

RISK ALERT

THE MONTHLY BULLETIN FOR WORKERS' COMPENSATION RISK MANAGERS



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CASE LAW UPDATE

Deadline for Paying Settlement Proceeds Clarified

On April 22, 2004, Robert Morrison agreed to resolve his claim against Public Service Company of North Carolina and Key Risk, its third party administrator, for a lump sum payment of \$127,500 and defendants' promise to continue weekly TTD checks until Commission approval of the settlement. A written agreement was prepared, executed, and approved by the Commission in an order received by the defendants on May 5, 2004.

Key Risk issued two settlement checks and mailed both to Morrison's attorney on June 1, 2004. The first was received on June 2 and the second a day later. At that point, Morrison's attorney filed a motion for a late payment penalty under N.C.G.S. § 97-18, contending that as a result of the Court of Appeals' holding in *Carroll v. Living Centers Southeast, Inc.* (see *Risk Alert*, April 2003), the defendants had twenty-four days from May 5, or until June 1, to make payment, and since claimant did not actually receive his settlement check until after that, a 10% penalty was owed.

Claimant's motion was denied by the Commission's Executive Secretary, Tracey Weaver, but granted on appeal by Deputy Commissioner Lorrie Dollar, who found that the payment was late and a penalty was owed. However, the Full Commission, with Commissioner Bolch dissenting, reversed the deputy commissioner's decision and reinstated Executive Secretary Weaver's order denying claimant's motion.

After claimant gave notice of appeal to the Court of Appeals, TCDG was hired as defendant's appellate counsel. The record included a stipulation entered into by the

parties at the hearing held by Deputy Commissioner Dollar that to avoid liability for the 10% penalty, the defendants were required to make payment within twenty-four days after the Commission's order of approval. They had also agreed that the deadline for making payment was June 1, 2004.

Claimant's argument to the Court of Appeals was that Key Risk's settlement checks had to be *received* within the twenty-four day deadline, i.e., by June 1, and that to avoid liability for the late payment penalty provided for in N.C.G.S. § 97-18, it was *not* sufficient for the defendants to have simply mailed their checks by that date. However, on April 17, in *Morrison v. Public Service Company of North Carolina, Inc.*, the Court of Appeals unanimously rejected that argument, holding that the Full Commission had properly denied claimant's motion for imposition of a penalty. In reaching that result, the Court observed that prior decisions, including *Carroll*, had held that payment of a settlement's proceeds must be "made" within twenty-four days for the penalty to be avoided. But, those cases had not specifically addressed the issue of when a payment has been "made."

After noting that in the past it had used the words "made" and "tendered" interchangeably, the Court ruled that settlement payments must be "tendered" within twenty-four days to be considered timely and avoid the penalty provisions of N.C.G.S. § 97-18. It then held that "tendering payment is not limited to the immediate transfer of physical possession of the payment," but rather, "may include depositing the payment, properly addressed to the payee, with the United States Postal Service or a designated delivery service."

In explaining the rationale for its holding, the Court noted that were it to

have ruled otherwise and use the date on which the injured worker actually received payment would be to require the defendants to estimate how long their check would take to reach its intended destination by mail, thereby effectively shortening the number of days allowed for payment by a “not ... easily discernable period of time.” That, in turn, would run contrary to the “otherwise simple process contemplated under N.C.G.S. § 97-18(g).” To the Court, the uncertainty inherent in attempting to determine in advance the date delivery might occur is evidenced by the facts of this case, which establish that although Key Risk mailed two settlement checks at the same time, they were received by claimant’s attorney on different days.

Risk Handling Hint: The *Morrison* decision resolves a hotly contested issue that had been the focus of much recent litigation at the Industrial Commission. While the Court of Appeals has clearly held that it is not proper to impose a late payment penalty if the defendants’ settlement payment is “tendered” by the twenty-fourth day after receipt of the Commission’s order of approval, nevertheless, the better practice is for risk managers to mail their settlement checks well within the twenty-four day window allowed by the statute, so as to ensure that they are actually received within that period of time. If they are, there would be no legitimate basis for claimant and his attorney to file a motion seeking a penalty or other sanctions. On the other hand, if the check is mailed at the last minute and not received until after the statute’s twenty-four day deadline has run, there is a significant risk that additional litigation will be initiated, and defense costs incurred, to determine whether a late payment penalty is in order.

Risk managers are encouraged to carefully document their files to preserve evidence of the date on which they not only receive the Commission’s order of approval, but mail claimant’s settlement check, so as to preserve the kind of evidence they will need to respond to motions such as that filed by claimant and his attorney in *Morrison*. At the same time, however, this entire issue can be avoided if the defendants’ settlement check is put in the mail well within the period of time allowed by N.C.G.S. § 97-18 and the holding in *Carroll*, so as to ensure that it is actually received prior to the twenty-fourth day.

Commission’s Refusal to Enforce Settlement Agreement Upheld

In early May 2001, Mona Lisa Smythe, who had previously fired her attorney and was acting *pro se* at the time, reached agreement with The Waffle House to settle her workers’ compensation claim. A clincher settlement agreement was prepared, signed and approved by one of the Commission’s deputy commissioners. After Smythe received and cashed the settlement check, she requested that the settlement be set aside due to alleged “misrepresentations.”

Her claim in that regard was litigated all the way to the Court of Appeals, which held that the parties’ settlement was invalid because the Commission had failed to undertake a full investigation to determine if it was “fair and just,” as required by N.C.G.S. § 97-17 (see *Risk Alert*, May 2005). The Court also found that the clincher agreement signed by the parties did not satisfy the provisions of Industrial Commission Rule 502(2)(h), which requires that written settlement agreements contain certain biographical information in those cases in which the employee is not represented by counsel and has not yet returned to work.

The Court of Appeals remanded the claim back to the Commission for entry of an order vacating its previous approval of the parties’ settlement and “further proceedings as necessary.” On remand, the Full Commission not only vacated its previous order of approval, but it also returned the claim to active status and ordered the defendants to reinstate claimant’s weekly TTD benefits, retroactive to May 2001.

The Waffle House then appealed the case back to the Court of Appeals, arguing that it should have been allowed to comply with the applicable statute and Commission rule by submitting the missing information, at which point it would have been proper for the Commission to approve the parties’ settlement. In essence, defendants’ position was that on remand the Commission should have limited itself to correcting the error which required remand, as opposed to completely invalidating the parties’ settlement and reinstating claimant’s benefits.

However, in *Smythe v. Waffle House*, an opinion entered on April 17, the Court of Appeals rejected that argument and held

that, with the agreement invalidated and the Commission having been directed to vacate its previous order of approval, its only option was to return the parties to the status quo before their settlement was approved. To do otherwise, and specifically to allow the defendants to avoid paying any benefits to claimant for the period during which the settlement agreement was in dispute, would be “inconsistent with the purposes of the remand order.” Thus, the Commission’s decision to invalidate the parties’ clincher agreement and reinstate claimant’s benefits was proper.

Risk Handling Hint: The Court of Appeals’ latest decision in *Smythe* provides risk managers with a useful reminder of the importance of ensuring that all settlement agreements are properly worded so as to satisfy the requirements contained in both the Workers’ Compensation Act and the Industrial Commission’s rules. In those cases in which the injured worker is unrepresented and has not yet returned to work, Rule 502 requires that certain biographical information be included in the agreement, unless claimant has expressly waived her right to future temporary total or temporary partial disability benefits.

Risk managers are also cautioned to recall that, in response to the Court of Appeals’ decision in *Atkins v. Kelly Springfield*, which had the potential of voiding every settlement in which *all* of the injured worker’s medical records were not submitted to the Commission with the clincher agreement, the Workers’ Compensation Act was amended so that now only “material” medical records need be included with clincher agreements when they are submitted for approval (see *Risk Alert*, October 2005). While that amendment makes it more difficult for claimants to successfully set aside Commission-approved settlements, the risk of that occurring is still real, and among the negative consequences of that happening is the risk of significant additional exposure for weekly benefits, such as in *Smythe*, in which the defendants were ordered to reinstate TTD going back almost six years.

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