Circuit Court for Calvert County
Case No. 04-C-16-000075

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2220

September Term, 2016

THOMAS J. CLEARY

v.

MARYLAND WORKERS' COMPENSATION COMMISSION

Wright,
Graeff,
Thieme, Raymond G., Jr.
(Senior judge, specially assigned)

JJ.

Opinion by Thieme, J.

Filed: December 18, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises out of an award of attorney's fees in a workers' compensation case. At all times relevant to this case, the workers' compensation claimant, Thomas J. Cleary, was represented by the same counsel. On November 18, 2015, Mr. Cleary, his employer, and the employer's insurer entered into a settlement agreement pursuant to which all of the parties agreed that Mr. Cleary's counsel would receive a fee of $30,000 for legal services and $240.82 as reimbursement for certain expenses. On January 12, 2016, the Maryland Workers' Compensation Commission ("Commission"), approved the settlement but reduced the attorney's fees by $10,000.

Mr. Cleary's counsel sought judicial review in the Circuit Court for Calvert County.[1] Thereafter, he filed a motion for summary judgment and, subsequently, a supplement to that motion. In an order dated November 15, 2016, the circuit court denied the motion and affirmed the decision of the Commission. This timely appeal followed.

QUESTIONS PRESENTED

The following questions are presented for our consideration:

> I. Did the circuit court err in affirming the Commission's abuse of discretion, when the Commission failed to explain why the work performed by counsel over a ten-year period was not extraordinary enough to approve the full fee that had been negotiated as part of the settlement and agreed to by the injured worker?

[1] The Commission was the only appellee in the circuit court and is the only appellee in this appeal. Neither the employer nor its insurer has an interest in the amount of attorney's fees awarded. *See Mitchell v. Goodyear Serv. Store*, 306 Md. 27, 36 (1986)("the Commission should be permitted to appear as appellee in the circuit court and in the appellate courts to argue relative to the correctness of its decision as to the attorney's fee to be allowed"). The Commission is represented by the Attorney General. *Id.*; *see also* Md. Code (2016 Repl. Vol.), § 9-744(b) of the Labor and Employment Article.

II. Did the circuit court err in affirming the Commission's denial of due process, when the Commission does not have any criteria whatsoever for explaining what constitutes "extraordinary work"?

For the reasons set forth below, we shall affirm.

FACTUAL BACKGROUND

The facts giving rise to this appeal are not in dispute. On October 15, 2005, Mr. Cleary sustained injuries to his lower back arising out of and in the course of his employment. He has not been able to work since 2007. In 2006, he retained counsel to represent him with respect to a workers' compensation claim. On numerous occasions, disputes arose between Mr. Cleary and his employer and its insurer that his counsel handled without the need for litigation. Eventually, in 2015, Mr. Cleary's counsel negotiated a final compromise and settlement that gave Mr. Cleary and his beneficiaries entitlement to a minimum guaranteed benefit of $500,399.20 and a projected maximum benefit of $1,381,277.44, while maintaining Mr. Cleary's right to future reasonable, necessary and causally related medical treatment. Paragraph 15 of the final compromise and settlement agreement, which was agreed upon by all the parties, provided attorney's fees to Mr. Cleary's counsel in the amount of $30,000 to be paid out of the settlement.

In an order dated January 12, 2016, the Commission approved the proposed final compromise and settlement agreement. In accordance with COMAR 14.09.04.03B(2)[2],

[2] COMAR 14.09.04.03B(2) provides that "[t]he Commission may approve an attorney's fee in excess of the limits set forth in this section only if exceptional circumstances are shown." COMAR 14.09.04.03 was previously codified as COMAR 14.09.01.25.

the Commission found that there were "exceptional circumstances" and awarded fees in excess of the limits imposed by the schedule of attorney's fees set forth in COMAR 14.09.04.03B(7)[3], but reduced the amount of attorney's fees from the $30,000 that had been agreed upon to $20,000. The Commission explained:

[3] COMAR 14.09.04.03B(7), which regulates settlement agreements, provides:

> (a) In a case in which an agreement of final compromise and settlement is approved, the Commission may approve an attorney's fee in accordance with this regulation.
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> (b) For a settlement amount that is less than or equal to 14 times the State average weekly wage, the attorney's fee shall be 20 percent of the amount of the settlement.
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> (c) For a settlement amount that is greater than 14 times the State average weekly wage but less than or equal to 35 times the State average weekly wage, the attorney's fee shall be:
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> (i) 20 percent of 14 times the State average weekly wage; plus
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> (ii) 15 percent of the difference between the settlement amount, and 14 times the State average weekly wage.
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> (d) For a settlement amount that is greater than 35 times the State average weekly wage, the attorney's fee shall be:
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> (i) 20 percent of 14 times the State average weekly wage; plus
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> (ii) 15 percent of 21 times the State average weekly wage; plus
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> (iii) 10 percent of the difference between the settlement amount and 35 times the State average weekly wage.
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> (e) The total amount of an attorney's fee in a case in which an agreement of final compromise and settlement is approved may not exceed 20 times the State average weekly wage.
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> (f) In calculating the attorney's fee, an attorney may not include as part of the settlement any amounts paid or payable in the case for medical services and prescription drugs including but not limited to:
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> (i) Any monies allocated to future medical expenses through a formal set-aside allocation;
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> (ii) Any monies apportioned to future medical benefits; and
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> (iii) Any monies already paid or owing for medical services and prescription drugs.

APPROVED WITH THE FOLLOWING MODIFICATIONS:

> [Mr. Cleary's counsel] in the amount of $20,000.00 (plus $240.82/costs advanced)
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> Based upon standard in Mitchell v. Goodyear, 63 Md. App. 426 (1985), aff'd, 306 Md. 27 (1986), which requires the Commission to consider, work performed by counsel (filed claim, filed issues on several occasions, but did not attend any hearings, negotiated settlement, sent out correspondence, telephone contact with opposing counsel and adjuster/insurer), time represented (since 2005), the Commission will award an attorney fee of $20,000 which is $5,500 over amount permitted by Fee Guide. The Commission does not find worker [sic] performed by counsel extraordinary enough to warrant a fee of $15,500 over the Fee Guide.

Mr. Cleary's counsel filed a petition for judicial review arguing that the Commission's reduction of the attorney's fees to $20,000 was arbitrary, capricious, and not in accordance with the work performed and the benefits secured for Mr. Cleary. He argued that he had resolved many disputes between Mr. Cleary, his employer, and the employer's insurer, and eventually negotiated a settlement favorable to Mr. Cleary without the need for any litigation. He also argued that awarding fees of such a low amount would effectively undermine the purpose of the attorney's fee guide set forth in COMAR 14.09.04.03, and generally deprive claimants of the practical ability to obtain counsel. In a supplemental memorandum[4], counsel argued that the limitations on attorney's fees served

> (g) The Commission may not regulate the attorney's fees charged for the administration of the formal set-aside allocation once a case is resolved by an agreement of final compromise and settlement.

[4] In the proceeding on judicial review in the circuit court, Mr. Cleary's counsel filed a motion for summary judgment and, later, a supplement to that motion. As the Commission noted in its Brief, the circuit court's review of a decision by the Commission concerning an attorney's fee is conducted on the record pursuant to Md. Rule 7-207. The

to deprive injured workers of their right to a remedy as guaranteed by Article 19 of the Maryland Declaration of Rights.[5] He asserted that the Commission's use of the fee guide to limit attorney's fees effectively penalized attorneys "who navigate their clients through the complexity of the Commission, to all three stages of the Maryland Court system[,]" and encouraged them to counsel their clients to enter into compromise settlements instead of seeking the remedies they are entitled to by law. According to Mr. Cleary's counsel, "[t]his sort of chilling effect, to convince injured workers to compromise their claims, is not what the attorneys' fee provision was initially designed to cause," and the Commission's use of the fee guide to limit attorney's fees has turned a provision designed to protect workers into one that works against the constitutional rights of workers.

The circuit court rejected these arguments. In a written opinion and order, the circuit court determined that the Commission acted within its discretion in determining that "exceptional circumstances" existed and in awarding fees of $5,500 in excess of what would otherwise be permitted under the fee guide. With respect to the constitutionality of the fee limits, the court determined that Mr. Cleary's counsel had not raised that issue

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Rules contemplate an exchange of memoranda that include a concise statement of the questions presented for review, a statement of facts material to those questions, and argument on each question, including citations of authority and references to the record. For purposes of this appeal, we shall view the motion for summary judgment and the subsequent supplement to that motion as memoranda pursuant to Md. Rule 7-207.

[5] Article 19 of the Maryland Declaration of Rights provides, in relevant part:

> Every man, for any injury done to him in his person … ought to have remedy by the course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.

before the Commission and did not raise it until the hearing on judicial review. As a result, the constitutional issue had been waived. In order to "head off future litigation," the court addressed counsel's "facial" challenge to the fee limits, but determined that he had not been denied due process because the Commission determined that "exceptional circumstances" existed and awarded attorney's fees in excess of the limits set by COMAR 14.09.04.03B.

STANDARD OF REVIEW

In an appeal from judicial review of an agency action, we review the agency's decision directly, not the decision of the circuit court. *Hollingsworth v. Severstal Sparrows Point, LLC*, 448 Md. 648, 654 (2016); *Comptroller v. Science Applications Int'l Corp.*, 405 Md. 185, 192 (2008). Although generally "the decision of the Commission is presumed to be prima facie correct, this presumption does not extend to questions of law, which we review independently." *Hollingsworth*, 448 Md. at 654-55 (internal quotations and citations omitted). We respect the expertise of the agency and accord deference to the Commission's interpretation of the statute it administers. *Hranicka v. Chesapeake Surgical, Ltd.*, 443 Md. 289, 297 (2015). We may reverse a Commission's decision only if we find "that the Commission's action was based on an erroneous construction of the facts or law." *Baltimore County v. Thiergartner*, 442 Md. 518, 529 (2015)(citations omitted).

In workers' compensation cases, attorneys "may not charge or collect a fee for . . . legal services in connection with a claim" unless the fee is approved by the Commission. Md. Code (2016 Repl. Vol.), § 9-731(a)(1)(i) of the Labor and Employment Article ("LE"). Because the Commission is vested with the authority to set counsel fees, in reviewing the Commission's decision regarding an award of attorney's fees, it is not our province "to

constrain the legitimate exercise of the [C]ommission's discretion," so long as the exercise of that discretion is neither arbitrary nor capricious. *Brunson v. Univ. of Maryland Med. Sys. Corp*., 221 Md. App. 583, 591 (2015), *cert. denied*, 443 Md. 735 (2015). As long as the Commission's award of attorney's fees is not arbitrary or capricious, the only issue before us is whether the Commission abused its discretion. *Mayor & City Council of Baltimore v. Bowen*, 54 Md. App. 375, 387 (1983). An abuse of discretion occurs when the Commission adopts a view that "no reasonable person would take" or "acts without reference to any guiding rules or principles." *Bord v. Baltimore County*, 220 Md. App. 529, 566 (2014)(quoting *In re Adoption/Guardianship No. 3598*, 347 Md. 295, 312 (1997)). The Commission also abuses its discretion when it issues a ruling that is "clearly against the logic and effect of facts and inferences" before it, or when the ruling is violative of fact and logic." *Id.* Under this standard, we may not reverse the Commission's decision unless it was "well removed from any center mark imagined by the reviewing court." *Santo v. Santo*, 448 Md. 620, 626 (2016)(internal quotations and citations omitted).

ATTORNEY'S FEES IN WORKERS' COMPENSATION CASES

In *Brunson*, Judge Graeff, writing for this Court, explained the workers' compensation statutory scheme with regard to attorney's fees which, for ease of reference, we repeat here:

> In *Engel & Engel, P.A. v. Ingerman*, 353 Md. 43, 724 A.2d 645 (1999), the Court of Appeals explained that the worker's compensation statutory scheme was
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> > "designed to protect workers and their families from hardships inflicted by work-related injuries. More particularly, it is designed to provide workers with compensation for loss of

> earning capacity resulting from accidental injury, disease or death arising out of and in the course of employment, to provide vocational rehabilitation, and to provide adequate medical services."

Id. at 51, 724 A.2d 645 (quoting *Queen v. Agger*, 287 Md. 342, 343, 412 A.2d 733 (1980)). In light of that goal, the legislature sought to regulate attorney's fees, noting that the party seeking compensation – the claimant – is responsible for his or her own attorney's fees. *Id.* Because worker's compensation law is designed to provide financial assistance to the injured worker in lieu of lost wages, "the legislature recognized that the purpose of the law would be subverted if a worker's recovery," which did not include "'any padding to take care of legal and other expenses incurred in obtaining the award,'" were dissipated as a result of excessive fees incurred in recovering the compensation. *Id.* at 51-52, 724 A.2d 645 (quoting 3 Arthur Larson, LARSON'S WORKMEN'S COMPENSATION LAW § 3.11, at 15-1271 (1989)). Consequently, the legislature authorized the Commission to adopt appropriate safeguards, thereby giving the Commission the power to regulate "'when and how much remuneration an attorney who represents a claimant . . . is to receive from the employee for legal services rendered to him.'" *Id.* at 52, 724 A.2d 645 (quoting *Chanticleer Skyline Rm. v. Greer*, 271 Md. 693, 699-700, 319 A.2d 802 (1974)).

The Court also recognized that, although "claimants must be protected from exorbitant legal fees, there also exists a need to ensure that workers are able to obtain competent counsel to pursue their claims." *Id.* at 53, 724 A.2d 624. Therefore, although fees "should not be so large as to be excessive . . . they also should not be so low as to make representing claimants undesirable to the legal practitioner." *Id.* To balance the need to protect claimants from excessive legal fees against the need of workers to retain competent counsel, the legislature delegated to the Commission, an administrative agency with special expertise in worker's compensation law, the authority over attorney's fees in worker's compensation cases, including the power to promulgate rules governing such fees. *Id.* at 53-54, 724 A.2d 645.

Brunson, 221 Md. App. at 591-93.

Pursuant to LE § 9-731, attorneys may not charge or collect a fee for legal services in connection with a workers' compensation claim. LE § 9-731(a)(1). Rather, "[w]hen the Commission approves a fee, the fee is a lien on the compensation award[,]" and the fee is

paid only in the manner set by the Commission. LE §9-731(a)(2) and (3). The award of attorney's fees is not an "add-on" or "double" benefit that the employer or insurer must pay injured workers in addition to the compensation award itself. *Feissner v. Prince George's County*, 282 Md. 413, 418 (1978). "Instead, a single award of compensation is made, that which is for the benefit of the employee, and the statute then merely gives an attorney a lien upon this compensation award to the extent of his fee as approved by the Commission." *Chanticleer Skyline Room, Inc. v. Greer*, 271 Md. 693, 700 (1974).

A schedule of fees, which establishes the maximum amount of attorney's fees based on the extent of disability and the amount of the award, is set forth in COMAR 14.09.04.03. As we have long recognized, the fee schedule "does not represent an *entitlement* to a specific amount of attorney's fees, but merely establishes the *maximum* fee that will be permitted." *Workers' Comp. Comm'n v. May*, 88 Md. App. 408, 417 (1991). An attorney seeking a fee in excess of the maximum permitted by the fee schedule must establish that "exceptional circumstances" exist and file a written petition with the Commission that provides the following information:

> (a) A clear and concise description of the legal services rendered to the claimant;
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> (b) The amount of attorney's fees requested to be approved;
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> (c) A detailed statement of the reasons for a fee in excess of the maximum amount set forth in Regulation .03 of this chapter;
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> (d) A detailed statement establishing the exceptional circumstances that warrant an excess fee;

> (e) The claimant's signed acknowledgement of the fact that the attorney is requesting approval of an attorney's fee in excess of the schedule, in the amount specified and for the services described;
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> (f) The amount of any medical evaluation fee requested to be approved; and
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> (g) A certificate of service indicating that a copy of the petition has been served on the claimant, as well as the other parties to the case.

COMAR 14.09.04.02B(2).

DISCUSSION

I.

Counsel for Mr. Cleary argues that the Commission abused its discretion in failing to explain why the work he performed over a ten year period was not extraordinary enough to warrant the full fee that had been negotiated as part of the settlement and agreed to by Mr. Cleary, his employer, and the employer's insurer. We disagree.

It is well established that we "give special deference to an agency's interpretation of its own regulations because the agency is best able to discern its intent in promulgating those regulations." *Brunson*, 221 Md. App. at 591. In the case at hand, the Commission considered the work performed by counsel, specifically that he had represented Mr. Cleary since 2005, filed a claim on his behalf, filed issues on several occasions, negotiated settlement, sent out correspondence, and had telephone contact with opposing counsel and the "adjuster/insurer." In addition, the Commission noted that counsel had not attended any hearings. The Commission recognized that counsel provided exceptional representation to Mr. Cleary and found that "exceptional circumstances" existed that warranted a fee of $5,500 more than that permitted by the attorney's fee schedule. There

is nothing in the record before us to show that the Commission abused its discretion in awarding attorney's fees in that amount.

II.

Counsel for Mr. Cleary next contends that the limitations on attorney's fees serves to deprive injured workers of their right to a remedy guaranteed by Article 19 of the Maryland Declaration of Rights. This issue was not preserved properly for our consideration. Counsel for Mr. Cleary never raised a constitutional challenge to the fee schedule before the Commission and, in fact, did not raise it until he filed his "Supplemental Brief to the Motion for Summary Judgment" in the circuit court. It is well established that "'questions, including Constitutional issues that could have been but were not presented to the administrative agency may not ordinarily be raised for the first time in an action for judicial review.'" *Allmond v. Dep't of Health & Mental Hygiene*, 448 Md. 592, 606 (2016)(quoting *Board of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 208 (1999)). As a result, any constitutional challenge to the attorney fee schedule was waived.

Even if a constitutional exception would permit a judicial determination without administrative exhaustion in this case, Mr. Cleary's counsel would fare no better. *See generally Priester v. Baltimore County,* 232 Md. App. 178, 210-13 (2017)(discussing the constitutional exception). The challenge raised by counsel was that the fee schedule deprived "injured workers of their right under Article 19 of the Maryland Declaration of Rights." The Court of Appeals has held that the "Law of the land" in Article 19 is the same due process of law that is required by the Fourteenth Amendment, which provides, in

relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" *Attorney Gen. v. Johnson*, 282 Md. 274, 298 (1978)(citing *In re Easton*, 214 Md. 176, 187 (1957)), *disapproved on other grounds by Newell v. Richards*, 323 Md. 717 (1991). *See also* U.S. Const. amend. XIV § 1. It is unclear from the proceedings below whether counsel was raising a facial or "as-applied" constitutional challenge to COMAR 14.09.04.03B. A facial challenge is "[a] claim that a statute on its face . . . always operates unconstitutionally." *Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 181 (2016). To be successful in a facial challenge, it must be established that there is no set of circumstances under which the regulation would be constitutional. *Id.* An "as-applied" challenge is "a claim that a statue is unconstitutional on the facts of a particular case or in its application to a particular party." *Id.* at 181.

A. Facial Challenge

Assuming that a facial challenge to the constitutionality of COMAR 14.09.04.03B was raised below, it must fail because the regulation does not always operate unconstitutionally. In fact, at the October 28, 2016 hearing on the petition for judicial review, Mr. Cleary's counsel conceded that the "fee guide works great, it really does work great for anyone who is not profoundly injured. For someone who has a Workers' Compensation claim that's worth $25,000, $50,000, $75,000, $100,000, $135,000. You are not hearing me complain about the fees in those cases." (E. 62-63) Moreover, a facial constitutional challenge will not stand if it ultimately requires a factual exploration. *Priester*, 232 Md. App. at 211. Here, a factual exploration would be required with respect to the amount of fees sought and the exceptional circumstances that would warrant an

award of fees above the maximum allowed by the regulation. Accordingly, there was no basis for counsel's contention that COMAR 14.09.04.03B is facially unconstitutional.

B. As-Applied Challenge

Assuming that an as-applied constitutional challenge to the regulation was presented properly, it would also fail. Mr. Cleary's counsel argues that the Commission's reduction of his fees to only $20,000 "sends a message to … all attorneys representing catastrophically injured workers in Maryland: do not attempt to achieve the full rights guaranteed to our clients by the Maryland Declaration of Rights, but instead seek to provide only the quantity and quality of service that the Commission will allow even if that does not grant the injured worker their full rights." He further contends that "the Commission's use of the Maryland Fee Guide to limit fees in this manner thus effectively penalizes attorneys who navigate their clients through the complexity of the Commission, to all three stages of the Maryland Court system. This encourages attorneys for injured workers, . . . to encourage their clients to enter into compromise settlements instead of seeking the remedy that they are entitled to by the law of the land." According to counsel, this chilling effect was not intended when the attorney's fee guide was adopted.

In support of his argument, counsel directs our attention to two out-of-state cases, *Injured Workers Ass'n of Utah v. Utah*, 374 P.3d 14 (Utah 2016), and *Castellanos v. Next Door Co.*, 192 So.3d 431 (Fla. 2016), both of which are inapposite. In *Injured Workers Ass'n of Utah*, the constitutional challenge was based on the separation of powers, not due process. The *Castellanos* case involved a Florida statue that required attorney's fees in workers' compensation cases to be paid by the employer or insurer, which is not the case

in Maryland. *See* LE § 9-731 (providing that attorney's fees come out of award of compensation).

The record is simply devoid of any evidence that the attorney's fee guide is so "cheeseparing" that it denies claimants the opportunity to obtain competent counsel. As we have stated before, the Commission "is much better able to assess, on a continuing basis, whether its fee guidelines offer sufficient inducements to attract the requisite number of competent attorneys." *Rogers v. Welsh*, 113 Md. App. 142, 155 (1996). Indeed, a determination of whether the fee cap should be increased is not a judicial function, but one for the Commission or the Legislature to consider. *Id*. There is nothing in the record before us to show that the attorney's fee schedule deprived Mr. Cleary, or claimants generally, of the ability to obtain competent counsel. Thus, even assuming that an as-applied constitutional challenge to the attorney's fee schedule was properly presented for our consideration, that claim would fail.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.