

Chapter 14

INTEREST, PENALTIES AND JUDGMENTS

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§ 14.01 Due Date.

Late payment of workers' compensation benefits is a systemic problem. It is first necessary to understand when payments are "due" under South Carolina law. Section 42-9-230 provides that in admitted cases the first payment of temporary total is "due" on the fourteenth day after the employer is notified of the injury. Subsequent weekly payments are payable (due) on the same day of each week.

Under section 42-9-240, payments made pursuant to an award are "due" seven days from the date of the award.

Neither statute provides a penalty for payments that are not paid when due. However, see section 14.02 below.

§ 14.02 Late Payment Penalties.

Section 42-9-90 requires that carriers pay an additional ten percent penalty added to any installment of compensation that is not paid within fourteen days after it "becomes due." See sections 42-9-230 and 240. In the case of a running award, the carrier has a fourteen-day grace period if the payment is not made on the usual day of each week! In the case of the

initial payment due under an award, the carrier has a twenty-one day grace period after the date of the award! The carrier can also avoid a penalty if it can show that it had no control over the late payment.

It is quite common for carriers to delay payment of an award for more than twenty-one days. This is especially true in cases that are appealed to circuit court. Section 42-17-60 gives the carrier thirty days after the full commission decision. Regardless of the thirty day appeal deadline, claimants are still entitled to the ten percent penalty.

§ 14.03 Wrongful Stop Payment Penalties.

Section 42-9-260 governs wrongful termination of temporary total benefits. The section provides that a carrier who wrongfully stops payment of temporary total benefits shall pay a twenty-five percent penalty to the employee on all benefits withheld in violation of the section. Unfortunately, the recent amendments to this section and the stop payment regulations now allow carriers to stop payment on a whim within one hundred fifty days after notice of the accident. See Chapter 7. However, the twenty-five percent penalty will continue to be applicable when carriers illegally stop payment beyond the one hundred fifty days.

The question that arises is when does a late payment become an illegal stop payment. The law is unclear on this issue. However, as a practical matter it will be difficult to convince the commission that an illegal stop payment has occurred until the claimant has not received a check(s) for at least the grace periods specified earlier.

May a claimant receive both the ten percent penalty of section 42-9-90 and the twenty-five percent penalty of section 42-9-260? In certain situations a good argument can be made that this should be allowed. Assume, for example, that an employer is ordered to make payment of back temporary benefits and to begin weekly payments. The carrier delays in making payment for several months. The claimant files another Form 50 seeking to compel the carrier to comply with the original order and asking that both penalties be assessed. The defense will argue that the stop payment penalty is not appropriate because payment was never actually started, albeit in violation of the order. This would allow a ludicrous result. Under this argument, if the carrier made a single payment, then stopped, it could be assessed the twenty-

five percent penalty and the ten percent penalty. However, it could avoid the twenty-five percent penalty by never making any payments!

§ 14.04 Miscellaneous Fines and Penalties.

The act contains numerous sections dealing with penalties for non-filing and late filing of forms. For example, a carrier may be fined for failing to file a Form 20 or other forms required by the commission. See regulations 67-1603(G) and 67-1401 and section 42-19-30. Employers/carriers who wrongfully defend claims may be assessed hearing costs under regulation 67-614.

§ 14.05 Interest.

As indicated earlier, section 42-9-240 provides that compensation is due seven days after a commissioner's award or judgment. It also provides that compensation shall be paid in full, with interest. Interest is to be computed from the original date of the single commissioner's award. See Appendix 14. Interest is to be paid at the "maximum legal rate." This is generally construed to require payment at the judgment rate of interest of fourteen percent.

§ 14.06 Judgment on Award.

Pursuant to section 42-17-70, approved agreements, commission orders and commission awards may be filed in circuit court as judgments. Unfortunately, filing of judgments is not as easy as it sounds. In order to file a judgment you must file a certified copy of the agreement, order of the single commissioner, order of the full commission, and/or order of the circuit court. These documents must be accompanied by some sort of motion seeking entry of judgment, and a proposed order for the court's consideration.

Whether the motion for judgment must be served on the opposing party is unclear, though this is probably the better approach. Whether a circuit judge may simply sign an order of judgment without conducting a hearing is also subject to debate. However, judges have been known to sign such orders in the past.

One of the biggest problems with entering a judgment in a workers' compensation claim is calculating an amount. Many commission orders, particularly running awards, do not contain

a specific dollar figure awarded. In preparing orders attorneys should be careful to liquidate amounts awarded whenever possible.

Section 42-17-70 is a very confusing code section. It should be carefully studied prior to an attempt to enter judgment.

South Carolina Code Ann. § 38-55-120 provides:

If an insurer fails to pay a final judgment rendered against it within fifteen days after the judgment becomes final, upon written application of the holder of the judgment the director or his designee shall give fifteen days' written notice to the insurer to pay the judgment and, upon the insurer's failure to pay the judgment within the time, shall revoke the license of the insurer to do business in this State and impound its bond or securities required to be deposited under Sections 38-9-80 through 38-9-140 or Section 38-15-30.

Unfortunately, past insurance commissioners have taken a hands off approach to transgressions of workers' compensation carriers, arguing that such matters should be left to the workers' compensation commission. Hopefully, the current commissioner will show more interest in enforcing the law.

§ 14.07 Common Law Penalties and Remedies.

It is obvious from the discussion above that the penalty provisions of the Workers' Compensation Act are woefully inadequate. Carriers continue to deny cases for no reason. They are constantly late with temporary total payments. They refuse to promptly pay medical bills, even after being ordered to do so by the commission. What, if anything, may the claimant's attorney and/or the commission do to make carriers do the right thing? Some commissioners are of the opinion that they have common law authority to assess fines and hold carriers and/or employers in contempt. The argument is that this authority is incidental to and a necessary part of their authority to administer the law. Whether this argument will survive an appeal is unknown. However, some commissioners have been known to level substantial fines against carriers who will not do right.

At least one circuit judge has signed a rule to show cause requiring the carrier to appear and show cause why it should not be held in contempt for failing to comply with a commission order. See Appendix 14.