



ILLINOIS STATE BAR ASSOCIATION

WORKERS' COMPENSATION LAW

The newsletter of the Illinois State Bar Association's Section on Workers' Compensation Law

Penalties for delay in authorization for medical treatment? No dice. A respondent's perspective

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In *Hollywood Casino v. IWCC*, the Appellate Court affirmed the Circuit Court and upheld that there is no legal basis for assessing penalties and fees against the employer for delay in authorization and/or pre-authorization of medical treatment.

The employers in the State of Illinois took a sigh of relief thanks to the Appellate Court decision of *Hollywood Casino v. IWCC*. By way of background, Petitioner was employed as a cocktail waitress by Respondent, Hollywood Casino. On January 1, 1999, she sustained a crushing injury to her foot while working. During the course of treatment, Dr. Lubenow implanted a spinal cord stimulator inside the Petitioner's back. Following a hearing, Petitioner was awarded benefits relative to the back and right foot.

Following the decision, Petitioner continued to treat with Dr. Lubenow who wrote a letter to the adjuster stating that the stimulator's battery would likely need replacement "within the first quarter of 2007." The adjuster received the letter on January 7, 2007 and never contacted Dr. Lubenow with any questions. In May 2007, the battery ceased to function and Dr. Lubenow scheduled the battery replacement surgery to take place that month. The adjuster requested a report from Dr. Lubenow explaining the medical necessity of the same, which was subsequently received on June 18, 2007. The surgery was performed on August 27, 2007.

The Petitioner filed a Petition seeking Penalties and Fees pursuant to Sections 19(k) and 16 of the Illinois Workers' Compensation Act (hereafter referred to as, "Act") with the Commission. The Commission awarded Pe-

tioner \$40,750 in penalties under section 19(k) of the Act and found that Respondent, "...unreasonably delayed authorization for the surgery performed by Dr. Lubenow without good and just cause." However, the Commission denied Petitioner's request for attorney fees under Section 16 of the Act.

Respondent sought review of the Commission decision with the Circuit Court, which reversed the Commission's decision and found that there was no legal basis for awarding penalties and fees where there was a delay in *authorizing medical* treatment. The Appellate Court agreed and noted: (1) that section 19(k) addresses only "delay in payment," and "underpayment;" (2) that the Act does not mention anything relative to delay in *authorization* in medical treatment; (3) that payment for the surgery was timely paid; and (4) that there is no provision in the Act authorizing the Commission to assess penalties against the employer for delaying medical authorization.

What does this mean for employers? Well, as a Respondent's attorney, you no longer have to fear opposing counsel's threats for

penalties for refusal to pre-authorize medical treatment and/or delay in authorization for medical treatment. That said, note section 7110.70 of the Commission Rules which states, "When an employer denies liability for payment of the cost of all or a part of an employee's medical care, or initially accepts liability but subsequently denies further responsibility for providing or paying for all or a part for such care (for any reason including but not limited to the necessity or propriety of care, or continuing of care, or the unreasonableness of the cost of care), the employer shall {emphasis added} promptly notify the employee with a written {emphasis added} of the basis for denial of liability or further responsibility." The said Rule requires the Respondent to provide written notice for denial of benefits under section 8 of the Act. Otherwise, the failure to do the same may result in penalties under section 19(k) and fees under section 16 of the Act. A written notice of denial will also serve as an exhibit in the event Petitioner's counsel elects to file a Penalties Petition.

While the employer may not be assessed penalties for failure to pre-authorize and/or authorize medical treatment, as a matter of professional courtesy, you should communicate the status of the same, if known, to opposing counsel. I have had the privilege to practice on both sides of the bar and, as a defense attorney; I am always sensitive to the demands faced by Petitioner's attorneys. Specifically, that opposing counsel also has a client to answer too much like myself. That said, often Respondent's attorneys are not aware of a delay in approval for medical treatment until either: (a) we are in receipt of a

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Section 19(b) petition; and/or (b) we receive an angry telephone call from Petitioner's attorney demanding that our client authorize the requested medical treatment. Keeping the lines of communication open with your adversary is critical in resolving most issues and, in turn, saving your client the time and expense of filing and/or defending Petitions. Maintaining professionalism at all times will

make handling of the case more efficient and, anything less, is a disservice to your client. Specifically, engaging in unprofessional behavior and/or being hostile with your adversary will not help advance your client's goals. While voicing your anger may feel good for the ego, your client is not paying for your ego, but rather, your legal expertise and favorable results.

With all that said, situations are sure to arise wherein the case will need to be litigated and an Arbitrator's decision will be required to obtain future medical treatment. However, as decided by the Appellate Court, threats for penalties for delay in authorization and/or pre-authorization for medical treatment no longer hold dice. ■

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