Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals *April 2010*

A Word from the Practice Group Chair

This month's newsletter is authored by one of our most experienced workers' compensation attorneys – Gary Borah. Gary is the supervising partner of the workers' compensation practice group in our Springfield office and has been representing employers, insurers, and third-party administrators before the Workers' Compensation Commission for decades. Gary consistently brings energy and enthusiasm to his practice, which is appreciated by both the arbitrators and our firm's clients.

Gary's topic this month is an interesting one that does not present itself in every claim but does come up from time-to-time. We have all encountered situations where a claimant refuses to undergo reasonable medical procedures and at the same time welcomes the receipt of other workers' compensation benefits such as TTD. We have even seen claims where the claimant actually engages in injurious practices that impede the medical recovery and potentially increases the overall exposure of the claim. Section 19(d) of the Act provides a rarely used vehicle for bringing these issues to the Commission's attention. We hope that Gary's overview of these issues will assist you should these issues arise in your claims.

Gary will also be one of our featured speakers at our upcoming Workers' Compensation Claims handling Seminar, which is set for Thursday, May 20, 2010, at 1:00 p.m. in Bloomington, Illinois. We hope to see you at our seminar!

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Heyl, Royster, Voelker & Allen presents its

25th Annual Claims Annual Seminar

Workers' Compensation

Thursday, May 20, 2010
1:00 p.m. – 4:30 p.m.
Bloomington, Illinois

Invitations will be mailed this month

Commission News

Effective March 22, 2010, Mitch Weisz was appointed Acting Chairman by Governor Pat Quinn. The current Acting Chair, Amy Masters, will return to her previous position of Secretary of Commission/Operations Manager.

This Month's Author:

Gary Borah is the supervising partner of the workers' compensation practice group in our Springfield office. He regularly counsels carriers, TPAs and self-insureds on their unique problems, offering experience and insight for implementing successful programs. Gary 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 issues.

SUSPENSION AND MODIFICATION OF BENEFITS FOR INJURIOUS PRACTICES: SECTION 19(d)

Section 19(d) of the Illinois Workers' Compensation Act permits the Workers' Compensation Commission to modify or suspend benefits if an injured worker has engaged in insanitary or injurious practices which delay or compromise recovery. 820 ILCS 305/19(d). Surprisingly, this section of the Act is rarely asserted by employers. While the Commission is usually reluctant to modify or suspend benefits, it has nevertheless done so on occasion. Accordingly, employers should watch for situations where a Section 19(d) defense can be raised.

Section 19(d) of the Act provides, in relevant part:

> If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. 820 ILCS 305/19(d).

The most recent Appellate Court decision construing Section 19(d) was the late 2009 decision of *Global Products v. Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 911 N.E.2d 1042 (1st Dist. 2009). There, the employer argued that the claimant had engaged in an injurious practice because he had refused to stop smoking, thus compromising his recovery from back surgery. The claimant testified that no doctor had advised him to stop smoking. Yet, the employer's independent medical examiner and claimant's treating surgeon both testified that they had instructed the claimant to stop smoking prior to surgery. Because the employer's IME physician had opined that the claimant's smoking resulted in the failure of a spinal fusion, the employer refused to authorize a third surgery. The Commission found that the fact that the claimant continued to smoke cigarettes was not a reasonable basis to deny his need for revision surgery. The claimant was awarded 6 ½ years of TTD, more than $53,000 for medical expenses, and penalties and attorney fees of an unidentified amount.

On appeal, the Appellate Court affirmed. First, the court rejected the employer's argument that smoking was an intervening cause severing the causal relationship between claimant's injury and the employment. Under an intervening cause defense, the intervening cause must completely break the causal chain between the original work injury and the resulting accident. The employment injury need not be the sole cause of the claimant's condition. The court stated that, "[s]o long as a 'but-for' relationship exists between the original event and the subsequent condition, the employer remains liable." *Global Products,* 392 Ill. App. 3d at 412. In this case, if the claimant had not had the surgery necessitated by the on the job fall, there would have been no fusion to fail as a result of claimant's smoking. Thus, smoking was not an intervening cause that would relieve the employer from liability.

Secondly, the court rejected the employer's contention that the claimant's smoking was an injurious practice under Section 19(d). Unlike an intervening act, however, an injurious practice is not required to be the sole cause of a claimant's condition for the Commission to reduce or deny compensation. The court stated, "[r]ather, the Commission may, in its discretion reduce an award in whole or in part if it finds that a claimant is doing things to retard his or her recovery." *Global Products,* 392 Ill. App. 3d at 412, citing *Keystone Steel & Wire Co. v. Industrial Comm'n,* 72 Ill. 2d 474, 481, 381 N.E.2d 672 (1978). Noting that an abuse in discretion occurs only when no reasonable person could agree with the position adopted by the Commission, the court concluded it could not say that the Commission abused its discretion in finding that the smoking was not an injurious practice. Since the employer took the claimant as he found him and the claimant was a smoker prior to the time he was injured, the claimant's smoking did not constitute an injurious practice which would justify suspension or modification of benefits under 19(d).

KEY APPELLATE COURT DECISIONS

In *Keystone Steel & Wire Co. v. Industrial Comm'n*, 72 Ill. 2d 474, 381 N.E.2d 672 (1978), the claimant refused to undergo surgery to repair a hernia. The claimant, a janitor, was found to be permanently and totally disabled. The Commission concluded the claimant genuinely feared the risk of further surgery. The court noted that the claimant's refusal must be in good faith. The court further noted that it is discretionary with the Commission whether to reduce or suspend compensation. According to the court, the Act is "designed for employees with divergent personalities, beliefs, and fears. If a claimant's response to an offer of treatment is within the bounds of reason, his freedom of choice should be preserved even when an operation might mitigate the employer's damages." *Keystone Steel & Wire Co.*, 72 Ill. 2d at 481-82 (*citing Rockford Clutch Division v. Industrial Comm'n*, 34 Ill. 2d 240, 247-48, 215 N.E.2d 209 (1966) (refusal

to undergo hernia operation deemed reasonable; court found the proposed operation was of "serious character.")).

In *Goldblatt Bros., Inc. v. Industrial Comm'n*, 78 Ill. 2d 62, 397 N.E.2d 1387 (1979), the Supreme Court refused to reduce benefits for an employee who refused to undergo an amputation of his leg, following a crush injury from a motor vehicle accident. The employer argued that it should not be liable for any disability resulting from claimant's refusal to have his leg amputated. The claimant was awarded permanent total disability. Relying on the *Keystone* decision, the court stated that the claimant's refusal of an operation must be a reasonable one. Whether an employee's refusal to have an operation is reasonable is a question of fact for the Commission to resolve and will not be reversed unless against the manifest weight of the evidence.

In *Allied Chemical Corp. v. Industrial Comm'n of Illinois*, 140 Ill. App. 3d 73, 488 N.E.2d 603 (1st Dist. 1986), the claimant suffered two lumbar herniated discs. Her physician consistently recommended surgery, but claimant refused the surgery because she was very afraid of it. When she was warned that she might be paralyzed if she did not have such surgery, the claimant responded, "'[w]hen I get paralyzed, I will come for the surgery.'" *Allied Chemical Corp.,* 140 Ill. App. 3d at 75. The court found that the claimant's refusal to submit to disc surgery was not unreasonable and did not justify denial or suspension of compensation benefits. The court reiterated that reasonableness is the standard for determining whether benefits should be suspended or modified under Section 19(d). The claimant was awarded permanent total disability.

SIGNIFICANT COMMISSION DECISIONS

Approximately ten cases have come before the Commission in the past decade in which the employer has asserted a Section 19(d) injurious practice claim to justify suspension or modification of benefits. While only two of those claims were resolved in the employer's favor, those decisions are nonetheless instructive for claims handling.

Refusal of Psychiatric Treatment – 19(d) Inapplicable

In *McCauley v. Spectrulite Consortium*, 99 I.I.C. 0447, 1999 WL 33321692 (May 18, 1999), the claimant observed a catastrophic accident and thereafter experienced depression and possible post traumatic stress disorder. The claimant refused psychiatric treatment. The employer had offered the claimant alternative work in an area of the plant other than in the room where the catastrophe had occurred. Although one doctor said it would be therapeutic for the claimant to return to work, the claimant refused the light duty work. While the claimant had asked several doctors to write him an off-work slip, one such doctor stated that the claimant's motivation was not to get better, but to stay off work. Despite this medical evidence and the claimant's refusal to submit to psychiatric treatment, benefits were awarded.

Smoking – 19(d) Inapplicable

In *Friedrich v. G.G. Management Co.*, 99 I.I.C. 0825, 1999 WL 33321377 (Oct. 14, 1999), the claimant underwent a two-level fusion, which failed at the upper level. Prior to surgery, no one had told the claimant that he should stop smoking. Following surgery, the claimant was so instructed and made an effort to do so. He was unsuccessful in stopping smoking. The Commission found that there was no persuasive evidence that the smoking had in fact contributed to the one-level failure of the fusion and refused to apply Section 19(d). The court noted that smoking is an addiction, and the claimant had been smoking for 20 years. The claimant made an effort to stop smoking, but was unsuccessful.

In *Watkins v. National Steel Corp.*, 97 IL.W.C. 57737, 2006 WL 1704255 (May 17, 2006), the employer argued that the claimant's cigarette smoking had impeded his recovery from a fusion. The court noted that smoking was not a purely willful act and that the Commission felt that smoking was an addiction that is difficult to overcome. The claimant had several unsuccessful attempts to stop smoking. The court distinguished the *Beebe* decision on the ground that the claimant here was engaged in only *one* injurious practice, smoking. Although recognizing that smoking is indeed an injurious activity, the Commission found that Section 19(d) sanctions are discretionary. The Commission declined to limit claimant's compensation because of his continuation of smoking.

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Violation of Restrictions – 19(d) Inapplicable

In *Wallingford v. Self-Help Enterprises, Inc.,* 02 I.I.C. 0196, 2002 WL 730915 (March 13, 2002), the Commission found the claimant was not engaged in an injurious practice when, to complete her modified duty work, she continued to use her injured her right hand in violation of her medical restrictions.

Fighting – 19(d) Inapplicable

In *Pruchinicki v. City of Chicago*, 04 I.I.C. 0454, 2004 WL 1873769 (July 1, 2004), the employer suspended the claimant's benefits under Section 19(d) when the claimant, who was recovering from right carpal tunnel surgery, beat his daughter's former boyfriend with both fists and/or a tire thumper to the point of unconsciousness. The Commission found that while they do not condone such conduct, an enraged father may do something he should not do, without regard to the consequences to his health. The Commission further noted that there was no medical evidence the claimant had delayed his recovery in any way, nor was there any evidence that the claimant was capable of performing his work if he was capable of engaging in such an altercation.

Multiple Employee Practices – 19(d) Applicable

In *Beebe v. Transport Leasing Contract*, 99 IL.W.C. 66951, 2005 WL 2989768 (Sept. 20, 2005), the Commission upheld the suspension of benefits for a claimant who was engaged in multiple injurious practices. The claimant had undergone an Achilles tendon surgery after jumping off a truck. The claimant ultimately developed RSD and chronic pain. The Commission held that the claimant was not entitled to extended temporary total disability or permanent total disability due to his persistence in a multitude of injurious practices that imperiled or retarded his recovery. The claimant was told repeatedly to stop smoking, to exercise, to lose weight and to stop wearing a CAM boot, which boot re-inhibited his range of motion, delayed his recovery, promoted muscle atrophy, and increased the risk of RSD. Here claimant rejected a variety of recommendations from his treating doctors. The Commission reasoned that the claimant's persistence in so many injurious practices compelled the Commission to invoke the sanction of Section 19(d).

Refusal of Physical Therapy – 19(d) Inapplicable

In *Pantelmoniuk v. Wholesale Oil Co.*, 03 IL.W.C. 26024, 2006 WL 3929700 (Dec. 21, 2006), employer argued that claimant had engaged in an injurious practice by failing to participate in physical therapy following knee surgery. The arbitrator had found that such failure was indeed an injurious practice. The Commission modified the decision of the arbitrator and found that the claimant did not engage in an injurious practice under Section 19(d). Interestingly, the Commission noted that Section 19(d) uses the term "persists" rather than "participate." The Commission noted the arbitrator had cited the Act to require only participation in an injurious practice, not persistence in such practice. The Commission found the claimant did not persist in injurious practices even though the therapist described his attendance as "inconsistent" and his effort as "only moderate." The therapist found claimant incapable of resuming his former maintenance job. The Commission also excused the claimant's failure to obtain therapy due to his having limited resources after the employer terminated his benefits.

Weight Loss – 19(d) Inapplicable

In *Pignon v. Trumpf Inc.*, 07 I.W.C.C. 0184, 2007 WL 891352 (Feb. 26, 2007), the employer argued that the claimant's failure to lose weight constituted an injurious practice. The claimant's treating surgeon recommended bariatric (weight loss) surgery when the claimant continued to experience symptoms following physical therapy, in order to improve her recovery. The employer did not offer a claimant a weight loss plan, recommend a weight loss plan, nor agree to pay for any weight loss plan or treatment, including the bariatric surgery. Moreover, the Commission found that the claimant had not refused any medical test or any specific medical treatment that was recommended by any of his physicians. The claimant was hired by employer as an obese person and had worked successfully as an overweight person prior to his date of accident. The Commission found that the claimant's conduct and treatment following the accident was reasonable. Accordingly, his compensation award could not be reduced or suspended pursuant to Section 19(b).

Alcohol Abuse – 19(d) Applicable

Recently in *Cedillo v. Four Seasons Heating – Cooling,* 03 IL.W.C. 61117, 2009 WL 1064563 (March 26, 2009), the employer suspended the claimant's benefits under Section 19(d) because the claimant refused to attend Alcoholics Anonymous. His treating doctor stated, "he must go to that (Alcoholics

Anonymous) before I am able to even approach his problem with his elbow." *Cedillo,* 2009 WL 1064563 at *3. The claimant's persistent alcohol abuse precluded him from receiving necessary medical and vocational treatment. The Commission affirmed, finding that it was appropriate for the employer to suspend benefits after the doctor made such statement. The Commission noted that benefits would be reinstated in the future, if and when the claimant recovered enough from his addiction to resume training or participate in the vocational training program.

PRACTICE POINTERS

As can be seen from the cases above, it is difficult to establish an injurious practice which justifies the suspension or reduction of benefits. Consistent with its liberal application of the Act in favor of the injured worker, the Commission is reluctant to find an injurious practice which warrants the suspension or reduction of benefits. Moreover, since this determination is a discretionary one, the Appellate Court is reluctant to interfere absent an abuse of that discretion.

Nevertheless, Section 19(d) can be a tool of value to employers. As discussed above, the Commission's standard for an injured worker's conduct when assessing a potentially injurious practice is that of *reasonableness*. Seemingly, the same standard applies to an employer's suspension of benefits. From the cases above, we can draw the following observations:

- A suspension of benefits should be based on some conduct by the claimant which is on its face arguably unreasonable.
- An employer's suspension of benefits should, when possible, be supported by a physician's opinion that the alleged injurious practice has in fact been to the detriment of claimant's recovery from the work injury.
- It is highly unlikely that a one-time incident would be regarded as an injurious practice. However, where a claimant's inappropriate conduct persists over an extended period of time or there are multiple grounds, a basis for a 19(d) suspension may exist.
- The suspension of benefits should be in good faith, well-documented, and made on a reasonable basis.

Whether the Commission will agree with the injurious practice defense is a fact-specific determination. Nevertheless, a good faith suspension of benefits can often serve to speed the claim toward resolution for the benefit of both claimant and employer. If an employer has a reasonable basis to make a claim of an injurious practice, the Commission rarely has awarded penalties for such suspension of benefits.

LINGERING QUESTIONS

With the anticipated spike in claims for permanency resulting from the current economic downturn, an interesting and unanswered question is how allegedly injurious practices might impact a claimant's claim for permanency benefits. Suppose, for example, that the employee has injured his knee but refuses to undergo arthroscopic surgery to repair his knee. The procedure is deemed reasonably safe and reasonably likely to produce favorable results, and will, if undergone, allow the claimant to return to his former job. Should that refusal to undergo surgery serve as a bar to or at least a reduction of permanency benefits? If the claimant contends that he cannot return to his former job and seeks a wage differential, it should be at least argued that his permanency evaluation should consider the fact that a reasonably safe surgery would likely return the claimant to his former employment, and therefore evaluate permanency under the permanent partial disability percentage of a leg.

At least one case has recognized such an argument, although it involved a disability claim under a police pension. In *Mulack v. Hickory Hills Police Pension Bd.*, 252 Ill. App. 3d 1063, 625 N.E.2d 259 (1st Dist. 1993), the city police pension board terminated a police officer's line of duty disability pension on the ground that he had a correctable physical condition (a tear of the posterior medial meniscus of the right knee) that he unreasonably refused to have remedied through a surgical procedure. The Board modified the pension, finding that the officer's inability to work was not due to his disability but rather due to his refusal to correct the condition via surgery. The Board reasoned that an officer who unreasonably refused to correct his condition is not disabled. The Board noted that the surgery was not attended with danger to life or health nor did it present extraordinary suffering. Moreover, the medical opinions indicated that the surgery offered a reasonable prospect of relief.

The Board and the Appellate Court cited numerous workers' compensation decisions in support of their findings, including *Mount Olive* and *Joliet Motor Co.* These cases from the late 1970s seem to make a departure from the attitude of the court during the early part of the century, which more strongly favored the employer in such circumstances. Specifically, in *Mt. Olive Coal Co. v. Industrial Comm'n*, 295 Ill. 429, 129 N.E. 103 (1920), the Supreme Court stated:

> It is conceded that there is no power in the Industrial Commission or elsewhere to compel defendant in error to submit to an operation, but, on the other hand, it must be conceded that whether the loss of 80 per cent of the use of the right hand of defendant in error is attributable to the accident or to the refusal of defendant

> in error to have the adhesions in the tendons forcibly broken up is a question for the commission, in the first instance, to determine. The uncontradicted evidence in the record shows that there was no possibility of danger to defendant in error from the operation. It is such an operation as any reasonable man would take advantage of, if he had no one against whom he could claim compensation. *Mt. Olive Coal Co.*, 295 Ill. at 432.

In *Joliet Motor Co. v. Industrial Comm'n*, 280 Ill. 148, 117 N.E. 423 (1917), the court stated:

> The evidence was that the proposed operation would not be attended with any risk and appears to be such as any reasonable man would take advantage of, if he had no one against whom he could claim compensation, and the board found that it was the duty of [the claimant] to have the operation performed. Under that finding the refusal of [the claimant] was unreasonable, and the continued total loss of sight should be attributable to such refusal, and not to the accident. *Joliet Motor Co*., 280 Ill. at 151.

This is the majority view nationwide. *Florczak v. Industrial Comm'n*, 381 Ill. 120, 44 N.E.2d 836 (1942), and has been applied in court of claims cases involving workers' compensation claims against the State of Illinois. *O'Herron v. State*, 12 Ill. Ct. Cl. 351 (1943); *Hersman v. State*, 12 Ill. Ct. Cl. 348 (1943).

The *Mulack* court observed that, in *Mount Olive Coal Co.* and *Joliet Motor Co*., the court had relied not upon Section 19(d) of the Act, but on the fact that the cause of the claimant's continuing disability was the refusal to undergo corrective surgery and not the work injury. Even so, *Mulack* is at least persuasive authority for arguing that injurious practices can impact a permanency award, provided it can be shown that the practices are unreasonable.

As noted, a Section 19(d) suspension of benefits is a fact-specific determination within the discretion of the Commission. Should you have any questions as to whether the facts of your case justify such a suspension, any of our Heyl Royster workers' compensation attorneys will be happy to discuss your claim with you.

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