

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Order

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SC Court of Appeals

WCC File No.:1417071

Appellate Case No.: 2019-001643

Joseph Jefferson, Employee,.....Respondent,

v.

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

FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE WORKERS COMPENSATION COMMISSION APPELLATE PANEL ERRED IN ORDERING APPELLANTS TO PAY RESPONDENT A 10% PENALTY DUE TO APPELLANTS' FAILURE TO TIMELY PAY THE AWARD ORDERED BY THE COMMISSION.

STATEMENT OF THE CASE

This is an appeal involving a decision from the South Carolina Workers' Compensation Commission. Respondent was involved in an admitted work accident on September 17, 2014. On September 12, 2017, a hearing was held before a Single Commissioner to determine Respondent's entitlement to benefits, including permanent disability and future medical treatment.

On March 1, 2018, the Single Commissioner issued a Decision and Order, wherein she found Respondent sustained compensable injuries to the cervical spine, head, and psychological overlay, rendering Respondent permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10. (R. pp. 58–59). The Single Commissioner ordered that benefits were to be paid to Respondent in a lump sum pursuant to S.C. Code Ann. § 42-9-301 and Regulation 67-1605. (R. pp. 63–64). The Single Commissioner also ordered Respondent was entitled to lifetime causally related medical treatment pursuant to § 42-9-10(A) and § 42-15-60(C). (R. pp. 58–59).

Following receipt of the Single Commissioner's March 1, 2018 Decision and Order, Appellants filed an appeal to the Full Commission Appellate Panel ("Full Commission") regarding the Single Commissioner's award of permanent and total disability under § 42-9-10, and Respondent filed a cross-appeal regarding the Single Commissioner's failure to find Respondent suffered permanent and severe brain damage pursuant to § 42-9-10(C).

On July 23, 2018, The Full Commission affirmed the Decision and Order of the Single Commissioner with amendments. (R. p. 47). The Full Commission amended the Single Commissioner's findings to (1) clarify that Respondent was permanently and totally disabled

pursuant to S.C. Code Ann. § 42-9-10(A), and (2) find that Respondent failed to meet the burden of proof necessary to establish that he suffered permanent and severe brain damage within the meaning of § 42-9-10(C) and accompanying case law. (R. pp. 37–43). Pursuant to the Full Commission’s July 23, 2018 Order, Appellants were ordered to pay Respondent a final award.

Pursuant to S.C. Code Ann. § 42-9-240, the award became due seven (7) days from the date of the award, which was July 30, 2018. Furthermore, pursuant to S.C. Code Ann. § 42-9-90, a 10% penalty would be applied if the award of the Commission was not *paid* within fourteen (14) days after it became due, which would fall on August 13, 2018.

On August 13, 2018, Appellants mailed Respondent the award check, which was dated August 10, 2018. (R. p. 98). The award check was received by Respondent on August 15, 2018. (R. pp. 98–101).

On August 27, 2018, Respondent filed a Form 50 request for hearing, seeking a 10% penalty for failure to timely pay an award pursuant to S.C. Code Ann. §42-9-90. Appellants timely filed a Form 51 answer to Respondent’s request for hearing, denying Respondent’s entitlement to a 10% penalty on the basis that the order award was timely paid. A hearing was held on the penalty issue before a Single Commissioner on January 16, 2019. On February 25, 2019, the Single Commissioner issued a Decision and Order, ordering Appellants to pay a 10% penalty to Respondent pursuant to S.C. Code Ann. § 42-9-90. (R. p. 24). On March 11, 2019, Appellants filed a Form 30 Request for Commission Review on the grounds that the Single Commissioner erred in finding that Appellants failed to timely pay the award and Respondent was therefore entitled to a 10% penalty.

On August 29, 2019, the Full Commission issued a Decision and Order, wherein the Full Commission majority affirmed the Single Commissioner’s decision that Appellants were to pay a

10% penalty for failure to timely pay the award. (R. p. 11). The Full Commission dissent held that a benefit is “paid” upon defendants mailing the award check, even if the check is received by the claimant or his attorney outside the timeframe prescribed by statute, and therefore Respondent was not entitled to a 10% penalty to be by Appellants. (R. pp. 12–13). On September 27, 2019, Appellants filed a Notice of Appeal before this Court. This appeal follows.

STANDARD OF REVIEW

In workers’ compensation cases, the South Carolina Workers’ Compensation Commission is the trier of fact. *Hunter v. Patrick Construction Co.*, 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(A)(6)(1976), establishes the “substantial evidence rule” as the standard for judicial review of a decision of the Commission:

The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the administrative agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (d) affected by other error of law; [or]
- (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

ARGUMENT

- I. THE WORKERS’ COMPENSATION FULL COMMISSION MAJORITY ERRED IN FINDING RESPONDENT WAS ENTITLED TO A 10% PENALTY ON THE HEARING AWARD DUE TO APPELLANTS FAILURE TO MAKE TIMELY PAYMENT PURSUANT TO S.C. CODE ANN. § 42-9-90.

The sole issue before this Court involves whether the Full Commission majority erred in finding Respondent was entitled to a 10% penalty due to Appellants failure to timely pay the final

award ordered by the Full Commission. Specifically, the issue before this Court comes down to the interpretation of the word “paid” as it is used in S.C. Code Ann. § 42-9-90.

S.C. Code Ann. § 42-9-240, titled “Date on which compensation payable under award becomes due,” states:

The first installment of compensation payable under the terms of an award by the commission or under the terms of a judgment of a court upon an appeal from such an award shall become due seven days from the date of such an award or from the date of such a judgment of the court, on which date all compensation then due shall be paid, including interest from the original date of the award at the maximum legal rate. Thereafter compensation shall be paid in installments weekly, except when the commission determines that payment in installments shall be made monthly or in some other manner.

S.C. Code Ann. § 42-9-240.

The Workers’ Compensation Act also includes a statute that addresses a 10% penalty for failure to timely pay an award ordered by the Commission. S.C. Code Ann. § 42-9-90, titled “Increase in compensation which is not *paid* when due,” states:

...if any installment of compensation payable in accordance with the terms of an award by the commission is not *paid* 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 per cent thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

S.C. Code Ann. § 42-9-90(emphasis added).

The Full Commission dissent accurately points out that the appellate courts of South Carolina have not addressed the meaning of the word “paid” in S.C. Code Ann. § 42-9-90, and a review of our sister state, North Carolina’s, opinions indicate that the North Carolina Court of Appeals has addressed the meaning of “paid” under their similar statute. (R. p. 12). As our

appellate courts have consistently held, “[t]he South Carolina Supreme Court generally accords North Carolina workers’ compensation cases weight, because the South Carolina statute was fashioned after North Carolina’s.” *Nelson v. Yellow Cab Co.*, 349 S.C. 589, 564 S.E.2nd 110 (2002).

In *Morrison v. Public Service Co. of N.C., Inc.*, the North Carolina Court of Appeals reviewed N.C. Gen.Stat. §97-18(g), a statute almost identical S.C. Code Ann. § 42-9-90, which imposes a 10% penalty if any installment of compensation is not *paid* within fourteen (14) days after it becomes due. The Court in *Morrison* concluded that payment must be tendered, not received, within the statutory period to avoid a late payment penalty. *Morrison v. Public Services Co. of N.C.*, 182 N.C.App. 707, 643 S.E.2nd 58, 61 (N.C. Ct. App. 2007).

Appellants argue that this Court should apply the holding in *Morrison*, which sets forth a clear and compelling analysis of why the term “paid” should be interpreted as when the party issues payment, as opposed to when payment is received. The holding in *Morrison* is consistent with both the plain meaning of the statutory language and the legislative intent of these penalty statutes.

In *Morrison*, the Court’s first analysis explains why its holding is in accord with the plain meaning of the statutory language. Specifically, the Court addresses the statute’s use of the word “paid” and explains:

Definitions of the verb to “pay” center around the verb to “give,” such as “to give money to in return for goods or services rendered” or “to give (money) in exchange for goods or services.” *The American Heritage College Dictionary* 1004 (3rd ed.1997). To “give,” in turn, means, *inter alia*, “to *deliver* in exchange or recompense,” “to accord or *tender* to another,” “to convey or *offer* for conveyance,” or “to execute and *deliver*.” *Id.* At 577 (emphasis added); *accord Black’s Law Dictionary* 698 (7th ed.1999). Thus, in accordance with the plain language of the statute, a late payment 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)(2005), as opposed to when payment is not *received* within fourteen days.

(*Morrison* at 62).

The Court in *Morrison* goes on to evaluate the legislative intent behind the relevant statute and finds it compels the same reading of the statute, stating:

The Workers’ Compensation Act strives to provide certainty in dealings between employees and employers regarding work related injuries.” See *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2nd 479, 484 (N.C. 1966)(“The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and *determinate liability to employers.*” (emphasis added)), *overruled in part on further grounds, Derebery v. Pitt County Fire Marshall*, 318 N.C. 192, 198, 347 S.E.2nd 814, 818 (1986). The legislature’s goal of providing certainty in worker’s compensation proceedings and settlements is further evidenced by the requirement imposed on employers by North Carolina General Statutes, section 97-18(h): further evidenced by the requirement.

(*Id.*).

In *Morrison*, the Court goes on to address N.C. Gen.Stat. §97-18(h)(2005), which requires an employer or insurer to send notice to the Commission and employee within sixteen (16) days that such final payment has been made, and failure to send notice results in civil penalty of twenty-five dollars (\$25.00) against the employer and insurer. The Court in *Morrison* explains:

As the Industrial Commission correctly noted, “[i]n order for defendant[s] to fulfill this statutory obligation, defendant[s] must know the exact date payment is made to both complete the form and determine when the statutory time period to file the form begins.” Thus, our holding that payment is made when tendered provides employers with greater certainty with regards to their potential liability pursuant to section 97-18(h).

In Conclusion of Law number 4, the Industrial Commission recognized the advantages of linking the date payment is made to the date tendered:

The most clear and determinable time to consider when payment is made is the time at which defendant[s] mail[] the check by depositing it with the United States Postal Service or other recognized parcel service. Defendants have control over the point in time in which the check is mailed. The defendants know this date and will have certainty that their obligation has been met. When the check is handed over to the parcel service, the check is no longer in defendant's [sic] control. This is a clearly and easily identifiable date the parties can reference to analyze their responsibilities and determine if statutory requirements have been met... Defendants should not be penalized for a delay in delivery since the actual delivery of the check is not in the defendant's [sic] control, but that of the postal or other parcel service.

Conversely, the Commission explained the limitations and substantial disadvantages of looking to the date of receipt by the employee:

To use the date plaintiff actually receives the check... will require defendant[s] to estimate the number of days it will take for the check to reach the plaintiff after mailing it to assure the plaintiff receives the check within the twenty-four (24) day time period. By taking this estimation into consideration, defendant's period of time to make payment is shortened. Not only is this not an easily discernible period of time with any exactitude, but it also runs contrary to an otherwise simple process contemplated under N.C.G.S. §97-18(g). Further, using the date plaintiff receives the check to determine when payment is made may cause confusion and create an opportunity for self-interest especially since defendant[s] do[] not have control over when plaintiff receives the check.
(*Id* at pp.62-63).

Appellants urge this Court to follow the logic applied by North Carolina Court of Appeals in *Morrison*. S.C. Code Ann. § 42-9-90 sets forth a penalty against the employer and insurer for failure to pay an award within the prescribed fourteen (14) day period. If 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. If an award is not considered to be “paid” until compensation is received by the claimant, the employer and insurer lose that control, and compliance is directed by forces outside their control; this would result in inherent uncertainty.

A practical application of this issue demonstrates that if an award is not “paid” until it is “received,” it would result in the unintended consequence of a fluctuating and often shortened time period allowed for the employer and insurer to issue payment and avoid a penalty. For example, awards are often issued to employees that have moved out of state, or even out of the country. If the award is not “paid” until it is received, the employer and insurer would have to estimate additional time required for mailing and accommodate the estimated additional period of time necessary for delivery to a further destination. Even then, the employer and insurer representative still cannot ascertain exactly when the delivered award is received.

Even if delivery of the award is made locally, the employer and insurer cannot control when payment is received. For example, attorney’s offices often use P.O. boxes for incoming mail. If an award is not “paid” until it is received, the employer and insurer are at the mercy of opposing counsel to check regularly and timely their P.O. box in order to avoid a penalty, which is completely out of their control.

In this case, counsel for Respondent emailed Appellants to let them know he would be in town to go sailing, and therefore he could come by and pick up the award check in person. (R. p. 93). While Appellants appreciate Respondent’s counsel’s offer in this case, rules placing a potential penalty on an employer and insurer cannot be handled on a case-by-case basis, and unless the rule mandates that opposing counsel make themselves available to pick up checks, employers and insurers simply cannot count on opposing counsel’s willingness to pick up award

checks themselves. The issue again comes down to the need for the employer and insurer's ability to control, with certainty, their compliance with the South Carolina statute.

The Full Commission majority states that the North Carolina courts questioned and limited the *Morrison* holding in *Fowler v. Riddle*,¹ which involved an order requiring the Plaintiff to pay to the Clerk of Court the costs of the action. 240 N.C. 602, 772 S.E.2nd 873 (N.C. Ct.App. 2015). In *Fowler*, the order went on to state "If plaintiffs failed to *make 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 Court in *Fowler* specifically addresses *Morrison*, and distinguishes the holdings based on the facts that payment in *Morrison* was due to the plaintiff while the payment in *Fowler* was due to the Clerk of Court, and the plain language of the applicable statute in *Morrison* used the term "paid" while in *Fowler*, the plain language term "payment" is critical.

This case is identical to *Morrison* in that it also involves payment to an injured worker and not the Clerk of Court, and S.C. Code Ann. § 42-9-90 uses the term "paid" and not "make payment." As such, Appellants argue that the Full Commission majority's reliance on *Fowler* is misplaced, and the holding in *Morrison* should control. The Full Commission majority incorrectly states that the *Fowler* Court distinguished *Morrison* because it involved payment pursuant to a compromise settlement agreement rather than an order, but the Court in *Morrison* explains "an agreement between the employer and workmen's compensation carrier and the employee for payment of compensation benefits, when approved by the Industrial Commission, is binding on the parties thereto" citing *Buchanan v. Mitchell County*, 38 N.C.App. 598, 598, 248

¹ Interestingly, no argument involving *Fowler v. Riddle* was raised by the Full Commission or Respondent at oral arguments, and Appellants would note that the issue of whether *Morrison* was distinguished by *Fowler* was only added by counsel for Respondent in drafting the final Full Commission Order.

S.E.2nd 399, 400 (1978), and “[i]n approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree.” *citing Pruitt v. Knight Publ’g Co.*, 289 N.C. 254, 258, 221 S.E.2nd 355, 358 (1976). Therefore, the Full Commission majority’s finding that *Fowler* is distinguished from *Morrison* because it involved payment pursuant to a settlement instead of an order is incorrect.

The Full Commission majority states that “paid” is a common and familiar word, and the layman understands what it means to his mortgage lender or his landlord. Appellant’s argue that using an individual’s payment to his mortgage company is simply too far out of context to serve as an example of how a workers’ compensation penalty is to be applied. Unlike the numerous uncertainties that exist with delivery to an injured worker, such as changes in location, an individual’s mortgage company is an institution whose location and method of acceptance does not vary or change like an injured worker or his attorney might.

The Full Commission majority goes on to state that the *Merriam-Webster* dictionary defines “pay” as “to satisfy one’s debts, duties, or obligations; to make requital or payment,” and the dictionary goes on to define “paid” as the “past tense and past principle of pay.” Even this reading of the definition of “pay” as defined by *Merriam-Webster* dictionary includes “to make requital or payment.” The holding in *Morrison* that something is “paid” when it is tendered is entirely consistent with this definition.

The Full Commission majority states that it is cognizant that many practitioners and carriers are accustomed to using ambiguous synonyms such as “sent out,” “issued,” “authorized,” “ordered,” “processed,” or “requested” to describe the status of overdue payments of compensation; however, the statute uses no such vague language. The Full Commission

majority also states, “quite simply, the debt is satisfied when it is paid, not when it is “issued,” “sent out,” “ordered,” or “processed.” Appellants agree that § 42-9-90 does not use vague language. The clear language of the statute says that the award must be “paid” within the fourteen (14) days after it becomes due. It does not say the award must be “received” within the fourteen (14) day period.

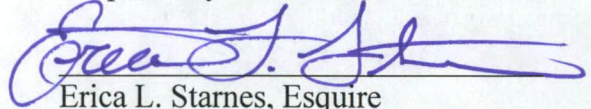
In addition to the North Carolina’s interpretation of “paid” set forth in *Morrison*, this Court can also look to other surrounding states for guidance. The Official Code of Georgia Annotated §34-9-221 designates the procedures for payment of benefits. Subsection (b) specifically states “...payments shall be considered to be paid when due when mailed from within the State of Georgia to the address specified by the employee or to the address of record according to the board.” O.C.G.A. § 34-9-221(b).

CONCLUSION

For the reasons set forth above, S.C. Code Ann. §42-9-90’s use of the word “paid” should be interpreted as when the employer and insurer issues payment of the award to the claimant, not when the award is received. The Full Commission majority’s finding that an award is not “paid” until it is received is contrary to the plain meaning of the statutory language and the legislative intent of S.C. Code Ann. §42-9-90. Accordingly, this Court should reverse the decision of the Full Commission majority’s decision that Respondent is entitled to a 10% penalty to be paid by Appellant for failure to make timely payment.

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Respectfully Submitted,



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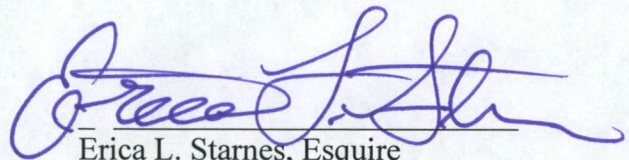
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CERTIFICATE OF COUNSEL

Appellants, by and through their undersigned counsel, certify that the Final Brief complies with Rule 211(b), SCACR.



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