THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1417071

Joseph Jefferson, Employee, ... Respondent.

vs.

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

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

QUESTIONS PRESENTED

DID THE WORKERS' COMPENSATION COMMISSION PROPERLY AWARD A TEN PERCENT (10%) PENALTY ON THE HEARING AWARD DUE TO THE APPELLANTS' FAILURE TO MAKE A TIMELY PAYMENT PURSUANT S.C. CODE §42-9-90?

STATEMENT OF ISSUES ON APPEAL

The Workers' Compensation Commission properly awarded a ten percent (10%) penalty on the hearing award due to the Appellants' failure to make a timely payment pursuant S.C. Code §42-9-90.

STATEMENT OF THE CASE

This is a Worker's Compensation case.

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 Appellant, State Accident Fund, to pay the Claimant One Hundred Nine Thousand Three Hundred Ten and 33/100 ($109,310.00) 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.

Thereafter, the Respondent filed a Form 50 hearing request seeking a ten percent (10%) penalty pursuant to S.C. Code §42-9-90 as a result of the Carrier's failure to make payment of compensation under the award when it was due. By Order of February 25, 2019, the Single Commissioner ordered that the Appellants pay a ten percent (10%) penalty for failure to timely pay the award of July 23, 2018.

The Appellants appealed to the Workers' Compensation Appellant Panel. By Order of August 29, 2019 the Appellant Panel affirmed the Single Commissioner's decision to award a ten percent (10%) penalty. This appeal followed.

ARGUMENT

The Workers' Compensation Commission properly awarded a ten percent (10%) penalty on the hearing award due to the Appellants' failure to make a timely payment pursuant S.C. Code §42-9-90.

FACTUAL BACKGROUND

The undisputed evidence of the record reveals that on August 3, 2018, after the Commission's award of July 23, 2018, Respondent's counsel emailed Appellants' 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).

Appellants' 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, Respondent'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 of July 23, 2018 was seventeen (17) days old, both parties had indicated they did not intend to appeal, and the Respondent's counsel had made the Appellants aware in writing 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 Respondent's counsel also wrote Appellants' counsel:

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

August 13 came and passed and the award check was not received.

On August 14, 2018, Respondent'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 Appellants' counsel 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).

It is undisputed that the check, dated August 10, 2018, (APA No. 25, p. 290), in satisfaction of the Order of July 23, 2018 was posted by the State Accident Fund on August 13, 2018, (APA No. 25, p. 291), and was not received by the Respondent until August 15, 2018. (APA No. 25, p. 291; APA No. 29, pp. 337-338).

S.C. Code §42-9-240 provides:

> **Date on which compensation payable under award becomes due.**
>
> The first installment of compensation payable under the terms of an award by the commission ... shall become due seven days from the date of such an award ... on which date all compensation then due shall be paid ...

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...".

LEGAL ANALYSIS

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." Garvin v. State, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005); Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003); Knotts v. S.C. Dep't of Natural Res., 348 S.C. 1, 10, 558 S.E.2d 511, 516 (2002). "The primary purpose in construing a statute is to ascertain legislative intent." Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005).

"'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" Knotts, 348 S.C. at 10, 558 S.E.2d at 516 (quoting Norman J. Singer, Sutherland Statutory Construction, §46.03 at 94 (5th Ed. 1992)); Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). "The legislature's intent should be ascertained primarily from the plain language of the statute." State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004); State v. Morgan, 352 S.C. 359, 366, 574 S.E.2d

203, 206 (Ct. App. 2002); Stephen v. Avins Constr. Co., 324 S.C. 334, 338, 478 S.E.2d 74, 76 (Ct. App. 1996).

"The first question of statutory interpretation is whether the statute's meaning is clear on its face." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 549 S.E.2d 243 (2001)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." Vaughn v. Bernhardt, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc., 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." Morgan, 352 S.C. at 366, 574 S.E.2d at 206 (Ct. App. 2002) (citing Southern Mut. Church Ins. Co. v. South Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991)). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005) (citing Hodges, 341 S.C. 79, 533 S.E.2d 578; Bayle, 344 S.C. at 122, 542 S.E.2d at 739). "When the terms of a statute are clear, the court must apply those terms according to their literal meaning." Georgia-Carolina Bail Bonds, 354 S.C. at 24, 579 S.E.2d at 337 (citing Cooper v. Moore, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002); Holley v. Mount Vernon Mills, Inc., 312 S.C. 320, 440 S.E.2d 373 (1994); Carolina Alliance for Fair Employment

v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999); see also Parsons v. Georgetown Steel, 318 S.C. 63, 65, 456 S.E.2d 366, 367 (1995) ("Where the terms of a relevant statute are clear, there is no room for construction.")).

The Commission was bound, therefore, to apply the plain meaning of the word "paid" found in S.C. Code §42-9-90. The Commission reasoned:

> 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.
> (App. Pan. Order 08/29/19, p. 7).

Dissenting from the Appellant Panel majority's finding, Commissioner James cited the North Carolina case of Morrison v. Public Service Company of North Carolina, Inc., 43 S.E. 2nd (N.C. Ct. App. 2007). The dissent found that:

> 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.

The majority of the Appellant Panel disagreed holding:

> 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) "payment of such costs by the plaintiff within 30 days." We note that N.C. Gen. Stat. §lA-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.
> (App. Pan. Order 08/24/2019, pp. 7-11).

Appellants argue that "If the liability for a penalty falls on the employer and insurer to comply with the time period set forth, the employer and insurer must be granted some certainty and control over the payment to ensure compliance with the statute." (App. Brief, p. 8).

Such policy arguments are the province of the Legislature and have no applicability to this Court's construction of a clear and unambiguous statute with terms which the Court applies according to their literal meaning.

In any event, the Legislature did not provide for a penalty lightly. First, the Legislature applied the penalties only to orders of the Commission rather than settlements. See S.C. Code §42-9-240. The Legislature also provided that compensation payable under the terms of an order "shall become due seven (7) days from the date of such award ... on which date all compensation then due shall be paid". S.C. Code §42-9-240. The Legislature, therefore, made payment on an award due seven (7) days from the date of the award, but did not provide for a penalty where carriers failed to make payment by that date. Instead, the Legislature enacted S.C. Code §42-9-90 and allowed another fourteen (14) day grace period beyond the statutory due date for payment. It is not until the carrier fails to make payment after that additional grace period that the Legislature provided a ten (10%) percent penalty.

The Legislature did not tie the ten percent (10%) penalty to the Carrier's failure make to a payment on an award when due; they tied the penalty to the Carrier's failure to make payment two (2) weeks after it was due.

In any event those policy judgments are for the General Assembly, not the Courts.

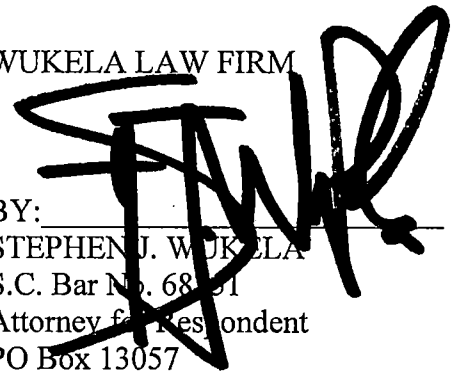
CONCLUSION

The Legislature used a clear unambiguous word: "paid." As the Appellant Panel noted, it is the common sense understanding that "payment is made when money is received."

For the foregoing reasons the finding of the Appellant Panel should be AFFIRMED.

Respectfully submitted,

WUKELA LAW FIRM



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January 30th, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1417071

Joseph Jefferson, Employee, ... Respondent,

vs.

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

PROOF OF SERVICE OF RESPONDENT'S INITIAL BRIEF

I certify that I have served the Respondent's Initial Brief on the Appellants by depositing a copy of it in the United States Mail, postage prepaid, on January 30th, 2020 addressed to Erica E. Loudin, 3600 Forest Drive, Suite 204, Columbia, SC 29204; and Page P. Hilton, Attorney at Law, State Accident Fund, PO Box 102100, Columbia SC 29221.

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January 30, 2020

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Joseph Jefferson vs. SC Department of Transportation
Appellate Case No. 2019-001643

Dear Ms. Kitchings:

Enclosed for filing please find the original Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal in the above case.

By copy of this letter, I am serving Erica Loudin, Attorney at Law, 3600 Forest Drive, Suite 204, Columbia, SC 29204; and, Page P. Hilton, Attorney at Law, State Accident Fund, PO Box 102100, Columbia, SC 29221, with the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb

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JAN 31 2020
SC Court of Appeals

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