Below the Red Line

Heyl Royster

Workers' Compensation Newsletter

A Newsletter for Employers and Claims Professionals — *May 2009*

A Word From The Practice Group Chair

This month's *Below the Red Line* focuses on the document that brings finality to a workers' compensation claim. Attorney Joe Guyette of our Urbana office is our author, and he has prepared an excellent outline of settlement contract issues and suggestions so that when you do settle a claim, it is gone forever.

If you need any assistance in preparing settlement contracts or in reviewing contracts that have been prepared by petitioners' counsel, please give any one of our workers' compensation attorneys a call or an e-mail. As you know, we handle and cover all workers' compensation venues in Illinois including Chicago, so we can conveniently assist or counsel you in all settlement contract situations.

We hope to see you at our workers' compensation seminar in Bloomington which is set for Thursday, May 21, 2009 at 1:00 pm. If you did not get an invitation, or if you need more invitations so you can invite a friend, please let us know.

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This Month's Author:

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

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Settlement Contracts – New Law And What You Need To Know

The vast majority of workers' compensation claims end with a settlement. In the last reported year, 2007, some 52,521 cases (87 percent of all closed cases) were resolved by settlement agreement. On its face, the process of settling a claim seems fairly straightforward. The Workers' Compensation Commission has done its part by providing a form to be used for the settlement contracts. However, for a document that consists mostly of boxes to be checked and lines for contact information, there are a number of substantial pitfalls that must be avoided in the drafting and presentation of a settlement contract.

In drafting settlement contracts, the primary goal is to accurately reflect the agreement reached. The amount of a permanency award is generally the focus, but it is only one of many critical elements to be addressed. When drafted properly, a settlement contract should conclude the claim, eliminate the possibility of further litigation on that claim, and put the employer in a position to dispute future claims, take a credit to reduce a future award or, where appropriate, collect on proceeds received by the injured worker from a third-party tortfeasor.

There are three main points of concern in drafting settlement contracts: (1) medical bills must be properly addressed; (2) the claimant's ability to seek additional benefits (such as those under sections 8(a) and 19(h)) must be limited; and (3) care must be taken to maximize the employer's ability to use the settlement contract to limit or eliminate future claims.

Medical Bills After *Hagene*

The Commission's standard form contains two boxes near the bottom of the first page which the parties are to use to confirm whether medical bills have or have not been paid.

Medical Expenses:

The employer has __ has not __ paid all medical bills.
List all unpaid bills in the space below.

____

____

Until recently, where all medical bills had been paid, the parties would mark the box indicating that the employer had paid all of the bills. However, a February 2009 appellate court decision has changed how settlement contracts should be written in order to ensure that the claimant cannot later seek and obtain payment of medical bills incurred prior to the settlement contract, but not paid by the employer.

Hagene (February 2009)

In ***Hagene v. Derek Polling Construction***, 902 N.E.2d 1269, 327 Ill. Dec. 883 (5th Dist. 2009), the Appellate Court, Fifth District, considered a case in which the claimant's attorney discovered unpaid medical bills after the claimant's settlement contract was approved. The settlement contract indicated that the employer had paid all of the claimant's medical bills. The employer did not have any knowledge of the unpaid bills at the time of contract approval. Ultimately, the appellate court decided that the employer was responsible for paying the newly-discovered medical bills because the contract indicated that the employer had paid all medical bills.

Unfortunately, the facts of the ***Hagene*** case present a relatively common situation. The claimant was unrepresented, and settled his claim *pro se* for a sum of $20,036.10, which represented 30 percent loss of use of the claimant's injured arm. Total temporary disability (TTD) benefits of 39 weeks had already been paid by the employer and the remainder of the claimant's TTD claim was contested. The front page of the settlement contract indicated that the employer had paid all medical bills, and the terms of settlement section on the back of the contract indicated that the lump sum of $20,036.10 represented full and final settlement of all issues, including TTD benefits and past, present and/or future medical and hospital benefits. The agreement also recited that the claimant expressly represented and agreed that, prior to the approval date of the settlement contract, he had submitted to the employer all reasonable, necessary, and causally related medical and hospital bills.

After the settlement was approved, the claimant became aware of nearly $20,000 in medical bills incurred prior to the date of settlement. These bills had not been paid by any entity, and had not been submitted to the employer. A year-and-a-half after the settlement was approved, the claimant filed an action in the circuit court to enforce the settlement contract pursuant to section 19(g) of the Workers' Compensation Act. The employer argued that the terms of the settlement contract precluded the claimant from seeking any additional benefits because the

lump sum agreed to represented full compensation including past and future medical expenses. The circuit court agreed and dismissed the claimant's complaint on the employer's motion. The claimant moved to vacate and reconsider, which the circuit court denied.

On appeal, the claimant argued that the settlement contract was ambiguous, citing the inconsistency between the checked box indicating that the employer had satisfied all of the medical bills and the settlement term indicating that past, present, and future medical benefits were comprised in the settlement. The appellate court noted that the employer's obligation to pay for medical treatment related to a compensable injury came from section 8 of the Act, independent of the settlement contract.

Although noting that disputed bills (on causation) may be resolved as a part of the settlement agreement, the settlement agreement did not indicate any dispute regarding whether any of the bills were causally related. In fact, at oral argument, counsel for the employer admitted that the bills were causally related to the claimant's work accident.

Further, the appellate court explained that the claimant's waiver of a statutory right would have to be explicit. As a result, the appellate court concluded that the parties did not intend for the claimant to waive the employer's statutory obligation to pay the medical bills. The court observed that the claimant settled the case based upon the belief that all of the medical bills had been satisfied. Allowing the employer to conclude the case without paying those medical bills, it reasoned, would result in a windfall because the claimant did not receive any consideration for waiving the employer's obligation to pay the bills. Ultimately, the case was remanded to the circuit court for entry of an order consistent with the appellate court's decision.

The ***Hagene*** decision was decided on February 24, 2009. To date, there have not been any other published decisions interpreting or examining the scope of the ***Hagene*** opinion. Whether ***Hagene*** would have been decided differently had there been at least some of the medical bills already paid is not known.

Drafting Contracts Post-*Hagene*

The most direct method for avoiding the situation that arose in ***Hagene*** is to mark on the settlement contract that the employer has not paid all medical bills. Further, it should be stated in the contract that the medical bills are disputed and the same language should appear under the terms of settlement on the back side of the contract. Unfortunately, the claimant may not consent to those terms because of the risk of unknown and unpaid medical bills having to be paid from the claimant's settlement proceeds.

Another option for avoiding responsibility for unknown and unpaid medical bills is to leave both boxes blank, adding language below the boxes to indicate that all submitted bills have been paid, and any bills not submitted as of the date of contract approval will be denied. Again, it is not clear whether an arbitrator would approve a settlement contract with neither box checked, but it would resolve any potential ambiguity between the front and back of the contract.

It is anticipated that the next year will bring a number of cases testing the scope and interpretation of the ***Hagene*** decision. For now, our best advice is to avoid marking the box to indicate that all of the medical bills have been paid, where possible, and to include the noted language in the terms of settlement. Please watch for new developments in this area of the law in our future newsletters.

Closing out the Claimant's Ability to Re-Open the Case

From the employer's point of view, any settlement contract should include the claimant's waiver of the rights provided by sections 8(a) and 19(h) of the Act. Specifically, section 8(a) allows the claimant to petition for additional medical benefits where more treatment is needed for the injuries sustained in a work-related accident, even after an award has been made. Section 19(h) allows for a claimant to petition the Commission for an increase in an award of permanent disability based upon a worsening condition, also after a final award has been made. The claimant's waiver of these rights is absolutely necessary to ensure that a claim has been finally resolved and may be closed. Any settlement contract that is approved without such a waiver may not conclude the workers' compensation claim.

Future Claims and Credits

In addition to concluding litigation on a current claim, a properly drafted settlement contract can protect an employer's interests in the future. To fully protect an employer's rights, a settlement contract must account for all available credits, make it possible to assert a credit in the future, and recoup workers' compensation benefits from a third-party tortfeasor.

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Credits

Section 8(e)(17) of the Workers' Compensation Act allows an employer, in certain circumstances, to assert a credit for a prior injury. In cases where a prior permanency award has been made based upon the partial loss of use of a hand, arm, thumb, fingers, leg, foot, or toes, the disability covered by that prior payment may be deducted from the award for a more recent injury. A similar credit may be taken for instances where a claimant had a pre-existing amputation, followed by a more recent work-related amputation. In settling a claim, care must be taken to determine whether a credit may be asserted for a prior injury and to maximize the credit that may be taken for a future injury.

A pre-existing disability, by itself, does not justify a credit under the Act. Instead, the disabling condition must have been related to employment with a permanency award made in the form of a partial loss of use of the affected body part. A comprehensive search should be made for prior claims, including contacting the Commission to determine if the claimant had previously filed other applications for adjustment of claim. The claimant does not have an affirmative duty to report these prior injuries or settlements.

When settling a new claim that is not subject to any credit, the language of the settlement contract and the calculation of the award should attempt to maximize the possibility of a future credit. No credit may be taken for a prior award based upon a loss of use of a man as a whole. ***Isaacs v. Industrial Comm'n***, 138 Ill. App. 3d 392, 485 N.E.2d 1093, 92 Ill. Dec. 850 (5th Dist. 1985). This point becomes important in cases where a claimant has injuries to one of the specific body parts mentioned above, as well as injuries to a body part covered under the "man as a whole" designation. If the settlement contract allows for the majority of an award to be based upon permanent disability to the specific body part, a credit can be taken for that portion of the award. Because a credit cannot be taken for permanency awards based upon a person as a whole, the settlement contracts should ideally minimize the portion of the permanency award based upon that designation.

Future Claims

A prior settlement award can also be used to dismiss a more recent claim where it can be shown that the more recent claim is based upon injuries covered by the prior settlement contract. The best evidence for establishing that a new claim was included in a prior settlement is to have the injury listed on the earlier settlement contract. As such, it is critical to include all of the claimant's injuries, conditions and diagnoses in the portion of the contract where the "nature of injury" is listed. By reviewing the claimant's medical records and including all of the conditions that are mentioned, there is a greater chance to preclude a future claim.

As mentioned earlier, it is necessary to include a waiver of the claimant's rights under sections 8(a) and 19(h) to avoid further litigation of the instant workers' compensation claim. The inclusion of such a waiver means that future medical treatment incurred because of the employment injury will not be covered through workers' compensation. Terminating the claimant's rights to seek future benefits for a workers' compensation claim is the only way to be certain that the case is closed.

Subrogation Rights

Pursuant to section 5 of the Workers' Compensation Act, an employer may seek reimbursement for any amounts paid as workers' compensation benefits where the claimant makes a recovery from a third-party who is liable for the claimant's injuries. In ***Borrowman v. Prastein***, 356 Ill. App. 3d 546, 826 N.E.2d 600, 292 Ill. Dec. 459 (4th Dist. 2005), the Appellate Court, Fourth District, ruled that an employer was required to specifically preserve its right of reimbursement under section 5 of the Workers' Compensation Act. The ***Borrowman*** decision was reversed by the Illinois Supreme Court in ***Gallagher v. Lenart***, 226 Ill. 2d 208, 874 N.E.2d 43, 314 Ill. Dec. 133 (2007). As a result, the employer's right of reimbursement may only be waived by explicitly stating such a waiver in an approved settlement contract. Nevertheless, it remains our recommendation to include a term preserving the employer's right to reimbursement in all settlement contracts. Given that the employer retains this right unless it is expressly waived, the claimant should not have any objection to the inclusion of that terminology in the settlement contracts. Further, this will insure that the employer's rights are protected in the event that the interpretation of the ***Borrowman*** and ***Gallagher*** decisions is changed.

In order for an employer to obtain any recovery pursuant to section 5, a settlement contract must be approved by the Commission. Even if temporary total disability payments are made pursuant to the Act, an employer cannot seek reimbursement for those payments until after the case has settled. As such, it is our recommendation to proceed with the presentation and approval of settlement contracts even where there is no permanency award. In cases where only TTD and medical benefits

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have been paid, settling the permanency aspects of a case for $1 will still allow for the employer to seek reimbursement of any and all payments made prior to settlement.

Correcting A Contract

If a mistake is made in drafting a settlement contract after the settlement contract has been approved, a small window exists for making corrections. The Commission's approval of a settlement contract has the same legal affect as an award following arbitration. In both instances, section 19(f) of the Act provides fifteen (15) days after receiving an award to move to correct a clerical or computational error. If no petition for review is filed within that time, the Commission no longer has jurisdiction to recall and correct the agreement. A judicial review is likewise possible if filed within twenty (20) days of receipt of the Commission's decision. After that time, neither the Commission nor the circuit court can modify the settlement contract. ***Alvarado v. Industrial Comm'n***, 216 Ill. 2d 547, 837 N.E.2d 909, 297 Ill. Dec. 458 (2005).

The need to correct a settlement contract may become relevant where an unpaid medical bill is discovered after the settlement contract has been approved. Assuming that the settlement contract has been properly drafted so as to terminate the employer's responsibility for paying those charges, the claimant's attorney may be facing a malpractice action if the bill is not promptly paid. The claimant's attorney may initiate a civil action to attempt to have those charges paid, challenging the approved settlement contract by any possible means. At that point, even though the settlement contract was properly drafted, if the employer contests the new bills, it will be forced to pay additional defense costs to defend itself against a frivolous action. The costs of the litigation may exceed the amount of the unpaid medical charges and the employer is left with a choice of either paying a medical bill for which it has no responsibility or paying an even greater amount to defend itself from the ongoing claim.

While it is impossible to predict and guard against the claimant's attorney's failure to properly account for the medical charges, it is critical to fully investigate the status of the claimant's medical bills prior to concluding a settlement.

Social Security and Medicare

Although covered in detail in our April 2009 newsletter issue, we must again mention that a proper settlement contract also takes into account issues relating to Social Security and Medicare.

Parting Words

The simplicity of the settlement contract form should not mask the importance of the document. There are a number of pitfalls that can be encountered in the drafting and execution of a workers' compensation settlement contract. A properly drafted contract can be a powerful tool to allow an employer to confidently end a claim and protect against future claims. A thorough investigation of the facts and careful wording of the terms of a settlement contract are necessary to avoid ongoing litigation, increased defense costs, and possible penalties.

We invite you to contact any of our workers' compensation attorneys listed on the following page with any questions or concerns regarding the drafting and approval of settlement contracts in your Illinois Workers' Compensation case.

Meet the Editor:

Brad Elward is a partner with Heyl Royster. He concentrates his work in appellate practice and has a significant subconcentration in workers' compensation appeals. He has been with the firm since 1991 and has handled all aspects of civil appeals, ranging from preparation of initial appeal documents through the drafting of appellate briefs and oral arguments. Brad handles workers' compensation cases before the Workers' Compensation Commission, the circuit courts, and the Appellate Court, Workers' Compensation Commission Division.

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The cases or statutes discussed in this newsletter are in summary form. To be certain of their applicability and use for specific situations, we recommend that the entire opinion be read and that an attorney be consulted. This newsletter is compliments of Heyl Royster and is for advertisement purposes.

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