

BELOW THE RED LINE

HEYL ROYSTER

WORKERS' COMPENSATION NEWSLETTER

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A Newsletter for Employers and Claims Professionals

December 2011

A WORD FROM THE PRACTICE GROUP CHAIR



This month's newsletter represents our last one of 2011, and the last one that will have me identified as Chair of our firm's Workers' Compensation Practice Group. I am not going anywhere – it is just time for succession in this position. My practice remains dedicated to the representation of employers in workers' compensation and a variety of other claims.

I succeeded our partner Bruce Bonds as Chair almost three years ago. While this position requires some additional work, it has also been very fulfilling for me both personally and professionally. The part I liked the most was that it gave me an opportunity to get to know many of you better.

Craig Young, a workers' compensation partner in our Peoria office, will assume the duties of Chair beginning January 1, 2012. We will continue to implement creative ways to better serve your interests and to identify solutions for you.

This month's author is Joe Guyette of our Urbana office. We hope you find his discussion of review issues helpful. We also wish you and yours the best of the holiday season.

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REVIEW OF A WORKERS' COMPENSATION CLAIM

Receiving an Arbitration decision can feel like reaching the finish line in a workers' compensation claim. Months, and even years, of investigation, evidence and testimony are wrapped into a five to ten page document, resolving all of the disputed issues in the case.

Yet almost immediately after receiving an Arbitration decision, consideration must immediately be given to whether that decision should be reviewed to the Workers' Compensation Commission, whether the claimant is likely to pursue a review, and how such a review might impact your case.

The procedures for reviewing an Arbitration decision to the Commission are relatively straight forward. Even so, despite the simplicity of these procedures, there remains plenty of room for strategy in pursuing a review, or convincing the claimant to forego a review.

THIS MONTH'S AUTHOR:



Joe Guyette is an associate with Heyl Royster. He began his career with the firm as a summer law clerk in the Urbana office. During law school, he served as Articles Editor for the University of Illinois Journal of Law, Technology & Policy. Following graduation from law school in 2004, Joe joined the Urbana office as an associate.

Joe concentrates his practice in the areas of workers' compensation defense, professional liability and employment matters.

Moreover, because the standard of review at the circuit court is less likely to result in a reversed decision, and because the costs associated with an appeal are much higher, the Commission's review of an Arbitration decision is many times the last stop for a litigated claim.

In prior issues we have discussed issues related to post arbitration remedies to reopen awards and issues relating to appeals and appeal bonds. *See* April 2011, December 2010, and March 2009. In this month's edition of *Below the Red Line*, we will examine the post-arbitration appeal procedures and identify where strategy can be used to increase the likelihood of a positive result. In addition, we will review a number of recent decisions involving post-arbitration procedures.

COMMISSION REVIEW PROCEDURE AND STRATEGY TIPS

Each party is generally provided 14 days after the close of arbitration to submit a proposed decision. Once the Arbitrator's decision is received, a party has 30 days to file a Petition for Review to the Commission pursuant to Commission Rule 7040.10. The appealing party is responsible for ordering the transcript of the arbitration hearing. The Commission then provides a notice, including the return date on review. This is the date by which the appealing party must file the arbitration transcript, after it has been authenticated by the attorney for each party.

Thirty days after the transcript is due to the Commission, the appealing party must file its Statement of Exceptions and/or Additions, and supporting brief. The non-appealing party's responsive brief is due 15 days after the last day allowed for the filing of the appellant's Statement of Exceptions. Generally, the Commissioners assigned to review the Arbitrator's decision are provided with the arbitration transcript and all trial exhibits. As a result, the appellate briefs contain citations to trial evidence and testimony, but do not include any new evidence or exhibits.

After both parties have filed their briefs, the Commission sets a date for oral arguments, and if neither

party requests oral arguments, the Commission will decide the case based on the arbitration transcript and the parties' briefs. Oral arguments are heard by a panel of three Commissioners, and a decision by a majority of the panel constitutes the decision of the Commission. The Workers' Compensation Act requires the Commission to file a decision within 60 days following the date on which the Statement of Exceptions and Response are requested to be filed, or oral arguments, whichever is later.

Import of the Commission's Decision

The Commission's Decision on Review serves a critical role because the Commission is the ultimate trier of fact and the Commission's conclusions are given significant weight for purposes of further appeals. Indeed, it is the Commission's decision that will ultimately be reviewed by the Appellate Court. On the Commission's review, the Arbitrator's decision is entitled to no deference. Even with regard to the credibility of witnesses who testified live in front of the Arbitrator, the Commission is entitled to reach its own conclusions, separate from any findings by the Arbitrator. While there have been several attempts made to modify this standard over the past decade and to afford some deference to at least those findings relating to credibility, the Appellate Court seems reluctant to adopt such an approach. For reasons explained more fully below, it is very difficult to overturn the Commission's decision on further appeal.

Circuit Court Review – Section 19(f)

A party seeking to appeal the Commission's decision to the circuit court has only 20 days to perfect an appeal. Employers seeking an appeal to the circuit court have the additional burden of posting a bond. Section 19(f) of the Act requires a respondent to file a bond, a summons prepared in accordance with Illinois Supreme Court Rule 292, a written request to commence proceedings for review, and a certificate of mailing written request, all within 20 days of receiving the Commission's decision. Further, there is no allowance for an extension of time, and the deadlines are absolute. Finally, the bond

must be signed by a representative of the employer who has the authority to bind the company. Finding a proper representative of the employer can pose significant difficulty; in some instances, the employer is no longer in business or may have filed bankruptcy or has been sold.

The standard of review at the circuit court poses a significant deterrent to continuing an appeal. The Commission's decision on fact issues is reversible only on a showing that it is against the manifest weight of the evidence. It is the Commission's job to weigh the evidence and draw reasonable inferences from that evidence, and the circuit court may not draw different inferences from that same evidence. The Commission's decision is given significant deference, and the majority of claims appealed to the circuit court raising manifest weight issues result in affirmation of the Commission's decision. Questions of admissibility are governed by a manifest weight of the evidence standard of review and questions of law are reviewed *de novo*. Issues involving the Commission rules are generally reviewed with some deference given to the Commission's interpretations.

Issues to Address With Appeals

Opportunities exist throughout the review and appellate process to resolve your case short of ultimate disposition by a reviewing court. The key to accomplishing this result is to view the appeal as a tool to manage your case rather than a burden. The threat of an appeal can at times help move a case towards settlement and produce a compromise that favors both parties. From the claimant's perspective, the amount of time and resources involved in a review or appeal can be daunting and there is no guarantee to the appealing party that a decision will be improved. Moreover, a review to the Commission gives no deference to the Arbitrator's decision and it is certainly possible that an award can be increased above and beyond the amount awarded by

the Arbitrator. Taking advantage of these uncertainties is where the opportunity rests.

When a claim is arbitrated and found compensable, medical benefits are almost always left open. These medical benefits cover any reasonable, necessary and causally related medical treatment for the claimant's lifetime, unless those benefits are closed through a separate order or agreement (settlement). Where the claimant's condition is unlikely to require much treatment going forward, it may be possible to negotiate a termination of medical benefits by threatening to pursue or filing a Commission review. Using the review as a tool of settlement versus a long appeal allows the file to be closed, thereby ending any further obligation to pay medical benefits.

The time and cost involved in pursuing a review or appeal can be a problem for both parties. As a result, there may be reasons to modify an Arbitrator's award to avoid the process entirely. In a recent case handled by our firm, a matter that was tried on October 21, 2010 resulted in an Arbitration decision that was received on December 6, 2010. A timely Petition for Review was filed, and oral arguments were held on May 24, 2011. The Commission's decision was not completed and received until December 9, 2011, over 13 months after the original trial. In our experience, this type of delay is uncommon, but not unheard of. In issuing a decision over six months after oral arguments, the Commission was in violation of the Act, but there is no recourse to be had by either party.

A delay of over 13 months places both the claimant and the respondent in a difficult position. When a case is found compensable and affirmed by the Commission, the respondent would have to pay not only those amounts ordered by the Arbitrator with interest, it could also owe additional benefits that have accrued between the Arbitrator's decision and the Commission's decision. This is especially prevalent in cases involving section 19(b) petitions. During that time, the claimant's treat-

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ment is essentially stalled, with no further treatment, corrective procedures, or rehabilitation authorized. The end result is that the employer could pay a considerable amount in temporary total disability benefits without the claimant getting any closer to returning to work. This possibility must be considered when making the decision whether to pursue a review of an Arbitrator's decision.

A lengthy delay also puts the claimant in a difficult position. Where benefits are being disputed, the claimant can be without medical treatment or income for a number of months. Even if the Commission determines that the claimant should be owed benefits for that time, those benefits might not be paid until months after the original Arbitration decision.

As is apparent, the potential for such delays should provide both parties with some motivation to resolve a case. In practice, this means that a claimant may sometimes agree to a reduced award in return for an immediate payment. Likewise, a respondent may have to consider authorizing a previously-denied medical procedure to avoid a very large and lengthy temporary total disability award.

Whether you win or lose at arbitration, the pros and cons of proceeding through a Commission review and further appeal must be considered. In some instances, it may be more cost effective to authorize treatment or negotiate a reduced award to resolve a case without further delay.

CASE LAW UPDATE

In the November issue of *Below the Red Line*, Kevin Luther provided brief summary of the Appellate Court's decision in *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 Ill App (3d) 100807WC. There, the Appellate Court held that the employer could be liable for penalties where it fails to pay undisputed portions of an Arbitrator's award as it pursues a review by the Commission. The Arbitrator's decision becomes final with regard to any issues that are not appealed to the Commission. As such, those undisputed awards should be promptly paid to avoid an award of penalties and attorneys' fees.

In addition to the *Jacobo* case, there have been a number of other Appellate Court decisions involving appellate procedure.

Shafer v. Illinois Workers' Compensation Comm'n

In *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, the Appellate Court, Workers' Compensation Commission Division, considered a case in which a respondent failed to include the correct case number on a Petition for Review. The claimant filed applications for adjustment of claim, indicating injury dates of November 23, 2007 and November 30, 2007. Both cases proceeded to arbitration, and the Arbitrator issued two separate Decisions on April 10, 2008. The Arbitrator found both claims to be compensable, and additionally authorized a surgical consultation that had previously been denied by the respondent.

On May 23, 2008 the respondent filed a single Petition for Review, challenging the Arbitrator's findings with regard to both claims. The Petition for Review indicated that the respondent was appealing both of the Arbitrator's decisions issued on April 10, 2008. The Petition accurately identified the case number associated with the first claim, but the second claim was misidentified as 07 WC 46127 instead of 07 WC 56127.

The claimant did not object to the incorrect case number, but both parties were notified prior to oral arguments that they should be prepared to discuss whether

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the Commission had jurisdiction to review the more recent claim in light of the incorrectly numbered Petition for Review.

The Commission issued a decision finding that they correctly had jurisdiction over the incorrectly numbered claim. The Commission found that incorrect number "amount[ed] to a clerical typographical error." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 23. Further, the Commission concluded that the employer had "substantially complied with the applicable statute and rules governing review proceedings before the Commission." *Id.* In that same decision, Commissioner Dauphin dissented, noting that "strict compliance with the Act and the Rules is required to enable the Commission to exercise jurisdiction on a review." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 24.

On judicial review, the circuit court rejected the claimant's arguments and affirmed the Commission's decision on all issues. On appeal, the Appellate Court affirmed and noted that the respondent had correctly identified the names of the parties and the date on which the Arbitrator's decisions were issued. The Appellate Court found that the respondent "complied with the Act's requirements notwithstanding the typographical error in one of the case numbers." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 32. As such, the court held that the Commission was correct in finding that it had jurisdiction over the misnumbered claim.

Rojas v. Illinois Workers' Compensation Comm'n

In *Rojas v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 965, 942 N.E.2d 668 (1st Dist. 2010), the First District Appellate Court, Workers' Compensation Commission Division, considered whether the Circuit Court would have subject matter jurisdiction to review a Commission decision where the claimant failed to submit timely proof of payment of the probable cost of the record. In August 1999, the claimant filed a workers' compensation claim resulting from alleged injuries to her left arm and shoulder. The case ultimately appeared above the red line, and neither the claimant nor anyone on her behalf was present to request a continuation. As

such, the Arbitrator dismissed the claim for want of prosecution in February 2003.

The claimant proceeded to file a Request to Reinstate her case in March 2004, 13 months after the original dismissal. The Arbitrator denied the Petition to Reinstate based upon the length of delay in the absence of good cause for such a delay. The claimant then filed a Petition for Review by the Commission, and the Commission affirmed and adopted the Arbitrator's order.

The claimant proceeded to appeal the Commission's order to the circuit court. The employer filed a Motion to Dismiss based on the claimant's failure to timely comply with the appellate procedures in the Act. Specifically, the respondent claimed that the claimant "had failed to file a request for summons, proof of payment of the probable cost of the record, or have summons issued within 20 days of receiving the notice of the Commission's decision as required by Section 19(f)(1) of the Act." *Rojas*, 406 Ill. App. 3d at 967. The Appellate Court concluded that the circuit court did not have subject matter jurisdiction of the claim, because the claimant failed to comply with the "statutorily mandated procedure set forth in the Act." Without addressing any of the other issues raised by the respondent, the Appellate Court held that the claimant's failure "to submit proof of payment of the probable cost of the record deprived the circuit court of jurisdiction." *Rojas*, 406 Ill. App. 3d at 973.

Help at Home v. Illinois Workers' Compensation Comm'n

In *Help at Home v. Illinois Workers' Compensation Comm'n*, 405 Ill. App. 3d 1150, 943 N.E.2d 644 (4th Dist. 2010), the Appellate Court considered whether an Arbitrator could hear additional evidence in a case remanded back to the Arbitrator by the Commission. The claimant alleged work related injuries to her low back and right shoulder as a result of an accident in December 2007. At arbitration, these injuries were found to be compensable, and the respondent filed a Petition for Review. By unanimous decision, the Commission found that there was no causal connection with regard to the claimed injuries to the claimant's right shoulder, and remanded the matter back to the Arbitrator. In addi-

tion, the Commission's decision specifically noted that "on remand, the Arbitrator may consider any additional evidence with respect to the causal connection of the right shoulder to the accident." *Help at Home*, 405 Ill. App. 3d at 1151.

The respondent appealed the Commission's decision to the circuit court, arguing that the Commission lacked authority to allow additional evidence to be heard on the issue of causal connection. The circuit court upheld the Commission's remand decision and the respondent continued appeal of the case to the Appellate Court.

The Appellate Court found that the Commission's decision to allow additional evidence was erroneous as a matter of law. The Court said that, under the law-of-the-case doctrine, a court's prior decision on an issue that has been litigated and decided settled the question for all subsequent stages of the action. The Appellate Court remanded the case to the Commission for further proceedings, but prohibited them from allowing the Arbitrator to consider any additional evidence with respect to the causal connection of the right shoulder to the accident.

Parting Words

The respondent has options following an Arbitrator's decision. If handled strategically, risks and costs can be minimized and in some cases, a favorable disposition can be reached short of an actual appellate decision.

We remind you that Heyl Royster has an appellate attorney who concentrates in workers' compensation appeals and is available to assist you in all venues across the state and at all levels of your appeal.

We invite you to contact any of our workers' compensation attorneys listed on the following page with any questions or concerns regarding your Illinois workers' compensation case, from the accident through a trial and appeal.

UPDATE – OCTOBER 2011 ISSUE AND TTD BENEFITS

In our October 2011 issue of *Below the Red Line* we mentioned the case of *Michael Gill v. Industrial Comm'n/Meany, Inc.*, 10 I.W.C.C. 0935 (Sept. 24, 2010), which held that an employer can terminate TTD benefits based upon the claimant's voluntary retirement. That decision was reversed by the circuit court on judicial review.

HRVA Makes House Calls!

If you or your organization is interested in a presentation on the recent Amendments to the Workers' Compensation Act and how they will affect your claims handling, Heyl Royster would be happy to visit. To schedule your "house call" please contact:

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We look forward to stopping by!

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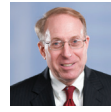
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