

IMPORTANT NEW DEVELOPMENTS 1/1/09 - 3/15/09

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1. Commission corrects maximum PPD rate for the period 7/1/08 - 7/1/09.

On 3/11/08 the Workers' Compensation Commission posted and published a correction to the maximum PPD rate that had been erroneously calculated this past January; **the correct maximum rate is now \$664.72**. We invite you to access and download our revised "rate sheet", containing information about all of the new and previous maximum and minimum rates since 2000, by using the link on the home page of this web site captioned "New Illinois Workers' Compensation Rates 1-15-09".

The maximum PPD rate effective 7/1/08 was previously calculated at \$643.82 and was posted as such by the Commission in January. It is our opinion cases involving injuries occurring on or after 7/1/08 that have been concluded with approved settlement contracts, or tried with final decisions rendered (i.e., not reviewed), where permanency was based upon the previously posted \$643.82 maximum rate, cannot be reopened to apply the recalculated rate; however cases involving such injuries that remain pending are subject to the new maximum rate, if applicable, unless at some future date the Commission or the judiciary determines the newly calculated rate only became effective as of the date the correction was posted. To our knowledge this precise issue, if it should be raised, would be one of first impression in Illinois.

2. Caution must be exercised when drafting settlement contracts in cases involving unpaid or disputed medical bills.

On 2/24/09 the Fifth District Appellate Court issued an opinion in Hagene v. Derek Polling Construction, 2009 WL 503454, addressing the question whether an employer can avoid liability for unpaid medical bills when the box on the front portion of a settlement contract is checked to show the employer has paid all medical bills but, in the terms portion on the reverse side of the contract, the employee acknowledged the settlement consideration included "past, present and future" medical and hospital bills. In Hagene It turned out the employer had not paid substantial medical bills it conceded were causally related. The Appellate Court determined the employee's waiver of the employer's responsibility to pay these bills in the "terms of settlement" conflicted with the employer's statement on the front portion of the contract it had paid all medical bills and, therefore, the parties did not intend to discharge the employer's statutory obligation to pay such bills. **This decision cautions employers, carriers, third party administrators and their representatives of the consequences of indicating all bills have been paid on the front portion of a settlement contract even though appropriate language reflecting certain medical bills are unpaid or disputed is clearly indicated on the reverse side of the contract and that the settlement consideration is intended to include those bills.**

The employee in this case sustained a compensable injury when he fell at a construction site, submitted to left shoulder surgery, received TT benefits for 39 weeks, returned to work, and eventually settled his case for \$20,036.10, representing 30% loss of use of his left arm. The employer indicated on the front portion of the contract all medical bills are paid but, in fact, causally related bills totaling \$19,977.25 remained unpaid. The employee filed a section 19(g) petition in the Circuit Court alleging the settlement agreement actually obligated the employer to pay these bills; the employer moved to dismiss the petition, arguing the “terms of settlement” provision in the contract expressly prohibited the employee from requesting payment. The employer’s motion was granted and the employee appealed.

The Appellate Court first noted Illinois courts “routinely look to the intent of the parties in order to ascertain the scope and extent of the claims released” when interpreting settlement contracts, and in the context of workers’ compensation cases “the employer’s obligation to pay all the medical bills related to the petitioner’s work injury flows not from the settlement contract but from the Workers’ Compensation Act”. The court then said: “No form of words, no matter how all-encompassing, will foreclose a court’s scrutiny of a release or prevent a reviewing court from inquiring into the surrounding circumstances to ascertain whether it accurately reflected the parties’ intention.” While acknowledging “employees can and do contract away their right to have past and future related medical expenses paid for by their employers”, the court emphasized “a waiver of important statutory rights must be explicit”. Then, after noting effect must be given to all relevant contract language to resolve the question of the parties’ intent, the court concluded:

“ When we consider the entire contract in the context of all the surrounding circumstances, we conclude that the parties did not intend to discharge the respondent's statutory obligation to pay the petitioner's past related medical bills. What is clear from the surrounding circumstances is that the settlement was premised on the understanding that the respondent had in fact paid all the outstanding medical bills to the date of the settlement as indicated in the contract recital. To find otherwise would result in a windfall to the respondent, because it would be absolved from paying bills as required by statute without paying the petitioner any real consideration (the settlement amount almost equals the unpaid medical bills) as well as a loss to the petitioner (after the payment of the medical bills in question and attorney fees). This is a result the parties never could have intended. We will not interpret the settlement contract in such a way to defeat a claim not then in the minds of the parties. To do so would not only lead to an absurd and unjust result but also seriously undermine the remedial purpose of the Workers' Compensation Act.”

When a case involving unpaid medical bills is settled, and the parties agree the amount being paid includes those bills, we recommend the question on the front portion of the contract whether the employer has or has not paid all medical bills simply be answered

“see terms of settlement”, or “disputed - see terms of settlement”; then appropriate language reflecting the bills should be placed in the terms paragraph on the reverse side of the contract (consistent with the court’s directive that the waiver of statutory rights be explicit). We particularly caution claim representatives who settle claims directly with attorneys representing the employee, and ask such attorneys to prepare the contracts, to be certain the box on the front of the contract indicating the employer has paid all of the bills has not been checked when, in fact, certain bills are unpaid. Such attorneys should be expected to draft contracts in a manner that best protect the interests of their clients, just as we do when drafting contracts for our insured and self-insured clients. We invite any questions or comments about this important Appellate Court decision.

3. The “hearing” of a compensation claim does not commence when the employee’s doctor is deposed.

In 2002 the Commission determined in Marks v. Acme Industries, 02 I.I.C. 892, that the employer’s IME report was not admissible since it was not tendered to the employee or his counsel 48 hours before the commencement of the evidence deposition of the employee’s treating doctor; thereafter both employers and employees operated under the assumption an evidence deposition of the employee’s treating or examining doctor was the actual “commencement of the trial” for purposes of applying the 48 hour rule. **That is no longer the law.**

On 12/23/08 the Appellate Court held in City of Chicago v. The Workers’ Compensation Commission, --- Ill.App.3d ---, 899 N.E.2d 1247, 326 Ill.Dec. 596, the “hearing” referred to in section 12 of the Act is the “arbitration hearing”, effectively overruling the Commission’s interpretation in Marks. In the City of Chicago case the employee’s counsel scheduled an evidence deposition of the employee’s treating doctor, which took place by agreement of the parties on 5/24/04. Thereafter the employer scheduled an IME with Dr. Slack, which took place on 8/26/04, and on 9/20/04 the employer’s counsel mailed a copy of Dr. Slack’s 9/6/04 report (covering the results of that IME) and asked the employee’s counsel to either agree to the report or request that Dr. Slack be deposed. There was no response from the employee’s counsel. The case was set for trial before an arbitrator on 2/8/05; after the employee testified and certain exhibits were admitted the employer offered Dr. Slack’s IME report. The employee objected, citing the Marks case, and the objection was sustained.

On appeal the employer argued Dr. Slack’s report should have been admitted, and the court agreed. The court specifically noted Dr. Slack’s report did not even exist at the time Dr. Chmell (the employee’s doctor) was deposed, the employee participated in Dr. Slack’s examination without objection, and the report was tendered well before the arbitration hearing. Quoting from its earlier opinion in Ghere v. Industrial Commission, 278 Ill. App.3d 845, 663 N.E.2d 1046, 215 Ill.Dec. 532 (1996), the court reiterated: “ It seems to us from the language of section 12 that the purpose in having the employee’s physician send a copy of his records to the employer no later than 48 hours before the arbitration hearing

is to prevent the employee from springing surprise medical testimony on the employer.”
The court then concluded:

“Given this court's prior determination that the purpose of section 12 is to prevent surprise medical testimony at the arbitration hearing, the Commission's ruling in Marks that the “hearing” referred to in Section 12 is the treating physician's deposition is completely at odds with this court's statement of the purpose of Section 12. The Commission's decision to exclude Dr. Slack's report was error as a matter of law. We note that had Dr. Slack's report been completed but withheld until after Dr. Chmell's deposition the outcome may have been different.” 663 N.E.2d at p. 1250.

We call to your attention the last sentence of this quoted language. The court had earlier observed that in Marks the employer had its examining physician's report in hand prior to the treating physician's deposition but failed to provide a copy to claimant's counsel until after the conclusion of the treating physician's deposition. While technically it should make no difference when the employer's IME report is tendered as long as it is done at least 48 hours before the arbitration hearing, according to the court's reliance on its previous opinion in Ghere, nevertheless the court seems to imply the deliberate withholding of an employer's IME report that already exists before the evidence deposition of the employee's doctor is taken should not be sanctioned, whereas if the employer waits until the deposition is taken, and then schedules its IME, the report (or transcript of the evidence deposition, if such deposition is requested by the employee's counsel) may be admitted if appropriately tendered. We anticipate that issue may eventually be litigated.

4. Changes to the Illinois Medical Fee Schedule

(A) Rate Increase: The Commission announced the rates for the 2009 schedule were increased by 5.37%, which is the increase in the Consumer Price Index-U between August, 2007 and August, 2008, for treatment on and after 1/1/09.

(B) New schedules: The Commission created new fee schedules for the following areas:

- 1) ambulatory surgical treatment centers;
- 2) hospital outpatient radiology, pathology and laboratory, physical medicine and rehabilitation services, and surgical services; and
- 3) rehabilitation hospitals.

In a 2/23/09 memorandum the Commission also announced there is now one set of rules for treatment before 2/1/09 and another set of rules for treatment on and after 2/1/09. Similarly, there are instructions and guidelines for treatment before 2/1/09 and instructions and Guidelines for treatment on or after 2/1/09. Links to the instructions, guidelines and rules may be accessed at <http://iwcc.ingenixonline.com/IWCC.asp>.