



FROM THE PRESIDENT

“Hope springs eternal” we are aptly told. As we embark on another baseball season and all the activities so endearing to us all during the prelude to summer, the WCLA will continue to host events, both educational and social, to serve its members. Further, we shall offer membership to our comrades in central and southern Illinois by a CLE program this spring and later this year.

Monthly Brown Bag Lunches, at which WCLA members in attendance earn one hour of CLE credit, shall proceed as scheduled. Consult the WCLA website — www.wcla.info — and look for notice of dates and topics.

Our annual golf outing will be held on July 27 at a new venue Eaglewood Golf Course. The event is a great opportunity to join your fellow WCLA members in a “good walk spoiled” and an evening of food, drinks, and entertainment. Also, the Young Lawyers’ Section will host a number of social events, including a charitable outing which is in the offing.

The medical seminar will be held on September 14, 2012, again at the Chicago Cultural Center, with all attendees earning four hours of CLE credit. Moreover, we have resurrected the Appellate Court Luncheon, which is scheduled for October 24, 2012. The year will finish with our annual Christmas party scheduled for December 7th at the W. Chicago City Center, 172 West Adams.

With interpretations of the 2011 amendments to the Workers’ Compensation Act anticipated, there is no better time to renew or become a member of the WCLA. If you have not already done so, please visit our website at www.wcla.info and complete a membership application. We look forward to you renewing your membership or becoming a new member. If you care to discuss the panoply of services offered, do not hesitate to contact the undersigned.

Sincerely,

Michael F. Doerries

Workers’ Compensation Lawyers Association
President

SPRING 2012

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Contact John Castaneda at jcastaneda@cac-law.com

Penalties and Payment of Non-disputed Portions of an Award

By: *Laura D. Hrubec*
Rosario Cibella, Ltd.

Introduction

The Illinois Appellate Court in Jacobo vs. Illinois Workers' Compensation Commission, 2011 Ill. App. Lexis 1186 (Ill. App. 3rd Dist. November 16, 2011) held that an employer's failure to pay the portions of an award that were no longer in dispute, while other unrelated issues were on appeal, entitled the petitioner to penalties under Sections 19(l), 19(k) and 16.

FACTS AND PROCEDURAL HISTORY

Arbitration

The employee injured her back in December of 1998 while working. The employer secured a Section 12 "IME" that provided it with a defense against payment of benefits. A petition for penalties and attorney fees was filed by the employee pursuant to Sections 19(l), 19(k) and Section 16. The matter proceeded to trial and the employee was awarded permanent total disability benefits (PTD), temporary total disability benefits (TTD) and reasonable and necessary medical expenses. The Arbitrator also granted the employee's petition for penalties finding that the employer unreasonably relied on an IME in denying benefits.

Commission

The employer appealed the decision. On April 10, 2007 the Commission affirmed the Arbitrator's award but reversed the award of penalties finding that the employer's reliance on its IME was not unreasonable.

Thereafter, on May 10, 2007, the employer's attorney advised the employee's attorney it did not intend to file an appeal and requested a demand for resolution of the award and interest. The employee meanwhile filed an appeal to the Circuit Court regarding the issue of the first penalties petition that was reversed by the Commission. The employee's attorney sent multiple emails regarding award payment.

Circuit Court

On June 17, 2008 the parties appeared in Circuit Court for hearing on the employee's appeal from the denial of the first penalties petition. On June 26, 2008 the Circuit Court reversed the Commission and reinstated the Arbitrator's award of penalties against the employer for relying on an IME to deny benefits.

The non-disputed portion of the award for PTD, TTD and medical benefits had still not been paid. The employee's attorney filed a second penalties petition for non-payment of the Arbitrator's award of PTD, TTD and medical expenses.

The employer appealed the Circuit Court's award of penalties to the Appellate Court.

Appellate Court

The Appellate Court, on April 27, 2009, reversed the Circuit Court. It found the employer's reliance on its IME was not unreasonable or vexatious and reversed the award of penalties. On June 24, 2009 the employer paid the undisputed portion of the Commission's awards for medical expenses, TTD and PTD benefits.

Commission

– Second Penalties Petition

On September 15, 2009 a hearing on the employee's second penalties petition occurred before the Commission. This penalties petition was denied and the Commission adopted the Appellate Court decision denying the employee's penalties petition. It did not make the distinction that this hearing involved a different penalties petition.

Circuit Court

– Second Penalties Petition

The employee appealed the Commission's denial. The Circuit Court confirmed the Commission's denial. It stated that the employee could not have sought a judgment from the court because proceedings were still pending. The court stated further that there is no case law or statutory authority requiring the employer to pay the undisputed amounts of the award. Since the case was still pending the employer's actions were not unreasonable or vexatious.

The employee appealed the judgment of the Circuit Court's denial of penalties to the Appellate Court.

Appellate Court's Holding and Reasoning

The Appellate Court reviewed the standards for awarding penalties under Sections 19(l), 19(k) and Section 16. It stated the standard for awarding penalties under Sections 19(k) and 16 was higher than the standard for awarding penalties under Section 19(l). The Court relied on *Mechanical Devices v. Industrial Comm'n*, in advising that Section 19(l) penalties are in the nature of a

late fee. *Mechanical Devices v. Industrial Comm'n*, 344 Ill.App.3d 752 (2003). It reasoned that penalties are awarded under this section when a payment is late and the employer or its carrier cannot show an adequate justification for the delay. The Court held that the Commission's evaluation of the reasonableness of the delay is a question of fact that will not be disturbed unless it is contrary to the manifest weight of the evidence.

The standard of awarding Section 19(k) and 16 penalties is higher because the reviewing body requires more than proof of an "unreasonable delay." The Court has stated on numerous occasions that penalties are "intended to address situations where there is not only a delay, but the delay is deliberate or the result of bad faith or improper purpose." (See *McMahan vs. Industrial Comm'n*, 183 Ill.2d.499 (1998).

19(l) Penalties

As stated above, the standard of review of the 19(l) penalties is the manifest-weight-of-the-evidence standard. The Court reversed the Circuit Court's decision to deny these penalties. In so doing, the Court looked at the employer's justification for delaying payment of the non-disputed portions of the award.

The employer argued that since the Appellate Court already found the employee was not entitled to penalties and that by filing this second penalties petition the employee was seeking a "second bite at the apple". The Appellate Court stated that the Commission's reliance on the Appellate Court's denial of penalties was in error. That decision involved different facts and circumstances and did not establish justification for the employer's delay under an objective reasonableness standard.

Next, the employer argued that

employee's appeal made the benefits award a non-final judgment. The Circuit Court agreed and specifically stated that there was no statutory authority or case law requiring the employer to pay the undisputed amount of the award while the appeal was pending. The Court found that statement to be incorrect. The Court relied heavily on *Zitzka v. Industrial Comm'n*, which specifically held that an employee's appeal of an issue unrelated to the substantive awards is not a legitimate reason to withhold payment of the undisputed award. *Zitzka v. Industrial Comm'n.*, 328 Ill.App.3d, 844 (2002). Thus, this issue had already been decided. The employer finally argued that the employee's appeal did not specify that the only issue on appeal concerned the Commission's denial of penalties. The Appellate Court gave no credence to that argument stating that it is a well settled rule that the failure to raise an issue before the Commission results in its waiver. The Court reasoned that the employer knew the employee could not raise any issues with respect to the substantive portion of the award on review – the only issue she could raise was the issue of penalties. The Court stated that the "employer's feigned ignorance of what issues were contested in the claimant's appeal is not a reasonable justification to delay the payment of the uncontested portion of the award."

Accordingly, penalties pursuant to Section 19(l) were awarded.

Section 19(k) and 16 Penalties

Section 19(k) and 16 penalties address situations where there is not only delay, but the delay is deliberate or the result of bad faith or improper purpose. The Court held that the Commission's decision to deny penalties was against

the manifest weight of the evidence and also an abuse of its discretion. The Court used strong language in awarding these penalties against the employer stating that the "employer's delay in paying the uncontested award... served no purpose except to delay compensation to an injured worker, a result that the penalties are designed to prevent". It went on to state that the Commission's denial of penalties under Sections 19(k) and 16 under the facts "of this case frustrates the Act's purpose to expedite the compensation of industrially injured workers."

The court also cited to the employee's brief supporting her argument that it "puts an injured worker in the position of having to choose whether to forego her appeal rights on certain issues, or, alternatively, risk the employer withholding the income stream she is due under the Act at a time when she is without income."

Conclusion

The Appellate Court took issue with the employer's decision not to pay the award because it "served no purpose except to delay compensation to an injured worker." Once the employer declined an appeal of the Commission's award in 2007 to the Circuit Court (the first time), the right to appeal the TTD, PTD and medical benefits was lost. The Appellate Court very sternly warned employers that the uncontested portions of any award at any stage of the litigation process must be promptly paid if not appealed.



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Case Law Update:

A Summary of Appellate Case Law

By: Cameron B. Clark & Catherine Krenz Doan / Arnold G. Rubin, Ltd.

The past six (6) months has brought a plethora of case opinions in the area of workers' compensation law. These materials attempt to briefly summarize the issues and holdings of the appellate court in 17 recent court opinions. This summary also includes cases which deal with collateral claims/issues that arose out of a work place injury. For a complete summary and analysis, please refer to the full court opinion.

Hollywood Casino-Aurora, Inc. v. Illinois Workers' Compensation Commission, 2012 IL App. (2d) 110426WC, 2012 WL 933282 (2d Dist. March 16, 2012):

Claimant appealed from the circuit court decision which reversed the decision of the Commission awarding Claimant \$40,750 in penalties against her employer pursuant to Section 19(k) of the Act. The court noted that there was no delay in payment of the medical bills, but rather the insurance adjuster did not authorize the recommended medical treatment until August 15, 2007, despite admitting that she received all necessary documentation to approve the procedure on June 18, 2007. The court held that the Commission had no statutory authority to award penalties for the delay in authorizing medical treatment.

Travelers Insurance v. Precision Cabinets, Inc., 2012 IL App. (2d) 110258WC, 2012 WL 938025 (2d Dist. March 16, 2012):

Claimant filed an Application for Adjustment of Claim seeking benefits from Employer for two separate accidental injuries. Following a consolidated hearing, the Arbitrator found that Claimant proved he sustained injuries arising out of and in the course of his employment and awarded Claimant temporary total disability (TTD) benefits, permanent total disability (PTD) and medical expenses. The Arbitrator found a borrowing/lending employer relationship between Precision, the borrowing employer, and Employers Consortium, Inc. (ECI), the lending employer. Based on her examination of Commission records, the Arbitrator determined that on January 10, 2003, Precision had workers' compensation coverage through West Bend Mutual Insurance Company and ECI had no workers' compensation coverage.

The Commission modified the Arbitrator's decision and found that ECI had workers' compensation coverage through Travelers Insurance on the date of accident and that "all employees of ECI during the effective dates of the policy are covered by that policy, regardless of any provisions, endorsements, or lack thereof, attempting to limit or modify the liability of Travelers." The Commission found ECI and Precision "jointly and severally liable for Petitioner's work related injuries." The Commission denied Traveler's motion to submit further

evidence regarding ECI's bankruptcy. The circuit court reversed the Commission's decision and found that ECI did not have workers' compensation coverage since they had not endorsed Travelers' policy.

The appellate court reversed the decision of the circuit court. The court held that Section 4(a)(3) of the Act, which sets forth that any provision in any policy, or any endorsement, attempting to limit or modify the liability for insurance is void. Thus, the failure to endorse the insurance policy is ineffective in withdrawing Travelers from coverage. Additionally, the court held that the Commission and circuit court did not err in failing to take judicial notice of the additional information submitted by Travelers.

In re Marriage of Washkowiak, 2010 IL App. (3d) 110174, 2012 WL 736627 (3d Dist. March 7, 2012):

The court awarded Claimant's wife 17.5% of Claimant's workers' compensation settlement, including 17.5% of the money allocated as a Medicare Set Aside, in a divorce decree. Claimant appealed. The decision was affirmed by the appellate court. The divorce decree set forth that the ex-wife would receive 17.5% of the net proceeds from Claimant's workers' compensation settlement. Net proceeds were defined as the agreed award amount less worker's compensation attorneys' fees and usual and customary litigation fees and expenses. Net proceeds included

Continued on page 9

any reimbursement for unemployment which he actually pays and medical payments he actually pays. Claimant argued that the MSA was not part of the net proceeds of the settlement by nature. The court concluded that the MSA was part of the settlement and the funds are to be used for medical payments. Accordingly, the MSA funds were net proceeds and the court upheld the award to Claimant's ex-wife of 17.5% of the settlement, including the MSA.

Will County Forest Preserve District v. Illinois Workers' Compensation Commission, 2012 IL App. (3d) 110077WC, 2012 WL 592319 (3d Dist. February 17, 2012):

Employer appealed the Commission's decision finding that claimant suffered a compensable shoulder injury which partially incapacitated him from pursuing the duties of his usual and customary line of employment and awarding Claimant benefits pursuant to Section 8(d)2. The circuit court affirmed the Commission's decision and Employer appealed. The appellate court held that:

1) the right shoulder injury did not prevent claimant him from pursuing his usual and customary line of employment;

2) an injury to the shoulder was not a scheduled loss to the arm; and

3) the shoulder injury qualified Claimant for person-as-a-whole award.

At the time this summary was prepared, a petition for rehearing and a petition for certification to the Supreme Court was pending.

Gruszczka v. Illinois Workers' Compensation Commission, 2012 IL App. (2d) 101049WC, 2012 WL 581391 (2d Dist. February 14, 2012):

The appellate court held that the "mailbox rule" did not apply to the provision in the Act regarding appeals from the Commission to the circuit court. Thus, the time when the documents necessary to prosecute such action were mailed was not the time of filing for jurisdictional purposes. In order for circuit court to acquire subject matter jurisdiction over the appeal, Claimant had to file request for issuance of summons and his attorney's affidavit of payment of the probable cost of the record with clerk within 20 days of receipt of the notice of Commission's decision regardless of when the documents were mailed.

Hastings Mutual Insurance Company v. Ultimate Backyard, LLC., 2012 IL App. (1st) 101751, 2012 WL 426671 (1st Dist. February 9, 2012):

Hastings Mutual Insurance Company filed a complaint for declaratory judgment in the circuit court seeking an order that it was not responsible for an underlying workers' compensation claim between the claimant and employer. The issue is whether the notice of cancellation that was sent from Hastings Mutual to the National Council on Compensation Insurance (NCCI) conformed with the statutory requirements set forth in Section 4 of the Act. Hastings Mutual appealed the denial of its motion to stay the workers' compensation claim as well as the order granting Claimant and Employers' motion to dismiss the circuit court complaint. The appellate court

reversed and remanded the case to the circuit court with the direction that the circuit court should stay the underlying workers' compensation claim until a decision is made by the court regarding the issue of insurance coverage.

This is a consolidated appeal which consists of: (1) an appeal of the June 23, 2010 denial of Hastings Mutual's motion to stay workers' compensation proceedings; and (2) Hastings Mutual's appeal of the August 18, 2010 order granting Claimant and Employer's motions to dismiss the complaint in circuit court with prejudice. The court held that the circuit court and Commission have concurrent jurisdiction over questions arising under the Act. The court held that this case involved a question of law, therefore, the circuit court was wrong in granting the motion to dismiss. The court also granted Hastings motion to stay the workers' compensation proceedings while the circuit court decided the issue of insurance coverage.

People v. Oshana, 2012 IL App. (2d) 101144, 2012 WL 458516 (2d Dist. Feb. 9, 2012):

Defendant was convicted in a jury trial of workers' compensation fraud and was sentenced to 24 months probation, fined, and ordered to pay restitution in the amount of \$22,594.61 to the administrator of workers' compensation benefits for the Defendant's employer, to reimburse it for the costs of investigating the workers' compensation claim and its attorney fees. Defendant appealed. The appellate court held that:

1) Defendant's failure to disclose his temporary light-duty work did

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not render his workers' compensation claim either false or fraudulent;

2) false statement regarding defendant's employment status at the time of the claim was insufficient to support conviction based on intentionally false material statement;

3) defendant's exaggeration of shoulder pain was sufficient to support conviction

4) trial court's brief reference to witness by incorrect name did not constitute fundamental error;

5) workers' compensation fraud statute was not unconstitutionally vague;

6) application of fraud statute when no harm occurred did not violate defendant's due process rights;

7) independent medical examination costs were properly included in restitution order; and

8) attorney's fees incurred by administrator were properly included in restitution order.

Patel v. Home Depot USA, Inc., 2012 IL App. (1st) 103217, 2012 WL 384573 (1st Dist. Feb. 2, 2012):

Claimant was awarded workers' compensation benefits by the Commission. The Commission's award included credit to Employer for payments of temporary total disability benefits already made to Claimant. Claimant filed a petition for judgment on a worker's compensation award in the circuit court. The circuit court entered judgment against Employer for the amount of the benefits award, and awarded attorney's fees and costs. Employer appealed and argued that it was entitled to the credit awarded by the Commission. The appellate court held that the Section 19(g) of the Act did not provide

employer with right to recover the credit awarded by the Arbitrator or use the credit as an offset against the benefits awarded to Claimant. Thus, Claimant was entitled to the full award from the Commission.

Professional Transportation, Inc. v. Illinois Workers' Compensation Commission, 2012 IL App. (3d), 2012 WL 222456 (1st Dist. Jan. 19, 2012):

Employer sought review of the decision of the Commission granting claimant permanent total disability (PTD) benefits and recovery of medical expenses. The appellate court held that:

1) the medical evidence did not support a finding of permanent total disability;

2) Claimant failed to undertake a diligent job search;

3) Claimant failed to establish that he was so handicapped that he would not be employed regularly in any well-known branch of the labor market;

4) the law-of-the-case doctrine did not preclude the Commission from awarding medical expenses; and

5) the evidence supported award of \$131,626.31 for medical expenses.

Skokie Casting, Inc. v. Illinois Insurance Guaranty Fund, 2012 IL App. (1st) 111533, 2012 WL 204077 (1st Dist. Jan. 18, 2012):

Employer brought action against the Illinois Insurance Guaranty Fund (Fund), seeking declaration that Fund was obligated to make permanent total disability payments to Claimant, following insolvency of Employer's excess workers' compensation insurer. The circuit court entered summary judgment in favor of employer, and Fund

appealed. The appellate court affirmed the holding of the circuit court and found that Fund's obligation to make payments was not subject to statutory \$300,000 cap since insurer's obligations would have been to pay the "workers' compensation claim." The appellate court held that:

1) Fund improperly terminated payments owed on Claimant's award;

2) the statutory cap does not apply to the Fund's payments in this case;

3) the Fund is liable for all benefits paid to Claimant by Employer since the insurance company went into liquidation;

4) Fund owes reimbursement to Employer for payments made to Claimant since the Fund terminated payments in 2005; and

5) the Fund continues to owe payments for benefits pursuant to the Claimant's award.

Ulm v. Memorial Medical Center, 2012 IL App. (4th) 110421, 2012 WL 34246 (4th Dist. Jan. 6, 2012):

Former employee brought retaliatory discharge, Whistleblower Act, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligent supervision and training actions against Employer. The circuit court granted Employer's motion for summary judgment, and employee appealed. The appellate court affirmed and held that:

1) medical center's discharge of manager violated a clearly mandated public policy, as required in order for manager to maintain a retaliatory discharge claim;

2) certification by center of alleg-

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edly inaccurate subpoenaed medical records did not violate a law or regulation, as required in order for manager to maintain a Whistleblower Act claim;

3) Employer's conduct leading up to its termination of manager was not extreme and outrageous, as required in order for manager to maintain an intentional infliction of emotional distress claim; and

4) manager's negligent infliction of emotional distress, and negligent supervision and training claims were preempted by the Workers' Compensation Act.

***Williams v. Awning Co. v. Illinois Workers' Compensation Commission*, 2011 IL App. (1st) 102810WC, 2011 WL 6382015 (1st Dist. Dec. 19, 2011):**

Employer appealed from decision of the Arbitrator awarding Claimant permanent total disability benefits. During the pendency of the appeal, Employer filed for bankruptcy, which triggered an automatic stay of any litigation pending against Employer. Before the stay was lifted, the Commission modified the Arbitrator's decision, and Employer appealed to the circuit court. The circuit court ruled that Commission's order was void for lack of jurisdiction since the proceeding should have been stayed based on an order from the bankruptcy court, vacated the Commission's decision, and remanded. Following remand, the Commission modified the Arbitrator's ruling to omit an award of penalties, and Employer appealed. The circuit court confirmed the Commission's second decision. Employer appealed, and Claimant cross-appealed. The appellate court vacated the circuit court order, reversed the first circuit court order

and reinstated the initial Commission decision. The appellate court held that:

1) although Commission's initial order might have been void as entered in derogation of the bankruptcy stay, with respect to employer's insurer, Commission's order was revitalized by the Bankruptcy Court's retroactive annulment of the stay; and

2) California Bankruptcy Court's stay order, declaring that all persons were enjoined from instituting or prosecuting any action against employer's insurer, did not deprive arbitrator of subject matter jurisdiction over workers' compensation claim brought against Employer.

***Burcham v. West Bend Mutual Insurance*, 961 N.E.2d 453, 356 Ill.Dec 357 (2d Dist. 2011):**

Claimant brought declaratory judgment action against Employer's insurer seeking declaration that the uninsured motorist coverage, which Claimant sought from insurer was not precluded under the policy limitation by payments Claimant was entitled to receive from same insurer through workers' compensation. The court held that:

1) The provision of the Workers' Compensation Act providing that no compensation was payable to claimant if compensation was payable under the provision addressing compensation for loss of use of body part and permanent disability did not preclude claimant from seeking compensation, pursuant to employer's uninsured motorist coverage, for disfigurement; but

2) Claimant could not, after receiving workers' compensation for permanent partial disability, subsequently also seek compensation under employer's uninsured motor-

ist coverage for loss of normal life; and

3) The uninsured motorist coverage provision stating that insurer would not pay for any element of loss if Claimant was entitled to receive payment for the same "element of loss" under workers' compensation precluded claimant, included payment for loss of earnings. Since Claimant received temporary total disability benefits from the workers' compensation insurance carrier, he could not claim loss of earnings in the uninsured motorist case.

***Jacobo v. Illinois Workers' Compensation Commission*, 959 N.E.2d 772, 355 Ill.Dec 358 (3d Dist. 2011):**

The appeal concerned the decision of the Commission not to award Claimant penalties and attorney fees against the employer pursuant to Sections 19(l), 19(k), and 16 of the Illinois Workers' Compensation Act for unreasonable delay in payment of compensation under the Act. Employer refused to pay the undisputed portions of Claimant's benefits until after all appeals were exhausted on an unrelated issue. The court held that undisputed benefits must be promptly paid or the employer will be subject to penalties and attorney fees. The case was reversed and remanded.

***Arcelor Mittal Steel v. Illinois Workers' Compensation Commission*, 961 N.E.2d 807, 356 Ill.Dec 418 (1st Dist. 2011):**

Employer appealed a finding of the Arbitrator, arguing that overtime wages and production bonuses should not have been included in the Commission's

calculation of claimant's Section 10 average weekly. The Commission disagreed. The appellate court affirmed the Commission's finding that Claimant's overtime hours were mandatory since all members of Claimant's work team were required to work the same hours. Further, the production bonuses paid by Employer should have been included in the calculation of average weekly wage since Employer had no discretion in paying the bonus and the bonus was for production; it was consideration for work actually performed.

Shafer v. Illinois Workers' Compensation Commission, 2011 IL App (4th) 100505WC2011 WL 5127769 (4th Dist. Oct. 28, 2011):

Claimant and Employer sought judicial review of decisions of the Commission awarding temporary total disability (TTD) benefits and medical expenses. The court held that:

1) Employer's failure to include correct case number on the petition for review did not deprive Industrial Commission of jurisdiction to hear petition;

2) Commission's findings that Claimant's work-related accidents arose out of and in the course of employment were not against manifest weight of the evidence;

3) Commission's finding of causal relationship between the work-related accidents and claimant's neck condition was not against manifest weight of evidence;

4) Claimant's ability to perform light work, and her filing a claim for unemployment compensation benefits, did not preclude a finding that she was temporarily and totally disabled; and

5) Commission's finding that Claimant's incurred medical expense was reasonable and necessary and was not against manifest weight of evidence.

Mason v. John Boos & Company, 959 N.E.2d 209, 355 Ill.Dec 181 (5th Dist. 2011):

Claimant brought negligence action against employee leasing company and temporary employer related to accident in which claimant's right hand was caught in a molding machine, resulting in amputation of claimant's thumb and most of the four fingers on the right hand. The court held:

1) In a matter of first impression, the failure of employee leasing company to register under the Employee Leasing Company Act did not negate the exclusive remedy provision of the Workers' Compensation Act; and

2) The terms of settlement agreement between Claimant, employee leasing company, and temporary employer, released any and all claims that arose out of the workplace accident.

WCLA Upcoming Events

WEDNESDAY, JUNE 13

Noon

Board Meeting

THURSDAY, JUNE 21

Noon

MCLE Lunch Program

JRTC Assembly Hall

James R. Thompson Center
100 W. Randolph

TUESDAY, JULY 10

Noon

MCLE Lunch Program

JRTC Assembly Hall

James R. Thompson Center
100 W. Randolph

TUESDAY, JULY 17

Noon

Board Meeting

FRIDAY, JULY 27

Annual WCLA

Golf Outing and Dinner

Eaglewood Golf Course
Itasca, Illinois

WEDNESDAY, AUGUST 8

Noon

MCLE Lunch Program

JRTC Assembly Hall

James R. Thompson Center
100 W. Randolph

Is what I just read true?

Patel v. Home Depot

*By: Kevin Botha,
Hannigan & Botha, Ltd.*

The Petitioner in this case sustained two accidental injuries. On September 3, 2000, he injured his left shoulder while unloading flooring tile inside a customer's home. Notice was given, and medical treatment ensued. During this period of time petitioner was placed on light duty work and received physical therapy. The light duty work was accommodated by Home Depot and there was no compensable lost time related to the initial injury.

On May 3, 2001 the petitioner was lifting a box containing a wardrobe cabinet with a coworker. The coworker dropped his end of the box resulting in re-injury to the petitioner's left shoulder and the left side of his neck. The petitioner resumed a course of conservative treatment for both the left shoulder and neck and continued on light duty work restrictions which were accommodated by the Home Depot. The petitioner underwent left shoulder surgery on November 29, 2001. On May 2, 2002 he underwent a cervical fusion and remained off of work. The petitioner was authorized off work by his treating physicians, and TTD benefits were being paid.

Around November 5, 2002 petitioner had been placed at maximum medical improvement with permanent restrictions determined by an FCE. He later sought a second medical opinion, and was kept off work by his second choice of physician, notwithstanding the FCE

restrictions.

TTD benefits were repetitiously suspended and reinstated through February 13, 2003. No further TTD was paid after February 14, 2003. The light medium physical demand level determined by the FCE restrictions was not accommodated by the Home Depot and the Respondent failed to provide the petitioner with vocational rehabilitation benefits.

At trial the arbitrator awarded 35 and 4/7 weeks of TTD benefits from February 14, 2003 through the date of trial October 20, 2003. Respondent offered into evidence an itemized summary of all workers' compensation benefits paid to the petitioner along with copies of the canceled checks. The summary of benefits paid contained both TTD payments and PPD advances paid to the petitioner. The arbitrator awarded credit for the TTD payments however because the hearing was pursuant to the petitioner's 19(b) petition he did not allow a credit for the PPD advances paid to the petitioner.

The arbitrator found that the respondent was entitled to an 8(j) credit of \$27,357.47. The arbitrator further ordered the respondent to authorize the future surgery as recommended by the petitioner's treating physician and also awarded §19(k) penalties in the amount of \$6,343.33, §19(l) penalties in the amount of \$2,500.00 and attorney's fees pursuant to §16 in the amount of \$1,268.66.

The Commission affirmed and adopted the decision of the arbitrator, but increased the respondent's

credit for their payments made to the petitioner to \$32,357.47, however ruled that the credit was not pursuant to §8(j) of the Act.

The respondent did not pay the award on the belief that it had overpaid the petitioner TTD benefits. The petitioner then filed a petition in circuit court for judgment on the Commission's award and also requested penalties and costs pursuant to §19(g) of the Act, which provides in pertinent part:

"Either party may present a certified copy of the award of the arbitrator or a certified copy of the decision of the Commission when the same has become final, when no proceedings for review are pending, providing for the payment of compensation according to this Act, to the circuit court of the count in which such accident occurred or either of the parties are residents, whereupon the court SHALL enter a judgment in accordance therewith. 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's fees in the arbitration proceedings and in the court entering the judgment for the person in whose favor the judgment is entered..."

The circuit court then entered judgment against Home Depot for \$22,798.54 and then in the best descriptive verb, "whacked" Home Depot for attorney's fees in the amount of \$47,000.00, costs of \$5,315.31 and interest in the

Continued on page 17

John Muir, CCLA, CPCU

As managing partner of Ringler Associates Bloomington, Illinois, John Muir is nationally known for his expertise in Workers Compensation cases. He specializes in settling worker's compensation and personal injury cases with a focus on the people in each case. He has specific expertise in funding workers' compensation matters including Permanent Total Disability, Wage Differential and Death cases. Additionally, he is an expert in funding and Medicare Set-Aside Arrangements, Life Care Plans and Special Needs Trusts.

John has 32 years of experience in the industry. He provides assistance and expertise to clients at mediations and settlement conferences. His goal is "to deliver innovative settlement solutions to all parties involved in an injury claim with fast and accessible services"

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amount of \$13,679.08.

The appellate court upheld this judgment after reviewing the construction of the statute de novo. The appellate court narrowly construed §19(g) of the Act holding that the respondent is not entitled to obtain the credit that the arbitrator and the Commission granted under §19(g) and finding that they have a common law right to recover. They noted that the proper remedy would be to file suit in circuit court based on the common law remedies of recoupment, restitution or reimbursement.

The appellate court relied on the case of *Illinois Graphics Co. v. Nickum* 159 Ill. 2d 469(1994). In that case, after payment of some workers' compensation benefits at trial the arbitrator denied the petitioner's claim. The Commission affirmed the denial of benefits and awarded respondent a credit for the money that it had already paid to the petitioner. Respondent then filed a petition pursuant to §19(g) to obtain a judgment against the petitioner for the amount of the credit given.

"§19(g) limited the type of decisions to those which provide for the payment of compensation benefits," held the Supreme Court, and stated that the employer had a common law remedy to recover any overpayment but it did not have a statutory remedy under §19(g).

The vast majority of attorneys practicing before the Illinois Workers' Compensation Commission and members of the Workers' Compensation Lawyers' Association understand the history behind workers' compensation legislation in Illinois.

I, as a practicing petitioner's attorney, explain the rationale of why

the Worker's Compensation Act came into existence to my clients on a daily basis to help them understand the extent (and limitations) of their benefits.

It is well known that prior to the enactment of the Illinois Workers' Compensation Act on May 1, 1912 an employee seeking benefits from their employer had to prove liability under common law theories. This resulted in excessive case loads in the courts, destitute workers and delays in benefits. In 1909, a mine fire in Cherry, Illinois resulted in the deaths of many people. Shortly, thereafter, an employer's liability Commission was then established and they began research based upon work conditions in the United States and foreign countries.

If one turns to Page 1 of the Illinois Workers' Compensation Act, the first line under the title reads, "An Act to promote the general welfare of the people of the State by providing compensation for accidental injuries ..."

If one peruses important Illinois Supreme Court cases, one will notice words such as "remedial in nature." Many early cases make the statement that the Illinois Workers' Compensation Act was created to provide financial protection for injured employees who might otherwise have to bear the loss of earnings themselves. The Act created an exclusive remedy and workers were unable to invoke common law remedies. Many prior cases also mandate that the Act be liberally construed to accomplish its objective and purposes.

In the 1978 Supreme Court case of *Kelsay v. Motorola Inc.* 74 Ill.2d 172, 384 N.E.2nd, N.E.2d 353, 23 Ill.Dec. 559 (1978) as one of its conclusions the court noted

that the Act is a humane law of a remedial nature. That language is cited throughout important case law in Illinois history. The Supreme Court and Appellate Court has on numerous occasions defined the Act's purpose of humane legislation of a remedial nature. The Kelsay court in dicta quoted, "The Act provides remedies and protection for employees thereby promoting the general welfare of the State." Hence, it was enacted in furtherance of sound public policy.

Depending on your views, where do we as practitioners draw the line between fairness, the general welfare of the people of this state, humane legislation of a remedial nature and zealous advocacy, as we were all sworn to when we were admitted to the Illinois Bar?

On the one hand, injured workers need protection, and where benefits are awarded and refused to be paid, then defiant Employer's should be punished when these benefits are not paid. On the other hand, where there is a good faith belief that benefits are not owed, why the need for such punitive awards?

Hmm...A penny for your thoughts?