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FIGHTING THE STRATEGIC BATTLE TO WIN THE WAR

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MOVING THE STALLED FILE: STRATEGIES FOR BRINGING THE CASE TO CLOSURE WHEN THE PETITIONER'S ATTORNEY AND THE SYSTEM PRESENT DELAY

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MOVING THE STALLED FILE: STRATEGIES FOR BRINGING THE CASE TO CLOSURE WHEN THE PETITIONER'S ATTORNEY AND THE SYSTEM PRESENT DELAY

One of the many frustrations employers and injured workers alike have with the Illinois workers' compensation process is the delay often involved in resolving claims. Many times the delay is justified due to prolonged necessary medical treatment and therapy, delays occasioned by the busy schedules of physicians who need to be deposed, or the time frequently required for a meaningful and productive vocational rehabilitation plan and job search. However, in some instances, the delay is due to the procrastination and inactivity of the attorneys. Petitioners' attorneys frequently choose to concentrate on their good, high dollar claims to the neglect of lesser valued claims with questionable compensability and/or minimal injuries. In this presentation, we will review the options available to employers to accelerate the resolution of claims.

I. THE ILLINOIS WORKERS' COMPENSATION SYSTEM

While it is easy to fault the Illinois workers' compensation system for delays in concluding claims, the truth is that the system rarely causes delay in resolution of claims. The Illinois Workers' Compensation Commission has arbitrators geographically dispersed around the state who hear cases on a monthly basis. In downstate Illinois, it is rare that an arbitrator is not available to hear a claim when both parties and their attorneys are present and ready for trial. The arbitrators hear a number of claims each month and occasionally an arbitrator's schedule will be so crowded that not all claims can be reached for trial, but that is the exception rather than the rule. Additionally, if a claim is not reached for trial one month, the arbitrators usually will give that claim priority on the next docket cycle, or agree to hear a case off docket the following month. Thus, at the trial level, delays are rarely occasioned by the arbitrator's unavailability to hear a trial.

However, there has been a delay in resolution of claims on appeal. Historically, it requires approximately one year from the time of appeal to the Illinois Workers' Compensation Commission's review decision. With the addition of a third review panel, that backlog of appealed cases seems to have been significantly reduced, and in recent months, claims on appeal are being heard and decided more quickly.

Once a case is appealed, there is little either party can do to accelerate the appeal process. The Illinois Workers' Compensation Commission has a schedule of deadlines which apply to each case and are generally strictly enforced. There is little either party can do to accelerate the appeal process. Waiver of oral argument will accelerate the decision date somewhat.

II. RED LINE CLAIMS

As is well known, the Illinois Workers' Compensation Commission will dismiss any claim which has been on file for more than three years without a specific request by one party or the other to continue the matter. Such cases of three years of age or older are referred to as being "above the red line." Such continuance requests must be accompanied by an explanation of why the matter has not been resolved and what further activity is required before the case can be taken to trial. Illinois Workers' Compensation Commission Rule 7020.60(b) (2)(c) states:

C) Cases on file 3 or more years.

i) In all cases which have been on file at the Industrial Commission for three years or more, the parties or their attorneys must be present at each status call on which the case appears. The case will be set for trial unless a written request has been made to continue the case for good cause. Such request shall be made part of the case file. The written request must be received by the Arbitrator at least fifteen days in advance of the status call date and contain proof of service showing that the request for a continuance was served on all other parties to the case and/or their attorneys. Any objection to a continuance in such case must be received by the Arbitrator at least seven days prior to the status call date and contain a similar proof of service. The Arbitrator shall rule on such requests for continuances or objections thereto at the status call. The parties must appear at the status call even if there is no objection to the continuance.

ii) Failure of the Petitioner or the Petitioner's attorney to request or answer a request for a continuance in accordance with subsection (b)(2)(C)(i) above and to appear at the monthly status call on which the case appears shall result in the case being dismissed for want of prosecution, except upon a showing of good cause.

As noted above, petitioners' attorneys often procrastinate on claims with complex issues, questionable compensability, and/or minor injuries. Those typically are the cases which rise to above the red line. Once a claim has become an above the red line case, respondents can object to further continuances. Arbitrators are increasingly placing pressure on petitioners' attorneys to take such claims to trial. If there is no good reason for a continued delay (petitioner still treating, true inability to obtain necessary deposition, etc.), most arbitrators will pressure the petitioners' attorneys to conclude their claim at the next docket cycle.

To increase the possibility of a red line claim being forced to resolution, respondents should fully prepare the claim for trial, serve notice of trial on petitioner's attorney, and appear at the docket call ready for trial and objecting to further continuance. Although the first time the case appears above the red line, the arbitrator is unlikely to dismiss the case without allowing petitioner's attorney another opportunity to finalize trial preparation, most arbitrators will impose an order for a future trial date certain, on which date the case must be tried. In advance of the docket, respondents should serve on the arbitrator and petitioner's attorney a letter stating there will be an objection to any effort to continue the red line claim.

Once a claim has been dismissed for want of prosecution, Rule 7020.90 of the Rules Governing Practice before the Illinois Workers' Compensation Commission provides that petitioner has 60 days from receipt of the dismissal order to file a petition for reinstatement. The petition must be in writing and must set forth the reason the cause was dismissed and the grounds relied upon for reinstatement. If a petition is filed within the required 60 days, the Commission typically will reinstate the claim (*e.g.*, *Alexander v. Carmax*, 03 IL.W.C. 04415, 04 IL.W.C. 03221, 08 I.W.C.C. 1025, 2008 WL 4635628 (Sept. 8, 2008)). If the petition for reinstatement is not filed within the 60-day period, the Commission generally will not reinstate the claim (*e.g.*, *Golemis v. Aramark*, 04 IL.W.C. 57456, 09 I.W.C.C. 1222, 2009 WL 5067511 (Nov. 16, 2009)).

III. RESPONDENT'S REQUEST FOR HEARING

Prior to a claim reaching red line status, a respondent can set a case for trial. Historically, arbitrators have been reluctant to force petitioners to trial until petitioners' attorneys feel ready to try the claim. However, the rules do allow a respondent to schedule a claim for trial under appropriate circumstances. Illinois Workers' Compensation Commission Rule 7030.20(c)(2) provides:

2) A Respondent may file a motion requesting a date certain for trial if Respondent claims that:

A) Respondent has not received in the prior 6 months any bills or other evidence that Petitioner is under medical care or undergoing physical or vocational rehabilitation related to the alleged accidental injuries, and

B) Respondent has evidence establishing that Petitioner has not been entitled for the prior 6 months to temporary total disability benefits as a result of the alleged accidental injuries, and such benefits have not been paid for that period.

Thus, a respondent can only schedule a case for trial if the petitioner has had no medical treatment, nor entitlement to TTD in the previous six months. While the arbitrators rarely force petitioners to trial, serving of a trial notice under section 7030.20 does cause most arbitrators to begin to put pressure on petitioners' attorneys to bring their cases to trial. It sometimes requires two to three trial notices before an order for trial date certain will be entered. Serving of a trial notice is an effective step to begin the claim resolution process, even if it does not succeed the first time in achieving a trial. Even if a trial is not accomplished, an order for trial date certain should be requested from the arbitrator. Once a trial date certain order has been entered, the arbitrators will pressure petitioners to present their claim for trial.

IV. TERMINATION OF TEMPORARY TOTAL DISABILITY

It is well established by Illinois case law that once a petitioner reaches maximum medical improvement temporary total disability can be terminated (*Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1067, 820 N.E.2d 570, 289 Ill. Dec. 794 (5th Dist. 2004)). Once benefits have been terminated, petitioners and their attorneys are generally eager to resolve claims. Thus, adjusters, case managers, and respondents' attorneys should all seek to move the claim toward maximum medical improvement (MMI) at the earliest possible date. Regular inquiries should be made of the physicians as to when MMI is anticipated. It is generally preferable to have an MMI opinion from a treating physician rather than just an examiner, although an examiner's opinion alone is generally an adequate basis to terminate TTD. While the Commission may disagree with such termination, penalties are usually avoided if there is a reasonable basis for the examiner's opinion that maximum medical improvement has been reached. Respondents should not terminate TTD just to harass or "starve" out a petitioner, but when appropriate, termination of TTD is an effective tool to cause petitioners and their attorneys to take steps toward resolving their claims.

V. RESPONDENT'S 19(B) PETITION

If it is felt that TTD cannot safely be terminated, the respondent can petition for a 19(b) hearing. The 2006 revisions of the Illinois Workers' Compensation Act provide circumstances under which an employer can schedule a 19(b) hearing. The relevant portions of the section read:

Provided the employer continues to pay compensation pursuant to paragraph (b) of Section 8, the employer may at any time petition for an expedited hearing on the issue of whether or not the employee is entitled to receive medical, surgical, or hospital services or other services or compensation as provided in paragraph (a) of Section 8, or compensation as provided in paragraph (b) of Section 8. When an employer has petitioned for an expedited hearing, the employer shall continue to pay compensation as provided in paragraph (b) of Section 8 unless the arbitrator renders a decision that the employee is not entitled to the benefits that are the subject of the expedited hearing or unless the employee's treating physician has released the employee to return to work at his or her regular job with the employer or the employee actually returns to work at any other job.
820 ILCS 305 §19(b)

The obvious disadvantage of utilizing this section of the Act is, of course, that compensation payments must continue to the petitioner while the claim is brought to trial and while the matter is under consideration by the arbitrator. However, where an unusual legal question is presented, an employer can avail itself of this section of the Act to obtain a compensability ruling before incurring prolonged temporary total disability or medical payments.

VI. SCHEDULING AN IME

Scheduling an independent medical examination (IME) can sometimes cause stalled cases to go off dead center. This is particularly effective when petitioner and their attorneys are concerned about future medical treatment and are delaying conclusion of the case with indecision about the need for future medical treatment. Obtaining an IME opinion concerning the need for future medical treatment can be a helpful tool to prod such cases along, especially if the IME is obtained with a credible physician respected by both parties.

VII. VOCATIONAL REHABILITATION

Vocational rehabilitation can sometimes be an effective tool to force petitioners to deal with their claims. A significant percentage of workers' compensation petitioners do not like the vocational rehabilitation process. In particular, they dislike the process of a regular job search. Implementation of a vocational rehabilitation plan and pressure to conduct a meaningful job search can be effective in forcing older claims to resolution. More and more attorneys and petitioners seem willing to accept up front payment for vocational rehabilitation, settle their workers' compensation claim, and conduct a job search effort on their own after settlement. While the assistance of a qualified vocational counselor can be invaluable to the petitioner sincerely seeking a job, a post settlement job search is more effective. Petitioners no longer have an incentive (continuance of maintenance payments) to drag out or delay the job search. The petitioner's job search is more effective because the petitioner truly needs a job and therefore makes a more committed effort to finding alternative employment.

Vocational rehabilitation should be undertaken with the goal of placing a petitioner in new employment. Vocational rehabilitation should not be undertaken with the sole purpose of finding a basis to terminate benefits, although it often has that benefit. Difficult petitioners with questionable claims rarely make a valid effort at a job search. Once it has been firmly established that the petitioner is not being cooperative with the job search efforts, maintenance benefits can be terminated. However, it is important that a solid basis of non-cooperation is established. Benefits should not be terminated until petitioner has been given every opportunity to cooperate, has failed the job search effort and unquestionably shown a lack of cooperation. The Commission generally upholds a suspension of maintenance benefits under such circumstances. (*Hayden v. Industrial Comm'n*, 214 Ill. App. 3d 749, 574 N.E.2d 99, 158 Ill. Dec. 305 (1st Dist. 1991)). Again, once benefits have been suspended or terminated, petitioners and their attorneys become more active in seeking to resolve their claims either by settlement or trial.

VIII. WHEN ALL ELSE FAILS, MAKE A SETTLEMENT OFFER

There is a long established thought in the insurance defense industry that a settlement offer should not be made until a settlement demand has been received. Sometimes, one simply cannot get a petitioner to submit a settlement demand. It can be helpful to simply make an

unsolicited settlement offer. It is particularly helpful when the cause of the delay is inactivity by the attorney rather than by an obstinate petitioner. A settlement offer compels the petitioner's attorney to speak with the petitioner and inform him of the amount of the offer. Such an offer is most effective if a deadline for response can be imposed. The petitioner and his attorney must feel there is something to be lost if the response is not promptly made. For instance, if the IME physician's deposition has not yet been taken, the settlement offer can be made with the understanding that a response must be received by the deadline or the deposition will be scheduled. The petitioner's attorney should be informed that once the physician's deposition scheduling fee has been incurred, the offer will be withdrawn. While a meaningful demand may not be received in response, making an offer can sometimes be an impetus to start the negotiation process.

IX. SOME CLAIMS IMPROVE WITH AGE

Usually, the more promptly a claim is resolved the better for both petitioner and respondent. It is sometimes said the only good file is a closed file. In most instances, that is true. It is to the benefit of both parties to resolve the claim as promptly as possible.

However, there are some difficult claims that do, for whatever reason, get better with age. A petitioner who is not motivated to work, who has had benefits suspended for a valid reason, whose attorney may have concern for proceeding with the case, may ultimately return to work in some capacity rather than continuing without payment. Sometimes the facts do change in favor of the respondent. It is difficult to predict when this will happen. And, the criteria for such claims would be virtually impossible to outline. Nevertheless, respondents should not lose sight of the fact that sometimes cases do get better with age. Thus, despite pressure to resolve claims and close files, some consideration should be given to simply letting claims linger until the facts change in favor of the employer.

Additionally, it seems arbitrators sometimes subliminally reason that the older a claim is before going to trial, the more questionable the compensability must be. A claim more than three years old must have some compensability issue or some question regarding the legitimacy of the claimed injury or petitioners' attorneys would seemingly bring the case to trial more quickly. Thus, it would seem arbitrators may be somewhat more reluctant to accept petitioners' claims of disability on older files than they are on claims of more recent injury. While such factor is totally intangible, it is a valid consideration for adjusters and respondents' attorneys as older claims linger on the docket.

X. SUMMARY

It will always be difficult to force claims to resolution before a petitioner chooses to resolve the claim. Nevertheless, the conclusion date of the claim can be accelerated somewhat if the respondent makes a persistent effort toward claims resolution. There is no hard and fast answer

that applies to every case. The best technique to resolve the claim is case specific and can vary significantly from one claim to another. While there are many claims where none of the above suggestions for claim resolution will be effective, most claims can be resolved more promptly if a concerted effort for resolution is made by the claims handler and the respondent's attorney.



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Gary has spent his entire legal career with Heyl Royster beginning in 1975 in the Springfield office. Born in Mt. Erie, Illinois, Gary became a partner with the firm in 1981.

He has handled a wide range of cases, including workers' compensation, medical malpractice, products liability, automobile, construction accidents, and coverage issues.

Gary concentrates his practice in the area of workers' compensation and employment law. He has made presentations for the Law Ed Seminars of the Illinois State Bar Association, and has frequently spoken to management and insurance audiences on workers' compensation and risk management. He regularly counsels self-insureds on their unique problems, offering experience and insight for implementing successful programs. He currently supervises the workers' compensation practice group in Heyl Royster's Springfield office.

Gary has been designated one of the "*Leading Lawyers*" in Illinois as a result of a survey of Illinois attorneys conducted by the *Chicago Daily Law Record*, a designation awarded to only the top five percent of lawyers in the state.

Public Speaking

- "Repetitive Trauma - The Defenses are in the Details"
Heyl Royster 2008
- "Dollars and Cents: Top Ten Things Everyone Should Know Regarding Workers"
SafeWorks Work Injury Conference 2006
- "Investigating and Resolving the Death Case"
Heyl Royster 2007
- "Cumulative Trauma Disorders and Job Site Analysis: Minimizing Risk in the Workplace and the Courts"
Midwest Rehabilitation 2008
- "Hot Topics in Illinois Workers"
Midwest Rehabilitation 2006
- "Penalties, Penalties, and More Penalties: The Changes to Section 19 and Strategies for Minimizing Penalty Exposure"
Heyl Royster 2006
- "The Illinois Workers' Compensation Reform Act 2005"
CorVel Corporation 2005

- "Top Ten Things Every Employer Should Know About Workers' Compensation"
Illinois Land Improvement Contractors Association 2006
- "Trade-Offs in Claims Management"
Hortica Insurance 2006
- "Top Ten Things Every Employer Should Know About Workers' Compensation"
Gateway Rehabilitation Workers' Compensation Spring Conference 2007

Professional Recognition

- Martindale-Hubbell AV Rated.
- Selected as a *Leading Lawyer* in Illinois. Only five percent of lawyers in the state are named as *Leading Lawyers*.

Professional Associations

- Workers' Compensation Lawyers' Association
- American Bar Association
- Illinois State Bar Association (past member Workers' Compensation Section Council)
- Sangamon County Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Central District of Illinois
- United States Court of Appeals, Seventh Circuit

Education

- Juris Doctor, University of Toledo, 1975
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