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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

T. Scott Beck, Commissioner and Chairman for the Panel
R. Michael Campbell, Commissioner
Gene McCaskill, Commissioner

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Appellate Case No. 2022-000581
Case No.: W.C.C. File No.: 1611416

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John A. Hinson, Employee, Respondent,

v.

BS Telecommunications, Employer, and Old Republic Insurance Co., Carrier, Defendants, of which BS Telecommunications is the Appellant.

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# REPLY BRIEF OF APPELLANT

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## ARGUMENT

**I. The clear and unambiguous language of the Clincher does not specifically include a provision which would entitle the Claimant to reimbursement for out-of-pocket medical expenses; therefore, the Claimant is not entitled to seek additional payments and the only entity entitled to payment for medical expenses under the Clincher is an authorized medical provider who has not received payment for medical treatment.**

"Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." Miles v. Miles, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (internal quotation marks and citations omitted). Here, the Clincher relieved the Employer and Carrier from all responsibility for benefits in the future and limited payments under the Clincher to those payable to unpaid authorized medical providers. (R. p. 103).

As provided in Reg. 67-801(E), the "(clincher) relieves the employer and its representative from any further responsibility for payment of compensation or medical expenses, unless [the clincher] specifically provides otherwise." Accordingly, following the proper execution of the clincher, "the claimant does not have the right to ask for additional payments in the future[,] unless otherwise specifically provided in the document." S.C Code Reg. 67-801(E). Here, as quoted to perhaps ad nauseum in these proceedings, the provision at issue provides as follows: "Employer and Carrier will pay any previously authorized medical expenses to medical providers that were incurred prior to February 13, 2020, but have inadvertently not been paid as of the date of this agreement . . . . " (R. p. 103, ¶ 2 (emphasis added); R. 209, ¶ 2 (emphasis added)).

Notably, the Parties did not include a provision specifically providing for the Respondent's entitlement to be reimbursed for payments made to medical providers. He waived that right as part of the clincher by not specifically including it. He now has no right to seek reimbursement.

The Appellant's sole responsibility under the clincher was to make payments to authorized medical providers which had not been paid due to inadvertence.

The Order of the Single Commissioner fails to address how the language of this provision, clearly limiting payments to the medical provider for unpaid medical expenses, can be manipulated into reading that the Respondent is entitled to a reimbursement. (See generally, R. p. 22; Order of Hon. Avery Wilkerson, p. 6 (where the Commissioner's findings jump from citing the provision at issue to finding the Respondent is entitled to reimbursement)). While the Single Commissioner cites prior consent orders, (R. p. 22, ¶ 7), the language of the settlement agreement is binding. It would be paradoxical for the Consent Orders to apply while also maintaining the Clincher is binding.

The Respondent posits that by "paying a portion of the bill owed to Dr. Mullen's office, he did not transform these authorized medical expenses owed by Appellants into something else". (Resp. App. Brief, p. 9; See, also, R. p. 24, ¶ 17). This is incorrect. By paying the bills, the Respondent transformed an unpaid bill into a paid bill. Thus, such funds would not be considered funds payable to authorized medical providers.

The Respondent suggests that the Appellant's reasoning is "difficult to follow". (Resp. App. Brief, p. 9). With regards to Appellant's reasoning, it looks to the language of the clincher. (R. p. 209, ¶ 2). In analyzing said language for the provision at issue, the subject of the provision is the "Employer and Carrier." The verb is "pay". The direct object of the verb "pay" is unpaid medical expenses. The object of the preposition "to", addressing whom would be paid such payment, are "medical providers" – not the Claimant. The Parties intended for all unpaid authorized medical providers to be paid to the extent those providers had not already received full payment. This is clearly expressed in the language chosen for the Clincher.

## II. The Parol Evidence Rule is a Rule of Substantive Law and, as such, it is applicable to proceedings before the Workers' Compensation Commission.

The Respondent argues that the Parol Evidence Rule is not applicable in proceedings before the Workers' Compensation Commission as "the South Carolina Rules of Evidence do not apply in proceedings before the [Commission]." (Resp. App. Brief, p. 10) (citing Hamilton v. Bob Bennett Ford, 339 S.C. 68, 528 S.E.2d 667 (2000)(citing to S.C. Code Ann. Section 1-23-330(1))). Undoubtedly, the Act has effectively disposed of many of the Rules of Evidence in hearings before the Workers' Compensation Commission. While this is admittedly frustrating in certain respects, the parties are not here to argue the applicability of the Rules of Evidence at a Workers' Compensation hearing. Indeed, "[t]he parol evidence rule is a rule of substantive law, not a rule of evidence." In re Est. of Holden, 343 S.C. 267, 276, 539 S.E.2d 703, 708 (2000).

Thus, the substantive law applicable to this case is "[w]here a written instrument is unambiguous, parol evidence is inadmissible to ascertain the true intent and meaning of the parties." In re Est. of Holden, 343 S.C. 267, 275–76, 539 S.E.2d 703, 708 (2000). "Where the terms of a contract are unambiguous, clear and explicit, parol evidence cannot be admitted to contradict or add to the terms of the contract absent fraud, accident, or mistake in its procurement." Levy v. Outdoor Resorts of S.C., Inc., 304 S.C. 427, 430, 405 S.E.2d 387, 389 (1991). Accordingly, the Full Panel and the Single Commissioner should have limited their review of the Clincher Agreement to the four corners of the agreement.

While Respondent surmises that the phrase "have inadvertently not been paid" as the language in dispute. (Resp. App. Brief, p. 11). This, in effect, detracts from the remainder of the sentence. As addressed above, the sentence in question addresses who is to make payment, what is to be paid, and whom is to be paid. To echo the analysis above, the Employer is to make payments "to authorized medical providers" for expenses which had not been paid due to

inadvertence. There is no language for reimbursement. The language, taken as a whole, is clear and unambiguous.

Furthermore, the e-mails submitted by the Respondent, which violate the parol evidence rule, in fact support the plain reading. During negotiations of the final language for the Clincher, Appellant's counsel informed Respondent's Counsel that they were working on "pay[ing] the outstanding balance at Dr. Mullen's office." (R. p. 193). Moreover, the e-mail explicitly highlights that Appellant's Counsel updated language for the Clincher regarding payments for medical treatment prior to February 13, 2020. Id. Specifically, the Clincher language included "to medical providers" and a separate section was added for mileage reimbursement to make things clear. Id. It is clear that the payments were only to be to medical providers for outstanding payments.

**III. The remedies provided by S.C. Code Section 42-3-175 explicitly requires an Order of the Commission and, because the Clincher, here, is what it purports to be in the caption, a "Final Agreement and Release", the Respondent is not entitled to recover under Section 42-3-175.**

The Claimant attempts to utilize S.C. Code Section 42-3-175 for attorney's fees and costs as well as sanctions. Regarding statutory interpretation, "if the words are unambiguous, we must apply their literal meaning." CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal citations and quotation marks omitted). "[T]he statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect . . . [N]o word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . ." Id. (internal citations and quotation marks omitted).

In pertinent part, the Act provides that:

> If a claimant brings an action before the commission to enforce an order authorizing medical treatment or payment of benefits and the commission determines that an insurer, a self-insured employer, a

> self-insured fund, or an adjuster, without good cause, failed to authorize medical treatment and/or pay benefits <u>when ordered to do so by the commission</u>, the insurer, the self-insured employer, the self-insured fund, or the adjuster must pay the claimant's attorneys' fees and costs of enforcing the order. The commission may impose sanctions for wilful disobedience of an order, including, but not limited to, a fine of up to five hundred dollars for each day of the violation.

S.C. Code Ann. § 42-3-175 (emphasis added). Here, the Employer was not ordered to do anything by the Commission under the Clincher.

Nevertheless, the Respondent cites a number of cases as supporting precedent for considering the Clincher, here, an Order of the Commission. (Resp. App. Brief, p. 11-14). Importantly, these cases do not contain the language that "a filed clincher, signed by two represented parties, is an Order of the Commission". The cases cited primarily focus on S.C. Code Ann. Section 42-17-70, which provides that "a certified copy of a memorandum of agreement approved by the commission, an order or decision of the commission, an award of the commission unappealed from or an award of the commission affirmed upon appeal" can be filed with the Clerk of Court for the respective Circuit Court and rendered as a judgment.

As a preliminary matter, this statutory provision, Section 42-17-70, is simply not applicable here. However, it is important to note, that Section 42-17-70, unlike Section 42-3-175, details several independent ways a claim can be resolved: a memorandum of agreement approved by the commission, an order or decision of the commission, an award of the commission unappealed from and an award of the commission affirmed upon appeal. Acknowledging the distinct nature of each of these documents, the Legislature elected to state each of them. In contrast, the legislature only named Orders for purposes of pursuing a remedy under Section 42-3-175. It is clear that the legislature intended to limit the applicability of Section 42-3-175 to orders of the Commission.

While this is definitive on this issue, the Clincher does not fall under the umbrella of the documents named in Section 42-17-70 – i.e., it is not a memorandum of agreement approved by the commission. S.C. Code Ann. Section 42-9-390 provides that:

> Nothing contained in this chapter may be construed so as to prevent settlements made by and between an employee and employer as long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this title. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney. If the employee is not represented by an attorney, a copy of the settlement agreement must be filed by the employer with the commission and approved by one member of the commission.

S.C. Code Ann. § 42-9-390. Of note, the approval requirement is only applicable to instances where the Claimant is not represented by counsel. S.C. Code Ann. Section 42-9-390 (1976), previously read, in pertinent part, as follows:

> Nothing contained in this chapter shall be construed so as to prevent settlements made by and between an employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Title. A copy of any such settlement shall be filed by the employer with and approved by the Commission.

In Mackey v. Kerr-McGee Chem. Co., 280 S.C. 265, 268, 312 S.E.2d 565, 567 (Ct. App. 1984), this Court, interpreting the prior language of Section 42-9-390, highlighted that the statute "specifically require[d] approval by the Commission of such settlements."

Following the 2007 reform, this Court recently addressed the amended language of Section 42-9-390 in Ex parte Horne v. Pierside Boatworks, 5929, Appellate Case 2018-001294 (Ct. App, Aug 3, 2022):

> We agree with Appellants and find that because the amended version of section 42-9-390 no longer requires Commission approval of settlement agreements if both parties are represented by

> counsel, the Agreement in this case only had to be filed with the Commission by Respondents, which was simply a perfunctory act.

This Court specifically acknowledged and highlighted that Commission approval is no longer required for settlement agreements in Workers' Compensation Commission proceedings. The act of filing the Agreement is "perfunctory." Cf. Order of Hon. Avery Wilkerson, p. 11 ("Clincher was duly filed and approved by the South Carolina Worker's Compensation Commission on March 23, 2021, and thereafter became binding.") (R. p. 11, ¶ 5).

Respondent attempts to limit the scope of their remedies by inferring that under the Appellant's interpretation of Section 42-3-175, parties would be forced to seek redress from the Circuit Court in matters involving clinchers. This is incorrect. Their remedy would be to file a Motion to Compel compliance with the clincher. Thereafter, if grounds were sufficient, they could obtain an Order from the Commission compelling compliance. If the Employer failed to abide by the Order, the Claimant could then utilize Section 42-3-175. If the parties felt that it was necessary to include attorney's fees and costs for a pre-vailing party seeking to enforce a Clincher, the parties, as with any settlement agreement or contract, could have included such language.

**IV. Section 42-3-175 requires an Order and no binding Order exists here because a Clincher is now the binding authority for the claim; moreover, the Record does not support the application of Section 42-3-175 as there is not sufficient evidence to support a finding that Appellant acted without good cause or willful disobedience.**

Similar to Section 42-3-175, "[a] party seeking a contempt finding for violation of a court order must show the order's existence and facts establishing the other party did not comply with the order." Browder v. Browder, 382 S.C. 512, 521–22, 675 S.E.2d 820, 825 (Ct. App. 2009). Here, as detailed above, the Respondent has failed to establish the existence of an actively binding order. The Clincher is controlling on the final resolution of this claim. In the event an Order is proven to exist, Section 42-9-390 requires a lack of "good cause" for the Employer's failure to

award attorney's fees and costs as well as a finding of "willful disobedience" to assess sanctions. The Respondent failed to establish the existence of an Order; moreover, the Appellant has only acted with good cause and there is no evidence to establish that Appellant acted with willful disobedience.

Here, there is no evidence to suggest that the Appellant acted without good cause. The communications between Respondent's Counsel and Appellant's Counsel were sparce. The initial contact requesting payment following the Clincher was on July 8, 2020. (R. p. 197). Again, this requested funds in excess of what was contemplated under the Clincher. The next e-mail correspondence from Respondent's Counsel occurred on April 15, 2021, after Appellant paid the $200 outstanding balance with Dr. Mullen. (R. p. 199).

The initial correspondence from Respondent's Counsel reflects an incorrect interpretation of the Clincher, which provides only that medical providers be paid for unpaid authorized expenses. Thereafter, Claimant's Counsel was silent on the issue until nearly a year later. Good cause existed for the delay. While the Respondent has repeatedly harped on the allegation that he was "forced" to continue paying for his medical treatment with Dr. Mullen. He never addresses why authorization was never requested by Dr. Mullen's office for the treatment. Likewise, the Respondent never felt it necessary to file a motion to compel payment under the Consent Order prior to the clincher. The fact of the matter is the Respondent knew he, or someone on his behalf, paid for medical treatment with Dr. Mullen. [1] In negotiating the terms of the mutually agreed upon settlement, the Respondent did not include language for reimbursement. As such, Respondent's Counsel attempting to seek payments in excess of the agreed upon language of the binding clincher and the lack of correspondence, each serve as good cause.

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[1] No witness testimony was taken before the Single Commissioner. Thus, there is no evidence in Record that the Claimant actually paid for these expenses.

Similarly, the Appellant did not act with willful disobedience. "Willful disobedience requires an act to be done voluntarily and intentionally with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." Browder v. Browder, 382 S.C. 512, 521, 675 S.E.2d 820, 825 (Ct. App. 2009) (addressing the term in the context of contempt hearings).

There is nothing in the record that shows that the Appellant attempted to act with a specific intent to fail to do something the law requires nor was there a finding to this effect. Here, the Respondent only submitted an email requesting payment in excess of what was required under the Clincher. (R. p. 197). The lack of evidence submitted on this point is further illustrated in the findings of fact by the Single Commissioner, whose Order, in pertinent part, found "the [Appellant's] excessive delay in paying only after being served with a Motion to Compel represents 'willful disobedience.'" (Order of Hon. Avery Wilkerson, p. 12; R. p. 12, ¶ 9). The mere filing of a Motion to Compel is not evidence of "willful disobedience." The e-mail and the Motion do not serve as evidence that the Appellant acted with a specific intent to fail to do something the law requires to be done.

**V. The Order of Sanctions in this matter is a violation of Due Process.**

The Eighth Amendment Excessive Fines Clause is an incorporated protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Timbs v. Indiana, 139 S. Ct. 682, 687 (2019). "The Court will only find a violation of the Excessive Fines Clause if the penalty is grossly disproportional to the gravity of a defendant's offense." State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc., 414 S.C. 33, 88, 777 S.E.2d 176, 205 (2015) (internal quotations and citation marks omitted).

The Appellate Panel imposed sanctions on Appellant of $30.00 per day for 386 days, which amounts to $11,580.00, for an inadvertently unpaid $200.00 medical bill. (The Appellate Order p. 8, ¶ 27). The imposition of sanctions at the rate of $30.00 per day, for 386 days, which amounted to $11,580.00 when the amount in question is $200.00 is unconscionable. Furthermore, the Appellate Panel failed to substantiate their sanction.

## CONCLUSION

For all of the foregoing reasons, the Appellate Panel's decision should be reversed in its entirety.

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