Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *April 2011*

A WORD FROM THE PRACTICE GROUP CHAIR

It is my pleasure to introduce this month's author, Toney Tomaso. A partner in our Urbana office, Toney has spent his entire legal career with our firm. Many of you have worked with him on workers' compensation claims with venues handled by our Urbana workers' compensation team.

Toney will also be one of our speakers at our workers' compensation program in Bloomington on May 19, 2011, and will be discussing Total Temporary Disability (TTD) issues. And, if there is new workers' compensation legislation by that time, we will outline those changes and discuss their impact on your current and future claims.

We hope to see you at our program. Until then, please enjoy spring.

Kevin J. Luther
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26th Annual Claims Handling Seminar

Thursday, May 19, 2011 • 1:00 - 4:30 p.m.

Click here for more information and to register

This Month's Author:

Toney Tomaso is a partner in the Urbana office who concentrates his practice in the areas of workers' compensation, third-party defense of employers, asbestos class action litigation, insurance coverage issues and automobile liability claims.

Toney has successfully defended hundreds of workers' compensation claims before various arbitrators throughout the State of Illinois, as well as before all three panels of the Illinois Workers' Compensation Commission.

Toney was a member of a three attorney trial team which handled a class action lawsuit arising out of a medical malpractice class action which lasted approximately eight weeks in East Central Illinois. During the course of this litigation, he was required to depose approximately one-half of the class, prepare defense experts, and participate in all phases of the eight-week trial.

After The War Is Over, There Are Still Battles To Be Won

While a loss at arbitration is something we always strive to avoid, the entry of an adverse decision certainly does not mean that there are no further opportunities to continue the fight. The Illinois Workers' Compensation Act provides employers with various rights to challenge awards of permanency and, in limited circumstances, to revisit and modify permanency awards. Our goal with this newsletter is to highlight the options available to an employer and those scenarios where they might be utilized.

An employer has several paths available after an unsuccessful arbitration hearing. First, an appeal can be taken to the circuit and appellate courts. Second, where the employer is faced with continuing payment

obligations, such as a wage differential award or a finding of permanent and total disability, the employer can press settlement discussions, either by using the threat of an appeal or through recognition that it is more economical to resolve the issues now.

The third option, and the one we focus on in this article, is that of paying the award, but nevertheless continuing to monitor the case in the future for changes in the claimant's condition. This third scenario most frequently comes into play where permanency benefits are paid to the injured worker based on a wage differential award, permanent total disability loss, or permanent partial disability findings.

We examine each of these permanency scenarios below and identify certain provisions in the Act which allow the parties to review and under some circumstances modify permanency awards. We further point out what areas of the claim are considered "open" following an arbitration award and what that might mean for setting your reserves.

Modifying Section 8(d)(1) Wage Differential Awards

Wage differential awards are governed by Section 8(d)(1) of the Act and provide the employee with a weekly benefit based on two-thirds of the difference between what the employee earned in his or her employment and what he or she is earning or capable of earning following the accident. 820 ILCS 05/8(d)(1). Wage differential awards are payable for life and do not end when the employee retires.

Section 19(h) of the Act permits both parties to review a prior award of permanency payable in installments where the employee's disability has "recurred, increased, diminished, or ended." 820 ILCS 305/19(h). Section 19(h), however, limits the time for challenging the employee's condition to 60 months after award becomes final in the case of an award under Section 8(d)(1). Section 19(h), therefore, gives either party five years to determine if the injured employee's condition has "recurred, increased, diminished, or ended." However, the case law is very clear that there must be a "material change in circumstance." It is not enough to show that the worker is now making more money than before and has received an economic boost in pay. Economic change is insufficient. *Petrie v. Illinois Industrial Comm'n*, 160 Ill. App. 3d 165, 513 N.E.2d 104 (3d Dist. 1987); *Cassens Transport. Co. v. Illinois Industrial Comm'n*, 354 Ill. App. 3d 807, 821 N.E.2d 1274 (4th Dist. 2005).

Building the Case to Reopen A Wage Differential

How does one go about obtaining evidence in order to establish that there has been a material change in circumstance? The courts are looking for medical evidence to substantiate the change. Let us assume for a moment that the employer believes the injured worker is physically doing much better than two years ago. What can the employer do to establish this fact?

The Section 12 IME

The employer has the right to set up a Section 12 independent medical examination. 820 ILCS 305/12. The employer is bound by the same rules and procedures that must be followed during the course of the claim before the arbitration took place. Specifically, reasonable notice needs to be provided to the injured worker, a mileage check needs to be tendered to the worker along with any incidental expenses (such as tolls and reasonable meal costs). If the medical examination, conducted by a qualified expert, provides substantiated proof that there is a significant change in the medical condition, then the employer has a right to file a Section 19(h) petition supported by the new

evidence and to request modification of the original permanency award issued by the arbitrator.

Video Surveillance

The employer can also place the claimant under surveillance. This method should be used as part of an overall plan, however, and should not be the sole evidence of whether a material change in circumstance has arisen. Video surveillance should be coordinated with competent medical examinations and then presented to the Commission as a complete evidentiary package. Relying solely on a video will likely result in the Commission denying the petition and finding that the activities portrayed on the video were either not representative of what the claimant could truly do or were not indicative of a material change in the claimant's medical condition.

What is Material Change?

The material change will always be a fact question which needs to be answered by the Commission. As noted above, the most persuasive evidence will come in the form of medical evidence based upon expert opinions. When coordinating a Section 12 exam, the reviewing expert should always be provided with all prior medical records and depositions as well as the latest medical evidence in order to compare the prior condition with the current condition. It is also advisable to have the physician actually examine the claimant.

Giving a "before and after" picture is essential in order to prove to the Commission that there has indeed been a material change. When the case is presented for hearing, the Commission will have before it and consider both the new evidence and the evidence from the original arbitration.

The injured worker will also be allowed to testify, and you must assume that the individual will attempt to defeat a Section 19(h) petition by asserting the condition has either remained the same or worsened. This opposition is typically a combination of the claimant's own testimony and treating physician or employee-obtained IME opinion testimony. As you can imagine, the injured worker will not sit idly by while you attempt to reduce his benefits and establish he is no longer as physically disabled as he used to be.

As a special note, the employer can use the exact opposite strategy for those occasions where the employee files a Section 19(h) petition. There, the employer's goal is to compare the injured worker's original complaints and diagnoses from the original arbitration hearing to the injured worker's current symptoms and complaints. If you can establish the complaints are virtually identical, then an injured worker's Section 19(h) petition should be denied. *Wrona v. Terry Farms, Inc.*, 94 IL.W.C. 59849, 00 I.I.C. 0286, 2000 WL 33420120 (2000).

Also, if the only material change is an additional surgery on the same body part, it is not necessarily true the injured worker stands to receive an increase in his permanency award. There are cases holding that the simple fact of an additional surgery (such as a revision, or removal of hardware) does not necessarily mean there was a material change in the injured worker's physical condition warranting an increase in the award. Again, the Commission focuses on the medical facts and asks whether the injured worker's symptoms have become worse. See, *Dolezal v. General Motors*, 90 IL.W.C. 56989, 00 I.I.C. 0029 (2000), and *Lamborn v. Bridgestone/Firestone, Inc.*, 01 I.I.C. 0191, 98 IL.W.C. 42012, 2001 W.L. 1142159 (2006). Thus, an employer may be liable for additional medical while not liable for increased permanency.

Benefits Cannot Be Terminated Until After An Order Has Been Entered

A word of warning concerning how to proceed when attempting to modify an earlier wage differential award using Section 19(h). If a material change in condition has occurred (either physically or mentally) with the injured worker, and it is decided that a Section 19(h) petition should be filed, the employer should not terminate or suspend wage differential benefits at that time. The claimant's benefits cannot be suspended or terminated until an order has been issued by the Commission allowing for such a change. This is true even where convincing video evidence shows the injured worker conducting activities that are completely inconsistent with the earlier findings

made by the arbitrator and/or where competent medical evidence clearly establishes the injured worker is physically now much better off.

Cases have shown that the Commission will award penalties and attorneys' fees if benefits are unilaterally reduced by the employer even if the Commission ultimately rules there was a substantial change in circumstances and subsequently sets aside the original 8(d)(1) wage differential award. The employer must go through the process of filing the petition, filing supporting briefs, presenting arguments (if requested by the parties), and awaiting a decision from the Commission on the pending Section 19(h) petition. Benefits cannot be terminated prior to that time without risking the imposition of penalties and attorneys' fees.

The Availability of Section 19(h) Following PPD Awards

An employee also has the option of filing a Section 19(h) petition where the arbitrator enters a permanent partial disability (PPD) award. Let us look at the example where an injured worker receives an award based upon a loss of use of a specific body part or person as a whole (such as under Sections 8(e) or 8(d)(2) of the Act). Does a party have a right to file a Section 19(h) petition in order to assert a significant change with the injured worker and have the original award altered to take into account the significant change? The simple answer is yes, but by nature of the remedy, such a petition can only be filed by the employee.

If you look at the forms provided by the Commission for workers' compensation settlement contract, you will note the second page (or the back side of the pink settlement contract) contains a section for the petitioner's signature, and it outlines all of the rights the injured worker is releasing or giving up in exchange for receiving the lump sum settlement monies. Those rights include a trial before an arbitrator, an appeal of the arbitrator's decision to the Commission, further medical treatment at the employer's expense if that treatment is a result of the injury in question, and the right to additional benefits if the condition worsens as a result of the injury. Parties may modify a prior award if a material change is established in the injured worker's physical (or mental) condition. See *U.S. Steel Corp. v. Illinois Industrial Comm'n*, 133 Ill. App. 3d 811, 478 N.E.2d 1108 (1st Dist. 1985).

If an award is issued by the arbitrator based upon a percentage loss of use of a body part or a person as a whole, and that decision is not appealed but merely paid by the employer, then you will be dealing with a closed file except the Sections 8(a) or 19(h) issues which may arise. If you suspect that this injured worker has taken advantage of the system, one of the benefits of paying the PPD award in weekly benefits (if applicable) would be to constantly monitor the injured worker's medical condition in order to leave yourself the opportunity to file a Section 19(h) petition. If all permanency benefits are paid, then the chances of recouping monies from the injured worker at a later date are small. This is true even if the Commission finds, per your Section 19(h) petition, that the percentage loss of use should be decreased because the injured worker's physical condition has benefited greatly due to the passage of time.

Modifying Section 8(f) Permanent Total Disability Awards

Permanent total disability (PTD) awards are also subject to review, but are not constrained by the time limitations of Section 19(h), nor are they constrained by the requirement of showing a material change in circumstances. Looking to Section 8(f), which governs PTD benefit awards, an employer's post-arbitration remedy stems from the very language of Section 8(f), which states:

> If any employee who receives an award under this paragraph (permanent total disability),

> afterwards returns to work or is able to do so, and earns or is able to earn as much as before the accident, payments under such an award shall cease. If such employee returns to work, or is able to do so, and earns or is able to earn part but not as much as before the accident, such award shall be modified so as to conform to an award under paragraph (d) of this Section. If such award is terminated or reduced under the provisions of this paragraph, such employees have the right at any time within 30 months after the date of such termination or reduction to file petition with the Commission for the purpose of determining whether any disability exists as a result of the original accidental injury and the extent thereof. 820 ILCS 305/8(f).

First, the most significant difference between Section 8(f) and Section 19(h) is that there is no time limitation concerning filing a Section 8(f) petition. Second, the triggering mechanism here is whether the employee "returns to work," or is "able to do so."

If the employee returns or is able to return to his former job, then the PTD award terminates and disability is recalculated under the various PPD provisions. If he returns or is able to return to work, but earns less than before, then permanency is revisited using the wage differential provisions of Section 8(d)(1).

Again, much like wage differential awards, these benefits are paid to the injured worker for life. Yet, as most employers know, PTD benefit awards are even more costly than the Section 8(d)(1) wage differential awards because there is no offset. As these benefits are being paid weekly, it is imperative to monitor the claim in order to determine if a material change has come about. If so, you can investigate and possibly argue the permanent total disability should be terminated.

Again, as is the case with Section 19(h), the employer can utilize Section 12 and require the injured worker to undergo an updated independent medical examination. Protocols and procedures need to once again be followed in order to ensure the injured worker attends the medical examination (such as providing a mileage check, reasonable notice, and other incidental expenses associated with attending the exam). Moreover, there are harsh penalties if the employer decides to unilaterally terminate said benefits without first obtaining an Order from the Commission allowing for such course of action.

In *King v. Illinois Industrial Comm'n*, 189 Ill. 2d. 167, 724 N.E.2d 896 (2000) the arbitrator had awarded the injured worker permanent total disability benefits based upon an "odd-lot" category. Ten years later the employer attempted to send the injured worker for a Section 12 independent medical examination, but the injured worker never appeared for the examination. Based upon this non-compliance, benefits were terminated. While the court determined that the employer had every right to send the injured worker for a Section 12 independent medical examination in order to re-evaluate the Section 8(f) permanency findings, it held that permanency benefits cannot be suspended or terminated before an Order is made by the Commission allowing for such modification pursuant to Section 8(f). The court found a proper 19(h) or 8(f) petition was never filed by the employer, rather simply a motion to suspend benefits pursuant to Section 12 because of non-compliance.

In *Keystone Steel & Wire Co. v. Illinois Industrial Comm'n*, 85 Ill. 2d 178, 421 N.E.2d 918 (1981), the employer filed a Section 19(h) petition and thereafter amended the petition to reflect a Section 8(f) petition. After the petitions were filed, benefits were suspended by the employer without an order from the Commission. Thereafter, evidence was heard by the Commission in which witnesses were called on behalf of the employer that showed the injured worker was working and conducting activities above and beyond his physical abilities even before the accident in question. The Court ultimately upheld the Commission's denial of the motion, despite the substantial evidence submitted by the employer that the injured worker was doing much better and working a new job. Moreover, the Court affirmed the award of penalties and attorney's fees based upon the fact the employer suspended benefits without obtaining a Commission Order allowing them to do so.

The burden of proof is on the employer any time it seeks to modify an earlier permanent total disability award. In *Roman v. Caterpillar, Inc.*, 94 I.I.C. 1012, 80 W.C. 39205 (1994), the employer attempted to

set aside an earlier permanent total disability award approximately 10 years after it was awarded by the arbitrator. The employer produced videotaped evidence of the injured worker engaging in various physical activities, and also provided a Section 12 medical examination wherein the defense expert concluded the injured worker was capable of being gainfully employed. The employee and his attorney provided contradicting evidence that concluded the injured worker was still not employable. The Commission rejected the defense expert's opinion holding it lacked credibility. *Caterpillar* established that the burden shifts to the employer to show not only that the employee is capable of engaging in some type of regular and continuous employment, but also that such suitable employment is regularly and continuously available. See also, *U.S. Steel Corp. v. Illinois Industrial Comm'n*, 133 Ill. App. 3d 811, 478 N.E.2d 1108 (5th Dist. 1985).

A Second Section 19(h)?

Although the time for filing a Section 19(h) petition is jurisdictional and cannot be waived, a decision awarding compensation starts a new 30-month period. 820 ILCS 305/19(h). Thus, if an employer successfully reduces a wage differential award to a permanent part disability award, a new 30-month period begins upon entry of the Order. The denial of a Section 19(h) petition does not have the same effect. *Behe v. Illinois Industrial Comm'n*, 365 Ill. App. 3d 463, 468, 848 N.E.2d 611 (2d Dist. 2006).

The Benefits of Settlement Versus Trying the Case

As noted above, the parties are always free to come together and reach an amicable settlement of the case based upon any terms they can reach. However, if you choose not to settle the claim but allow it to remain open, you do face potential Section 8(a) implications (the "open medical" scenario) where the injured worker may continue to treat for medical symptoms so long as those conditions "arise out of" and are "causally related to" the injury in question.

With open medical, a claimant can continue to seek medical benefits so long as it can be shown that the condition being treated was related to the original injury. A claimant seeks additional medical by filing a Section 8(a) petition with the Commission, usually in conjunction with a Section 19(h) petition. A claimant may also accompany that Section 8(a) petition with Section 8(b) petition seeking additional total temporary disability (TTD) benefits for any time off work associated with an increase in permanency or the additional medical care. Thus, if an employee's condition worsens and additional surgery is needed, the Act permits that employee to not only seek the costs of the medical treatment and surgery, but also to seek TTD benefits for the time missed to undergo the surgery and for recovery from that surgery, as well as any rehabilitative treatment necessary. These issues all are certainly the downside of having tried a case and lost.

However, the upside of an open case is the potential to modify the permanency award under Sections 19(h) or 8(f) as noted above. In lieu of paying the entire lump sum of a wage differential or PTD award, it may be beneficial to pay these awards in weekly benefit checks. This allows you an opportunity to keep tabs on the injured worker and to modify an award if circumstances permit. Periodically conducting surveillance of the claimant and sending that worker for a Section 12 medical examination with the defense expert of your choosing are both reasonable means to monitor the claimant's condition and to determine if there has been a material change in circumstances which would warrant filing a Section 19(h) or 8(f) petition.

Remember, just because an employer has lost at arbitration does not mean the case is lost in perpetuity. Rather, the Act gives the employer some power to continue monitoring the injured worker and to challenge that individual's entitlement to the ongoing permanency benefits he is receiving.

If you have any questions concerning settlements, continuing benefits, or modifying future benefits, please feel free to contact any of our workers' compensation lawyers throughout the State.

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