Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

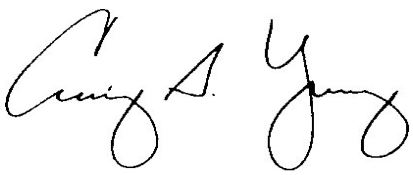
A Newsletter for Employers and Claims Professionals *March 2012*

A Word From The Practice Group Chair

As always, the year is moving quickly and we are pleased to provide you with our March edition of *Below the Red Line*. Given the legislative changes of 2011, we are confident 2012 will be a very active year as we track the interpretation of these changes by both the Workers' Compensation Commission and the Appellate Court. We are seeing some good trends and decisions from arbitrators across the state, and while it remains too early to calculate the impact of the legislative changes, early decisions appear promising. Interestingly, the Appellate Court has been very active in deciding some controversial cases.

We are happy to present in this edition a detailed article by John Flodstrom of our firm outlining the Appellate Court's decision in *Grassner v. Raynor Manufacturing Company*. John provides some good advice on the issue of open medical in settlement contracts. In addition, we provide some more detailed analysis on the now well known *Will County Forest Preserve* case addressing shoulder injuries. Lastly, we outline two important cases addressing the mailbox rule, and the issue of enforcing credits for overpayments of TTD. All these decisions address issues we encounter often, and we hope you find our analysis helpful.

We again remind you of our annual firm seminar on May 17, 2012 in Bloomington, Illinois. Official invites will be sent soon and please set aside that date to join us. We believe this seminar will be invaluable as we provide you with a detailed analysis of trends we are seeing across the state following implementation of the 2011 legislative changes. We hope to see you there!



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This Month's Author:

John Flodstrom joined the Urbana office of Heyl Royster in 1986 following his graduation from Northern Illinois University Law School. He became a partner in 1996. John devotes a significant portion of his practice to the defense of employers in Illinois workers' compensation cases. John has tried well in excess of 100 cases before various Workers' Compensation Commission arbitrators. John is also involved in civil litigation, where much of his work entails defending employers in third party cases. In addition to being a frequent lecturer on workers' compensation issues, John has written several articles on various aspects of workers' compensation and has also provided in-house training to firm clients.

GASSNER V. RAYNOR MANUFACTURING CO. – BEWARE OF LEAVING MEDICAL BENEFITS OPEN IN WORKERS' COMPENSATION SETTLEMENTS

The old saying, "the only good file is a closed file," is particularly apt in the area of workers' compensation claims. An open claim carries with it continuing exposure for lost time benefits and medical treatment, not to mention the administrative and legal costs of defending the claim. Medical expenses are often of paramount concern for employers because of their high cost and the potential for treatment for work-related injuries for the lifetime of the claimant.

The most common approach for closing a workers' compensation claim is to negotiate a settlement contract that extinguishes all claims and benefits. The claimant's entitlement to medical benefits is terminated by incorporating language in the contracts stating there is a waiver of the provisions of Section 8(a) of the Workers' Compensation Act. Section 8(a) is the portion of the Act making the employer liable for any reasonable, necessary and causally related medical treatment, and an express waiver of Section 8(a) closes all medical rights upon approval of the contracts by the arbitrator. 820 ILCS 305/8(a).

The Illinois Workers' Compensation Commission template for settlement contracts includes a separate admonishment to the claimant that an approved contract will extinguish any "right to any further medical treatment, at the employer's expense, for the results of this injury."

While the most preferred method for settling a workers' compensation claim is to include a Section 8(a) waiver of medical rights, in some instances, the circumstances or a recalcitrant claimant will not permit a full waiver of medical benefits. One potential solution is to negotiate a settlement that preserves medical benefits in some fashion beyond the approval of the settlement contracts. This article will discuss a recent Second District Appellate Court decision, *Gassner v. Raynor Mfg. Co.*, 409 Ill. App. 3d 995, 948 N.E.2d 315 (2d Dist. 2011), which highlights the pitfalls of agreeing to open medical benefits and the procedural and substantive issues that might come into play subsequent to the approval of settlement contracts.

Factual Background of *Gassner*

The claimant was injured on May 30, 2000, when he fell down some stairs at work. The employer Raynor (RMC) accepted the claim as compensable. The claimant was diagnosed with a herniated disc at L4-L5 and underwent surgery on February 25, 2002. He subsequently developed a post-operative deep staph infection at the site of the surgical incision, which was treated with antibiotics.

The claimant and employer negotiated a settlement of the workers' compensation claim, and the contracts were approved by an arbitrator on May 1, 2002. The settlement contract contained general language stating the claimant was waiving his rights for medical treatment under Section 8(a) of the Act. However, there was a separate clause stating, "Notwithstanding anything to the contrary contained herein, as additional consideration, [RMC] agrees to pay reasonable and necessary medical expenses for treatment to the low back causally related to the alleged injury of May 30, 2000, for a period of one year after the date of approval of this settlement contract, but not thereafter."

In October 2002, the claimant was diagnosed with a heart infection. He was examined by Dr. Jeffrey Coe, who concluded the heart infection was caused by the same bacteria responsible for the low back infection that developed following back surgery. The cost of the medical treatment was approximately $190,000.

On October 1, 2003, the claimant filed a petition with the Commission seeking to enforce the settlement contract by requiring the employer to pay any medical bills related to the heart infection. This petition was dismissed by the Commission for lack of subject matter jurisdiction. The claimant subsequently filed a petition for entry of judgment with the circuit court under Section 19(g). The circuit court eventually granted summary judgment in favor of RMC, and the ruling was appealed by the claimant. As explained below, the Appellate Court reversed and remanded the case, finding the provisions of the settlement contract ambiguous.

Procedures for Recovering Medical Benefits Following Approval of Settlement Contracts

If there is a dispute between the claimant and employer regarding the terms of an open medical provision

in the settlement contracts, what is the appropriate forum to decide the issue? According to the opinion in *Gassner*, and depending on the specific language in the settlement contract, the correct forum is an Illinois circuit court. The typical settlement contract includes a waiver of any rights of review under Section 19(h) of the Act. Section 19(h) is the specific provision of the Act that vests the Commission with jurisdiction to review issues that develop subsequent to an arbitration award or a settlement contract. In *Gassner*, the settlement contracts included a waiver of Section 19(h), and the Commission concluded it did not have subject matter jurisdiction as a result of the waiver.

The correct procedure for presenting a dispute regarding a settlement contract, assuming there has been a waiver of Section 19(h), is to initiate proceedings before the circuit court as set forth in Section 19(g) of the Act. This statute allows either party to file a certified copy of the settlement contract with the circuit court in the county where the accident occurred or where either party is a resident. A presiding judge will hear the case and decide any disputes regarding the terms of the settlement contract.

Statute of Limitations for Petitions Seeking Enforcement of Settlement Contracts

The employer in *Gassner*, argued that a five-year statute of limitations applied to any claims pursuant to the settlement contract. This argument was based on Section 13-205 of the Code of Civil Procedure, which establishes a five-year statute of limitations for "actions on ... awards of arbitration ... and all civil actions not otherwise provided for ... ." 735 ILCS 5/13-205.

The *Gassner* court rejected the argument for a five-year statute of limitations, and instead concluded there was a 10-year limitations period because the case involved a written contract. 735 ILCS 5/13-206 allows a 10-year statute of limitations for actions related to a written contract. The statute of limitations begins to run on the date the cause of action accrues. In *Gassner*, the cause of action accrued on May 1, 2003, which was one year from the date of the approval of the settlement contract, and the expiration date for one year of open medical benefits. Thus, the claimant in *Gassner* had until May 1, 2013, to make a claim for enforcement of the settlement contract.

How Are Open Medical Provisions Interpreted by a Court?

The *Gassner* court used principles of contract law to determine the scope and meaning of the open medical provision of the settlement contract. The employer took the position that the reference to "treatment to the low back" was limited to treatment directly in the area of the low back and that any treatment of the heart infection was thereby excluded. The claimant, on the other hand, asserted that the staph infection of the heart was causally related to the original low back injury and surgery, and therefore was encompassed within any treatment of the low back.

Courts have relied on two different approaches in interpreting contracts. The most common is the traditional four corners rule. Under this technique:

> An agreement, when reduced to writing, must be presumed to speak to the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used it. Is not to be changed by extrinsic evidence.

Gassner, 409 Ill. App. 3d at 1006 (*citing Air Safety, Inc. v. Teacher's Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882 (1999) (*quoting Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291, 186 N.E.2d 285 (1962)).

The four corners rule would require a court to make an initial examination of the language of the contract and nothing else. If the language is unambiguous on its face, it will be interpreted as a matter of law without any consideration of outside evidence. If some ambiguity does

exist, it is then appropriate to review outside evidence in an effort to determine the intent of the parties.

The second form of contract interpretation is known as the provisional admission approach. This was described in *Gassner* in the following manner:

> Under the provisional admission approach, although the language of [the] contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract. Under this method, an extrinsic ambiguity exists 'when someone who knows the context of the contract would know if the contract means something other than what it seems to mean,' ... [I]f, after provisionally reviewing the parol evidence, the trial judge finds that an 'extrinsic ambiguity' is present, then the parol evidence is admitted to aid the trier of fact in resolving the ambiguity.

Gassner, 409 Ill. App. 3d at 1007 (*citing Air Safety*, 185 Ill. 2d at 463).

In *Gassner*, the Appellate Court found the open medical provision of the contract was ambiguous under both the four corners rule and the provisional admission approach. The court construed the contract against the drafter (the employer) and concluded the open medical provision was unclear as to whether it applied to medical treatment for an infection of the heart.

The court reversed the circuit court ruling granting summary judgment for RMC and remanded the case to the trial court for a hearing to determine the intent of the parties entering into the settlement contract, and whether the open medical provision was intended to cover the staph infection of the heart.

What Can We Glean from the *Gassner* Decision?

The *Gassner* case stresses the importance of reaching a settlement with the claimant that terminates all rights upon approval of the settlement contracts. The employer in *Gassner* was facing an exposure for close to $190,000 in medical bills for an unusual medical complication that was not manifested until seven or eight months after the claimant underwent back surgery. To make matters worse, the claimant had 10 years from the termination of the open medical provision to pursue a circuit court claim against the employer. Open medical provisions entail high exposure and the possibility of an open claims file for many years. Finally, if the settlement contract is drafted by the employer, which is usually the case, the terms will be strictly construed against the employer if any dispute arises.

PRACTICE TIPS

Obviously, open medical provisions in workers' compensation settlement contracts should be avoided if possible. However, in those instances where an open medical provision is utilized, the terms should be carefully drafted to limit the employer's exposure. Here are some suggestions for open medical provisions:

- Use very specific language to identify the body parts or medical conditions intended to be covered by the open medical provision.
- If possible, the exact treatment should be delineated (i.e. certain number of follow-up x-rays or office visits).
- The time frame for any open medical care should be spelled out in the contract.
- Mention that any medical care will be paid pursuant to the Medical Fee Schedule.
- Consider placing a cap on the dollar amount of any medical treatment.
- Stipulate to a shorter statute of limitations than the 10-year statute for written contracts.

If you have any questions concerning the settlement contracts or open medical or concerning any of the cases discussed herein, please contact any of our workers' compensation attorneys.

RECENT APPELLATE COURT CASES OF INTEREST

Appellate Court discovers that shoulder injuries are not part of the "arm" and should be compensated as loss of use of a person as a whole.

The Appellate Court, Workers' Compensation Commission Division, handed down a decision on February 17, 2012, that has already stirred much discussion at the workers' compensation calls and among practitioners. In *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n,* 2012 IL App (3d) 110077WC, a unanimous Appellate Court held that a shoulder injury cannot be considered an arm under the scheduled loss provisions of Section 8(e)(10), but instead is to be evaluated under the person as a whole provisions of Section 8(d)(2). In that case, the parties stipulated that the claimant, a heavy equipment operator, sustained an injury to his right shoulder which arose out of and in the course of his employment. The claimant underwent an arthroscopic repair of a right rotator cuff tear and a subacromial decompression with acromioplasty, following which he returned to work without restrictions. The claimant acknowledged he was able to perform his regular job duties, but testified that since returning to work, he noticed his right shoulder becoming stiff and weak if used a lot, soreness with vibration and weather sensitivity.

Relying on several dictionary definitions of the word "shoulder," as well as authorities from other jurisdictions, and ignoring nearly 100 years of precedent of shoulder injuries being compensated based on a loss of use of an arm, the Appellate Court "discovered" that the arm and shoulder are distinct parts of the body and that, "if the claimant sustained an injury to his shoulder, an award for scheduled loss to the arm would be improper." In doing so, the Appellate Court affirmed an award of 25 percent loss of use of a person as a whole under Section 8(d)(2), which equates to 49.4 percent loss of use of an arm under the Schedule. As a result of the new maximum PPD rates, the petitioner is to receive $113,397 for a shoulder injury with surgery, and a full duty return to work.

While a petition to reconsider and/or appeal to the Illinois Supreme Court was filed, workers' compensation carriers, adjusters, employers, and claims professionals should be advised that effective immediately, arbitrators are making awards and assessing *pro se* contracts of shoulder injuries based on the loss of use of a person as a whole. We suggest that in preparing *pro se* cases which have been resolved based on a loss of use of an arm, the contracts reflect both the percentage of an arm and the equivalent amount based on the loss of use of a person as a whole.

The mailbox rule does not apply to judicial review filings under Section 19(f).

In *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2012 IL App (2d) 101049WC, the Appellate Court, Workers' Compensation Commission Division, held, in a 3-2 decision, that the mailbox rule found in Supreme Court Rule 373 does not apply to judicial reviews from a Commission decision filed under Section 19(f). In that case, the claimant had mailed all required documents necessary to perfect a judicial review to the circuit court within the 20-day filing period. The circuit court, however, did not file-stamp the materials until 14 days afterwards, which provoked a motion to dismiss filed

Heyl, Royster, Voelker & Allen
presents our

27th Annual Claims Handling Seminar

Concurrent Sessions:

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or

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Thursday, May 17, 2012
1:00 p.m. – 4:30 p.m.
Doubletree Hotel
Bloomington, Illinois

An agenda will be available soon

Invitations will be mailed at a later date

by the employer. The circuit court denied the motion, but that ruling was reversed on appeal.

According to the majority, Section 19(f) does not contain a mailbox rule and must be strictly construed. The majority further found that Section 19(f)'s review procedures were more akin to the filing of a complaint than an appeal and that a complaint must be physically filed with the court before the expiration of the statute of limitations, and the complaint is not subject to the mailbox rule. Two justices dissented, arguing that the mailbox rule should be applied and that the Section 19(f) filing was an appeal. The mailbox rule has long been applied to the filing of a notice of appeal.

A petition for rehearing was filed with the court. While this case was decided in favor of an employer, the decision is nevertheless one of interest. Applying the mailbox rule to circuit court filings would significantly benefit employers. As the law currently stands, the safe and sound procedure for filing requires employer's counsel to travel across the state and file the review in person at a substantial expense.

An employer cannot enforce a credit for overpayment in a circuit court Section 19(g) proceeding.

In *Patel v. Home Depot USA, Inc.*, 2012 IL App (1st) 103217, the Appellate Court, First District, refused to apply the employer's credit for overpayment of benefits to an award in response to the employee's Section 19(g) circuit court petition to enforce. In that case, the Commission had awarded the employer a credit for overpayment of TTD benefits and because of the overpayment, the employer owed nothing. Nevertheless, the claimant demanded that the employer pay the award of $22,798.54 and filed a Section 19(g) petition to enforce the Commission's decision in the circuit court. The employer responded by noting it had a credit of $27,357.47 for TTD benefits previously paid and said that it owed nothing. The circuit court disagreed, entered judgment on the Commission's decision, awarding the full benefits without reference to the credit and, to add insult to injury, awarded attorneys' fees of $47,000, costs of $5,315.31, and interest of $13,679.08.

The employer appealed and the Appellate Court, First District, affirmed. According to the court, Section 19(g) applies only to compensation and does not recognize a credit as compensation. The court then referenced the prior Supreme Court case of *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 639 N.E.2d 1282 (1994), which refused to permit an employer to use Section 19(g)'s procedures to collect an overpayment. According to the court, an employer must pay the full amount of the award and then seek to recover the credit for overpayment in a separate civil action against the claimant. The *Patel* decision is simply wrong and represents a misunderstanding of workers' compensation realities. Unfortunately for this employer, not only will it likely not be able to recover the amount of overpayment, but it was wrongly saddled with outrageous attorneys' fees, costs, and interest. *Patel* is part of a long line of appellate decisions that demonstrate why appeals from Section 19(g) rulings should be handled by the Appellate Court, Workers' Compensation Commission Division, rather than the traditional Appellate Court.

The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.

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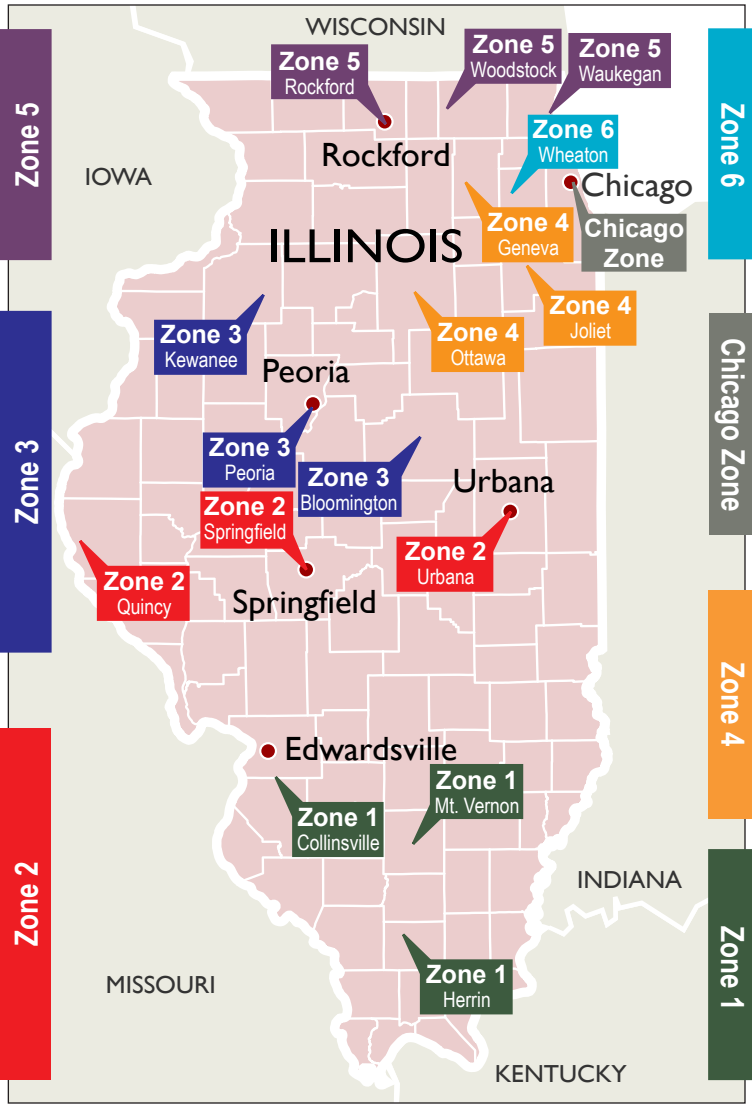

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