

# WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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### CAN RESPONDENT BE ASSESSED FOR THE PER DIEM CHARGES OF THE PETITIONER'S ATTORNEY WHEN SUCCESSFUL IN COLLECTING PENALTIES?

"Most employers and their carriers have come to realize the importance of the prompt payment of benefits after an approved settlement contract or after an arbitrator's decision. What happens, however, when the respondent files a review which is subsequently dismissed? Can the respondent be held for penalties and attorney's fees and, if so, might this prove to be very expensive?" questioned Oliver W. Graymatter at the firm's weekly meeting.

"I didn't think so!" responded junior associate, Ms. Truly M. Equal. "Obviously, interest would be due based on the rate shown in the arbitrator's decision. But, why should the respondent pay penalties and attorney's fees just because it availed itself of the review process?"

"You're in for a surprise!" expounded Graymatter. In the recent case of *Stephens v. Industrial Commission*, the appellate court upheld the Commission's imposition of penalties and attorney's fees because the respondent could not show that its failure to pay the award during the review process was reasonable. So, you can see that in certain cases the respondent may consider paying the award even though a review has been filed.

But, this *Stephens* case involved a more significant monetary exposure because of a rather novel approach by the petitioner's attorney, who requested fees on a per diem basis for all time expended after the Commission's initial decision. "The amount requested for attorney's fees amounted to almost ten times the amount of the penalty that had been assessed." explained Graymatter.

“That must have provided quite a shock to the respondent,” exclaimed Ms. Equal, “fees to petitioner’s attorney are usually paid by the petitioner. In the case of penalties, fees are sometimes assessed against the respondent but, there again, only on the basis of a percentage and never on a per diem basis.”

Before reviewing the facts in this case, it is important to describe the three sections of the Act involved. Section 19(l) permits penalties of \$10 per day, up to a maximum of \$2,500, for respondent’s failure to pay TTD. Section 19(k) permits an additional 50% of compensation for benefits unreasonably withheld. Section 16 provides attorney’s fees for penalties assessed under Section 19(k), which attorney’s fees are to be paid by the respondent rather than the petitioner.

Geraldine Stephens, a correctional officer for the County of Cook, obtained an initial award for benefits and penalties under Section 19(l) of the Act because of respondent’s delay in paying TTD benefits. Both parties filed reviews but respondent’s review was dismissed on its own motion when the respondent stated that the petitioner had been paid. Petitioner was not satisfied and requested additional penalties under Section 19(k), as well as attorney’s fees under Section 16. The Commission found “that respondent had failed to present any evidence that the 65-day delay in paying the award was reasonable; that the payment came after repeated delays in paying TTD; and the explicit mandate of the Act to provide prompt, sure and definite compensation was contravened.”

The award was as follows:

- (a) \$5,322.78 penalty under Section 19(k);
- (b) \$1,064.76 attorney’s fees based on 20% of the 19(k) penalty;
- (c) \$650.00 in penalties under Section 19(l).

The appellate court reversed and remanded the matter to the Commission solely on the issue of whether the allowance of attorney’s fees pursuant to Section 16 of the Act was adequate. Perceiving that this statement by the appellate court might provide the basis for a much higher fee, the petitioner’s attorney requested that the respondent pay attorney’s fees of

\$48,400, based on a \$200 hourly rate, for the time expended following the Commission’s decision.

There is nothing in the experience of the Commission that leads to the belief that attorneys are unwilling to represent injured workers if they are paid fees at the rate established by the Act.

“You can see,” interjected Graymatter, “that the County of Cook may have been slightly nervous at this stage.” The appellate court had questioned whether the \$1,064.76 award in attorney’s fees was adequate and the County was now faced with a possible attorney’s fees claim of \$48,500, which amount would have been paid by the County. Fortunately, however, the Commission maintained its prior position that the fee should not exceed 20% of the amount recovered, stating:

*The purpose of §19(k) penalties is to protect the injured worker by penalizing the employer for vexatious and unreasonable conduct. The purpose of awarding attorneys’ fees as a penalty under §16 is to relieve the Petitioner of the responsibility for paying the attorney’s fees he would otherwise be obligated to pay. Allowing the increase of fees based on a quantum meruit theory is not warranted. There is nothing in the experience of the Commission that leads to the belief that attorneys are unwilling to represent injured workers if they are paid fees at the rate established by the Act. Fees based on quantum meruit constitute an unreasonable cost burden on the system. In a vexatious case involving §16, fees may be awarded on all compensation. A fee should not exceed what the Petitioner would have had to pay or 20% of the total award due.*

The appellate court agreed with the Commission stating:

*Here, claimant’s attorney wants to use the provision in section 16 allowing the Commission the prerogative to order the respondent to pay claimant’s attorney fees as a method of obtaining a “punitive” award in the form of attorney fees by allowing the Commission to order the respondent to pay more attorney fees than those for which the claimant would be liable. The plain language of the sections of the Act relied on by claimant do not support reading such a provision into the Act. The purpose of these sections of the Act is to provide relief to the claimant, not to provide a method whereby*

The court held that all specific losses of members, including amputations, are covered by Section 8(e) and are, therefore, bound by the 60% rate.

claimant's attorneys can obtain increased fees.

*Although we have determined that Section 16(a) does not directly pertain to the situation presented in this case, the Commission could look to Section 16(a) in determining the reasonableness of attorney fees to be awarded under section 16. In Section 16(a), the legislature has expressed a public policy to generally limit attorney fees in workers' compensation cases to 20% of the award.*

**EDITOR'S NOTE:** THE COMMISSION SEEMS MORE AND MORE INCLINED TO IMPOSE PENALTIES AND ATTORNEY'S FEES AND PERMITTING RECOVERY ON A PER DIEM OR QUANTUM MERUIT BASIS WOULD HAVE CAUSED SIGNIFICANT PROBLEMS.

### QUESTIONS OF RATE AND PROMPTNESS OF PAYMENT IN AMPUTATION CASES

The recent case of *Modern Drop Forge Corporation*, involved an amputation to the lower part of the right arm. The case presents interesting discussions on three separate issues:

- (a) Is the compensation rate for an amputation based on 60% or 66-2/3% of the average weekly wage?
- (b) When must the amputation payments begin in order to avoid penalties?
- (c) Can there be an award for the uninjured arm based on overuse?

On December 15, 1988, Roger Koenig crushed his right forearm and fractured his left middle finger. The right arm was amputated just below the elbow. Koenig returned to work on June 12, 1989 and was awarded TT for the 25-3/7 weeks.

Upon Koenig's return to work, he was unable to perform his prior duties and was given sedentary part-time employment. On August 18, 1989, Koenig resigned because of his stated inability to perform his work, a developing numbness and tingling of the left hand suggesting carpal tunnel syndrome and emotional depression from the effects of the injury. He moved to Buffalo, New York, enrolled in a vocational rehabilitation program and tried attending

school. He was not employed on March 12, 1992, when he filed a petition for penalties and attorney's fees because of respondent's failure to institute permanency benefits based on the amputation. On March 18, 1992, respondent paid the accrued PPD benefits (\$39,559.48), and thereafter, made periodic payments. The Commission addressed the three issues with the appellate court reversing the Commission on one issue and affirming the Commission on the other two.

(a) **Rate.** The Commission had awarded PPD benefits at the rate of 66-2/3 of the average weekly wage for the amputation and the rate of 60% for the carpal tunnel syndrome to the uninjured member. The court held that all specific losses of members, including amputations, are covered by Section 8(e) and are, therefore, bound by the 60% rate. Admittedly, Section 8(b-4) puts the amputation maximum at 133% of the average weekly wage, but the rate is still calculated at 60% of the wage.

(b) **Promptness of Payment.** This respondent followed the procedure of many other respondents in not voluntarily paying benefits for an amputation until a settlement or until the arbitrator's decision is rendered. As a result, by the time the respondent made its first PPD payment, \$39,559.48 had accrued. The court agreed with the Commission decision to impose a 50% penalty (\$18,874.39) under Section 19(k) and an attorney's fees award of \$3,774.88, representing 20% of the 19(k) penalty, stating:

*[W]e find that the legislature intended that individuals who receive amputations should be immediately compensated when no dispute exists as to whether the injury arose out of and in the course of employment. Such a result is consistent with the legislature's intent because prompt payment alleviates the possibility that an employee will be faced with unnecessary financial burdens. Requiring immediate payment is not unfair to the employer because statutorily it would have to pay the amount owed at some point in time. It is consistent with the purpose of the Act to require the amount owed to be paid promptly. The employer can pay the amount owed immediately since section 8(e) clearly sets forth the compensation an employer is*

*obligated to pay. As such, it is unreasonable that an employee should have to wait for a judgment to be entered before receiving the compensation clearly owed.*

The respondent had objected, contending that the petitioner had not made his choice of remedies and that the petitioner might have requested a wage loss differential under Section 8(d-1) of the Act. The court noted that, in any event, the respondent would have received credit for any compensation paid, stating:

*There is no reasonable argument that a claimant would choose a section 9(d)(1) wage-loss differential award if the amount he is likely to receive under that provision is less than his statutory entitlement under section 8(e). The respondent risks nothing when it begins payments for an undisputed section 8(e) injury, such as an amputation. Should the claimant later elect a wage-loss differential, the employer will still be entitled to credit for amounts paid, and additional amounts will necessarily remain to be paid.*

**(c) Award for uninjured member.**

Petitioner contended that the amputation of the right arm caused the left arm overuse, resulting in a left carpal tunnel syndrome. The court accepted the petitioner's argument regarding causal connection, stating:

*The loss of the right hand was a precipitating factor in the claimant's development of left carpal tunnel syndrome. Thus, if not for the amputation, the claimant would not have developed carpal tunnel syndrome in his left upper extremity. While this condition was undoubtedly accelerated by the claimant's attempt to return to work from June through August 1989 Matteliano's opinion suggested that the syndrome would likely have developed anyway, simply by virtue of the claimant's constant use of a hand that was little-used during most of his life when he had a dominant right hand. The Commission could reasonably find that the amputation was a causative factor in the claimant's development of left carpal tunnel syndrome.*

**EDITOR'S NOTE:** UNTIL THIS CASE, PETITIONERS' ATTORNEYS HAD CLAIMED THAT THE TTD RATE

APPLIED TO AMPUTATIONS. NOT SO. ON THE ISSUE OF PROMPT PAYMENT, ADVISE THE PETITIONER WHEN YOU'RE SWITCHING FROM TTD TO PPD.

**COMPENSATION SETTLEMENT AS MARITAL PROPERTY**

In our previous newsletter (April 1996), we discussed the conflict of appellate court decisions concerning a spouse's claim that a compensation settlement is marital property. The supreme court, in the recent *DeRossett* case found that compensation should be classified as marital property but not necessarily distributed on a 50/50 basis.

Husband and wife were married from 1987 to 1994, with the husband developing bilateral carpal tunnel syndrome as a result of an injury in 1990. At the time of the marriage dissolution, the trial court found that the claim was marital property and, shortly thereafter, the husband settled his workers' compensation claim, netting \$111,000.

Petitioner argues that he has a "personal right to his financial security which is owned by him individually and was brought into the marriage as his separate property."

The husband contended that the settlement was compensation for his diminished earning capacity which, due to his retirement, would continue far beyond the date of dissolution. In addressing this issue, the court noted:

*Petitioner argues that he has a "personal right to his financial security which is owned by him individually and was brought into the marriage as his separate property." However, it is unnecessary to adopt the "analytical" approach in order to address petitioner's concerns, because the statute already in place mandates that the trial court consider petitioner's financial security in dividing the marital estate.*

The supreme court emphasized that the trial court's award to the wife of 30% was not an abuse of discretion. The statute requires the court, in dividing marital property, to consider the *age, health, . . . employability. . . and needs of each of the parties' together with the opportunity of the spouse to secure future income.* In this case, the trial court apparently considered the disability of the injured spouse and awarded him the larger portion of the marital property.

**EDITOR'S NOTE:** YOUR EDITOR ANTICIPATES MORE

CASES WHERE THE EMPLOYER OR CARRIER WILL BE DIRECTED TO ISSUE SEPARATE DRAFTS IN THE CASE OF A COMPENSATION SETTLEMENT OR AWARD. BE SURE THE DICTATES OF THE COURT ORDER ARE FOLLOWED.

**INDUSTRIAL COMMISSION PERSONNEL  
CHANGES**

Chairman John Hallock, of the Industrial

3. James Giordano of LaSalle-Peru, has been appointed as an arbitrator and will be assigned to the Rock Island and Ottawa hearing sites.
4. Effective November 12, 1996, the cases presently assigned for hearing in St. Charles will be conducted at the Kane County Courthouse in Geneva, Illinois.

nFRANK J. WIEDNER

Commission, has announced the following changes:

1. Arbitrator Donald Callahan has announced his retirement after 35 years of dedicated service.
2. Arbitrator Leo Hennessy will be assigned to the Joliet hearing site to replace Arbitrator Callahan.