WCLA 2-27-2020

- February Update: Cases & Legislation
- February 27, 2020
- 12:00 noon to 1 pm
- James R. Thompson Center Auditorium, Chicago, IL
- 1 hour general MCLE credit

§19(k): Penalty for Delay

- (k)In case 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, then 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. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay.
- When determining whether this subsection (k) shall apply, the Commission shall consider whether an Arbitrator has determined that the claim is not compensable or whether the employer has made payments under Section 8(j).

§19(l): Penalty for Delay

- (l) If the employee has made written demand for payment of benefits under Section 8(a) or Section 8(b), the employer shall have 14 days after receipt of the demand to set forth in writing the reason for the delay. In the case of demand for payment of medical benefits under Section 8(a), the time for the employer to respond shall not commence until the expiration of the allotted 30 days specified under Section 8.2(d). In 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. A delay in payment of 14 days or more shall create a rebuttable presumption of unreasonable delay.

Sec. 16 Attorneys' Fees To Be Paid as Penalty

- Whenever the Commission shall find that the employer, his or her agent, service company or insurance carrier has been guilty of delay or unfairness towards an employee in the adjustment, settlement or payment of benefits due such employee within the purview of the provisions of paragraph (c) of Section 4 of this Act; or has been guilty of unreasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act, the Commission may assess all or any part of the attorney's fees and costs against such employer and his or her insurance carrier.

Hollywood Casino v. IWCC
2012 IL App (2d) 110426WC

- Prior PPD award; Respondent fails to authorize battery replacement for stimulator; Petitioner files 19(k) Penalty Petition
- "Hollywood argues that it was under no obligation to authorize medical treatment for the claimant and that section19(k) penalties may not be assessed for an employer's delay in authorizing medical treatment. We agree with Hollywood."
- Statutory construction: 19(k) addresses "delay in payment" and "underpayment" of compensation. It says nothing about delay in authorizing medical treatment, even assuming arguendo that an employer has an obligation to give authorization in advance of medical treatment for an injured employee .
- When an unambiguous term contained in a statute is not specifically defined, it should be given its plain and ordinary meaning. Payment is defined as: "[T]he act of paying or giving compensation" by Webster's Third New International Dictionary. The definition does not include the giving of authorization for a service.
- 2 Dissenters bring up Plantation Manufacturing, 294 Ill.App.3d 705 (1997): 8(a) obligation to "provide" is same as obligation to "pay"

Hollywood Casino v. IWCC
2012 IL App (2d) 110426WC

- **Even though statutory construction, how much do facts count**?
- 12-22-06: Dr. Lubenow writes battery will run out in first quarter of 2007
- 5-07: battery ceases to function
- 6-18-07: Dr. Lubenow sends “medical necessity fax” requested by adjuster
- 8-2-07: Petitioner files 19(k)
- 8-15-07: Adjuster authorizes
- 8-27-07: SX takes place
- Hearing on 19(k): “No medical bills outstanding at the time of the hearing”
- 8-31-10: Commission order awards $40K penalties
- 10-26-11: Respondent files Circuit Court Review
- 4-8-11: Circuit Court reverses Penalties

Justin O'Neil v. JGS Marine 16WC031519; 18IWCC0295 (Arbitrator)

- There is no contrary opinion for the need of medical intervention. There is no Utilization Review report indicating that the procedure is inappropriate under-nationally recognized medical standards. There is no evidence that Petitioner suffers from a pre-existing condition. Respondent did not uncover any new information in regard to Petitioner's previous healthcare that could lead a reasonable person to believe that his condition of ill-being was not related to his well-documented work-place accident.
- Having said that, the case law is clear that Section 19(k) penalties for future medical are not appropriate.
- However, the Arbitrator finds that Respondent is liable for penalties under Section 19(1) of the Act for without good and just cause failing, neglecting, refusing, and unreasonably delaying payments under Section8(a) of the Act, i.e. authorizing the surgery. These penalties will amount to $30 per day beginning on the date of Petitioner's last medical treatment on September 27, 2016, and total in the amount of 230 days or $6,900.
- The Arbitrator further finds that Respondent is liable for attorneys' fees under section 16 of the Act for engaging in frivolous claims that do not present a real controversy, and creating an unreasonable and vexatious delay by continuing proceedings in that vein. (20% of 19(l) penalty).

Justin O'Neil v. JGS Marine 16WC031519; 18IWCC0295 (IWCC Majority)

- Based on the above, and pursuant to the dictates of *Hollywood Casino-Aurora. Inc.* 967 N.E.2d 848 (2012), the Commission modifies the decision of the Arbitrator to find that the Commission lacks the authority to award penalties based on a failure or delay in authorizing medical treatment. Along these lines, the court in *Hollywood Casino* specifically noted that even"[a]ssuming for the sake of analysis that this provision (§8[a]) is sufficiently broad so as to include a requirement that an employer authorize medical treatment for an injured employee in advance of the services being rendered, the fact still remains that there is no provision in the Act authorizing the Commission to assess penalties against an employer that delays in giving that authorization.
- Hollywood Casino specifically dealt with a Commission award under § 19(k), the Commission finds that by extension the same rationale would apply to penalties pursuant to § 19(1) and § 16 as well. In support of its holding, the appellate court pointed out that the statute addresses 'delay in payment' and 'underpayment' of compensation. It says nothing about any award of additional compensation(penalties) for an employer's delay in authorizing medical treatment, even assuming *arguendo* that an employer has an obligation to give authorization in advance of medical treatment for an injured employee.
- Furthermore, per the statute, § 16 attorney fees are predicated on an award pursuant § 19(k),and since *Hollywood Casino* has determined that §19(k) does not authorize the Commission to award penalties for the failure to authorize medical treatment it follows that§ 16 attorney fees are likewise not available under such circumstances. Therefore, while the Commission does not condone the actions of Respondent in denying authorization for surgery that both the Arbitrator and the Commission on Review believe to be reasonable and necessary as well as causally related, the plain language of the statute, as explained in *Hollywood Casino* simply does not provide for the award of penalties based upon a failure or delay in authorizing treatment. As a result, the Commission hereby vacates the Arbitrator's award of additional compensation pursuant to § 19(1) and attorneys' fees pursuant to § 16 of the Act.

Justin O'Neil v. JGS Marine 16WC031519; 18IWCC0295 (IWCC Dissent)

- *Hollywood Casino-Aurora, Inc.,* supra, stands for the proposition that the Act does not specifically grant the Commission the authority to award ***§19(k) penalties*** based on a failure or delay in authorizing medical treatment given that "[t]he statute addresses 'delay in payment' and 'underpayment' of compensation." The appellate court was ***not*** asked and did ***not*** comment on the appropriateness of ***§19(1)*** and ***§16*** penalties for the failure to authorize same.
- I would submit that refusing to authorize essential and oftentimes critical treatment, without adequate justification, is just as harmful if not more so than the failure to pay a bill after the fact. More to the point, the human toll, and the deleterious effect on the health and well being of injured workers! in legitimate need of medical care, in my humble opinion, far outweighs the monetary need to pay for same, and should be protected just as vigilantly.

O'Neil v. IWCC
2020 IL App(2d) 190427WC

- Similar to *Hollywood Casino*, while section 19(*l*) addresses a failure, neglect, refusal, or 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*.
- Nevertheless, as we observed in *Hollywood Casino*, 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.
- It is the function of the legislature, not the judiciary, to provide a penalty for those employers that unreasonably or vexatiously refuse or delay authorization for reasonable and necessary medical services required to cure or relieve an injured employee from the effects of an accidental work injury.

Sec. 8.7 Utilization Review

- 8.7(i)(3): An employer may only deny payment of or refuse to authorize payment of medical services rendered or proposed to be rendered on the grounds that the extent and scope of medical treatment is excessive and unnecessary in compliance with an accredited utilization review program under this Section. (PA 97-18; 9-1-11)
- 8.7(j): When an employer denies payment of or refuses to authorize payment of first aid, medical, surgical, or hospital services under Section 8(a) of this Act, if that denial or refusal to authorize complies with a utilization review program registered under this Section and complies with all other requirements of this Section, then there shall be a rebuttable presumption that the employer shall not be responsible for payment of additional compensation pursuant to Section 19(k) of this Act and if that denial or refusal to authorize does not comply with a utilization review program registered under this Section and does not comply with all other requirements of this Section, then that will be considered by the Commission, along with all other evidence and in the same manner as all other evidence, in the determination of whether the employer may be responsible for the payment of additional compensation pursuant to Section 19(k) of this Act. (PA 94-277; 2-1-06)

O'Neil v. IWCC
2020 IL App(2d) 190427WC

- The language from section 8.7 *was* in effect at the time the events relevant to our holding in *Hollywood Casino* occurred.
- We see nothing in section 8.7(j) that authorizes the Commission to assess penalties against an employer based on a failure or delay in authorizing reasonable and necessary medical treatment. Like sections 19(k) and 19(*l*) of the Act, section 8.7(j) speaks to an employer's denial or refusal to authorize *payment*, not medical treatment.
- Section 8.7(j) applies only in assessing penalties under section 19(k) of the Act. The penalties at issue here were assessed under section 19(*l*). The arbitrator expressly declined to impose penalties under section 19(k) of the Act, and claimant never challenged that finding before the Commission. See. Pietrzak v Industrial Comm'n, 329 Ill. App. 3d 828, 832 (2002) (noting that the failure to raise an issue before the Commission results in forfeiture).

CAT Express v. DOI & Liberty Mutual 2019 IL App(1st) 181851

- After a hearing, defendant Robert H. Muriel, in his capacity as the Director of Insurance (Director), adopted the hearing officer's findings of fact, conclusions, and recommendation that Liberty correctly determined that CAT's "owner-operators" were employees rather than independent contractors and found CAT liable for the additional premiums.
- We find that the Department did not have express or implied statutory authority to resolve this employment status dispute. The determination of whether the owner-operators were employees or independent contractors of CAT for purposes of calculating workers' compensation insurance premiums does not directly or indirectly involve the Department's or the Director's authority to administer the insurance laws of this state. Therefore, the Department acted beyond its authority in conducting the hearing and issuing the final order. We therefore vacate the circuit court's judgment affirming the Director's final order and vacate the Director's final order.
- Finally, we disagree with CAT's contention that the Illinois Workers' Compensation Commission has concurrent jurisdiction over the parties' dispute. This dispute does not involve a determination of whether any individual is entitled to workers' compensation benefits or whether CAT is liable for workers' compensation benefits under the Workers' Compensation Act. Instead, this is essentially an insurance coverage or breach of contract dispute that requires a determination of whether Liberty was entitled to additional premiums based on its premium audit finding that the owner-operators were CAT's employees. Such a determination, under the circumstances of this case, does not fall within the Department's express or implied authority, and thus CAT and or Liberty needed to look elsewhere to resolve this dispute.

Washington v. Northeastern Illinois Univ. 17WC018052; 19IWCC0184

- IWCC reverses Arbitrator's denial of benefits to dependents of decedent
- Arbitrator "relied exclusively on the voluntary recreational activity exclusion pursuant to Section 11 of the Act"
- IWCC determines decedent was traveling employee: "her position required her to travel to at least one high school to engaged with students participating in the program."
- Analysis would usually end with traveling employee "performing a reasonable and forseeable act."
- But, IWCC concludes the Section 11 exclusion of voluntary recreational activity is inapplicable when the injured employee is a traveling employee.

Thomas Dietrich v. CTA 17WC037201; 19IWCC0317

- CTA VP required to travel from site to site throughout the City, fell down stairs at Skokie where he was attending meeting.. hurrying, carrying…does not recall slipping on something or missing step
- Determination of whether an injury arose out of employment for a traveling is governed by different rule than applies to other employees
- Not necessarily whether a hazardous condition caused fall, but whether activity was reasonable and forseeable
- Petitioner was traveling employee and “misstep” was reasonable and forseeable
- Neutral risk analysis is “inapposite”
- IWCC affirms and adopts with this dissent: “I do not believe that the status of traveling employee necessarily fulfills” arising out of”: Petitioner must show employment risk and not idiopathic…not required to use stairs because of elevator…no defect..fall was idiopathic.

Michael Pearl v. Chicago Chesed Fund 16WC034526; 19IWCC0183

- Arbitrator approves settlement contract on 3-26-18
- Discovers error in BCBS lien
- Petitioner files Petition for Review 4-24-18
- Petitioner alleges “mutual mistake of fact”
- IWCC retains jurisdiction to review a settlement contract when Petitioner files for review 29 days after the Arbitrator approved the contract
- IWCC “finds a settlement contract approved by an Arbitrator has the same effect as a decision by the Arbitrator” and “does not become a final decision of the Commission until 30 days after its approval…Commission possesses proper jurisdiction to review the settlement contract if a timely Petition for Review is filed.”
- Rescission of the contract is appropriate due to this glaring mistake of fact

HB4151 (Hoffman)

- Amends the Workers' Compensation Act. In a provision creating the Illinois Workers' Compensation Commission, provides that each Commissioner appointed on or after the effective date of the amendatory Act shall be required to be authorized to practice law in this State by the Illinois Supreme Court and to maintain this authorization throughout his or her term of employment. Removes a provision that requires Commissioner candidates, other than the Chairman, to: (i) be licensed to practice law in the State of Illinois; (ii) have served as an arbitrator at the Illinois Workers' Compensation Commission for at least 3 years; or (iii) have at least 4 years of professional labor relations experience. Provides that each Commissioner appointed on or after the effective date of the amendatory Act shall receive an annual salary of 70% of a Circuit Court Judge in the Judicial Court constituted by the First Judicial District under the Salaries Act and the Chairman shall receive an annual salary of 5% more than the other Commissioners. Provides that the performance of all arbitrators shall be reviewed by the Chairman every other year, or more at the discretion of the Chairman (rather than the performance of all arbitrators shall be reviewed by the Chairman on an annual basis). Provides that the Chairman shall have the discretion to assign arbitrators by county (rather than no arbitrator shall hear cases in any county, other than Cook County, for more than 2 years in each 3-year term). Provides that on and after the effective date of the amendatory Act, the Secretary and each arbitrator shall receive a per annum salary of 5% less than the per annum salary of members of the Illinois Workers' Compensation Commission as provided in a specified provision of the Act, payable in equal monthly installments. Effective immediately.

SB1422 (Murphy)

- Amends the Workers' Compensation Act in relation to repetitive injuries. Provides that an accidental injury that results from repetitive or cumulative trauma and occurs within 6 months after the employee begins employment shall not be considered by a workers' compensation insurer in setting rates. Provides for contribution by prior employers with respect to awards for repetitive or cumulative injuries.
- “within one year after…award” for repetitive trauma, responsible employer or carrier may “institute proceedings for “contribution or reimbursement” (2 year statute of repose)
- “Shall not delay, diminish, restrict or alter” benefits to injured worker
- IWCC to promulgate rules

SB 2530 (Hastings)

- Amends the Workers' Compensation Act. Provides that any emergency services personnel, public safety personnel, or individuals licensed as emergency medical services personnel under the Emergency Medical Services (EMS) Systems Act who has been diagnosed by a licensed psychiatrist with post-traumatic stress disorder is entitled to benefits under the Act. Provides that a qualifying individual is not required to demonstrate physical injury to receive benefits under the Act. Requires the Illinois Workers' Compensation Commission to ensure that services provided under the amendatory Act comply with all applicable federal parity regulations including, but not limited to, the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008. Requires emergency services providers and law enforcement agencies to provide employees with educational training related to mental health awareness, prevention, mitigation, and treatment.