



ILLINOIS STATE BAR ASSOCIATION

WORKERS' COMPENSATION LAW

The newsletter of the Illinois State Bar Association's Section on Workers' Compensation Law

Assessment of penalties for failure to pay medical bills

By Arnold G. Rubin

Section 8(a) of the Illinois Workers' Compensation Act requires that the employer shall provide and "pay for all of the necessary first aid, medical and surgical services and all necessary medical, surgical and hospital services . . . which is reasonably required to cure or relieve the employee from the effects of the accidental injuries." If an employer refuses to pay a medical bill that an employee has incurred as part of the medical treatment for the work-related injury, the only mechanism that the employee, has had, in the past, to enforce payment of the bill is through the filing of a Section 8(a) Petition, or as part of a 19(b) Petition, or to submit the bill for payment in the Petitioner's case-in-chief at the time of the Arbitration hearing.

From a Petitioner's prospective, the employer's failure to pay medical bills has, perhaps, been one of the most frustrating aspects of the practice. The frustration is that the employee's credit rating becomes adversely affected during the litigation of the workers' compensation case because of the employer's failure to promptly administer the payment of the bills. This problem is distinct from the balance billing problem which was a subject matter in the State Legislature earlier this year. Balance billing refers to the practice of employers paying only a portion of a bill and the medical provider billing the employee for the balance. In many cases, employers simply ignore payment of the entire bill. The burden for payment of the medical bill remains with the employee. This results in numerous letters directed to the employee from the medical providers, and collection agencies demanding payment in full. In some cases, actual law suits

are filed against the employees for the recovery of these bills. Unfortunately, due to the make-up of the legislature and based on the fact that Illinois has not had a Democratic governor for many years, it has been impossible for Labor to pass a strong bill in the Legislature which would provide sanctions against an employer for the unreasonable and vexatious delay of payment of medical bills incurred by an employee as part of the reasonable and necessary medical treatment received by the employee as a result of the work-related injuries. On October 22, 1998, the Illinois Supreme Court filed its decision, *McMahan v. Industrial Commission*, No. 84057, 1998 WL 734512 (Ill. Oct. 22, 1998). This decision may certainly be considered as one of the most significant decisions in many years affecting the rights of injured workers under the Illinois Worker Compensation Act. In this case, the employee, Robert McMahan, filed a case seeking benefits for injuries to his back while employed by Farmer's Elevator. The Arbitrator awarded Mr. McMahan temporary total disability benefits of 13-6/7 weeks, medical expenses, attorneys' fees under Section 16 of the Act and penalties under Sections 19(k) and 19(l) of the Act. The Illinois Industrial Commission, on review, modified the award by reducing the amount of medical expenses awarded and eliminating the award of attorneys' fees and Section 19(k) penalties. A dissent was filed by one Commissioner regarding the Section 19(k) penalties and attorneys' fees under Section 16. This award was confirmed by the Circuit Court. A further appeal was filed to the Appellate Court, challenging only the Commission's refusal to award attorneys' fees and Section 19(k) penalties. In the Appellate Court, that

portion of the Arbitrator's decision awarding Section 16 attorneys' fees and Section 19(k) penalties was reinstated. The Illinois Supreme Court considered this case after two members of the Appellate Court filed a statement that the case involved some substantial questions warranting consideration by the Supreme Court. The only issue before the Supreme Court was whether the employee was entitled to an award of penalties under Section 19(k) and attorneys' fees under Section 16.

The key facts of the case set forth in the Supreme Court decision establish that the employee sustained a work-related accident on May 20, 1992. Prior to that date, he had undergone back surgery. The back surgery occurred approximately seven years earlier. Although the employee complained of periodic pain in his left leg and left foot, the pain did not keep him from working. In May 1992, the employee injured himself at work when he slipped on some loose rocks and fell on his buttocks. He experienced pain in his left buttock, extending down to his left leg to his knee. His supervisor suggested that he see a doctor. The doctor gave the employee several prescription medications. Thereafter, he sought treatment from his chiropractor and from an urgent care facility. Eventually, the employee was referred to a neurosurgeon. The employee received diagnostic studies and epidural injections. The diagnostic studies included a CT-scan and myelogram study. Eventually, the employee underwent surgery for his low back. The surgery was performed by an orthopaedic surgeon who opined that the surgery was necessary to relieve the employee of his symptoms and that the condition was causally connected to the accident

in May 1992. Of significance was the fact that "no other physician gave a contrary opinion."

The employer was contacted in January 1994, at the time that surgery was contemplated, to request that temporary total disability benefits begin on the date of surgery. The employer did not comply with the request to pay temporary total disability benefits; nor did the employer comply with the request to pay medical bills. Apparently there was a dispute between the employer and its workers' compensation insurance carrier. The employer's representative established that it was the employer's policy to take care of some workers' compensation claims internally and not to submit accident reports on such claims to the insurance company. The insurance carrier refused to pay any portion of the medical bills based on its position that the employer had not complied with policy provisions. A 19(b-1) Petition was filed by the employee seeking penalties under Section 19(k) and 19(l) of the Act and attorneys' fees under Section 16. The Arbitrator found that the employer was liable for medical expenses in the amount of \$23,477.04. The amount of compensable medical expenses was modified on review to \$21,795.11, since a portion of the bills submitted were unrelated to the employee's work injuries.

One of the issues presented to the Industrial Commission division of the Appellate Court, was whether Section 19(k) penalties and Section 16 attorneys' fees could be only assessed on conduct that occurs after an award has been entered in favor of a claimant. The Illinois Supreme Court pointed out that the Appellate Court had acknowledged that the case of *Brinkmann v. Industrial Commission*, 82Ill.2d 462 (1980) is "no longer good law." The Illinois Supreme Court stated that *Brinkmann* does not limit the availability of penalties and attorneys' fees to a situation where the delay in payment occurs following entry of an award in favor of the claimant. The obvious impact of this statement is that the Illinois Supreme Court is specifically stating that Arbitrators can make awards for 19(k) penalties and Section 16 attorneys' fees. The Illinois Supreme further pointed out: "The claims that such fees and penalties must be based on an existing award of benefits, the payment of which is delayed, was rejected by our court as involving 'too narrow a reading of the statutory sections involved, and too broad a reading of *Brinkmann*.'"

The Illinois Supreme Court also rejected

the argument of the employer that Section 19(k) penalties and Section 16 attorneys' fees cannot be awarded because of the language of Sections 19(k) and 19(l). The employer pointed out that Arbitrators are not specifically mentioned within Sections 19(k) and 16. Those Sections speak of findings, assessments and awards by "the Commission." The Illinois Supreme Court set forth that "we do not believe that it has the significance suggested by the employer." The Supreme Court specifically pointed out: "Sections 16 and 19(k) . . . presuppose that the Arbitrator's award will be reviewed by the Commission, as was the case here."

The employer also contended that attorneys' fees were erroneously computed in this case. The employer pointed out that the 20% statutory rate for attorneys' fees which were assessed by the Arbitrator included the amount of money for the medical payments due the employee. The employer argued that Section 16 attorneys' fees can only be awarded for delays in paying or underpaying compensation for lost wages. The employer argued that such fees cannot be predicated on delays in paying or underpaying amounts for medical expenses. The employer relied upon the case of *Childress v. Industrial Commission*, 93 Ill.2d 144 (1982). The Supreme Court distinguished its holding in *Childress*. The Supreme Court set forth that unlike *Childress*, the delay was not limited to payment of medical expenses. In this case, it involved temporary total disability payments as well. The Supreme Court pointed out that the predicate for a Section 16 attorneys' fees award found missing in *Childress* was present in the *McMahan* case. Furthermore, the Illinois Supreme Court held "we do not find the reasoning of *Childress* to be persuasive." The Supreme Court pointed out that *Childress* was premised on an overly narrow and incorrect reading of the relevant statutory provisions. The Supreme Court went on to say "we do not read Section 19(k) as precluding the imposition of penalties for unreasonable and vexatious delay in paying medical expenses." The Supreme Court further interpreted the word, "compensation," in Section 19(k) to include not only compensation for lost wages but also payment for medical services.

After establishing through principles of statutory construction that Sections 16 and 19(k) allowed for an assessment of attorneys' fees and penalties in instances of an employer's failure to pay, medical expenses,

the Supreme Court considered the employer's argument that the facts of the case did not support the type of conduct allowing for imposition of Section 19(k) penalties and Section 16 attorneys' fees. The Supreme Court held that Sections 19(k) and 19(l) were actually intended to address different situations. The Supreme Court pointed out the additional compensation authorized by Section 19(l) is in the nature of a late fee. The Supreme Court pointed out that if the payment is late, for whatever reason, and the employer or its carrier cannot show an adequate justification for the delay, an award of the statutorily specified additional compensation is mandatory. However, the Supreme Court pointed out that imposition of additional penalties under Section 19(k) are discretionary, rather than mandatory. In the 19(k) situation, the statute uses the term vexatious, intentional and merely frivolous. Section 16, which uses the identical language, was intended to apply in the same circumstances. The Illinois Supreme Court acknowledged that a higher standard was required for Section 19(k) penalties and Section 16 attorneys' fees and agreed with the Appellate Court that the facts of the instant case supported an award for such penalties and attorneys' fees. The Illinois Supreme Court pointed out that the employer's conduct was not the result of simple inadvertence or neglect. It involved more than just lack of good and just cause. The Supreme Court pointed out that the employer made an intentional decision not to honor the statutory obligations to the employee.

The Illinois Supreme Court concluded that the decision of the Industrial Commission should be reversed with respect to the denial of penalties under Section 19(k) and attorneys' fees under Section 16. The Illinois Supreme Court held that the award of the Arbitrator should be reinstated, with a slight modification as to computation, for the award of such penalties and fees. In a special concurring opinion, Justice Heiple held that the ruling in *Brinkmann* should simply be overruled. Justice Miller issued a concurring opinion in which he disagreed with the majority opinion which overruled *Childress v. Industrial Commission*. Justice Miller stated that the Supreme Court should continue to follow *Childress* until the legislature changes the statutory language on which that opinion was based.

Obviously, the *McMahan* decision must

be considered a significant decision in the practice of Workers' Compensation Law. It imposes a new obligation upon employers, insurance companies, and third-party administrators to promptly pay medical bills for treatment which meets the requirements under Section 8(a) of the Act. This is a deci-

sion that is not only favorable for employees but it is also a decision which will have great benefit to those medical providers who render treatment to injured workers. No longer will the medical providers need to wait for the claims adjustor to process a medical bill for medical services rendered to an injured

worker. Rather than simply setting the medical bill aside for days, months, or years, there will now be an incentive for that claims adjustor to make prompt and proper payment of the medical bill or risk having the Industrial Commission assess penalties and attorneys' fees against the employer. ■

THIS ARTICLE ORIGINALLY APPEARED IN
THE ILLINOIS STATE BAR ASSOCIATION'S
WORKERS' COMPENSATION LAW NEWSLETTER, VOL. 36 #2, JANUARY 1999.
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