

alert

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ATTORNEYS AT LAW

*McMahan v. I.C., Sup. No. 84057,
(Ill. Sup. 10/22/98)*

*Brinkmann v. I.C.,
82 Ill. 2d 462 (1980)
Board of Education v. I.C.,
93 Ill. 2d 1 (1982)*

CAN ATTORNEY'S FEES UNDER SECTION 16 BE AWARDED FOR UNPAID MEDICAL BENEFITS? IN THE RECENT MCMAHAN CASE, THE SUPREME COURT SAYS "YES!"

HISTORY

To understand the development of the law regarding penalties and attorney's fees, we must review the three provisions of the Workers' Compensation Act:

Section 16:

Awards attorney's fees and costs if the employer (a) is guilty of unreasonable or vexatious delay in payment or (b) is guilty of unfairness in payment of benefits, or (c) has engaged in frivolous defenses which do not present a real controversy.

Section 19(k):

50% penalty for unreasonable or vexatious delay of payment of compensation.

Section 19(l):

Payment of \$10 per day, up to \$2,500, for failure or delay to make payment of TTD.

After Section 19(k) became law in 1951, the consensus among practicing attorneys was that Section 19(k) penalties could only be assessed for nonpayment of an Industrial Commission award. In 1975, at the request of labor, the Illinois General Assembly passed Section 19(l) so that the employer, who failed to make TTD payments would, at least, pay \$10 per day penalty, up to a maximum of \$2,500. Up to that time, no case supported the view that Section 19(k) would be applicable until after an award. Also in 1975, the pertinent provision of Section 16, which authorized the imposition of attorney's fees, was added. Again the consensus of the practicing attorneys and the majority of the Commission supported the position that Section 19(k) and Section 16 were only applicable to unpaid awards.

1980: BRINKMANN CASE SAYS "NO" TO PAYMENTS OF PENALTIES AND ATTORNEY'S FEES UNLESS AWARD IS UNPAID

The 1980 case of *Brinkmann* stated unequivocally that Section 16 attorney's fees and Section 19(k) penalties were "applicable only when an award has been entered in favor of a claimant and the responsible party has unreasonably delayed payment." In effect, the prior legal consensus had been verified. As of 1980, the only "penalty" was a relatively minor \$10 per day.

1982: BOARD OF EDUCATION CASE SAYS "YES" TO PENALTIES AND ATTORNEY'S FEES PRIOR TO AWARD

Unfortunately, however, the *Brinkmann* case has since been ignored and has now been specifically overruled. The first reversal involved the imposition of the Section 19(k) penalty on TTD benefits prior to the award. In the 1982 *Board of Education* case, the supreme court held that penalties and attorney's fees can be assessed should an employer fail to pay TTD benefits prior to the adjudication of liability. The court concluded that the claim that such fees and penalties must be based on an existing award of benefits, should be rejected as involving "too narrow a reading of the statutory sections involved and too broad a reading of *Brinkmann*." The court failed to acknowledge the fact that not in the 30 years since Section 19(k) became law did any court sustain an imposition of penalties prior to an award.

1982: CHILDRESS CASE SAYS "NO" TO PENALTIES AND ATTORNEY'S FEES ON MEDICAL BENEFITS

The next attempt to expand the penalty and attorney's fees provisions to include medical expense led to the 1982 *Childress* case, where the court stated:

In the instant case the charge of unreasonable and vexatious delay concerned the payment of medical expenses under section 8(a), not disability compensation under section 8(b). The sanction of attorney fees under section 16, by its terms, does not apply. Accordingly, we hold that the award of attorney fees for an unreasonable and vexatious delay in the payment of medical expenses is not property under section 16 of the Workmen's Compensation Act.

It should be noted that *Childress* included a dissenting opinion that attorney's fees could be imposed because of a delay in payment of medical expenses. However, the majority opinion, which denied attorney's fees on medical expense, seemed to be followed from *Childress* to *McMahan*, a period of 16 years. The *McMahan* case (filed October 22, 1998) has changed that.

1998: MCMAHAN CASE SAYS "YES" TO ATTORNEY'S FEES ON MEDICAL BENEFITS

Robert McMahan sustained a back injury as a result of a fall on May 20, 1992. After several months of unsuccessful chiropractic and physical therapy treatment, while McMahan kept working, he was diagnosed as having an L4-L5 narrow disc space. A subsequent myelogram, performed by Dr. Russell, a neurosurgeon, found an extradural defect at L4-L5. An orthopedic surgeon subsequently recommended a lumbar laminectomy but, because of McMahan's fear of surgery and his concern about being away from work during the employer's busy period, the surgery was not performed until January 5, 1994. No TTD or medical benefits were paid, despite the absence of any medical information disputing causal relationship. All benefits were denied because the employer's insurance carrier contended that it had no obligation to McMahan because the employer had failed to comply with the notice provisions of the policy. The employer refused to absorb the cost and nothing was paid. The insurance carrier's untenable position may, to some extent, explain the court's decision.

The arbitrator awarded McMahan everything: penalties under Sections 19(k) and (l) and attorney's fees on TTD and medical under Section 16. The Commission reversed, permitting only the TTD and actual medical expense, plus \$970 under Section 19(l). The appellate court reversed the Commission and awarded all penalties and attorney's fees. The supreme court, having the final word, agreed that penalties and attorney's fees, including the fees on the medical expense, should be awarded.

The most significant issue is the award of attorney's fees on disputed medical charges. The figures utilized by the Commission are somewhat confusing, but seemed to indicate the following:

13-6/7 weeks TTD	\$ 4,315.34
Disputed medical expense	<u>21,795.11</u>

Total TTD and medical expense	<u>\$26,110.45</u>
50% Section 19(k) penalties on TTD	\$ 2,158.60
\$10 per day penalties under Section 19(l)	970.00
Section 16 attorney's fees of 20% of \$26,110.45	<u>5,222.09</u>
Total penalties and attorney's fees:	<u>\$ 8,350.69</u>

As you can see from the above, the penalties and attorney's fees increased the award by approximately one-third. How did the supreme court decide to award 20% fees on medical expense? We must again review the language of Section 16, which authorizes such an award, when the employer is

guilty of reasonable or vexatious delay, intentional under-payment of compensation benefits, or has engaged in frivolous defenses which do not present a real controversy, within the purview of the provisions of paragraph (k) of Section 19 of this Act.

The court could have imposed penalties on the basis of intentional under payment or use of frivolous defenses without calling payment of medical benefits "compensation", but chose to go further. The court held that medical expenses should be treated as compensation under Section 19(k), stating:

Although the statute does refer to "compensation," we believe that the legislature intended to use that term in the same way it did in section 8 of the statute. Under section 8, the amount of "compensation" an injured employee is entitled to receive for an accidental injury not resulting in death is expressly defined to include not only compensation for lost wages but also payment for medical services.

The court concluded that any other result would be "absurd, inconvenient and unjust," stating:

The refusal of an employer to pay for an injured employee's medical expenses is as contrary to the purposes of the Workers' Compensation Act as an employer's refusal to compensate the employee for lost earnings. For the employee, the consequences can be every bit as devastating. Indeed, to the extent that nonpayment of medical expenses may imperil the employee's ability to obtain future treatment, the consequences of the employer's actions may actually be far worse. Under these circumstances, it would make no sense to say that employees should be allowed to recover their attorney fees when they are forced to retain counsel to obtain compensation for their lost earnings, but not when they have to hire a lawyer to compel payment of their medical expenses. In our view, the legislature could not have intended such an absurd and unjust result.

The employer's arbitrary position was not viewed with favor by the court.

The employer made an intentional decision not to honor its statutory obligations to the employee, and it did so simply because it had not complied with the requirements of its insurance policy and was unwilling to absorb the cost itself. Compounding the situation is that the employer's violation of its insurance policy was not accidental or inadvertent. It was the product of an established company policy.

EDITOR'S NOTE: EMPLOYERS AND CARRIERS MAY NO LONGER SIT BACK AND IGNORE MEDICAL BILLS WITHOUT RISK. A DENIAL OF PAYMENT SHOULD BE BASED ON A PROFESSIONAL OPINION THAT DISPUTES THE AMOUNT, REASONABLENESS OR NECESSITY OF THE CHARGE OR A STRONG DEFENSE BASED ON CAUSAL RELATIONSHIP.

EDITOR'S NOTE 2: CASE LAW IN ILLINOIS HAS ALWAYS SUPPORTED THE PROPOSITION THAT PAYMENT OF A MEDICAL INVOICE WOULD NOT, IN ITSELF, EXTEND THE LIMITATIONS PERIOD. WHAT EFFECT DOES THE *MCMAHAN* DECISION HAVE WHEN THE COURT SUGGESTS THAT "COMPENSATION" WOULD "INCLUDE NOT ONLY COMPENSATION FOR LOST WAGES BUT ALSO PAYMENT FOR MEDICAL SERVICES."

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