

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

WCC File No.: 1408826

RECEIVED

DEC 20 2017

SC Court of Appeals

Gennette Sowell, Employee, Petitioner,

v.

Piggly Wiggly, Employer, and
Auto Owners Insurance, Inc., Carrier, Respondents.

REPLY TO THE RETURN TO THE MOTION
FOR AN ORDER REQUIRING
PAYMENT PURSUANT TO SOUTH CAROLINA
CODE §42-17-60 AND FOR PENALTIES,
FINES, INTEREST AND ATTORNEYS FEES
PURSUANT TO THE SOUTH CAROLINA
CODE OF LAWS

By way of Reply to the Return to the Motion for Payment Pursuant to South Carolina Code §42-17-60, the Respondent and Movant before the Court would respectfully show unto the Court as follows:

1. That based on a review of the Return to the Motion, the Appellants take and/or state no position as to whether or not they are responsible for payment under S.C. Code §42-17-60. SCACR Rule 269 provides that:

"Where an appeal, petition, motion or return is ... taken solely for the purposes of delay ... the Appellate Court may upon its own motion or that of a party, after ten (10) days' notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require".

There is simply no basis set forth in the Return to establish that the response is not interposed for delay in payment.

2. That the Appellants, the Defendants below, who are responsible for payment pursuant to South Carolina Code §42-17-60 under the Award that is on appeal, during the pendency of the appeal to this Court, have appealed compensability, all issues of law and all/any entitlement to benefits alleging that the Commission erred in awarding benefits to the injured worker and not denying the claim. Therefore, all issues concerning the compensability of this matter and the payment of any benefits due are on appeal and are therefore before this Court as the, "issues" involved in the, "Appeal" pursuant to SCACR Rule 205 and thus this Court has exclusive jurisdiction over all "issues" that are the subject of the appeal.

3. That the Appellants totally misstate SCACR Rule 241(a) and (b). Subsection (b) simply provides that the Award of the Commission is not stayed to the extent and as provided for under S.C. Code §42-17-60. The very purpose of that section is to insure prompt immediate payment to the injured worker during appeal. Subsection (a) provides only that matters, "not

affected by the appeal ..." remain with its lower tribunal.

Again, the very purpose of the appeal and the "matter" on appeal is the Award of which on-going weekly compensation and on-going medical care after the appeal is only part of the award made.

4. That assuming arguendo under SCACR Rule 205 and 240 that the Commission, the tribunal below, has jurisdiction to entertain a motion, the Respondent would submit that it is concurrent jurisdiction which does not supersede or replace the jurisdiction of this Court to entertain the motion of the Respondent filed pursuant to South Carolina Code §42-17-60. The only affect that the 2007 Amendments to South Carolina Code §42-17-60 had on the payments under an Award was that instead of the appeal from the Full Commission Decision being to the Circuit Court, the appeals are now taken directly to the South Carolina Court of Appeals and the Defendants are now responsible for both the payment of weekly compensation benefits and the payment of medical care as ordered by the Commission during the pendency of the appeal. All of the decisions and the Respondent as Movant before this Court would submit that the Supreme Court in all cases has held that the Court with Appellate jurisdiction, that being the Circuit Court at that time, had jurisdiction over all motions to enforce the payments as provided for under §42-17-60 during the pendency of the appeal. For an excellent review of all the various factual scenarios wherein payment is due, see:

Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57 (1960); see also McLeod v. Piggly Wiggly, 280 S.C. 466, 313 S.E.2d 38 (SC App. 1984) and more recent case of Johnson v. Sunoco Products, 381 S.C. 172, 672 S.E.2d 567 (2009).

5. That in addition thereto, taking into consideration the legislative intent of prompt payment to the worker during the appeal and, while there is a blossoming motion practice before the South Carolina Workers' Compensation Commission, there is simply no statutory authority for a general motion practice before the Commission. Thus the only way of actually enforcing any order of the Commission before the Commission would be to file a Form 50 on which a hearing cannot be held for a period of at least 30-days under the APA and actually not for a period of at least 60-days allowing for the 30-days for reply per a Form 51. As the Supreme Court noted in the Case supra,

"the purpose of the statute is to provide some means of subsistence for the injured employee during the determination of the employer's appeal, that purpose would be defeated if the employer, who is required to make such payments pending decision ... of his appeal from the Commission's Award, should be able to discontinue them ... until his appeal from that judgment has been disposed of".

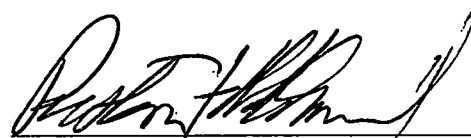
This Court reiterated that statement of principle in its decision in McLeod and that same principle was further reiterated in the Johnson v. Sunoco Products decision, supra.

6. That the Court will note as was expressed in the Motion that in the Response to the Motion again, there is absolutely no intent expressed as to the Appellants complying with the Motion or the statute requiring payment. There is no citation to any authority that the Appellants are not responsible for payment under the statute.

7. That the Petitioner would submit that the Motion is properly before this Court, that this Court has jurisdiction over the Motion and that this Court should quickly enforce the Award of the Commission on behalf of this injured worker.

WHEREFORE, in addition to the other prayer for relief in the Motion, the Movant would specifically ask for a ruling by the Court as to whether or not the Appellants have violated the provisions of Rule 11 the Frivolous Proceedings Act and SCACR Rule 269. This Motion is clearly interposed for no other purpose than to delay and specifically since it sets for no basis that the payments as provided for under S.C. Code §42-17-60 are not due and payable pursuant to that section.

Respectfully submitted,



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And

Gerald Malloy, Esquire
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Attorneys for Movant/Respondent
To the Appeal for the Injured
Worker, Ms. Gennette Sowell

December 18, 2017

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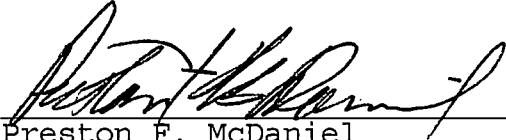
PROOF OF SERVICE

I certify that I have served the REPLY TO THE RETURN TO THE MOTION FOR AN ORDER REQUIRING PAYMENT PURSUANT TO SOUTH CAROLINA CODE §42-17-60 AND FOR THE PENALTIES, FINES, INTEREST AND ATTORNEYS PURSUANT TO THE SOUTH CAROLINA CODE OF LAWS by facsimile and by depositing a copy of it in the United States Mail, postage prepaid, on December 15, 2017 addressed to:

VIA FAX (888)811-7144 and EMAIL kmiller@dmclaw.com
Kenya C. Miller, Attorney
Dickie, McCamey & Chilcote, PC
P. O. Box 2046
Lancaster, SC 29721

Honorable Jenny Abbott Kitchings
S.C. Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Dated: December 18, 2017


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Proudly representing injured workers
For over 30 years.

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December 18, 2017

Via Fax @ 803-734-1839 & Us Mail
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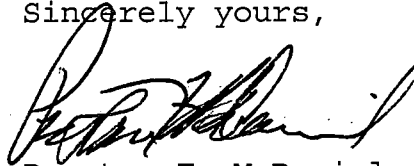
RE: Gennette Sowell, Claimant/Respondent v.
Piggly Wiggly, Employer and Auto Owners Insurance
Inc., Carrier/Appellants
WCC File: 1408826

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of
REPLY TO THE RETURN TO THE MOTION FOR AN ORDER REQUIRING PAYMENT
PURSUANT TO SOUTH CAROLINA CODE §42-17-60 AND FOR PENALTIES,
FINES, INTEREST AND ATTORNEYS FEES PURSUANT TO THE SOUTH CAROLINA
CODE OF LAWS in the above referenced matter. I would appreciate
you returning the clocked-in copy to me in the self-addressed,
stamped envelope which is enclosed

By copy of this letter I am notifying and serving Counsel
with a copy of same. As always, I appreciate all the courtesies
and kindnesses shown to me by the Court.

Sincerely yours,



Preston F. McDaniel

PFM/abh/rmt/smk
Enclosure

cc: Kenya Miller (via US Mail, fax and email kmiller@dmclaw.com)
Gerald Malloy, Esquire (via email: gmalloy@bellsouth.net-3)

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