for travel time between Greenville and Columbia during the trial of this matter. (R. p. 119). Appellant's entire argument on this issue on its Motion for Reconsideration consisted of roughly two sentences: "Over 300 billed hours is far beyond reasonable for an administrative case of this nature. There are a number of unreasonable billed hours, including, among other things, nearly 24 hours in travel time, duplicate billing entries, and multiple days in which Mr. Rothstein billed over 15 hours." (R. p. 99).

The only evidence in the record regarding the reasonableness of Respondent's fees are the Affidavit and Supplemental Affidavit of Respondent's Counsel, along with the attachments to those Affidavits, which contain detailed entries from counsel's computerized time management system. (R. pp. 19-37, 62-70). Respondent's counsel testified in his Affidavit, "I believe that all of the time recorded in Clio is reasonable and was necessary in the representation of Mr. Davenport." (R. p. 21, ¶ 13). Although the issue of travel time was not specifically raised in Appellant's initial brief or discussed during the hearing on the attorney's fee petition, Respondent's actually counsel drove with Mr. Davenport to trial in Columbia every day and used the 3-hour travel time to discuss the case, formulate trial strategy, and prepare witness testimony.

Importantly, Appellant's counsel did not attack the reasonableness of the attorney's fee petition initially. During the hearing on June 13, 2018, Judge Robinson asked, "Now, also, Mr.

Wicevic, do you have any argument that you wanted to place on the record with respect to the reasonableness of the hourly fee that's [been requested]." Appellant's counsel stated, "I think he - - Mr. Rothstein included an affidavit. We would appreciate it - - if the [court is agreeable] to it, we'd be appreciative of being able to research that. At this time, no, we have no reason to dispute Mr. Rothstein's affidavit." (R. p. 1567, ll. 16-25) (emphasis added). Clearly, during the hearing Appellant's counsel waived the issue of the reasonableness of the fee petition.

Appellant first raised the issue about the reasonableness of the amount of attorney's fees requested when Appellant filed its Motion for Reconsideration. Of course, it is well-settled that "[a]n issue may not be raised for the first time in a motion for reconsideration." Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); see also MailSource, LLC v. M.A. Bailey & Assocs., Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCF motion which could have been raised at trial.") (citing Commercial Credit Loans, Inc. v. Riddle, 334 S.C. 176, 186, 512 S.E.2d 123, 129 (Ct. App.1999); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App.1995)). Because Appellant did not attack the reasonableness of the attorney's fees requested initially, but only attempted to do so on a motion for reconsideration, the Administrative Law Court erred in addressing this issue on Appellant's Motion for Reconsideration.

In any event, the Administrative Law Court erred in ruling that travel time should not have been included in the calculation of a "reasonable attorney's fee." Respondent's counsel's decision not to stay over at a hotel in Columbia every night during the trial did not cause an unnecessary increase in the time spent on the case. As noted above, Respondent's counsel drove in the same car with Mr. Davenport every day throughout the trial. Mr. Davenport lives in Anderson County and

met Respondent's counsel at his office in Greenville every morning before trial. The work done during the commute to and from trial every day was substantial and would not have been reduced even if the two of them had stayed in a hotel during the week at considerable additional expense.

Finally, although Respondent's counsel was unable to locate any precedent in South Carolina on this exact issue, numerous courts from around the country have included attorney travel time in a statutory award of attorney's fees. See Henry v. Webermeier, 738 F.2d 188, 194 (7th Cir.1984) (traveling time in statutory fee cases compensable just as for fee-paying clients); Danny Kresky Enter. v. Magid, 716 F.2d 215, 217–18 (3d Cir.1983) (holding that district court abused its discretion by deducting travel time from attorney's fee petition); Sulkowska v. City of New York, 170 F. Supp. 2d 359, 369 (S.D.N.Y. 2001) ("Although courts in this district customarily apply [a 50%] reduction to travel expenses, it is within the Court's discretion to compensate counsel for travel time at full hourly rates."); Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 396 (8th Cir.1987) (travel to and from depositions compensable) (citing Craik v. Minnesota State Univ. Bd., 738 F.2d 348, 350 (8th Cir.1984) (travel to oral argument)); see also Fox v. Pittsburg State Univ., 258 F. Supp. 3d 1243, 1259 (D. Kan. 2017) ("Although some attorneys customarily charge for such time at their full hourly rate, the Court believes that the most reasonable approach is to allow counsel to recover 50 percent of travel time.").

Respondent lives in Anderson County and works in Greenville County. His choice of an attorney from Greenville to handle this matter did not cause an unnecessary or unreasonable increase in the attorney's fees incurred. All of the depositions in this case were taken in the Upstate. The fact that the trial of this contested case occurred in Columbia, where the Administrative Law Court is located, necessarily required travel to Columbia. The Administrative Law Court erred in deducting

travel time from the attorney's fee award. Accordingly, Respondent requests that the nineteen (19) hours of travel time improperly deducted by the Administrative Law Court from the attorney's fee petition be restored.

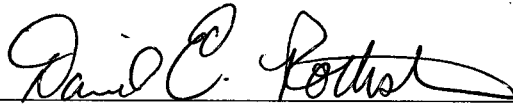
CONCLUSION

For all of the foregoing reasons, Respondent-Appellant respectfully requests that this Court increase the attorney's fee award in this case properly to include post-trial work and travel time reasonably and necessarily incurred in connection with this case. In addition, Respondent-Appellant respectfully requests that this Court award appropriate costs in the amount of \$8,460.00.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent-Appellant on Cross Appeal complies with Rule 211(b), SCACR.

March 29, 2019



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