Below the Red Line

Workers' Compensation Update

"We've Got You Covered!"

A Newsletter for Employers and Claims Professionals — *August 2021*

A Word From The Practice Chair

Back to school and back to masks! Recently, Governor Pritzker has mandated the wearing of masks in public (indoor) areas. This makes no one happy, but I will say this, I have plenty of masks that I kept just in case. So, I am covered there (sorry, I could not resist the bad Dad pun). I have experienced a first in my world, dropping a child off at college. And now, my entire family is experiencing what life is like without having someone who has been around for the last 18 years. It really is a surreal experience and much more difficult than I thought it would be. There is a silver lining. Since this child is away at school and not using a family vehicle on a regular basis, I was able to get a nice discount on our car insurance. I find if you don't look for the silver linings in life you dwell on the negatives before you.

A special shout out to my friends and colleagues in Louisiana and surrounding states battling Hurricane Ida right now. I wish you well and a quick recovery.

This month's article is a good reminder and also a warning as it relates to Penalties and Attorneys' Fees sought by employees. The author is my associate, Mr. Jordan Emmert who works in our Rockford office. While it is always preferred to dispute and deny a claim, it is prudent to make sure you have a reasonable basis for denying benefits. If you can assert a well-reasoned accident defense, or you have an expert report refuting medical causation, then you can rely upon those defenses to serve as a shield against any assertions made by the employee and his attorney that your defenses are frivolous and a claim by the employee and his attorney for Penalties and Attorney's Fees under the Act. Those penalties and attorney's fees can really add up if you don't have a reasonable basis to deny benefits. If you need help with figuring out penalty / attorney's fee exposure and whether you have appropriate defenses to deny a claim, contact your Heyl Royster workers' compensation attorney and we can walk you through the analysis.

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Payment v. Authorization of Treatment-Penalties Under Section 19(l)

By: Jordan Emmert - *Rockford Office*

As we regularly defend workers' compensation claims, we are all familiar with the petitioner's bar routinely filing petitions for penalties under Sections 19(k) and 19(l) of the Act as a response to the denial of a claim. Despite their occasionally frivolous nature, these petitions should not be treated lightly.

The Illinois Appellate Court recently addressed the topic of whether penalties under 820 ILCS 305/19(l) were appropriately awarded for a respondent's revocation of authorization for surgery in *O'Neil v. Illinois Workers' Comp. Comm'n,* 2020 IL App (2d) 190427WC. Ultimately the Court concluded that the Commission lacked statutory authority to assess penalties pursuant to Section 19(l) of the Act under such circumstances.

Factual Background

The petitioner in *O'Neil* had sustained an injury to his right knee in February of 2016 while working as a boat mechanic. *Id.* at ¶ 3. Throughout much of 2016, the petitioner treated conservatively with various medical providers until he was scheduled for surgery in December 2016. *Id.* at ¶¶ 5-8. Initially, surgery on the knee was authorized by the respondent. *Id.* at ¶ 8. However, upon further investigation into the claimant's prior medical history, Respondent became aware of prior treatment to the right knee, including a 2001 procedure 3 inches below the right kneecap to remove multiple lipomas (fatty tumors). The respondent revoked authorization for the knee surgery by relying on the lipoma removal as a prior treatment to the knee. *Id.*

The matter proceeded to arbitration, and the Arbitrator ultimately held that the arguments advanced by the respondent at trial in support of revocation of authorization for surgery were frivolous, without any medical support, and resulted in a vexatious delay of treatment. *Id.* at ¶ 13. The Arbitrator awarded the petitioner penalties under Section 19(l) and attorney's fees under Section 16 of the Act. *Id.* On appeal, the Commission reversed the Arbitrator's award of penalties and attorney's fees, concluding that there was no statutory authority to make such an award. This appeal to the appellate court followed.

Appellate Court Analysis

On appeal, the petitioner's primary argument was that the Commission improperly relied on *Hollywood Casino-Aurora, Inc. v. Illinois Workers' Comp. Comm'n*, 2012 IL App (2d) 110426WC as its legal support for the ruling that the Commission lacked the requisite statutory authority to award penalties under the circumstances. *Id.* at ¶ 18. The petitioner argued the Commission analysis was improper because the *Hollywood Casino* case did not address penalties under Section 19(l). *Id.*

The primary issue in *Hollywood Casino* was whether the Commission had the statutory authority pursuant to 820 ILCS 305/19(k) to assess penalties for the employer's delay in authorizing medical treatment. *Hollywood Casino*, 2012 IL App (2d) 110426WC, ¶¶ 12-21. The court in *Hollywood Casino* reasoned that the plain language of Section 19(k) prohibited the Commission from assessing penalties based upon a delay in authorizing medical treatment. *Id.* at ¶ 18. The Court further held that Section 19(k) clearly related to a delay in payment or deliberate underpayment of benefits, and was silent with respect to a delay in authorization of medical treatment. *Id.* at ¶ 15. The Court ultimately held that no provision under the Act authorized the Commission to award penalties for a delay in authorization of medical treatment. *Id.* at ¶ 19.

The *O'Neil* court found the reasoning in *Hollywood Casino* persuasive as to a penalties petition under Section 19(l) for the denial or delay in authorization of medical treatment. In coming to its decision, the Court first looked to the language of Section 19(l), which provides in relevant part that, "[i]n case the employer or his or her insurance carrier shall without good and just cause fail, neglect, refuse, or unreasonably delay the payment of benefits under Section 8(a) or Section 8(b), the Arbitrator or the Commission shall allow to the employee additional compensation in the sum of $30 per day for each day that the benefits under Section 8(a) or Section 8(b) have been so withheld or refused, not to exceed $10,000." 820 ILCS 305/19(l).

The Court held, similar to *Hollywood Casino*, that while Section 19(l) addresses an unreasonable delay in the payment of benefits, the plain language of the statute contains no language authorizing an arbitrator or the Commission to assess penalties for an employer's failure, neglect, refusal, or unreasonable delay in authorizing medical treatment. *O'Neil,* 2020 IL App (2d) 190427WC, ¶ 22. While the petitioner argued that 820 ILCS 305/8(a) obligates employers to provide and pay for all the necessary medical and surgical services, the Court indicated that it must apply the plain language of the statute; and neither Section 8(a) nor any other provision of the Act allows the

Commission to assess penalties against an employer based on a failure or delay in authorizing medical treatment. *Id.* at ¶ 21 (citing *Hollywood Casino*, 2012 IL App (2d) 110426WC, ¶ 19). As a result, the Appellate Court majority held that the Commission did not err in finding it did not have the statutory authority to assess penalties under Section 19(l) for the respondent's decision to revoke authorization of the knee surgery. *Id.* at ¶ 22.

While the Appellate Court majority affirmed the Commission finding in *O'Neil,* Justice Holdridge dissented, citing his prior dissent in *Hollywood Casino.* Justice Holdridge reasoned that the concepts of payment and authorization for treatment are closely related and that the majority's interpretation of Section 19(l) is too narrow, and as a result, the respondent's revocation of authorization of treatment fell within the scope of Section 19(l). *O'Neil,* 2020 IL App (2d) 190427WC, ¶ 31.

Key Takeaway

While this case is an interesting and employer-friendly decision, it illustrates an important point for respondents in workers' compensation cases to keep in mind. The arbitrator emphasized in his decision that the respondent offered no medical evidence to support its position that the petitioner's knee condition was not causally related to the work injury, or that the proposed treatment was not reasonably related to the medical condition. When medical causal connection or the necessity of treatment is at issue, it is vitally important for respondents to support their arguments with medical evidence such as an independent medical examination under Section 12 of the Act or a utilization review under Section 8.7. Doing so will not only improve the chances of a favorable outcome at arbitration, but it will also aid in combating petitions for penalties when medical treatment is denied.

Jordan Emmert - *Rockford Office*

Jordan focuses his practice on civil litigation in both federal and state courts in the areas of civil rights/ Section 1983 litigation, commercial litigation, and representing employers in employment law and workers' compensation matters.

In the area of employment law, Jordan focuses on employers' compliance with federal and state employment laws, such as the Family Medical Leave Act, anti-discrimination laws, and retaliatory discharge matters. He also represents employers in workers' compensation matters. Jordan is also involved in commercial litigation where he represents businesses that are involved in business disputes.

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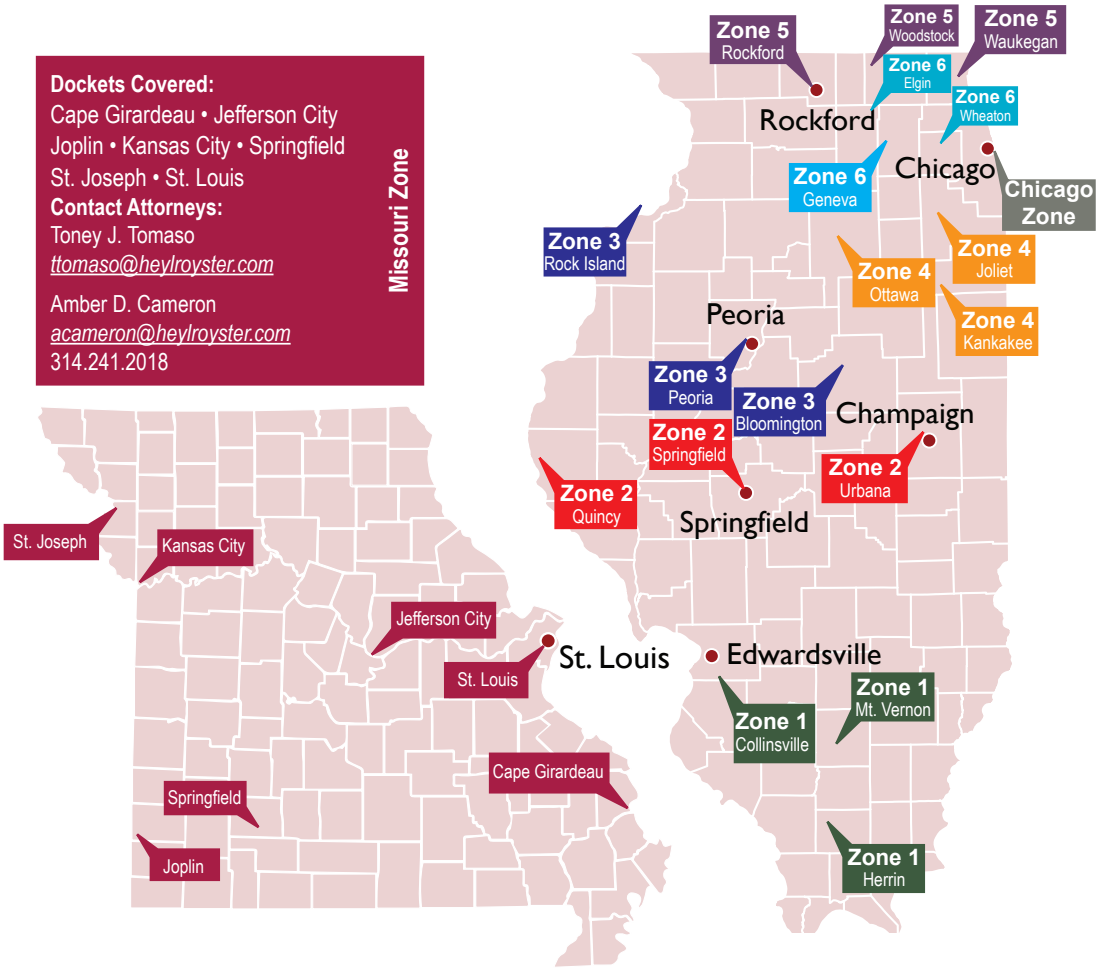

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