

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

A Newsletter for Employers and Claims Professionals

June 2010

A WORD FROM THE PRACTICE GROUP CHAIR



We want to thank those of you who attended our 25th Annual Claims Handling Seminar in Bloomington on May 20, 2010. We received good feedback from the attendees and hope you found it helpful in your claims handling. Special thanks to Commissioner Nancy Lindsay, who provided the audience with a very entertaining and informative presentation on her perspective as a Commissioner of the Workers' Compensation Commission. If you or your colleagues need the handout materials, they are now posted on our website at www.heyloyroyster.com.

This month's author is Bhavika Amin. Bhavika is an attorney in our Rockford office who graduated from the University of Illinois College of Law. Bhavika's article provides an update us on the thorny issue of penalties and attorney fees.

In recent news, Mitch Weisz, the new Chairman of the Illinois Workers' Compensation, has now posted arbitrator re-assignments that are scheduled to take effect September 1, 2010. For specific reassignment information please visit www.iwcc.il.gov. It has also been announced that effective January 1, 2011, the Lawrenceville arbitration venue will be discontinued and those cases will be reassigned to the Mattoon and Mt. Vernon venues.

School is out. Summer is here. We hope all of you will enjoy safe travels!


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FROM THE COMMISSION ...

On May 14, 2010, Governor Pat Quinn appointed Daniel Donohoo as Commissioner to replace the retired Paul Rink. Commissioner Donohoo holds a B.S. degree in Business

Administration from Southern Illinois University, and a J.D. degree from Thomas M. Cooley Law School. He served as the Madison County Recorder of Deeds for 21 years, and operated his own accounting firm for 17 years. After completing the legally-required training, Commissioner Donohoo will be assigned to a panel and hearing sites.

Also, on May 7, 2010, the Illinois Senate confirmed Mitch Weisz as chairman. Governor Quinn had appointed Chairman Weisz on March 22, 2010. Chairman Weisz holds a B.A. degree in History from Northwestern University and a J.D. degree from IIT Chicago-Kent College of Law. He worked as an attorney concentrating in workers' compensation for 25 years, and has banking and business experience as well.

NEWS FROM HEYL ROYSTER

Congratulations are due to **Brad Peterson** of our Urbana office, who has been appointed to the position of Secretary of the Illinois State Bar Association's Workers' Compensation Section Counsel. His term begins in June 2010. In June 2011, Brad will become Vice-Chair and Section Chair in 2012, Chairman. The Workers' Compensation Section Counsel at times plays a significant role in addressing Illinois workers' compensation issues.

Tom Crowley, Chair of the Winnebago County Bar Association's Workers' Compensation Section, presided at the recent Workers' Compensation CLE Seminar at Giovanni's in Rockford. Justice William Holdridge and Kevin Luther were both featured speakers at the event.

THIS MONTH'S AUTHOR:

A native of Bourbonnais, Illinois, **Bhavika D. Amin** began her career at Heyl Royster as an associate in the Rockford office in 2008. Prior to joining Heyl Royster, Bhavika clerked in the legal department of Federal Signal and at the Champaign County State's Attorneys' Office. She practices in the areas of workers' compensation and tort litigation.



PENALTIES AND ATTORNEYS' FEES

In today's legal environment, Illinois employers and their workers' compensation insurance carriers must be increasingly aware of the potential for penalties and attorneys' fees for any perceived unreasonable delay in or termination of the payment of benefits or medical bills. As the chart below shows, the incidence of penalties and attorneys' fees is highest in expedited cases – those involving Section 19(b) petitions – with penalties or fees imposed in as many as one in ten cases.

PERCENTAGE OF IWCC DECISIONS AWARDING PENALTIES AND ATTORNEYS' FEES

	<i>Arbitration Decisions</i>		<i>Commission Decisions</i>	
	<u>Expedited</u>	<u>Regular</u>	<u>Expedited</u>	<u>Regular</u>
2000	9%	2%	9%	2%
2005	14%	3%	10%	4%
2006	9%	3%	6%	4%
2007	10%	2%	3%	2%
2008	10%	2%	5%	2%

(SOURCE: *Illinois Workers' Compensation Commission FY2008 Annual Report*, p. 20).

In 2008, there were 225 cases in which penalties were awarded, representing approximately 4 percent of the total decisions issued. Given these statistics, it is imperative that cases are handled in a way that will minimize the employer's exposure to penalties and attorneys' fees awards.

Rule 7110.70

One of the more common scenarios for penalties involves an improperly documented termination of or refusal to pay benefits. At the heart of such penalties is the failure to comply with Commission Rule 7110.70. This Rule places an affirmative obligation on employers to provide a written explanation to claimants in two circumstances: (1) where benefits are demanded but the employer denies liability for payment of TTD benefits; and (2) where benefits (TTD or medical) are commenced, but later terminated or suspended before the employee has returned to work. Rule 7110.70(a), (b), (d). In all instances, Rule 7110.70 places an obligation on the employer to provide the employee with a written explanation of the basis for denying or for termination of benefits.

Section (c) of the Rule also provides:

When an employer takes the position that it has insufficient medical information to determine its liability for the initial payment of temporary total compensation, or the continuation of such payment, the employer shall have the initial responsibility to promptly seek the desired information from those providers of medical, hospital and surgical services of which the employer has knowledge. The employee shall have the responsibility to provide or execute authorizations for release of medical information as the employer may reasonably request from time to time, and the employer shall promptly provide the employee or his or her representative, upon request, with copies of the complete medical records and reports it obtains with the authorizations.

50 Ill. Admin. Code 7110.70(c).

The failure to comply with any of the provisions of Rule 7110.70 "without good and just cause" shall be considered when adjudicating a petition for penalties pursuant to Section 19(l) of the Act, or a petition for assessment of attorneys' fees and costs pursuant to Section 16. See 50 Ill. Admin. Code 7110.70.

In *Bustami v. H & H Electric*, 08 IL. W.C. 06599, 09 I.W.C.C. 0194, 2009 WL 686353 (2009), the Commission imposed a Section 19(l) penalty upon the employer for violating Rule 7110.70 by failing to provide any written explanation for its non-payment of benefits. The claimant asked for, and received, \$3,120.00 in additional compensation (104 days at \$30/day). The failure to inform the employee in writing of reasons to terminate benefits can provide a basis for awarding penalties even where the employer shows a reasonable basis for having discontinued benefits. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 56, 523 N.E.2d 1265, 1270 (1st Dist. 1988) (Although the Commission held that medical evidence finding there was no indication of a need for further treatment supported the employer's conclusion that the petitioner's condition had stabilized, penalties were nevertheless imposed due to the employer's termination of TTD benefits without providing the proper notice to the petitioner under Commission Rule 7110.70(b)).

To guard against such penalty situations, we recommend thoroughly documenting your file and being certain to provide written denials of benefits or termination in every case. This documentation should be kept and made available to your trial counsel in the event that a penalties petition arises.

Delays in Paying Benefits

The most common penalties and attorneys' fees are those set forth in Sections 19(k), 19(l), and 16 of the Act. 820 ILCS 305/16, 19(k), (l). Requests for such benefits often accompany Section 19(b) petitions seeking emergency or immediate benefits. Section 19(l) provides for the imposition of a \$30-per-day penalty for each day that a weekly compensation payment is withheld or refused "without good and just cause," subject to a \$10,000 maximum (or \$10 per day up to a \$2,500 maximum for injuries occurring before February 1, 2006). 820 ILCS 305/19(l). Section 19(k) authorizes a penalty of 50 percent "of the amount payable at the time of an award" for an "unreasonable or vexatious delay of payment or intentional underpayment of compensation," or when "proceedings have been instituted or carried on [by the employer responsible for payment], which do not present a real controversy, but are merely frivolous or for delay." 820 ILCS 305/19(k). Section 16 provides for the assessment of attorneys' fees and costs when conduct contemplated by Section 19(k) occurs and applies the same standards as Section 19(k).

Section 19(l)

The Section 19(l) penalty is in the nature of a late fee. *USF Holland v. Industrial Comm'n*, 357 Ill. App. 3d 798, 805, 829 N.E.2d 810, 817 (1st Dist. 2005). The statute applies whenever the employer or its carrier simply fails, neglects, or refuses to make payment or unreasonably delays payment "without good and just cause." *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998). Assessment of the penalty is mandatory if the benefit payment is late, for whatever reason, and the employer or its carrier cannot show an adequate reason for the delay.

A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay. 820 ILCS 305/19(l). The burden of opposing a petition for Section 19(l) sanctions is on the employer.

Sections 19(k) and 16

Section 19(k) provides for much more extensive penalties, but also requires a higher threshold of conduct. As noted above, Section 19(k) penalties may be awarded "where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are

merely frivolous or for delay." 820 ILCS 305/19(k). Failure to pay compensation in accordance with the provisions of Section 8(b) shall be considered unreasonable delay. If such conduct by the employer is found, "the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k).

Imposition of Section 19(k) penalties is discretionary. *USF Holland*, 357 Ill. App. 3d at 805. The statute is intended to address situations where there is not only a delay, but where that delay is deliberate or the result of bad faith or improper purpose. *McMahan*, 183 Ill. 2d at 515.

In the recent amendments to the Workers' Compensation Act, employers were given additional considerations for penalty situations. When determining whether Section 19(k) applies, the Commission is to consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j) (group benefits). 820 ILCS 305/19(k).

In almost all Section 19(k) cases, claimants are also awarded attorneys' fees under Section 16. Section 16 provides that "the Commission may assess all or any part of the attorney fees and costs against such employer and his or her insurance carrier." 820 ILCS 305/16. By its language, however, Section 16 attorneys' fees are limited to cases where Section 19(k) penalties are awarded; Section 16(l) is limited to vexatious and frivolous conduct and therefore does not apply to Section 19(l) penalty scenarios.

Defenses to Penalty and Fee Petitions

Generally, an employer's reasonable and good-faith challenge to liability does not warrant the imposition of penalties. *USF Holland*, 357 Ill. App. 3d at 805. When the employer acts

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in reliance upon reasonable medical opinion or when there are conflicting medical opinions, penalties are ordinarily not imposed. *Reynolds v. Illinois Workers' Compensation Comm'n*, 395 Ill. App. 3d 966, 971-72, 918 N.E.2d 1098 (3d Dist. 2009). An employer's belief is honest only if the facts in the possession of a reasonable person in the employer's position would justify it. The employer bears the burden of proving the objective reasonableness of its belief. *Connell v. Industrial Comm'n*, 170 Ill. App. 3d 49, 56, 523 N.E.2d 1265, 1270 (1st Dist. 1988). The Commission's determination of whether the claimant is entitled to penalties or attorneys' fees is a factual question, which can only be overturned if it is against the manifest weight of the evidence. *McMahan v. Industrial Comm'n*, 183 Ill. 2d at 516.

Practice Pointer

Select a competent IME physician to render independent evaluations and be sure that the physician provides a thorough report and evaluation and that he or she addresses all issues in dispute.

In *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 911 N.E.2d 1042 (1st Dist. 2009), the claimant was injured after he slipped and fell at work. The claimant underwent a second lumbar fusion because the first surgery failed. The employer's independent medical examiner, Dr. Mather, testified that the claimant was instructed to quit smoking prior to surgery. Dr. Mather opined that claimant's smoking resulted in the failure of his first spinal fusion. Based on this opinion, the employer discontinued the payment of benefits. Although the court did subsequently affirm that the claimant's smoking did not constitute an injurious practice such that the Commission should have denied claimant recovery for medical expenses and time off work following his second surgery, it set aside the Commission's award of penalties. Because Dr. Mather's testimony was "relatively compelling," the employer could rely upon his opinions and "no reasonable person could conclude that respondent was not entitled to do so." *Global Products*, 392 Ill. App. 3d at 414.

What Constitutes Benefits?

In *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 702 N.E.2d 545 (1998), the Illinois Supreme Court held that the term "compensation," as used in the various penalty provisions, was broad enough to include medical benefits. In the Court's view, it made no sense to allow employees to recover penalties and attorneys' fees when they were forced to sue for compensation

for lost earnings but not when they sued to compel payment of medical expenses. Thus, Sections 19(l) and 19(k) as well as Section 16 providing for attorneys' fees apply to any denial or termination of TTD benefits, medical benefits, or permanency/death benefits.

On What Amounts May Penalties Be Properly Assessed?

In *Navistar Intern. Transp. Co. v. Industrial Comm'n*, 331 Ill. App. 3d 405, 771 N.E.2d 35 (1st Dist. 2002), the Court held that the Commission *may* award penalties and fees on the whole amount, rather than just the unpaid portion. The Commission is not required to do so, however, and it may, in its discretion, base the penalty and fee awards on that portion of the award which has accrued but has not been paid. *Navistar*, 331 Ill. App. 3d at 414.

Therefore, Section 19(k) penalties and attorneys' fees pursuant to Section 16 may be based on the entire amount of the award that has accrued or only the unpaid portion thereof, as the Commission in its discretion sees fit. Amounts that have not accrued are not included in the calculation. *Anders v. Industrial Comm'n*, 332 Ill. App. 3d 501, 773 N.E.2d 746 (4th Dist. 2002); *Zitzka v. Industrial Comm'n*, 328 Ill. App. 3d 844, 767 N.E.2d 405 (1st Dist. 2002). Moreover, penalties and attorneys' fees are not considered "compensation" and are not included when computing a subsequent award of penalties and fees. *Scott v. Industrial Comm'n*, 184 Ill. 2d 202, 703 N.E.2d 81 (1998).

Section 19(g) Attorneys' Fees and Costs Upon Entry of Judgment

The threat of penalties is not limited to conduct taking place during the pendency of the workers' compensation claim. Although much less common, attorneys' fees and costs can be imposed pursuant to Section 19(g) as part of the employee's action to enforce the Commission's award. Under Illinois law, a Commission decision is not considered a judgment upon which collection may be based; rather, a party seeking to collect must file a civil proceeding with the circuit court requesting that judgment be entered on the Commission's award. 820 ILCS 305/19(g). Thus, in a situation where an employer is late in paying the award or simply refuses to pay the award, the employee must file a Section 19(g) action in the circuit court before collection may commence.

Section 19(g) states:

In a case where the employer refuses to pay compensation according to such final award or such final decision upon which such judgment is entered the court shall in entering judgment thereon, tax as costs against him the reasonable costs and attorney fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered.

820 ILCS 305/19(g).

Reasonable costs and attorneys' fees in the underlying action typically refer to 20 percent of the amount of total benefits – in essence, what the claimant's attorney recovers via the representation agreement. Moreover, reasonable costs and attorneys' fees are recoverable for the time and effort associated with the Section 19(g) proceeding. Attorneys' fees for proceedings before the circuit court are typically reimbursed on an hourly basis plus costs.

As an additional penalty, awards subject to entry of judgment under Section 19(g) also carry with them the higher statutory interest rate of 9 percent. 735 ILCS 5/2-1303; *see also Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769, 777, 856 N.E.2d 1 (4th Dist. 2006). Typically, the interest rate on a Commission award is calculated based on Section 19(n) of the Act and, because it is associated with market rates, is usually much lower than 9 percent. 820 ILCS 305/19(n). In *Radosevich*, the Appellate Court held that the higher 9 percent judgment interest applied to any Commission decision reduced to a judgment under Section 19(g). Thus, Section 19(n) interest applies to the date of judgment; Section 2-1303 interest applies from the date of judgment forward.

Fortunately, the mere filing of a Section 19(g) petition does not carry with it an automatic right to an award of attorneys' fees and costs. *Ponthieux v. Fernandes*, 278 Ill. App. 3d 104, 109, 662 N.E.2d 169, 172 (4th Dist. 1996). There must be a refusal to pay compensation when it becomes due. In most cases, the court will give the employer between 30 and 45 days to pay an award. Indeed, many Section 19(g) petitions arise concerning a question of interest due on the award. Some courts have upheld a refusal to award attorneys' fees where the failure to pay involved a dispute over interest due on the award, while others have not. However, when an award is not paid promptly, "violence is done to the purposes of the Act. Therefore, where

an unreasonable failure to pay has been demonstrated, a minor dispute over the calculation of interest may not avoid the imposition of attorney fees and costs." *McGee v. Ractian Const. Co.*, 231 Ill. App. 3d 929, 936-37, 596 N.E.2d 1261, 1266 (4th Dist. 1992). Most of the courts dealing with this issue have concluded that the determining factor is whether there is a *bona fide* dispute over amounts owed for interest. *Ponthieux*, 278 Ill. App. 3d at 111.

The Court in *Ponthieux* also listed several factors to be considered when determining whether a failure to pay was unreasonable, including: (1) the presence or absence of a demand for payment; (2) the length of time which elapsed between the date the Commission's decision became final and the date of filing of the Section 19(g) petition; (3) the negotiations and communications which took place between the parties during this period; (4) whether the decision of the Commission left room for good-faith disagreement as to the amount of payments owed by the employer; and (5) whether and when the employer made a good-faith offer of settlement or partial payment. *Ponthieux*, 178 Ill. App. 3d at 115.

Practice Pointer

If the employer holds back the payment of TTD, medical or PPD benefits over an interest dispute, this will frequently result in an award of attorneys' fees and costs under section 19(g). Thus, any delay in payment should be well-documented by the employer to support its contention that the cause of the delay was either accidental or resulted from circumstances which do not constitute bad faith. Moreover, where there is a dispute over a particular aspect of an award, the employer should go ahead and pay the undisputed portion thus leaving only the disputed amount unpaid.

Conclusion

As this review illustrates, the potential for penalties and attorneys' fees can be significantly lessened by careful documentation. Moreover, any termination or non-payment of benefits should be done only when reasonable and in accordance with the rules and statutory provisions. When questions arise regarding the possible termination, delay, or non-payment of benefits or medical expenses, please feel free to consult any of our workers' compensation attorneys.

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