THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison R. Lee
Circuit Court Judge

Appellate Case No. 2023-001663
Circuit Court Case No. 2014-CP-40-02496

South Carolina Workers' Compensation Commission, ... Respondent,

v.

WestPoint Home, LLC..... Appellant.

APPELLANT'S BRIEF

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wbd-us.com
1221 Main Street, Suite 1600
Columbia, SC 29201
(803) 454-6504

LAW OFFICES OF HERBERT BEIGEL

Herbert Beigel
Pro Hac Vice
hbeigel@me.com
5641 N. Chieftan Trail
Tucson, AZ 85750
(520) 825-1995

Attorneys for Appellant WestPoint Home, LLC

July 17, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

STATEMENT OF ISSUES

This appeal presents three issues for the Court's review:

1. WestPoint Stevens was a company that declared bankruptcy and has not been in business since 2005. When buying WestPoint Stevens' assets out of bankruptcy, WestPoint Home deposited $1.8 million in a bank account to collateralize a letter of credit that provided security for workers' compensation claims made by former WestPoint Stevens employees. Despite there never being $1.8 million in workers' compensation claims pending, the Workers' Compensation Commission withdrew that entire deposit, secreted into an account with the State Treasurer, and has wrongfully been collecting interest on WestPoint Home's deposit since 2005. The circuit court held that the Commission was "fully justified" in sweeping all of WestPoint Home's deposit out of its private bank account and keeping the earnings on that deposit. Was that ruling in error?

2. Because WestPoint Stevens went out business in 2005, the statute of repose for workers' compensation claims by its former employees closed in 2007. The Commission's Executive Director testified to this point at trial, and it is how every court that has examined the issue has ruled. Notwithstanding the proof at trial and the authority construing the statute of repose, the circuit court held that the Commission could continue to retain the unused portion of WestPoint Home's deposit—nearly $1.2 million—indefinitely. Was that ruling in error?

3. Is WestPoint Home entitled to collect prejudgment interest on the amounts owed to it by the Commission?

STATEMENT OF THE CASE

This case involves a dispute about $1.8 million that WestPoint Home deposited over 18 years ago when purchasing assets of a company in bankruptcy that was self-insured for workers' compensation claims made by its South Carolina employees. That deposit was ordered by a Bankruptcy Court in New York in 2005 as security for potential claims by the bankrupt company's now-former employees, but it turned out to be far in excess of the security actually needed.

Despite not needing the entirety of that deposit, the Workers' Compensation Commission wrongfully seized all of WestPoint Home's deposit in 2005; it has wrongfully collected interest on that deposit ever since; and it now refuses to return the unused, and never-to-be-used, portion. The factual background necessary to understand how this case came to be is detailed below, along with this case's procedural history.

I. Factual Background

A. WestPoint Stevens operated textile plants in South Carolina, but it declared bankruptcy in 2003 and went out of business in 2005.

WestPoint Stevens was a textile manufacturer with facilities in South Carolina. It was initially known as WestPoint Pepperell. On May 6, 1988, WestPoint Pepperell acquired four plants from J.P. Stevens, the merger of which became WestPoint Stevens. (R. p. 211; Letter from WestPoint Pepperell to Commission, at 2 (Aug. 28, 1989).)

In 2003, WestPoint Stevens filed for Chapter 11 bankruptcy, Case No. 03-13532 (RDD) (Bankr. S.D.N.Y.). Although the typical goal of a Chapter 11 case is for the debtor to reorganize and confirm a plan of reorganization, when the debtor is unable to confirm a plan, it may have to liquidate its assets instead of reorganizing. That is what happened to WestPoint Stevens, as it was unable to propose a plan of reorganization that would obtain the requisite votes to confirm from its sophisticated, well-informed creditors. *See generally In re WestPoint Stevens, Inc.*, 600 F.3d

231, 236–37 (2d Cir. 2010) (describing the history of WestPoint Stevens' bankruptcy proceedings).

The entity that is now known as WestPoint Home was the successful bidder during the bankruptcy sale. (*See* R. pp. 868–873 (tracing the corporate history of WestPoint Home).) The parties entered into an Asset Purchase Agreement that outlined in specific detail that WestPoint Home was purchasing only WestPoint Stevens' assets out of the bankruptcy process. (R. p. 260; Asset Purchase Agreement with Attachments.)

WestPoint Stevens subsequently went out of business on August 8, 2005. (R. p. 98; Trial Tr. 20:2–3.)

B. At the time of the bankruptcy, WestPoint Stevens was self-insured for purposes of workers' compensation claims.

At time of the 1988 WestPoint Pepperell–J.P. Stevens merger, the employees at J.P. Stevens' South Carolina plants were insured for workers' compensation claims through private insurance, and injuries to J.P. Stevens employees that occurred prior to that acquisition continued to be covered by insurance. (R. p. 212; Commission Internal Database Screenshot.) WestPoint Pepperell, on the other hand, was self-insured for purposes of workers' compensation claims. As noted above, the combined company eventually became known as WestPoint Stevens, and WestPoint Stevens was a self-insured employer for workers' compensation purposes. (R. p. 210; Letter from WestPoint Pepperell to Commission, at 1 (Aug. 28, 1989).)

The South Carolina Workers' Compensation Commission requires companies that self-insure for workers' compensation claims to provide sufficient surety for potential claims. The Commission does not have any actuaries on staff. (R. p. 119; Trial Tr. 41:15–17 (testimony of Mr. Cannon).) Instead, the agency uses the following actuarial formula for calculating the surety requirement for self-insured employers:

- The average annual claims paid for the last three years,
- Multiplied by a factor of 1.5, and then
- Rounded to the next highest $50,000

(R. p. 216; Letter from Commission to WestPoint Stevens (July 14, 1997); R. pp. 119–120; Trial Tr. 41:21–42:13.)

The agency's actuarial formula for calculating the surety amount is the same for bankrupt and non-bankrupt companies. (R. p. 156; Trial Tr. 78:7–19.) The formula is specifically designed to set surety "at a level sufficient to pay all claims in the event of an insolvency." (R. p. 216; Letter from Commission to WestPoint Stevens, at 1 (July 14, 1997); R. p. 121; Trial Tr. 43:1–10.)

In 1997, the Commission's actuarial formula yielded a surety requirement of $1.4 million for WestPoint Stevens. (R. p. 218; Letter from Commission to WestPoint Stevens (July 14, 1997).) WestPoint Stevens and the Commission entered into a "Memorandum of Understanding" that allowed WestPoint Stevens to post a letter of credit in that amount with NationsBank to secure payment for potential workers' compensation claims. (R. p. 223; Letter of Credit; R. p. 225; Memorandum of Understanding.)

In 2003, after WestPoint Stevens filed for bankruptcy protection, the Commission sent a letter to WestPoint Stevens indicating that its surety for workers' compensation claims would increase to $1.8 million. (R. p. 226; Letter from Commission to WestPoint Stevens (July 15, 2003).) In response, WestPoint Stevens amended its existing letter of credit to increase the amount to $1.8. million. (R. p. 227; Amendment to Letter of Credit (Aug. 1, 2003).)

C. WestPoint Home deposited $1.8 million to collateralize a letter of credit, but the Commission improperly took the entire deposit.

As noted above, WestPoint Home was the successful bidder during the bankruptcy sale, and it entered into a court-supervised and court-approved Asset Purchase Agreement to acquire

certain of WestPoint Stevens' assets. As a condition of its purchase of assets out of bankruptcy, WestPoint Home agreed to deposit up to $35 million to collateralize WestPoint Stevens' various existing letters of credit. (R. p. 287; Asset Purchase Agreement § 3.1(a).) Included among those letters of credit was the $1.8 million letter of credit WestPoint Stevens had with the Commission to cover potential workers' compensation claims in South Carolina. (R. p. 577; Cash Collateral Control Letter Agreement, at WPH0009.)

The Asset Purchase Agreement provided that WestPoint Home was depositing its cash with the understanding that it retained the "right to receive back any portion" of that money that was not used. (R. p. 287; Asset Purchase Agreement § 3.1(a).)

On August 17, 2005, the Commission withdrew the full amount of WestPoint Home's $1.8 million deposit. (R. p. 67; Commission Reply to Counterclaim ¶ 32.) However, unknown to WestPoint Home, there were not $1.8 million in claims pending from former WestPoint Stevens employees at the time the Commission withdrew the entire deposit. (R. pp. 101–102; Trial Tr. 23:23–24:8.)

D. The Commission hired a third-party administrator to process claims by former WestPoint Stevens employees, and the last claim was made in 2006.

Through the discovery process, WestPoint Home learned that the Commission hired Key Risk to adjust and administer workers' compensation claims by former WestPoint Stevens employees. (R. p. 591; Contract for WestPoint Stevens South Carolina Run-Off.) The Commission transferred portions of WestPoint Home's deposit to Key Risk and authorized it to pay claims made by former WestPoint Stevens employees. The Commission transferred $500,000 of WestPoint Home's deposit to Key Risk in September 2005. (R. p. 107; Trial Tr. 29:10–13; R. p. 665; Email from Smith to Sanders (Aug. 26, 2005).) Once those funds were exhausted, the

Commission sent Key Risk another $500,000 in April 2006. (R. pp. 110–111; Trial Tr. 32:21–33:9; R. p. 666; Email from Smith to Sanders (Apr. 5, 2006).)

But Key Risk did not need all of the funds that the Commission sent in the second transfer. Therefore, once Key Risk completed its work administering claims by former WestPoint Stevens employees and all open claims were closed, Key Risk returned $364,512.49 of WestPoint Home's original deposit back to the Commission. (R. p. 113; Trial Tr. 35:17–22; R. p. 667; Table of Account Balance.)

Accordingly, the principal remaining from WestPoint Home's deposit is ***$1,164,512.39***. (R. p. 113; Trial Tr. 35:17–22.) The principal balance has not changed since 2008. (R. p. 115; Trial Tr. 37:3–5.)

There has not been a new claim made against the money deposited by WestPoint Home in ***over 17 years***. The last such claim was reported on June 21, 2006. (R. p. 602; Key Risk Loss Run Report, at Claim Ending 4475.) Tellingly, following WestPoint Stevens' bankruptcy, seven of its former employees filed workers' compensation claims based on alleged lung illnesses; the Commission denied all seven of those claims. (R. pp. 126–127; Trial Tr. 48:25–49:8; R. pp. 603–643; WestPoint Stevens Claims Data.)

There have not been any payments made from the money deposited by WestPoint Home in ***over 15 years***. The last such payment was made on May 7, 2008, and it was a check for $45.41 to the Turner Padget Graham & Laney law firm for legal expenses. (R. p. 637; Key Risk WestPoint Payments Spreadsheet, at Claim Ending 7445.)

As of February 28, 2023—the last time the parties reported to the circuit court—the balance on the account holding the remainder of WestPoint Home's deposit was $1,730,565.36, which included both (1) principal remaining from WestPoint Home's initial deposit and (2) interest that

has accumulated on that principal while WestPoint Home's money has been in the Commission's custody. The parties agree that there are no open claims, there is no money reserved to pay claims, and there have not been any new claims in over a decade and a half. (R. p. 117; Trial Tr. 39:6–14.)

II. Procedural History

This litigation is the saga of WestPoint Home's attempt to reclaim the unused portion of its deposit and the interest that has been wrongfully accumulated by the Commission with WestPoint Home's money.

As described below, those efforts have lasted more than a decade because of the Commission's refusal to provide any information at all about what happened to WestPoint Home's deposit. As discovery revealed and as trial confirmed, WestPoint Home is entitled to receive its money back plus interest, as the Commission never needed to sweep the full amount of the deposit out of the bank, and there is no chance of any new claims being made against that deposit as a matter of law.

A. Over a decade ago, WestPoint Home began inquiring into the status of its deposit and requested a refund of the unused portion, but it was stonewalled by the Commission.

The interactions between the parties regarding WestPoint Home's attempt to recover the unused portion of its deposit began with a phone call in 2012, and then with a follow-up letter on February 22, 2013, in which WestPoint Home's then-General Counsel wrote to the Commission seeking certain information as part of an overall goal for "a reduction in the Security Amount held by the State." (R. p. 578; Letter from Fundler to Commission (Feb. 22, 2013).)

It took the Commission seven months to respond to the letter. When it did, the Commission stated that it was "unable to release the information you have requested." (R. p. 579; Letter from Roberts to Fundler (Sept. 10, 2013).)

WestPoint Home responded by explaining that its money was being used to pay claims for former WestPoint Stevens employees, that it has a reversionary interest in the remainder of its deposit pursuant to an order of the Bankruptcy Court, and that the repose period for any additional claims has closed. (R. p. 581; Letter from Fundler to Roberts (Oct. 15, 2013).) The Commission wrote back that it still would not provide any of the requested information to WestPoint Home. (R. p. 583; Letter from Roberts to Fundler (Nov. 19, 2013).)

B. The Commission filed suit in 2014 seeking a declaration that it is entitled to keep information regarding WestPoint Home's deposit a secret, and WestPoint Home counterclaimed to recover its money with interest.

As the next step of its stonewalling, the Commission commenced this case on April 17, 2014, and sought a declaration that WestPoint Home was not entitled to receive the information it had requested, arguing that the information was strictly confidential and could not be disclosed outside of the agency. (R. pp. 46–50; Compl.) In other words, the Commission sought a ruling that it did not have to tell WestPoint Home anything about how the agency had spent WestPoint Home's money in the intervening nine years.

WestPoint Home responded with a counterclaim seeking an accounting and an order that it is entitled to receive both the requested information and "all monies owed and improperly retained by the State." (R. p. 60; Ans. & Am. Countercl.) It amended its counterclaim, with permission from the circuit court, to also seek interest. (R. p. 60; *id.*)

The parties jointly moved to have this case referred to the Business Court, where it was assigned to Judge Lee. They also agreed to bifurcate the case into two issues: (1) "Whether Defendant is entitled to access certain records and information maintained by Plaintiff," and (2) "Whether Defendant is entitled to recover certain monies that are currently in the custody of the State of South Carolina." (R. p. 17; Consent Scheduling Order (Dec. 11, 2014).)

The parties briefed Issue 1, and the circuit court initially granted summary judgment in the Commission's favor on that issue. (R. p. 19; Order (Apr. 26, 2019).) WestPoint Home timely sought reconsideration of that ruling, and after briefing and a status conference, the circuit court issued an order requiring the Commission to disclose two pieces of information to WestPoint Home: (1) "The number of open health care claims currently asserted against the above-described funds being held by the Treasurer [*i.e.*, WestPoint Home's deposit]"; and (2) "The amount of the funds that remain." (R. p. 29; Order (July 3, 2019).)

Those disclosures resulted in a sea-change in the litigation.

C. The Commission revealed that it still held over $1.1 million of the principal deposit; it had earned an additional $600,000 in investment returns off of WestPoint Home's deposit; and it had not paid a claim in over a decade.

The Commission complied with the circuit court's instruction to disclose these data points, and its disclosure was damning: Nearly 15 years after WestPoint Home made its deposit, the agency still held the bulk of that deposit, and there were no open claims.

Armed with this new information, WestPoint Home supplemented its arguments regarding reconsideration and asked the circuit court to require the Commission to produce a loss-run report showing how the agency has paid claims using WestPoint Home's money, and then to perform "an actuarial analysis to determine how much security, if any, would be needed for potential future claims." (R. p. 916; Supp. Mem. at 6 (Sept. 13, 2019).)

Consistent with its stonewalling, the Commission again opposed any additional disclosure, and again it argued that South Carolina law prohibited the Commission from disclosing any information to WestPoint Home about how WestPoint Home's deposit had been spent. (R. p. 925; Resp. Mem. (Oct. 10, 2019).)

The Court held a hearing on October 18, 2019, regarding the access-to-records issue. During that hearing, the Commission revealed for the first time—***after litigating the issue for over five years***—that the data sought by WestPoint Home was not truly confidential, but instead was in the custody of Key Risk, a third-party administrator that adjusted claims for the Commission.

Following that disclosure, WestPoint Home subpoenaed records from Key Risk, without objection by the Commission. Key Risk complied with the subpoena and produced records showing that the last payment made on any workers' compensation claim from a former WestPoint Stevens employee was a $45.41 payment to the Turner Padget Graham & Laney law firm on May 7, 2008. (R. p. 637; Key Risk WestPoint Payments Spreadsheet, at Claim Ending 7445.)

WestPoint Home then sought to depose the Commission through a Rule 30(b)(6) witness regarding the information it received from Key Risk. Consistent with its efforts to prevent WestPoint Home from learning anything about the deposit, the Commission moved for a protective order and sought to quash the deposition. (R. p. 935; Mot. for Protective Order (Mar. 8, 2021).) The circuit court denied that motion and noted that the disclosure of information from Key Risk without objection from the Commission effectively resulted in WestPoint Home's prior motion to reconsider being granted. (R. p. 32; Order Denying Mot. for Protective Order (Nov. 16, 2021).)

Following that order, the Commission produced records revealing the agency has its own actuarial formula for calculating the amount of surety it requires of self-insured employers. (R. p. 216; Letter from Commission to WestPoint Stevens (July 14, 1997).) Under that actuarial formula, which was detailed above in Section I.B, WestPoint Home should have recovered the full balance of its deposit in 2012—which is precisely when WestPoint Home first reached out to the Commission about recovering the remainder of the deposit.

The Commission's records also revealed that at the time of the production, the Commission held a balance of $1.7 million using WestPoint Home's deposit: principal of $1.16 million, and the remainder was interest earned off of the principal. (R. p. 668; Trust Fund Report.)

D. At trial, the Commission's Executive Director conceded both that the agency never needed the entire $1.8 million deposit in the first place and that the repose period for new claims closed in 2007.

Trial took place on August 31, 2022, in Richland County. At trial, Gary Cannon—the Commission's Executive Director—testified unequivocally that the Commission withdrew the entirety of WestPoint Home's $1.8 million deposit even though there never has been and never will be an actual need for the agency to use all of that money.

1. The Commission took all of WestPoint Home's deposit even though there has never been a need for the entire $1.8 million deposit.

Director Cannon began his testimony by confirming that the plain language of the letter of credit collateralized by WestPoint Home's deposit allowed the Commission to withdraw money only "if needed":

> Q: And item four [of the letter of credit] says that the Commission can draw on a letter of credit ***if needed*** to pay any Workers' Compensation claim or claims of administration expense; is that right?
>
> A: Yes, sir, that's what it says, ***if needed***.

(R. p. 100; Trial Tr. 22:2–:6 (emphasis added).)

He then conceded the Commission withdrew the entire letter of credit—all $1.8 million of WestPoint Home's money—in 2005 even though only a fraction of the deposit was "needed" to pay claims:

> Q: The agreement says that the time the agency can call the letter of credit is if the money is needed to pay claims, right?
>
> A: That's what it says.

Q: That's right. And when the agency withdrew $1.8 million on August 17th of 2005 and moved it to an account w[ith] the State Treasurer's office, ***there was not $1.8 million in claims pending, were there?***

A: ***No, sir, there was not.*** We weren't sure, though, because of the type of business they had and the potential asbestos claims that could have been filed.

Q: Right. Claims could have been filed?

A: That's right.

Q: ***But they weren't filed?***

A: ***They were not.***

Q: There were not $1.8 million of claims pending at the time the money was taken from my client's bank account, were there?

A: ***No, sir, not any pending claims***, but it is the Commission's responsibility to ensure money is available for any claims to be fled in the future for employees of a self-insured company.

Q: And the way the agency ensures that that money is there is by having these letters of credit, right?

A: That's correct.

(R. pp. 101–102; Trial Tr. 23:19–24:18 (emphasis added).)

And Director Cannon confirmed that the agency still does not "need" that money even today:

Q: The agency basically took it as a $1.8 million loan from WestPoint Home that you can use to pay claims if they ever come up, right?

A: We never considered it a loan. We considered it money that would be available to pay the claims if they came up, not a benefit to the Commission. We gained nothing by getting that money other than exercising our fiduciary responsibility to ensure the claims that would be paid for the employees of [WestPoint] Stevens.

Q: ***But you didn't need $1.8 million?***

A: ***Not the day we drew it down***, but we weren't sure what we would need in the future.

Q: ***And you haven't needed it today, have you?***

A: Well, ***we have not***, but we have examples of similar businesses that claims have been fled where the authorities were—since the '50s. So we have to look at the businesses, we have to look at the potential claims coming in to ensure that money is available. If it's not available and a claim is filed 40, 50 years later, then the injured employee has no recourse to pay for their medical benefits or compensation.

Q: Mr. Cannon, we'll get into that in just a minute, but my question is, again, very precise. ***As we stand here today in August of 2022, the agency has not needed $1.8 million to pay claims of former WestPoint Stevens employees, has it?***

A: ***That's correct.***

(R. pp. 106–107; Trial Tr. 28:2–29:3 (emphasis added).)

Stunningly, Director Cannon tried to explain away this obvious breach of the letter of credit and unlawful taking of WestPoint Home's money by saying that the Commission's behavior was consistent with an unwritten agency policy:

Q: So there's really no dispute that that money was going to be there [in the bank, collateralizing the letter of credit]. It was just a question of which account is it in. Is it in my client's account where it will collect interest or is it in the agency's account where it will collect interest not for my client?

A: And we were following policy of drawing down the letter of credit when the company [*i.e.*, WestPoint Stevens] went out of business.

Q: That policy is not published anywhere, is it?

A: No, sir.

(R. pp. 109–110; Trial Tr. 31:24–32:15.)

2. There is no reason for the Commission to retain any of WestPoint Home's deposit.

Not only did Director Cannon concede that the agency has never needed the entirety of WestPoint Home's deposit, he also conceded that the agency will never have a need for any of the remaining money in the future. First, Director Cannon confirmed the agency's own actuarial formula has required $0 as security for claims from former WestPoint Stevens employees since 2012, which is when WestPoint Home first contacted the agency about recovering its money:

> Q: So in 2012, the agency's formula for calculating the surety needed on deposit was zero dollars; is that right?
>
> A: Based on this formula.
>
> * * *
>
> Q: And it's been zero every year since 2012, right?
>
> A: That's correct.

(R. p. 124; Trial Tr. 46:3–:5, 46:16–:17.)

Not only did the agency's own actuarial formula reveal that the agency didn't need any of WestPoint Home's money since 2012, Director Cannon testified the statute of repose for any new claims filed by former WestPoint Stevens employees ***closed on August 8, 2007***:

> Q: The company WestPoint Stevens went out of business on August 8th, 2005, right?
>
> A: That's right.
>
> Q: The statute of repose for any latent injury claim closed on August 8th, 2007, right?
>
> A: Any latent claims is two years from the date of diagnosis.
>
> Q: No, sir, that's the statute of limitations. I'm talking about the statute of repose.
>
> A: Repose.
>
> Q: ***The statute of repose is two years from the last exposure, correct?***

A: ***Yes.***

Q: ***So that would have been August 8th of 2007, correct?***

A: ***Right.***

(R. pp. 118–119; Trial Tr. 40:15–41:4 (emphasis added).)

E. The circuit court denied WestPoint Home all relief.

After trial, the circuit court requested that the parties submit competing proposed orders resolving the issues in dispute. Thirteen months after trial, the circuit court denied WestPoint Home all relief, finding that the agency was "fully justified" in sweeping the entirety of WestPoint Home's deposit out of the bank and retaining it indefinitely. The circuit court entered final judgment in this matter fully resolving the disputed issues on September 25, 2023.

Respectfully, that order goes against all evidence presented at trial recited above and, as discussed below, South Carolina law addressing the issues in this case. It should be reversed.

STANDARD OF REVIEW

This appeal involves the interpretation of statutes and regulations, which is reviewed *de novo*. *Books-A-Million, Inc. v. S.C. DOR*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022).

WestPoint Home's claim is for an accounting and a return of monies owed. (R. p. 53; Ans. & Am. Countercl. at 3.) Actions for an accounting are equitable in nature. *Laughon v. O'Braitis*, 360 S.C. 520, 524, 602 S.E.2d 108, 110 (Ct. App. 2004). Accordingly, "this court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence," though it is not required to disregard the circuit court's findings. *Id.* at 524–25, 602 S.E.2d at 110.

ARGUMENT

I. The circuit court erred by finding the Commission rightly withdrew the entirety of WestPoint Home's deposit and kept the interest earned on that money, as the Commission itself conceded at trial that it has never needed the full deposit.

The Commission should not have withdrawn the entirety of WestPoint Home's deposit in the first place, and the circuit court erred when it excused the agency's unlawful taking.

As described above, WestPoint Home's $1.8 million deposit was made at the instruction of the Bankruptcy Court to collateralize a letter of credit that WestPoint Stevens provided the Commission as security for workers' compensation claims. (R. p. 228.) The Commission's regulations allow self-insured employers to provide a letter of credit as security for potential claims, and the regulations detail the limited circumstance under which the agency can withdraw money through a letter of credit:

> The Commission may exercise the letter of credit at any time ***if the proceeds are needed for payment of a claim that occurred during the self-insured period***.

S.C. Code Ann. Regs. 67-1507(D)(5) (emphasis added). This same "if needed" limitation on the Commission's ability to withdraw funds was included in a Memorandum of Understanding regarding the letter of credit for which WestPoint Home's deposit provided collateral:

> The Commission may, at any time, draw on the Letter of Credit ***if needed*** to pay any workers' compensation claim and claims administration expense which are the responsibility of the Employer.

(R. p. 225; Memorandum of Understanding ¶ 4 (emphasis added).)

There is no dispute that the Commission withdrew all $1.8 million of WestPoint Home's deposit even though there were not $1.8 million of "claims that occurred during the self-insured period." For one, nearly $1.2 million of the principal remains untouched and is still within the agency's custody more than 18 years after it was withdrawn. (R. p. 113; Trial Tr. 35:17–22.)

Likewise, Director Cannon testified repeatedly at trial that there were not $1.8 million of claims pending when the agency withdrew the entirety of the deposit, and that there haven't been $1.8 million of claims made by former WestPoint Stevens employees against that deposit. (R. pp. 101–102, 106–107; Trial Tr. 23:19–24:18, 28:2–29:3.) As he conceded:

> Q: As we stand here today in August of 2022, the agency has not needed $1.8 million to pay claims of former WestPoint Stevens employees, has it?
>
> A: That's correct.

(R. pp. 106–107; Trial Tr. 28:24–29:3.)

It is unavoidable that the agency wrongfully withdrew the entirety of WestPoint Home's $1.8 million deposit in August 2005. There were not then, and there never have been, $1.8 million of workers' compensation "claims that occurred during the self-insurance period" for former WestPoint Stevens employees. S.C. Code Ann. Regs. 67-1507(D)(5).

An agency's regulations are construed using the familiar tools of statutory construction. *See Murphy v. S.C. DHEC*, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012) ("Regulations are interpreted using the same rules of construction as statutes."). The plain language controls, and courts routinely reject an agency's interpretation of a regulation that goes against the plain language or that leads to absurd results. *See, e.g.*, *Media Gen. Commc'ns, Inc. v. S.C. DOR*, 388 S.C. 138, 149–50, 694 S.E.2d 525, 530–31 (2010) ("We find the ALC was not required to defer to the Department's interpretation in this instance because it was contrary to the plain language of the statute."); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation."); *Blackmon v. S.C. DHEC*, 436 S.C. 529, 539, 873 S.E.2d 774, 780 (Ct. App. 2022) ("When the language of a regulation is plain, unambiguous, and conveys a clear and definite meaning, interpretation of the regulation is unnecessary and improper." (quoting

Kiawah Dev. Partners II v. S.C. DHEC, 411 S.C. 16, 39, 766 S.E.2d 707, 720–21 (2014))) (cleaned up).

Here, the governing regulation is clear on its face: the Commission is permitted to draw on a letter of credit only when the money withdrawn is "needed for payment of a claim that occurred during the self-insured period." S.C. Code Ann. Regs. 67-1507(D)(5). There is no provision for the agency to prospectively withdraw funds in anticipation of potential, future, unknown, may-never-occur claims.

And there is an obvious reason for this withdraw-as-claims-occur system: The money in the bank that collateralizes a letter of credit belongs to the private company that posts the funds, and that company is entitled to earn interest on its money while in the bank. (*See, e.g.*, R. p. 570; Cash Collateral Control Letter Agreement (Aug. 8, 2005) ("Interest, if any, earned on the Cash Collateral Account [from which the Commission withdrew the funds] shall be deposited in the Cash Collateral Account.").) By withdrawing the entirety of WestPoint Home's deposit, the Commission has wrongfully deprived WestPoint Home of the benefit of nearly 20 years of interest on its money.

Despite the regulation's plain language and the undisputed fact that the agency never "needed" the entire deposit because barely $600,000 of claims actually "occurred during the self-insured period," the circuit court excused the Commission's decision to withdraw the entirety of the deposit for two reasons.

First, the circuit court justified the agency's conduct by stating that the Commission did not "kn[o]w how much money was needed to satisfy these claims" that were pending at the time of the withdrawal. (R. p. 8; Order at 8.) But this does not impact the analysis of the regulation at all.

Regulation 67-1507(D)(5) allows the agency to withdraw money only on an as-needed basis when claims occur. If a payment was owed to an injured worker, the Commission could have and should have drawn down only that amount from WestPoint Home's deposit; after all, this is exactly how a letter of credit is designed to function. In fact, Director Cannon acknowledged that the agency could have administered claims that way, but it chose not to. (R. p. 105; Trial Tr. 27:9–17.) The law simply does not allow the Commission to indiscriminately take a private company's money unless and until those funds are actually needed to pay a claim that has occurred.

The circuit court reiterated its erroneous reading of the regulation by stating that "even after the pending claims were fully paid, the Commission exercised reasonable judgment in retaining the balance of the funds." (R. p. 8; Order at 8.) But once the claims "were fully paid," there were no longer any unpaid "claims that occurred during the self-insured period." S.C. Code Ann. Regs. 67-1507(D)(5). The regulation does not leave any room for the agency to exercise its subjective judgment in seizing and then keeping a private company's money—it wasn't authorized to take WestPoint Home's entire deposit in the first place, and it certainly wasn't authorized to keep any of that deposit "after the pending claims were fully paid." The circuit court's interpretation of Regulation 67-1507(D)(5) is wrong as a matter of law.

Second, the circuit court justified the Commission's decision to withdraw the entire deposit because, as part of its winding up process, WestPoint Stevens notified the Commission in August 2005 that it would no longer be making payments on workers' compensation claims. According to the circuit court, the Commission "was entitled to treat the August 2005 letter as a cancellation or revocation of the letter of credit" even though that correspondence "did not specifically cancel the letter of credit." (R. pp. 8–9; Order at 8–9.) This fundamentally misreads that correspondence and ignores undisputed evidence from trial.

On August 15, 2005, WestPoint Stevens sent a letter to the Workers' Compensation Commission notifying the agency of the Asset Purchase Agreement through which WestPoint Home purchased WestPoint Stevens' assets under the Bankruptcy Court's supervision. (R. p. 586; Letter from Sears to Smith (Aug. 15, 2005).) The Asset Purchase Agreement required WestPoint Home to deposit funds sufficient to collateralize WestPoint Stevens's various existing letters of credit, which included the $1.8 million letter of credit that WestPoint Stevens had with the Commission. (R. p. 287; Asset Purchase Agreement § 3.1(a).) Moreover, the Asset Purchase Agreement specifically provided that WestPoint Home retained the "right to receive back any portion" of its deposit that was not used. (*Id.*)

The August 15, 2005 letter did not somehow put the letter of credit in jeopardy. To the contrary, it specifically notified the Commission that funds would be available to support the letter of credit despite WestPoint Stevens' bankruptcy and dissolution. And at trial, Director Cannon confirmed that the agency never believed the letter of credit had been canceled:

> Q: But you knew that WestPoint Home had stepped into the shoes of WestPoint Stevens and had assumed that letter of credit?
>
> A: We did.

(R. p. 105; Trial Tr. 27:5–:8.) He reiterated the agency was aware of the Cash Collateral Control Letter Agreement, which provided that WestPoint Home was entitled to retain all interest earned on its deposit:

> Q: How did you come to know that WestPoint Home had assumed the obligations of WestPoint Stevens' letter of credit?
>
> A: We received a copy of this letter of credit. Now, the copy that I have here, it only has one signature on it. One is from WestPoint Stevens. It's not for the agency.
>
> Q: If you turn the page, I'll bet you'll see more signatures as you go?

A: Oh, I got you.

Q: But you understand my point, this document is the document that makes it clear that WestPoint Home is standing in the shoes of WestPoint Stevens for WestPoint letters of credit, right?

A: Right. We were aware of it, but we're not a party to it.

(R. p. 147; Trial Tr. 69:6–:21.) And he confirmed that at no point "did the agency ever think that letter of credit was no longer in existence." (R. p. 148; Trial Tr. 70:6–:8.)

At bottom, the circuit court's treatment of the August 2005 letter finds no support in the evidentiary record and, in fact, is contradicted by both the plain language of that correspondence and the agency's own testimony about that letter at trial.

The circuit court's erroneous construction of the Commission's authority to withdraw the entirety of WestPoint Home's deposit has had a tremendous adverse impact on WestPoint Home. That withdrawal in August 2005 has deprived WestPoint Home of the benefit of 18 years of interest (and counting). As of February 28, 2023, the Commission had earned over $560,000 in interest on WestPoint Home's money:

$1,730,565.36	balance of account (as of 2.28.23)
– $1,164,512.39	unused principal from WestPoint Home's deposit
$566,052.97	interest earned on WestPoint Home's deposit (as of 2.28.23)

There is no basis in law or equity for the Commission to retain interest earned on WestPoint Home's money, and the circuit court erred in ruling that the agency rightly took and kept WestPoint Home's entire deposit. Doing so violated the plain language of the regulation governing when the Commission can draw on a letter of credit, and the circuit court's ruling should be reversed and the Commission ordered to return to WestPoint Home all interest the agency has earned on WestPoint Home's money.

II. The circuit court erred by finding the Commission can indefinitely retain the unused portion of WestPoint Home's deposit, as the repose period for any new claims has closed.

In addition to wrongfully taking the entire deposit in 2005, the Commission has wrongfully retained the unused principal from that deposit, which is nearly $1.2 million. The circuit court held that the agency is entitled to retain those funds even though there is not a single open or unpaid claim because "[i]t is entirely possible that the Commission will be required to utilize the funds held by the State Treasurer to satisfy claims brought by the former workers of WestPoint Stevens" due to, in its view, "the possibility of latent future claims" involving asbestos exposure. (R. pp. 12–13; Order at 12–13.) This is incorrect as a matter of law.

First, this ruling runs contrary to Regulation 67-1507(D)(5), as discussed in the preceding section. If the Commission is not authorized to take a private company's money unless and until an actual claim "occurred," it certainly cannot hold the private company's money indefinitely because of "the possibility" of "future claims."

This ruling is also wrong as a matter of law because the statute of repose that governs new workers' compensation claims expired in 2007—a point that Director Cannon even conceded at trial. (R. pp. 118–119; Trial Tr. 40:10–41:4 (emphasis added).)

"Statutes of repose serve to relieve potential defendants from liability for acts committed long ago and reflect a ***legislative judgment*** that after a period of time, a defendant should be free from liability. Where a statute of repose is enacted limiting the time for filing a claim, it has the effect of creating a substantive right created by law. Thus, ***statutes of repose can have the effect of extinguishing a claim even prior to discovery of the claim***." *Matthews v. E.I. du Pont de Nemours & Co.*, Case No. 4:16-cv-2934-RBH, 2018 U.S. Dist. LEXIS 193735, at *24–26 (D.S.C. Nov. 14, 2018) (emphasis added); *see Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368

S.C. 137, 142–43, 628 S.E.2d 38, 41 (2006) ("A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.").

Because they create substantive rights—rather than only procedural rights, like a statute of limitations—statutes of repose are not subject to equitable defenses like "waiver, tolling, and estoppel." *G&P Trucking v. Parks Auto Sales Serv. & Salvage, Inc.*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003).

The statute of repose for pulmonary diseases in the South Carolina Workers' Compensation Act is South Carolina Code § 42-11-70, which provides:

> Time in which disease must have been contracted.
>
> Neither an employee nor his dependents shall be entitled to compensation for disability or death from an occupational disease, except that due to exposure to ionizing radiation, unless such disease was contracted within one year after the last exposure to the hazard peculiar to his employment which caused the disease, save that in the case of a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years.

This statute has been repeatedly examined by the courts and by the Commission itself, and they have resoundingly rejected the circuit court's reading of the law.

Federal Courts. For instance, in *Parker v. Asbestos Processing, LLC*, Case No. 0:11-1800-JFA, 2015 U.S. Dist. LEXIS 115094 (D.S.C. June 30, 2015), *aff'd sub nom. Southern v. Bishoff*, 675 F. App'x 239 (4th Cir. 2017), a series of plaintiffs claimed to have been injured from exposure to asbestos during their employment at Springs Mills, a textile plant in South Carolina. At the direction of their then-counsel, they filed suit in Mississippi state court asserting common law claims against asbestos manufacturers, but the plaintiffs never provided notice of their claims to

Springs Mills, as required by the South Carolina Workers' Compensation Act to preserve claims under that statute.

In *Parker*, the plaintiffs were suing their former counsel for legal malpractice, arguing that the attorneys failed "to advise their clients that, by going forward solely with asbestos tort claims, the Plaintiffs were forever waiving the right to assert any South Carolina workers' compensation claims they might have had at the time." *Id.* at *6. In response, the defendant-attorneys argued that the plaintiffs did not have any workers' compensation claims to waive because, by the time the defendant-attorneys were engaged to file a tort suit in Mississippi, the statute of repose for such claims had already expired because the plaintiffs had not "contracted" their injuries within two years of their last exposure at Springs Mills. *Id.* at *11–12.

Judge Anderson agreed with the defendant-attorneys. He began his analysis by acknowledging that "there are no decisions from the South Carolina Supreme Court construing § 42-11-70 [the statute of repose]. Thus, this Court must predict how the South Carolina Supreme Court would rule if squarely presented with the issue." *Id.* at *13.

From there, Judge Anderson identified two cases from the South Carolina Supreme Court where it had "interpreted the same term ['contracted'] when construing a statute in the same chapter and title." *Id.* at *14. In *Vespers v. Springs Mills*, 276 S.C. 94, 97, 275 S.E.2d 882, 884 (1981), and *Glenn v. Columbia Silica Sand Co.*, 236 S.C. 13, 21, 112 S.E.2d 711, 715 (1960), the Supreme Court construed the word "contracted" in South Carolina Code § 42-11-40 to mean "disablement or death."

Because South Carolina follows the rule of statutory construction that the same word should be given the same meaning when it appears throughout a single statutory scheme, Judge Anderson concluded that the statute of repose must mean that a latent injury claim is barred unless

a worker becomes disabled by or dies from a pulmonary disease within two years after his or her last exposure. 2015 U.S. Dist. LEXIS 115094, at *16. As Judge Anderson put it: "[I]n order to demonstrate that they had a viable workers' compensation claim, the Plaintiffs must be able to show that they became disabled within two years of their last exposure to asbestos as the Springs Mills plants." *Id.* at *21–22.

Judge Anderson also surveyed decisions from the South Carolina Workers' Compensation Commission that dealt with the issue. By his count, three decisions from the Commission used the exact same analysis he did—namely, relying on how *Vespers* construed the term "contracted" within the same statutory scheme—to conclude that South Carolina Code § 42-11-70 was a statute of repose that barred longtail claims: *Gibson v. Westinghouse Elec. Corp.*, No. 0319071, 2006 SC Wrk. Comp. LEXIS 895 (S.C. Work Comp. Comm'n 2007); *Bishop v. Westinghouse Elec. Corp.*, No. 0318085, 2006 SC Wrk. Comp. LEXIS 1015 (S.C. Work Comp. Comm'n 2007); and *Truax v. Daniel Constr./Fluor Daniel*, No. 0411701, 2009 SC Wrk. Comp. LEXIS 30 (S.C. Work Comp. Comm'n 2009).

Because the statute of repose had lapsed on all of the plaintiffs' potential workers' compensation claims before they engaged tort counsel in Mississippi, Judge Anderson granted summary judgment in the defendant-attorneys' favor and dismissed the legal malpractice claims. *Id.* at *29.

Nor does *Parker* stand alone. Consider *Matthews v. E.I. du Pont de Nemours & Co.*, Case No. 4:16-cv-2934-RBH, 2018 U.S. Dist. LEXIS 193735 (D.S.C. Nov. 13, 2018), which is a standard asbestos tort case. There, the plaintiff filed suit against 29 defendants, with DuPont as the only remaining defendant when this order was entered. *Id.* at *1. DuPoint moved for summary judgment, arguing that the plaintiff was its statutory employee and, therefore, the Workers'

Compensation Act provided the exclusive remedy. *Id.* at *8. The plaintiff opposed by arguing he was not a statutory employee (which the court rejected), and that "the Workers' Compensation Act is not Mr. Matthews's exclusive remedy because he does not have a right to compensation under the Act based on the statute of repose." *Id.* at *22. Judge Harwell framed this aspect of the plaintiff's opposition as follows:

> It is Plaintiff's position that because the Act includes a statute of repose for Mr. Matthews's asbestos-related lung cancer, which by its nature has a long latency period, his occupational disease is not compensable under the Act. Therefore, Plaintiff argues that unless there is a right to compensation under the Act, the exclusive remedy provision is inapplicable.

Id. at *9.

Judge Harwell rejected the plaintiff's argument. He began his analysis by explaining that "[s]tatutes of repose serve to relieve potential defendants from liability for acts committed long ago and reflect a legislative judgment that after a period of time, a defendant should be free from liability." *Id.* at *24. Because statutes of repose create a "substantive right created by law," they "can have the effect of extinguishing a claim even prior to discovery of the claim." *Id.*

Like Judge Anderson in *Parker*, Judge Harwell noted that the South Carolina Supreme Court had not addressed the issue, but that "the Workers' Compensation Commission has routinely barred employees from receiving benefits under the Act pursuant to Section 42-11-70 where the two-year time period has expired." *Id.* at *24–25 (citing *Truax*, *Bishop*, and *Gibson*). In his view, "[t]hese administrative decisions acknowledge that the purpose of the statute of repose is to protect the employer against claims which, due to the passage of time, can no longer properly be investigated and defended." *Id.* at *25.

Judge Harwell does not appear to think this was a close call. He acknowledged that neither party asked him to certify the question to the South Carolina Supreme Court, *id.* at *24 n.7, and he

affirmatively held that his decision was compelled by "the legislature's intent in its decision to limit the time period for employees with asbestos-related injuries to recover under the Act, despite its harsh application in this case," *id.* at *25. He confirmed his ruling by looking to cases from other jurisdictions that reached similar conclusions. *Id.* (citing *Hendrix v. Alcoa*, 506 S.W.3d 230 (Ark. 2016), and *Folta v. Ferro Eng'g*, 43 N.E.3d 108 (Ill. 2015)). And Judge Harwell summarized his ruling as follows:

> Here, the plain reading of the statute of repose serves to clearly provide that claims for pulmonary disease arising out of the inhalation of organic or inorganic dusts ***must be brought within two years after the last exposure to the hazard***. Mr. Matthews worked for DuPont throughout the 1960s. He developed his pulmonary disease decades later, well past the period provided for in the statute of repose. While this result may seem unfair, this Court is not tasked with legislating. Accordingly, this Court agrees with Defendant DuPont that as to DuPont, Mr. Matthews's claim is governed by the Workers' Compensation Act and its exclusivity provisions. Any effect of the Act's statute of repose does not allow him to seek compensation through a civil lawsuit.

Id. at *26 (emphasis added).

State Courts. This construction of the statute of repose is reinforced by *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999). In *Muir*, this Court held that the claimant complied with the one-year statute of repose for non-pulmonary illnesses because he was diagnosed with an illness and brought a claim in March 1993, and his last exposure to the occupational hazard was in August 1992. 336 S.C. at 294–95, 519 S.E.2d at 597–98. This Court's analysis in *Muir* is fully consistent with the straightforward analysis of both *Parker* and *Matthews*.

The Commission Itself. As noted in both *Parker* and *Matthews*, the Workers' Compensation Commission—sitting in its appellate capacity, meaning that at least three commissioners agreed on this result in each case cited below—has repeatedly denied lung cancer claims based on the statute of repose:

Table of Commission Decisions Denying Longtail Claims Due to Repose Period

Case Denying Claim Due to Statute of Repose	**Last Date of Employment**	**Date Injury Diagnosed**
Bethea v. City of Myrtle Beach, No. 1802724, 2019 SC Wrk. Comp. LEXIS 208 (2019).	2005	2018
Truax v. Daniel Const./Fluor Daniel, No. 0411701, 2009 SC Wrk. Comp. LEXIS 30 (2009).	1972	2006
Gibson v. Westinghouse Elec. Corp., No. 0319071, 2006 SC Wrk. Comp. LEXIS 895 (2007).	1995	2003
Bishop v. Westinghouse Elec. Corp., No. 0318085, 2006 SC Wrk. Comp. LEXIS 1015 (2007).	1995	2003

Truax is the agency's most fulsome treatment of the issue. There, the agency used strong language to make the point that longtail claims are barred by the statute of repose:

> Under the "plain meaning" rule, it is not the court's place to change the meaning of a clear and unambiguous statute. S.C. Code Ann. § 42-11-70 is abundantly clear in its intent to disallow compensation for disability or death for an occupational disease of a pulmonary nature that is not contracted within two years of the date of the last injurious exposure. Notwithstanding the latency period of asbestos related diseases, such as asbestosis, the legislature has never amended this provision and its intent is abundantly explicit. Any doubt as to the intent of the legislature to exclude any pulmonary related diseases from compensation unless contracted within two years of the claimant's last exposure is removed when looking at the lone exception to this rule, that being for ionizing radiation.

2009 SC Wrk. Comp. LEXIS 30, at *5–6 (internal citations omitted).

The Commission further explained that enforcing the law in this manner protects employers from liability when "employer representatives are no longer available" and "the personnel records and any pertinent test results are likewise unavailable." *Id.* at *7. And in denying Mr. Truax's claim, the Commission held that "it is ***impossible*** to reconcile the thirty-two year gap in this case between the Claimant's last date of employment (1972), and the date he 'contracted' his disease (*i.e.* became disabled) in 2006." *Id.* (emphasis added).

The same theme appears in the Commission's other decisions cited above:

> Since exposure and contracting the disease are distinct, and not the same, an ordinary and unambiguous meaning should be assigned to the word contracting, *i.e.* when the disease manifests itself and/or disables the claimant. The legislature chose to make compensability dependent on their being less than one (or two) year(s) between exposure and contraction of the disease.
>
> The Appellate Review Panel finds that the purpose of 42-11-70 is to protect the employer against claims too old to be fairly investigated and defended. Accordingly this statute should be read to effectuate the legislative intent to reasonably limit an employer's period of potential liability for workers' compensation benefits.

Gibson, 2006 SC Wrk. Comp. LEXIS 895, at *21–22; *Bishop*, 2006 SC Wrk. Comp. LEXIS 1015, at *20–21 (same language in both cases, and the opinions were issued on same day as both workers were claiming benefits from the same employer and the same time period).

* * * * *

The circuit court's order is impossible to reconcile with this long line of forceful, reasoned decisions. The lone authority it identified that runs contrary to these decisions is another decision by the Commission, *Powell v. Yeargin Constr. Co.*, No. 0617676, 2008 WL 5066354 (S.C. Work Comp. Comm'n 2008). (R. p. 11; Order at 11.) But not only have more recent decisions by the Commission rejected the outcome suggested by *Powell*, that decision lacks any precedential value because it contains no analysis supporting its outcome. In fact, *Parker* specifically rejected *Powell* and criticized it as being "inexplicabl[e]," as "provid[ing] no analysis," and for stating its decision "cryptically." 2015 U.S. Dist. LEXIS 115094, at *16, 19.

At bottom, every case that actually analyzed South Carolina Code § 42-11-70 has held that the repose period for a workers' compensation claim for "a pulmonary disease arising out of the inhalation of organic or inorganic dusts the period shall be two years" from the worker's final exposure to the hazard. For former WestPoint Stevens employees, the repose period for any new

claims closed no later than August 8, 2007, as WestPoint Stevens stopped conducting business on that same day in 2005. Director Cannon even conceded this exact point at trial:

Q: The statute of repose is two years from the last exposure, correct?

A: Yes.

Q: So that would have been August 8th of 2007, correct?

A: Right.

(R. pp. 118–119; Trial Tr. 40:25–41:4.)

In light of this crush of legal authority and unambiguous testimony at trial, the circuit court's ruling that former WestPoint Stevens employees may still be able to bring workers' compensation claims for not-yet-diagnosed asbestos-related injuries is wrong as a matter of law. This outcome is an unavoidable function of "the legislature's intent in its decision to limit the time period for employees with asbestos-related injuries to recover under" the Workers' Compensation Code. *Matthews*, 2018 U.S. Dist. LEXIS 193735, at *25. And "[w]hile this result may seem unfair, this Court is not tasked with legislating." *Id.* at *26.

Accordingly, the Court should reverse the circuit court's ruling on this point and direct the Commission to return the unused principal from WestPoint Home's deposit without further delay. Not only would that align this case with South Carolina law and general notions of equity—there is no legitimate reason for the government to sweep money from a private company's bank account and hold it indefinitely—it is compelled by an order of the Bankruptcy Court.[1] The Court should direct the Commission to return to WestPoint the remaining $1.16 million of its initial deposit.

[1] The Bankruptcy Court approved the Asset Purchase Agreement and its provision that WestPoint Home retained a "right to receive back any portion of the Letter of Credit Purchase Price in excess of any amounts not drawn under any such letters of credit." (R. p. 287; Asset Purchase Agreement § 3.1(a); R. p. 228; Order in *In re WestPoint Stevens Inc.*, Case No. 03-13532

III. WestPoint Home is entitled to prejudgment interest.

WestPoint Home seeks prejudgment interest associated with the Commission's wrongful seizure of WestPoint Home's deposit. Because the circuit court ruled against WestPoint Home on the other issues related to it receiving a return of its deposit and interest earned on its deposit, the circuit court did not reach the issue of whether WestPoint Home is entitled to prejudgment interest. It undoubtedly is.

Prejudgment interest is controlled by statute and is not discretionary with the Court. South Carolina Code § 34-3-20(A) directs that prejudgment interest "shall" be drawn at 8.75% per annum. Prejudgment interest begins accruing when the sum owed is "certain or capable of being reduced to certainty." *Wayne Smith Constr. Co. v. Wolman, Duberstein & Thompson*, 294 S.C. 140, 147, 363 S.E.2d 115, 119 (Ct. App. 1987).

Here, WestPoint Home's actuarial expert presented a report concluding that the surety needed under the Commission's actuarial formula showed that the agency no longer needed any of WestPoint Home's deposit starting in 2012, the same year WestPoint Home began contacting the agency about the status of the deposit and whether it could receive any of the money back. (R. p. 895; Johnson Report.) Director Cannon agreed with this conclusion:

> Q: So in 2012, the agency's formula for calculating the surety needed on deposit was zero dollars; is that right?
>
> A: Based on this formula.
>
> * * * * *
>
> Q: And it's been zero every year since 2012, right?
>
> A: That's correct.

(R. p. 124; Trial Tr. 46:3–5, 16–17.)

(RDD) (Bankr. S.D.N.Y. July 8, 2005). That order is entitled to full faith and credit. *McNaughton-McKay Elec. Co. v. Andrich*, 324 S.C. 275, 280–81, 482 S.E.2d 564, 567 (Ct. App. 1997).

By 2012, there hadn't been a new claim filed by a former WestPoint Stevens employee since 2006; the repose period had closed in 2007; there hadn't been any payments made on any claim since 2008; and the Commission's own actuarial formula for any security that it could possibly have requested revealed that it did not need any money remaining in reserves. Accordingly, WestPoint Home was entitled to recover its deposit in full no later 2012, and the sum it is owed—the principal balance of $1,164,512.39—has been "certain or capable of being reduced to certainty" since at least that point. WestPoint Home is therefore entitled to recover prejudgment interest on the sum-certain principal balance each year since 2012.

8.75% of $1,164,512.39 is $101,894.83 annually in prejudgment interest. Accordingly, South Carolina law directs that WestPoint Home should recover $101,894.83 in prejudgment interest for each year between August 2012 and the date on which the Commission returns WestPoint Home's deposit, and the Court should so order.

CONCLUSION

WestPoint Home has been wrongfully deprived of its money for over a decade and a half. There was no lawful basis for the Commission to sweep the entirety of WestPoint Home's $1.8 million deposit out of its bank account in 2005. There was no lawful basis for the Commission to collect and keep interest on WestPoint Home's money in the meantime. And there is no lawful basis for the Commission to retain the remainder of that deposit, as the window for any new claim that could be made against that deposit closed long ago—as the Commission concedes.

Accordingly, the Court should reverse the circuit court's ruling and direct the Commission to return to WestPoint Home the remainder of its deposit, the interest earned on that deposit, and prejudgment interest to which WestPoint Home is entitled as a matter of South Carolina law.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By:/s/ M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

LAW OFFICES OF HERBERT BEIGEL

Herbert Beigel
hbeigel@me.com
5641 N. Chieftan Trail
Tucson, Arizona 85750
(520) 825-1995
Admitted Pro Hac Vice

Attorneys for WestPoint Home, LLC

July 17, 2024

CERTIFICATE OF COMPLIANCE

The undersigned certify that this Brief complies with Rule 211(b), SCACR.

WOMBLE BOND DICKINSON (US) LLP

By: /s/ M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wbd-us.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

LAW OFFICES OF HERBERT BEIGEL

Herbert Beigel
hbeigel@me.com
5641 N. Chieftan Trail
Tucson, Arizona 85750
(520) 825-1995
Admitted Pro Hac Vice

Attorneys for WestPoint Home, LLC

July 17, 2024

RECEIVED
Jul 17 2024
SC Court of Appeals

PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellant, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below via email at the address(es) below:

Pleading(s): Appellant's Brief

Parties Served:

Michael H. Montgomery (mhm@montgomerywillard.com)
Montgomery Willard, LLC

J. Keith Roberts (keroberts@wcc.sc.gov)
South Carolina Workers' Compensation Commission

Counsel for Respondent

By: /s/ M. Todd Carroll
Attorneys for WestPoint Home, LLC

July 17, 2024