The State of South Carolina

Office of the Attorney General

Opinion No. 86-67

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The Honorable John D. Bradley, III
Member, House of Representatives
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Dear Representative Bradley:

You have asked whether the Industrial Commission may supervise and approve the fees of defense attorneys in workers compensation cases. You note that the Commission presently approves claimants' attorneys fees; however, the defendant employer's or carrier's attorneys fees are not given the same judicial scrutiny. According to the facts presented, defendants' attorneys fees are solely subject to the review of an administrative employee or official of the Commission. Your concern is whether, pursuant to §§ 42-15-90 and 42-3-185, the Commission may delegate approval of attorneys fees to an administrative employee.

I emphasize at the outset that this Office, in the issuance of an opinion does not investigate or attempt to determine facts. See, Op. Atty. Gen., December 12, 1983; November 14, 1985. Our opinion is based upon the facts presented which must be assumed correct.

Section 42-15-90 provides in pertinent part as follows:

> Fees for attorneys and physicians and charges of hospitals for services under this title shall be subject to the approval of the Commission; but no physician or hospital shall be entitled to collect fees from an employer or insurance carrier until he has made the reports by the Commission in connection with the case.

To our knowledge, this statute has not been definitively interpreted by our Supreme Court. And it is not clear from the language of the statute what the Legislature intended by the use of the phrase "[f]ees for attorneys ... for services under this title ...". However, a number of authorities have concluded that similar statutes employing such language do not authorize the approval of attorneys fees of employers or carriers, but, instead, are limited to the approval of the fees of claimants' attorneys.

A leading authority in workers compensation law, Professor Larson, while recognizing that every state possesses some type of provision for subjecting claimants' attorneys fees to supervision, has noted, however that:

> [t]he fees of the employers' or insurers' counsel, since they have no immediate impact or net benefits, are not ordinarily supervised or limited.

LARSON'S WORKMENS COMPENSATION LAW, § 83.18, p. 15-684. Larson further identifies South Carolina's provision (§ 42-15-90) as among those that apply to claimants' attorneys fees. Id., Appendix B-18 D-4. Moreover, the authorities recognize that in those jurisdictions that require the approval of attorneys fees, the supervising authority is ordinarily limited to a review of those fees which are required to be paid from, or sought to be enforced against, the proceeds of an award to the injured worker. 81 Am.Jur.2d, Workmen's Compensation, § 820. I cite for your review the following cases, where courts have construed statutes similar to the South Carolina statute as applying only to claimants' attorneys fees. Burgess v. Oakley, 169 N.E.2d 512 (Ohio, 1960); Carr v. State Industrial Commission, 11 P.2d 134 (Ok. 1932); Feldman v. Edwards, 107 Ga. App. 397, 130 S.E.2d 350 (1963).

More specifically, in Butter Nut Baking Co. v. State Ins. Fund, 294 P.2d 842, 845 (Ok. 1956), the Oklahoma Supreme Court, in construing a statute similar to § 42-15-90, elaborated:

> We think this section when properly construed confers jurisdiction upon the State Industrial Commission to fix and allow claims for attorneys representing claimant only and cannot be construed to authorize it to fix and allow fees for services of attorneys representing the employer and/or his insurance carrier....

And, interpreting a provision virtually identical to § 42-15-90, the Court in Huff v. Sup. Court of Del., 430 A.2d 796, (1981) observed that

> [t]he inclusion of this provision in the original Delaware Workmen's Compensation Law is in harmony with the basic concept of that law to provide a new remedy and protection for those who are injured while working in industry, to provide a facility by which compensation could be readily available to injured employees ... and to assume that the employees would not suffer excessive charges for services rendered in obtaining that compensation. (emphasis added).

Moreover, in National Car Coupler Co. v. Sullivan, 73 Ind. App. 442, 126 N.E.2d 494, 496 (1920), overruled on other grounds in Union Hospital v. Brown, 11 N.E.2d 520 (Ind. 1937), the Court in dicta explained why the attorneys fees of employers or carriers are not considered subject to the supervision of an Industrial Commission by virtue of a statute almost identical to § 42-15-90. Because the Court's reasoning in Car Coupler is so cogently expressed, I quote from the case at considerable length:

> As the [workers compensation] act ... made no provision for the employment of attorneys, we are not expressly advised as to what the Legislature meant by "fees of attorneys under this act," and, if called upon to determine, would necessarily be guided very largely by facts of common knowledge, which evidently led to legislation in that regard. When so guided, we would naturally conclude that the fees of attorneys referred to in said section were those which an applicant might become liable in the prosecution of his claim before the Industrial Board and on appeal, where an appeal is taken. Such conclusion would be supported by a consideration of the simplified procedure for obtaining compensation under such act, and the wrongs to injured [employees] ... and their dependents, that would probably follow, if some restrictions were not placed upon the cost of legal services rendered applicants in the prosecution of

> their claims for compensation. And while it may be said that the services of attorneys, in the defense of a claim for compensation are as much "under the act" as those rendered the applicant in the prosecution of such claim, still we do not believe it could be said with reason that it was the intention of the Legislature that fees of attorneys engaged by employers or their insurance carriers, to defend against such applications come within the provisions of such section. The fact that there were no harmful practices, at the time of the enactment of the Workmen's Compensation Act, respecting charges for legal services, when engaged by an employer or his representative, and no good reason to believe that such practices would arise under such act, tends strongly to support the views we have stated. Thus we would be led to classify fees of attorneys in applying said section 65, although the act itself fails to do so by any express provision. (emphasis added).

See also, Hoffman v. Brooks Const. Co., 41 N.E.2d 613 (Ind. 1942) (reaffirming National Car Coupler case, after Union Hosp. case, supra had been decided).

In addition, to the authorities elsewhere, while it is true that no case decided by our Supreme Court has construed § 42-15-90 definitively, certain other interpretations of this statute are instructive. For example, in a 1936 opinion of this Office, former Attorney General John Daniel stated, as have many of the decisions referenced above, that the principal purpose of § 42-15-90 is to protect the workman from the charging of excessive fees. 1936-37 Op. Atty. Gen., p. 299. Similarly, in an opinion, dated May 23, 1957, this Office assumed that the statute in question related solely to the approval by the Commission of claimants' attorneys fees and noted that the provision required that "the attorney shall not retain any portion of the money paid to the claimant." The opinion's conclusion stated that "Fee for Claimants Attorneys in Industrial Commission Cases to be approved by Commission." (emphasis added)

Furthermore, we note that, consistent with the foregoing opinions of this Office, at all times prior to August 18, 1984, the Industrial Commission has limited application of § 42-15-90 and its predecessors to claimants' attorneys fees. See, Commission Policies for Approval of Attorneys Fees dated January 6, 1958, September 27, 1966, October 7, 1975 and February 23, 1981. This longstanding administrative interpretation, without legislative interference or change, by the agency charged with the Compensation Act's enforcement must be given considerable deference. Etiwan Fertilizer Co. v. S. C. Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950).

Finally, we note that other state statutes, where intending that attorneys fees for employers and carriers be supervised by the Industrial Commission, have clearly stated such intent in express terms. See, Merrimac Anthracite Coal Corp. v. Showalter, 163 S.E. 73 (Va. 1937). ["Fees of attorneys and physicians and charges of hospital for services whether employed by employer, employee or insurance carrier under this act, shall be subject to the approval and award of the commission."] (emphasis added). See also, Carson v. Beall, 55 Ohio App. 245, 9 N.E.2d 729 (1937) ["The industrial commission shall have authority to inquire into the amounts of fees charged employers or claimants by attorneys ... ".] (emphasis added). The fact that the General Assembly, in enacting § 42-15-90, did not employ such explicit and specific language is further evidence that it did not intend that the fees of attorneys representing employers or carriers be supervised by the Commission.

Accordingly, based upon the foregoing authorities, it is doubtful whether § 42-15-90 presently authorizes the Industrial Commission to approve the fees of attorneys representing employers or carriers. As was stated in the National Car Coupler case, although the services of attorneys in the defense of a claim for compensation may, arguably, be said to be services under the Act (or "under this title"), we doubt that it was the intention of the legislature that such defense fees be supervised by the Commission. The intent of the General Assembly must be controlling, of course, especially in light of the fact that there has been no substantive change in § 42-15-90 in the face of almost fifty years of an uninterrupted administrative interpretation that defense fees are not subject to the Commission's jurisdiction. Although the language of the statute may leave some room for a contrary interpretation, and while some courts have recognized

public policy reasons for supervising defense fees, see, Carson v. Beall, 55 Ohio App. 245, 9 N.E.2d 729, 731 (1937) ["The provisions of the statute are to protect the claimant as well as the employer against excessive fee charges"], such an interpretation is not clearly authorized by the present statutory scheme. Of course, should the General Assembly desire, as a policy matter, to make it clear that it is its intent to include the fees of employers and carriers within the scope of § 42-15-90, it could do so at any time.

For the sake of answering your remaining questions, we will, however, assume that the present wording of § 42-15-90 is sufficiently broad to encompass the supervision of defense fees. We understand that the Commission on August 18, 1984 construed § 42-15-90 to be applicable to attorneys fees for both the claimant and the defendant. See, Minutes, Special Meeting of the Industrial Commission, August 18, 1984 (transcribed August 29, 1984). According to the information you have provided, defense fees are solely subject to the review of an administrative employee or official of the Commission and are not approved by the Commission as are claimants' fees. You wish to know whether such distinction is authorized.

Even assuming arguendo and for the sake of your question that § 42-15-90 presently authorizes the Commission's supervision of attorney fees of employers or carriers, it is clear that such supervision must take the form of "approval" by the Commission. In construing a statute, the language used should be given its plain and ordinary meaning and usage. State v. Hardee, 279 S.C. 409, 308 S.E.2d 521 (1983). And the intent of the Legislature is best determined by reliance upon the ordinary and popular significance of the words used in the statute. Bohlen v. Allen, 228 S.C. 135, 89 S.E.2d 99 (1955).

It must be presumed that the General Assembly used the terms "approval of the Commission" advisedly, and intended that the phrase was to mean what it plainly conveys. The word approve ordinarily "implies the exercise of discretion and judgment." Brice v. Robertson House Moving, Wrecking and Salvage, 249 N.C. 74, 105 S.E.2d 439 (1958). Further, the act of approval imports the passing of judgment, the use of discretion and determination thereon. Id. More specifically, it has been said,

> [S]tatutes which vest 'approval' authority normally imply a discretion and judgment to be exercised to sanction or reject the act submitted. The very act of 'approval,'

> unless limited by the context of the statute providing therefor, imports the act of passing judgment in the use of discretion, and a determination as a deduction therefrom, and does not contemplate a purely ministerial act.

Oahe Conservancy Subdistrict v. Kanklow, et al., 308 N.W.2d 559, 561 (S.D. 1981).

With regard to workers' compensation actions, statutes requiring approval of attorneys fees generally vest in the discretion of the Commission the power to fix fees in individual cases. 82 Am.Jur.2d Workmens Compensation, § 644. Brice v. Robertson House Moving, Wrecking and Salvage, supra. Moreover, it is well recognized that the approval of attorneys fees in workers' compensation cases involves a quasi judicial resolution, that should ordinarily be preceded with notice and opportunity to be heard, and the ruling must be based upon evidence in the record. LARSON'S WORKMEN'S COMPENSATION LAW, § 83.13(b).

Thus, the language of § 42-15-90 clearly contemplates that the Commission, in its approval of attorneys fees under the Compensation Act, will function in its quasi judicial capacity. 1/ We emphasize that we do not here imply that the authority inherent in the Commission to delegate certain preliminary proceedings to an administrative employee is uniquely constrained in this area. For example, the Commission in approving attorneys fees may clearly delegate to subordinates the task of taking testimony and receiving observations and making recommendations thereon; nonetheless, the actual decision to approve must be made by the Commission or its members, since these officials constitute the single authority duly designated by the Legislature to exercise this authority. See, Pettiford v. S.C. State Board of Education, 218 S.C. 322, 62 S.E.2d 780 (1950), cert. den. 341 U.S. 920.

1/ This Office has earlier concluded that the approval of settlements relating to compensation benefits is a quasi judicial function vested in the Commission or its members since the approval involves an exercise of discretion. Op.Atty.Gen. (8/2/85).

Your inquiry poses an additional question concerning the relationship between § 42-15-90 and § 42-3-185. 2/ Section 42-3-185 is intended to govern the procedures and policies employed by the Commission pursuant to § 42-15-90 to implement its authority to approve attorneys fees (and other designated fees and costs). The requisites to the Commission implementing any policies or procedures are expressly provided in § 42-3-185, and any policies or procedures must receive prior approval by Concurrent Resolution of the General Assembly and prior approval of the Judiciary Committees of the Senate and the House. While 42-3-185 may well possess constitutional problems with respect to several provisions of the State Constitution (Constitution of S.C. 1895, as amended), 3/ our Court has frequently held that

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2/ Section 42-3-185 provides:

> Any policies or procedures implementing the provisions of § 42-15-90 shall become effective only when such implementation is accomplished by regulations promulgated in accordance with the Administrative Procedures Act, which proposed regulation shall have before promulgation received approval of the Judiciary Committees of the Senate and House of Representatives and also by concurrent Resolution of the General Assembly.

3/ Section 42-3-185 may raise questions as to whether it is a special law enacted in the area where a general law could be made applicable, thus violative of Art. III, § 34(IX); see, State, ex rel Riley v. Martin, ___ S.C. ___, 262 S.E.2d 404 (1983). Moreover, several cases in other jurisdictions have construed similar statutory provisions that subject executive action to legislative approval to be violative of various constitutional provisions relating to the separation of powers (Art. I, § 8.); bicameral requirements (Art. III, § 18); and presentment requirements (Art. IV, § 21); see, e.g., INS v. Chadha, et al., 462 U.S. 919 (1983); Barker v. Manchin, 279 S.E.2d 622 (W.Va. 1981); Baliles v. Mazur, 297 S.E.2d 695 (Va. 1982); Stephen v. Kansas House of Representatives, 687 P.2d. 622 (Kan. 1984). However, as we have consistently stated, this Office must presume the constitutionality of any act of the General Assembly and can only identify potential constitutional concerns. Only a court may declare an act of the Legislature to be unconstitutional.

"[a]n administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its power, nor has it any discretion as to the recognition of or obedience to a statute. The agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon." S.C. Tax Commission v. S.C. Tax Board of Review, 278 S.C. 556, 299 S.E.2d 489, 491-492 (1983) (quoting 2 Am.Jur.2d Administrative Law, § 188, p. 21). (emphasis added).

Accordingly, we believe that, pursuant to the express mandate of § 42-3-185, the Industrial Commission should submit to the General Assembly for its review any policy or procedures related to the approval of defense attorneys fees in compensation cases. 4/ Again however, it must be remembered that this conclusion assumes that § 42-15-90 is applicable to defense attorneys fees as well as fees or claimants' attorneys. As stated earlier, based upon authorities in other jurisdictions and the longstanding interpretation of the Industrial Commission, it is doubtful whether § 42-15-90 may be so construed, and a court may well read the statute as being applicable to claimants' attorneys fees only.

CONCLUSION

In summary, although a contrary interpretation may be argued, it is doubtful that § 42-15-90 may be construed as presently authorizing approval by the Industrial Commission of employers' or carriers' attorneys fees. This conclusion is based upon the cases in other jurisdictions, previous opinions of this Office and almost fifty years of uninterrupted interpretation by the Industrial Commission, which has been acquiesced in by the General Assembly. It is recognized herein that the Legislatures in certain jurisdictions have determined that, for policy reasons, all attorneys fees, including defense fees, should be supervised by the Industrial Commission. Thus, if it is desired to exercise supervision over the attorneys fees of employers or carriers, a statute expressly authorizing such in the same manner as the jurisdictions referenced herein may be deemed desirable.

4/ This Office has previously advised that the Commission's policies, regulations, and rules properly promulgated prior to the effective date of § 42-3-185 (June 5, 1980) remain valid. Op. Atty. Gen., July 28, 1980.

Assuming for the sake of your remaining questions that § 42-15-90 may be construed as authorizing approval by the Commission of employers or carriers attorneys fees, such approval must be made by the exercise of quasi-judicial discretion, rather than a ministerial act. Moreover, again assuming that 42-15-90 authorizes approval of defense fees, 42-3-185 requires the Industrial Commission to submit to the General Assembly for review any policy or procedures related to the approval of defense attorneys fees in compensation cases.

If we can be of further assistance, please let us know. With kindest regards, I remain

Very truly yours,

Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:

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