

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1417071

Joseph Jefferson, Employee,

Claimant/Appellate/Respondent,

vs.

South Carolina Department of Transportation,
Employer, and State Accident Fund, Carrier,

Defendants/Respondent/ Appellants.

RECEIVED

SEP 27 2019

SC Court of Appeals

Appellate Panel Review held in Columbia,
South Carolina, June 17, 2019 notices
timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed

August 29 2019

APPEARANCES:

Claimant/Appellant/Respondent represented by Stephen J. Wukela
of Florence, South Carolina

Defendants/Respondents/ Appellants represented by Erica E. Loudin of Columbia, South
Carolina

I.

STATEMENT OF THE CASE

This matter was decided by the Single Commissioner on the Claimant's Form 50 seeking a ten percent (10%) penalty pursuant to S.C. Code §42-9-90 for the Carrier's failure to make payment of compensation under an award when due. Claimant's Form 50 also sought the payment of medical treatment provided by the authorized treating physician along with attorney's fees and costs pursuant to S.C. Code §42-3-175; which was taken up by the Commission at a separate hearing and decided on a separate order. After hearing of January 16, 2019, the Single Commissioner issued an Order dated February 25, 2019 awarding a ten percent (10%) penalty pursuant to S.C. Code §42-9-90.

The Single Commissioner found:

II. **ANALYSIS/FINDINGS**

A. S.C. Code §42-9-90, 10% Penalty.

By Order of the Workers' Compensation Commission Appellate Panel, filed and served by the Commission on July 23, 2018, (APA No. 23), the Commission ordered the State Accident Fund to pay the Claimant one hundred nine thousand three hundred ten and 33/100 (\$109,310.33) dollars which, after credit for temporary total disability benefits, left a total award of eighty-nine thousand seven hundred seventeen and 22/100 (\$89,717.22) dollars due as a result of the Panel's finding that the Claimant was totally and permanently disabled.

The evidence of the record reveals that on August 3, 2018, Claimant's counsel emailed defense counsel:

Erica:

Joseph Jefferson is coming into my office for me to advise him about the Order.

It is my intention to advise him not to appeal and I am sure he will want to know what you all intend to do.

Can you tell me what your plans are?

Stephen
(APA No. 24, p. 287).

Defense counsel responded on August 8, 2018:

Hi Stephen,

We will not be appealing the Order.

Erica E. Loudin, Esquire
(APA No. 24, p. 287).

On August 9, 2018, Claimant's counsel responded:

Erica:
Thank you for your email.

Mr. Jefferson advises me that he will not appeal if they do not.

Also, I note that S.C. Code Section 42-9-90 provides that:

"if any installment of compensation payable in accordance with the terms of an award by the commission is not paid by within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten percent thereof."

Section 42-9-240 provides that compensation payable under an award is due seven days from the date of the award. Therefore, by operation of these two statutes, any award that is not paid within three weeks of the date of the award shall result in a penalty of 10%.

Given the fact that the award of \$109,000 was made on July 23, 2018 and the three weeks runs on August 13, (Monday), I am curious as to when the Fund will pay the award.

Please advise.

Stephen
(APA No. 24, p. 286).

Thus, as of August 9, 2018, the Commission's Order was seventeen (17) days old, both parties had indicated they did not intend to appeal, and the Claimant's counsel had made the Carrier aware of his position that, pursuant to the operation of S.C. Code ' 42-9-90 and ' 42-9-240, a penalty would accrue if the payment of the award was not made by August 13, four (4) days away.

The record reveals that on August 9 Claimant's counsel also wrote:

Erica:

Your numbers are correct. They can hold the check for another week if they like, 10% sounds pretty good to me.

If not, I will be in Columbia tomorrow afternoon to go sailing. I can drop by and pick up the check.

Up to them.

Stephen J. Wukela
(APA No. 24, p. 285).

Thus, the record establishes that by August 9, 2018, the Fund had no intention of appealing the award, they were aware of the Claimant's contention that a penalty would accrue if the award was not paid by August 13, and Claimant's counsel had offered to go to the Fund and pick up the check.

August 13 came and passed and the award check was not received. On August 14, 2018, Claimant's counsel wrote defense:

Erica:

Today is Tuesday, August 14, 2018.

I have not received a check from the State Fund in satisfaction of the Order of July 23, 2018.

As I indicated in my email of August 9, 2018, by virtue of SC Code

Section 42-9-90 and Section 42-9-240, a 10% penalty accrues to the judgment.

Please advise when I can expect to receive a check in satisfaction of the judgment, along with the penalty.

Stephen J. Wukela (APA No. 24, p. 283).

The defense responded:

Stephen:

Per the adjuster, the check was sent out yesterday (8/13/18) so payment of the award was timely.

Erica E. Loudin, Attorney (APA No. 24, p. 283).

The check, dated August 10, 2018, (APA No. 25, p. 290), was posted by the

Fund on August 13, 2018, (APA No. 25, p. 291), and was not received by the Claimant until August 15, 2018. (APA No. 25, p. 291; APA No. 29, pp. 337-338).

S.C. Code §42-9-90 provides:

"... if any installment of compensation payable in accordance with the terms of an award by the commission is not paid by within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten percent thereof."

The penalty is mandatory, and is triggered when an award by the Commission "...is not paid by within fourteen days after it becomes due..."

"Paid" is a common and familiar word. The layman understands what it means to his mortgage company or his landlord. The Merriam-Webster dictionary defines "pay" as "to satisfy one's debts, duties or obligations; to make requital or payment". The dictionary goes on to define "paid" as the "past tense and past participle of 'pay'". The Commission is cognizant that many practitioners and carriers, are accustomed to using terms like "sent out", "issued", "authorized", "ordered", "processed", "requested", and any number of similarly ambiguous synonyms to describe the status of overdue payments of compensation; however, the statute uses no such vague language. Quite simply, the debt is satisfied when it is paid, not when it is "issued", "sent out", "ordered", or "processed".

The Fund was ordered by this Commission to make a payment to the Claimant, after credit for temporary total disability award, of eighty-nine thousand seven hundred seventeen and 22/100 (\$89,717.22) dollars. The statute provides that if they do not make that payment within three (3) weeks of the Order they shall incur a ten (10%) percent penalty.

The Fund knew the deadline would come, the Claimant's counsel warned the Fund of the deadline, and the Claimant's counsel offered to pick up the check.

The Defendants argue that the term "paid" in §42-9-90 should be read to describe the date on which the installment of compensation is posted to the Claimant. Defendants argue that they posted the payment on August 13, 2018, and that they cannot control when the payment of compensation is received after it has been posted.

The undersigned notes, however, that in this case, the Claimant's counsel offered to physically come to the State Fund and receive the check in hand, and the State Fund declined. Moreover, it is evident that there was no delay in the delivery of the check by the Post Office. The check was posted by the Fund on August 13, 2018 and received by the Claimant on August 15, 2018.

The Fund did not even post the payment until the date it was due; therefore, it could not have been received by the Claimant on the date it was due, no matter how quickly the Post Office acted. Therefore, the Fund's contentions that they cannot control the speed of delivery once posted is not persuasive.

In sum, pursuant to S.C. Code §42-9-90, the payment was due to be received by the Claimant on August 13, 2018. It was not. Thus, a penalty of ten (10%) percent is due.

* * *

ORDER

ORDERED that the State Accident Fund shall, pursuant to S.C. Code §42-9-90, pay to the Claimant a ten (10%) percent penalty in the amount of eight thousand nine hundred seventy-one and 72/100 (\$8,971.72) dollars for failure to timely pay the award of eighty-nine thousand seven hundred seventeen and 22/100 (\$89,717.22) dollars.

This appeal followed.

WE, THE APPELLATE PANEL, having reviewed the evidence of the record, the Single Commissioner's Order, and the briefs and oral arguments of the parties, hereby, AFFIRM, the Decision and Order of the Single Commissioner.

APPELLATE PANEL ANALYSIS/FINDINGS

Based upon the evidence the Single Commissioner's Order, and the briefs and oral arguments submitted by the respective parties pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING:

The Appellant Panel specifically adopts and reiterates, as if set out here in full and verbatim, the analysis and findings of the Single Commissioner. In particular, we find that the Single Commissioner's analysis of the operative language in the S.C. Code §42-9-90 is persuasive.

S.C. Code §42-9-90 provides:

"... if any installment of compensation payable in accordance with the terms of an award by the commission is not paid by within fourteen days after it becomes due, as provided in Section 42-9-240, there shall be added to such unpaid installment an amount equal to ten percent thereof."

The penalty is mandatory, and is triggered when an award by the Commission "... is not paid by within fourteen days after it becomes due...". (Emphasis added).

As the Single Commissioner held, "Paid" is a common and familiar word. The layman understands what it means to his mortgage company or his landlord. The Merriam-Webster dictionary defines "pay" as "to satisfy one's debts, duties or obligations; to make requital or payment". The dictionary goes on to define "paid" as the "past tense and past participle of 'pay'". The Commission is cognizant that many practitioners and carriers, are accustomed to using terms like "sent out", "issued", "authorized", "ordered", "processed", "requested", and any number of similarly ambiguous synonyms to describe the status of overdue payments of compensation; however, the statute uses no such vague language. Quite simply, the debt is satisfied when it is paid, not when it is "issued", "sent out", "ordered", or "processed".

The majority of the Panel agrees with the Single Commissioner that the Order is satisfied, that is, "paid" when the Carrier delivers money to the Claimant.

Put simply, a debt is paid when the payment is received, not when it is promised, not when payment is posted. This is the common understanding of the term, and the understanding that this Commission is bound to apply.

In dissent, our esteemed colleague points to a North Carolina Court of Appeals decision construing the term "paid" under the North Carolina Worker's Compensation Act. As the dissent correctly points out, South Carolina Courts frequently look to North Carolina's construction of their Worker's Compensation Act when there is lack of precedent in South Carolina. Certainly, the South

Carolina Worker's Compensation Act is modeled on North Carolina's Law. In Morrison v. Public Service Company of North Carolina, Inc., 643 S.E.2d 58 (N.C. Ct. App. 2007), the North Carolina Court of Appeals construed the term "paid" in North Carolina Gen. Stat. §97-18 which is mirrored by its South Carolina counterpart, S.C. Code §42-9-90. In Morrison the parties stipulated to a due date for a settlement payment and the Carrier mailed checks to the Plaintiff's Counsel on that date. The Morrison Court considered whether the Claimant should be awarded a ten percent (10 %) penalty pursuant to the North Carolina counterpart to S.C. Code §42-9-90 because the payments were not received until after the date they were due. In construing the word "paid", the North Carolina Court of Appeals found that definitions of the verb "to pay" center around the verb "to give", such as to give money in return for goods or services. The Court went onto reason that the term "to give" in turn means "to deliver in exchange or recompense, to accord, or to tender to another, to convey or offer for conveyance, or to execute and deliver". Morrison, 643 S.E.2d 58, 62.

Thus, the North Carolina Court reasoned that a late penalty applies "whenever 'any installment of compensation is not paid, [i.e., given, tendered, offered, or delivered] within 14 days after it becomes due', N.C. Gen. Stat. §97-18(g), as opposed to when payment is not received within fourteen (14) days." Morrison v. Public Serv. Co. of N.C., Inc. 643 S.E. 2d 58, 62.

The dissent here concludes that, in the absence of South Carolina precedent, this Commission should adopt the logic of the North Carolina Court of Appeals in construing the term "paid" and find that "pay" means "give", that "give" in turn means "tender", and that an item is tendered when it is offered unconditionally, not when it is received. Thus, under this logic, a debt is "paid" when payment is "tendered" or offered unconditionally; and one may "tender" payment by depositing it in the United States Post Office.

With due respect for the North Carolina Appellate Court, the majority regards this litany of:

“pay means give, give means tender, tender means unconditionally offer, mailed is unconditionally offered, therefore, paid means mailed” as exactly the kind of tortured construction of a plain and ordinary term that our Courts have long and consistently warned against.

As the Single Commissioner held, paid is a common and familiar word; the laymen understands what it means to his mortgage company or his landlord. Quite simply, paid does not mean “the check is in the mail”.

Indeed, the North Carolina Courts, themselves, have questioned and limited the holding in Morrison. In Fowler v. Riddle 772 S.E. 2d 873 (N.C. Ct. App. 2015) the North Carolina Court of Appeals distinguished its decision of Morrison. Fowler involved the construction of North Carolina Rule 41 (d) which provides that if a Plaintiff who has once dismissed an action commences the action again based on the same claim against the same Defendant before the payment of costs for the action previously dismissed, the Court shall “make an Order for the payment of such costs by the Plaintiff within thirty (30) days and shall stay the proceedings in the action until the Plaintiff has complied with the Order.” North Carolina Rule 41 (d) goes on to provide that “if the Plaintiff does not comply with the Order, the Court shall dismiss the action.”

In Fowler, a Plaintiff dismissed and refiled an action based upon the same claim and the North Carolina trial court entered an order requiring that the Plaintiff “shall pay to the Clerk of Court [the costs of the action]...” It went onto provide “If Plaintiffs failed to make that payment within thirty (30) days of the date of this Order, this action would be subject to further order of this Court including dismissal.”

The Plaintiff in Fowler posted a check for the costs to the Clerk of Court on the 29th day after the date of the Order. The check was received via US mail by the Clerk of Court on the 31st day. The trial court dismissed the Plaintiff’s action for failure to comply with the Order requiring payment

within 30 days. Citing Morrison, the Plaintiff argued that mailing payment to the Clerk within 30 days (rather than actual receipt by the Clerk) satisfied their obligation under the Order. The Fowler Court distinguished Morrison; finding that it involved payment pursuant to a compromise settlement agreement, rather than an order. The Court found that “Unlike in Morrison where the parties stipulated to the due date of the settlement payment, in the present case the trial court entered an order requiring plaintiffs to make payment within thirty (30) days based on Rule 41 (d).” Fowler at 873. The Fowler Court went on to conclude that the plain and ordinary meaning of the word pay required actual delivery. The North Carolina Court held:

As previously stated, “[s]tatutory interpretation properly begins with an examination of the plain words in the statute, because [t]he legislative purpose of a statute is first ascertained by examining the statute’s plain language.” Wind v. City of Gastonia, 226 N.C. App. 180, 187, 738 S.E. 2d 780, 784 (2013) (citations and quotation marks omitted). The plain language of Rule 41 (d) requires “payment of such costs by the plaintiff within 30 days.” We note that N.C. Gen. Stat. §1A-1 Rule 41 does not define “payment.” “Nothing else appearing, the Legislature is presumed to have used the words of a statute to convey their natural and ordinary meaning. In the absence of a contextual definition, [*10] courts may look to dictionaries to determine the ordinary meaning of words within a statute.” Perkins v. Arkansas Trucking Servs., 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citations omitted).

Black’s Law Dictionary defines “payment” as

1. Performance of an obligation, usu. by the delivery of money. ? Performance may occur by delivery and acceptance of things other than money, but there is payment only if money or other valuable things are given and accepted in partial or full discharge of an obligation. 2. The money or other valuable thing so delivered in satisfaction of an obligation.

Black’s Law Dictionary 1150 (7th ed. 1999). Thus, according to the ordinary meaning of the term “payment,” a plaintiff who voluntarily dismisses an action or claim must perform by delivering money, specifically the costs of the action, within thirty (30) days. “Payment” only occurs if the costs are “given and accepted” in full discharge of an obligation. Because plaintiffs failed to deliver the costs of the voluntarily dismissed action the defendants within thirty (30) days of the 17 February 2014 order, we affirm the 23 April 2014 order of the trial court dismissing plaintiffs’ 8 January 2014 action.

Thus, when construing the word payment in the context of an order, the North Carolina Court

of Appeals, consulting Black's Law Dictionary, interpreted the word payment as to require the actual delivery of money, and found posting insufficient.

Here, as in Fowler, payment was due in satisfaction of an order, not in satisfaction of a settlement agreement, as was the case in Morrison. Even if North Carolina precedent was binding in the case of at bar, that North Carolina has distinguished the precedent of Morrison in cases involving orders rather than settlement agreements. However, North Carolina precedent is not binding on this Commission. While the majority acknowledges with approval our studied colleague's consultation of North Carolina jurisprudence on the question before us, (especially considering the fact that it was not presented by counsel for the parties), we are still constrained by South Carolina Law to apply the plain and ordinary meaning of the term "paid" chosen by the legislature without resulting to subtle or strained constructions of that decidedly everyday word.

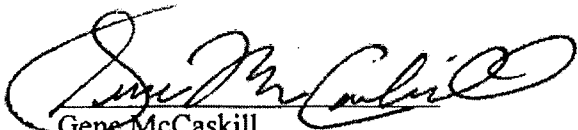
Payment is made when money is received. The State Fund had more than adequate opportunity to deliver the funds necessary to satisfy their obligation under the Order of this Commission in the time mandated by statute. They failed to do so, notwithstanding the fact that the Claimant's counsel offered to come to the Fund in person to receive the check on behalf of his client. Instead, the Fund elected to post the funds the day they were due. By statute, their delay resulted in a mandatory penalty.

For the foregoing reasons, the decision below is AFFIRMED.

IT IS SO ORDERED.



R. Michael Campbell, II



Gene McCaskill
Chair

Commissioner Melody L. James, dissenting.

The appellate courts of South Carolina have not addressed the meaning of the word "paid" in Sec. 42-9-90. A review of our sister state's, North Carolina, opinions, indicate that the North Carolina Court of Appeals has addressed the meaning of "paid" under their similar statute in Morrison v. Public Serv. Co. of N.C., Inc., 182 N.C.App. 707, 643 S.E.2d 58 (N.C. Ct. App. 2007). As such, I find this case law of North Carolina to be persuasive on this issue.

In Morrison, the North Carolina Court of Appeals held:

[T]he employer and administrator tendered or made the settlement payment within twenty-four days, as required to avoid late payment penalty, when employer and administrator mailed checks to claimant's counsel on *last day of the 24-day period, even though checks were received by counsel after expiration of the 24 day period.* Morrison v. Public Serv. Co. of N.C., Inc., 182 N.C.App. 707, 713, 643 S.E.2d 58, 63 (emphasis added).

The North Carolina Industrial Commission entered an order on May 5, 2004, approving the parties' settlement agreement. Id. at 713, 643 S.E.2d at 63. The defendants were required to make payment within twenty-four days, so either on or before May 29, 2004. Id. May 29, 2004, however, fell on a Saturday and the following Monday was Memorial Day. Id. Thus, the payment deadline was extended to June 1, 2004. Id. See Morris v. L.G. Dewitt Trucking, Inc., 143 N.C.App. 339, 343, 545 S.E.2d 474, 476 (2001) (noting that pursuant to Workers' Compensation Rule 609(8), when the last day of the payment period falls on a weekend or legal holiday, the payment period is tolled until the next day that is not a Saturday, Sunday, or legal holiday). It was uncontested that the defendants mailed the checks to the claimant on June 1, 2004. Morrison, at 714, 643 S.E.2d at 63. The claimant's attorney received the checks on June 2nd and 3rd. Id. at 708, 643 S.E.2d at 60. The North Carolina Court of Appeals found that the defendants properly

tendered or made payment within the twenty-four day period, and thus, the Full Commission did not err in denying the claimant's motion for imposition of a late payment penalty. Id. at 714, 643 S.E.2d at 63.

In conclusion, in the absence of South Carolina precedent, this Commission should adopt the holding of Morrison that a benefit is "paid" upon the defendants mailing the check, even if the check is received by the claimant or their attorney outside the time frame. See Morrison v. Public Serv. Co. of N.C., Inc., 182 N.C.App. 707, 643 S.E.2d 58.

I RESPECTFULLY DISSENT.


Melody L. James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on August 29, 2019