EVANS & DIXON LLC
ATTORNEYS AT LAW

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Occasional Wages V. Regular Income and When TTD Can Be Cut Off *–Chris Tomczyk*

Once TTD has been paid on a file the next question is when can it be stopped? Typically if Petitioner obtains new employment ongoing TTD can be suspended. But, a recent case has indicated that TTD may not be terminated if a Petitioner only earns occasional wages, which are not regular and continuous income.

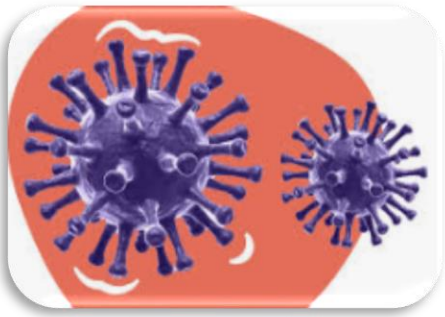
The recent case of Stachowicz v. Wilson Hill LLC, 29 ILWCLB 169 (Ill. W.C. Comm. 2021) had a Petitioner who was a painter and construction worker for the Respondent. He did general construction work, painting, and tasks involving home renovations. He injured his low back on October 18, 2016. He then suffered an additional injury in May 31, 2017 to his lower back and was recommended to have a lumbar fusion surgery. After the second injury he was unable to continue his regular work for Respondent and sought TTD. After some initial payment of benefits, Respondent learned that Petitioner was performing small side jobs, of painting, power washing exteriors, and hanging pictures. In total Petitioner made $5,000.00 in performing these various activities. Due to the same Respondent refused to pay TTD citing Petitioner's ability to secure income.

At the hearing the Arbitrator, and Commission, found that while Petitioner was able to secure some income after his injury, it was not a source of regular and continuous income for Petitioner. The Commission found that the wages earned were occasional wages, and thus did not preclude a finding that Petitioner was temporarily and totally disabled. The Commission awarded TTD benefits from June 2, 2017 through July 10, 2019. The Commission did allow a credit to Respondent for the $5,000.00 that Petitioner earned when performing the occasional work. The moral of the story is that while we want to limit the liability of TTD on a file, we must determine if the wages are continuous and regular enough to stop benefits. While penalties were not awarded by the Commission in this instance, this case may present a basis for Petitioner's counsel to seek penalties should benefits be terminated for similar occasional work in the future.

What's New In 2022 *–Paul Krauter*

As COVID numbers continue to decline we all hope for some type of return to normalcy. However, the effects of COVID will continue to linger at the Illinois Workers' Compensation Commission from some time.

In late 2021 the first two decisions addressing causation and COVID were issued by the Commission. Arbitrator Amarilio found that the Respondent successfully rebutted the presumption of compensability but that the Petitioner's diagnosis of COVID was still causally related to his employment. *Lucero v. Focal Point, 20 WC 018985*. In Southern Illinois, Arbitrator Cantrell issued a decision finding that the Respondent did not rebut the presumption of compensability. *Dalton v. Saline Care Nursing & Rehabilitation Center 21 WC 008010*. Both



decisions provide a glimpse as to how the Commission will handle COVID exposure claims. One key take-a-way is that both decisions contained a similar initial analysis finding that although the petitioner filed an Application under the Illinois Workers' Compensation Act, that the Commission had the right to amend the Application on their own for benefits under the Occupational Disease Act. By doing so, the Petitioner received the rebuttable presumption of comp ensability. Our office presented a

webinar regarding these decisions on January 20, 2022. We have a recording of the webinar available as well as handouts.

There have not yet been any decisions issued regarding the value of COVID claims. We expect that at some point in 2022 that we will begin to see decisions addressing that issue. Thus far, pre-trial recommendations for minor COVID claims have been all over the board and highly dependent upon the Arbitrator. We have seen some Arbitrators treat minor cases similar to nuisance value while others have treated it similar to a back strain.

The Commission continues to operate the same in terms of hearings and pre-trials. We do not expect that to change even as COVID restrictions are removed. Pre-trials and motions will be conducted via WebEx video. Personal appearances at the Commission will be limited to trials. In some instances pre-trials and motions will be held in person depending on the circumstances. The Arbitrators are working to try and remedy the lack of available pre-trial dates. It has often been difficult to get newer cases set for pre-trial as the available dates are gone by the time those cases are reached on the call. Some of the Arbitrators are setting more cases for pre-trial in time slots based on the thought that a large amount of cases will end up being continued. Hopefully this system will continue to be perfected and it will be easier for cases to receive a pre-trial date.

Make sure that claims from the second half of 2021 are properly reserved! In January of 2022 the Commission published the new maximum PPD rate for 7/1/17 – 6/30/22. The new rate is $973.11 which is up $65.38 from the prior rate of $871.73. Remember that the rate change applies retroactively to all claims that occurred on or after 7/1/21. Also, make sure to keep an eye on the minimum rates as they continue to increase as well. On January 15, 2022 the minimum rates for PPD and TTD increased to $320.00 per week. That amount increases 10% for each spouse or child not to exceed $480.00. If you need more information, we have a rate chart available on our website. We also have laminated desk top copies. Remember that the minimum rate cannot exceed the average weekly average! (Subject to exceptions for amputations, death, and PTD)

Keep your eye on November 8, 2022! It's an election year for the Governor of Illinois. The Chairperson of the Commission, the Arbitrators and the Commissioners are all appointed by the Governor subject to confirmation by the Illinois Senate. Several years ago, the Illinois Legislature amended the Workers' Compensation Act to make Arbitrator appointments come up every three years. While the intention of the amendment was to hold Arbitrator's more accountable rather than have a virtual lifetime appointment, it has created a more politically charged environment at the Commission. The Governor's office holds more power and influence over the Commission than ever before. The outcome of the election will largely dictate the direction of the Commission over the next four years.

If you need a copy of the Illinois laminated rate sheet (or a rate sheet for Missouri, Kansas, Iowa or Nebraska) please let us know. We will be happy to mail a copy to your office or home. We also have handouts available from the COVID webinar. Reach out to Amy Haller ahaller@evans-dixon.com for any of these materials.

We would love to see you again! If your group is interested in a seminar or lunch n' learn please let us know. We can do this via Zoom or WebEx. If your office is open we would really like to do the presentation in person! Video conferences are great but there is no substitute for getting together in person.

If you have any questions, ideas for seminars, etc., please reach out to any member of our team. I can be reached at pkrauter@evans-dixon.com.

WATCH WHERE YOU ARE GOING!!!

–Robert Pawlowski

Jimenez v. Chicago Marriott Oak Brook, 29 ILWCLB 90 (Ill. W.C. Comm 2021)

Fact Pattern: Petitioner was employed by Respondent as a hotel banquet server. On April 12, 2018, Petitioner was instructed by her supervisor to obtain coffee lids from the Starbucks inside the hotel, as the storage unit and VIP area were empty. Petitioner went to Starbucks

and retrieved coffee lids, but after returning to the VIP area, realized that she grabbed the incorrect



size. After her realization, Petitioner went back to Starbucks to get the correct sized lids. While Petitioner was returning with the proper lids, she tripped on the transition from hardwood to carpeting. Petitioner testified that her foot got stuck, and her leg went to the side. While doing so, Petitioner heard a "pop." Petitioner did not fall. Petitioner testified that there were no actual defects with the floor. Petitioner testified that she was walking fast, though not running or jogging, as guests were complaining about the lack of coffee lids. After the incident, Petitioner obtained medical treatment. Petitioner was initially diagnosed with a knee strain, but upon completion of an MRI, her diagnosis was upgraded to a torn meniscus. Petitioner subsequently underwent arthroscopic surgery to her left knee. The Arbitrator awarded benefits, and the Commission affirmed.

Applicable Case Law: In affirming the Arbitrator's Decision, the Commission relied on *McAllister v. IWCC*. *McAllister* which holds an injury arises out of and in the course of claimant's employment if, at the time of injury, the claimant was performing an act that he/she might reasonably be expected to perform incident to his/her employment, or casually connected to what the claimant must do to full his/her job assigned job duties, **even if the act involves an everyday activity, such as walking or bending over**.

Application: In the present matter, Petitioner not only was instructed by her supervisor to obtain the coffee lids, but also the task of retrieving said coffee lids is an act her employer might reasonably expect her to perform, incident to her job duties as a banquet server.

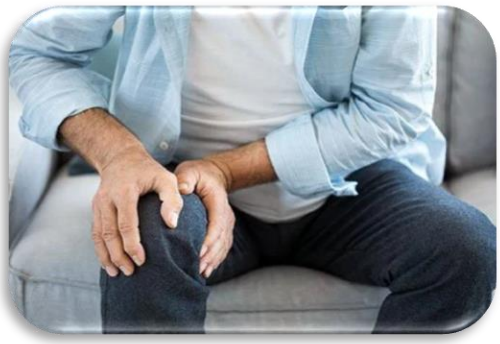
Penalties: When Imposed and How to Avoid Them – Ken Capps

The imposition of penalties is not common, and fortunately, it is avoidable. No employer wants to be hit with penalties, especially when the employer is also faced with supplying sometimes substantial compensation benefits. It is, therefore, important to understand when and how penalties are imposed, so that they can be avoided altogether.

Markiewicz v. McHugh Construction, 29 ILWCLB 164 (Ill. W.C. Comm. 2021), is instructive. In that case, the Petitioner claimed injury to his knee on 12/16/11. The Respondent disputed medical causation. The case went up to the Appellate Court, which remanded to the Commission for a determination on the issue of penalties.

On remand the Commission awarded penalties. In doing so, it took a close look at the facts of the case. Respondent initially sent Petitioner to Dr. Levin for a Section 12 examination who found Petitioner sustained a work-related injury. Petitioner underwent an FCE, as recommended by Dr. Levin, which was valid and indicated Petitioner could work at the medium demand level. Respondent obtained another Section 12 examination from Dr. Aribindi. He opined Petitioner's work injury was a causative factor in the knee pain. Dr. Aribindi felt Petitioner could not return to his job as an ironworker, which was in the very heavy demand level.

The Commission found both experts, as well as the treating physician, were not conflicting as to medical causation and did not provide a reasonable basis for Respondent to dispute the issue.



The Commission cited Sections 19(k), 19(l), and 16 of the Act. These provide for penalties for unreasonable or vexatious delay of payment, or frivolous litigation without any real controversy. These sections allow for penalties up to 50% of the amount payable at the time of the Award, plus $30 per day for each day benefits are withheld (not to exceed $10,000), and assessment of attorney's fees.

The Commission also cited Rule 9110.70(b), to the effect that when an employer begins payment of temporary total compensation and later terminates payment before an employee has returned to work, the employer shall provide the employee with a written explanation of the basis for the termination no later than the date of the last payment of temporary total compensation.

In guiding employers on how to avoid penalty situations, the Commission pointed to the Supreme Court, which has explained: when an employer acts in reliance upon a reasonable medical opinion, or when there are conflicting medical opinions, penalties are not ordinarily imposed. Further, the Commission pointed to the Appellate Court explanation that the test for penalties is whether the employer's conduct and reliance on medical opinion to contest liability is reasonable under the circumstances.

Additionally, the Commission cited examples of when delay in payment may be excused, including: reasonable grounds for challenging liability, discussions between counsel on the issue of credit for a prior award, and negotiations between counsel in an effort to achieve settlement.

Ultimately, Respondents must have a reasonable basis to dispute liability for benefits. This does not mean they must win all such disputes, it simply means they must provide evidence, typically in the form of conflicting medical opinions, upon which they can legitimately rely. Respondents would also do well to follow Commission rules, including providing explanations for termination of benefits.

Does AWW stand for Another Wacky Windfall?

– Jesse Lanshe

In a recent IWCC Decision (Antonio Robeledo v. Four Seasons HVAC, 21 IWCC0406), the answer, for now, appears to be yes.

Petitioner, an HVAC installer, sustained a work related lumbar injury resulting in permanent restrictions. In the year preceding his accident, Petitioner earned approximately $35.00 per hour with frequent mandatory overtime. The nature of Petitioner's position was seasonal. As such, winter and summer were extremely busy (sometimes working 30 hours straight), while Petitioner only worked around once or twice a week during the "off season."



The arbitrator calculated Petitioner's AWW ($854.61) by taking Petitioner's gross wages and dividing them by 52. The arbitrator believed that "this best comport[ed] with the requirements of Section 10" of the Act. The arbitrator further found that "[d]ue to the nature of Petitioner's earnings as a lead installer (piecework, hourly pay, overtime pay) the testimony and wage and earnings records adduced d[id] not persuade the [a]rbitrator that a calculation pursuant to Sylvester v. Industrial Comm….could be made." (citations omitted).

A unanimous Commission disagreed with the arbitrator's analysis of Sylvester and upwardly modified the arbitrator's AWW calculation. In so doing, the Commission noted that the pay exhibits "indicate[d] there were periods of time during that 52-week[ ] period in which Petitioner was not working [i.e. most of fall and spring]. The Act specifies that if a claimant loses more than five calendar days of work during the 52 weeks prior to the accident, [AWW] shall be calculated by dividing the number of weeks and parts thereof remaining after that time so lost has been deducted." (citing Sylvester approvingly).

As Petitioner had lost more than 5 calendar days, the Commission took his gross wages ($42,070.88) and divided it by the "actual" number of weeks worked during that period (36.8, not 52) to arrive at an AWW of $1,143.23.

This upward modification resulted in an award of TPD, which the arbitrator had declined to award due to the (then) similarity between Petitioner's pre- and post-accident wages. It also resulted in Petitioner's 8(d)(2) award ("typical" PPD, in this instance 20% BAW) being changed to an 8(d)(1) award (wage differential). The wage differential award was based in part on the AWW analysis above, but also on the Commission's interpretation of Petitioner's post-accident light duty permanent position.

Post-accident, Petitioner returned to light duty work as a parts department supervisor. In this position, he was working full-time earning $20.86, plus overtime, and set to receive a raise "soon." In this position, Petitioner was earning approximately $5.00 more per hour than 3 other employees similarly situated, but who did not have Petitioner's "field experience." Due to Covid-19, Petitioner was ultimately laid off after trial, despite his light duty position having been "permanent." Due to this, Petitioner filed a Motion to Re-Open proofs, alleging that the permanent position had been a "sham" job.

This motion was denied by the arbitrator due to lack of jurisdiction. However, the Commission, while agreeing that the arbitrator did not have jurisdiction to re-open proofs, nevertheless considered the post-trial arguments anyway, per below.

The Commission averaged the hourly rates of the other 3 similarly situated employees ($653.20 per week), completely discounting Petitioner's "field experience," and "deemed" that average to be the "actual value" of Petitioner's post-accident work.

This author strenuously disagrees with the application of Sylvester and the Act's mandate of using the "weeks and parts thereof" analysis in situations like this. For workers like Petitioner, and similar "seasonal" based jobs (i.e. teachers, life guards, camp counselors), this author believes the gross wages should be divided by 52, full stop. The reason is that jobs like this factor in these non-working periods as part of the bargained for exchange of the job itself. For example, teachers get paid $X per year to only work Y weeks per year (including 10+ weeks of vacation). That is the job. If workers such as this desire to continue to work during the off periods, they certainly may do so, but in that instance, any additional wages can be considered under a concurrent employment analysis. Similarly, here Petitioner could have worked another job during his "off" periods, but elected not to, preferring instead a less intense fall/spring schedule.

As it stands, this author believes, under the current state of the law, such workers receive an unearned windfall in circumstances such as this. With the rise of non-traditional work arrangements resulting from the Covid-19 pandemic, more of these "weeks and parts thereof" cases may proliferate. Perhaps it is time for a sensible Respondent to take up the mantle and push back against such fanciful windfalls via the appellate courts. Otherwise, the Commission may continue to generate unfavorable opinions such as this one.

EVANS & DIXON, LLC RECENT WINS

Jesse Lanshe recently secured a win in a trial for disputed 8a benefits. Petitioner alleged left shoulder pathology and CRPS (chronic regional pain syndrome), both disputed, as a result of an accepted injury to his left hand/wrist. The arbitrator found Respondent's IME doctors more credible than the treating doctors and found that the left shoulder and CRPS were not related. As a result, Petitioner's requested left shoulder surgery was denied.

Paul Krauter secured a win in Rockford involving a 19(b) petition requesting authorization of a knee replacement and TTD. The petitioner alleged a specific injury to his knee in 2017 when he fell off a ladder at work. He did not seek treatment and continued to work through 2019 when he alleged a second accident for repetitive trauma with the same employer. There were two different carriers for each date of accident, with Paul representing the second carrier. During cross-examination the petitioner admitted to having knee pain for years and discussing the need for a knee replacement with his employer prior to both alleged dates of accident.

Depositions of IME physicians were taken that supported denial on the basis of accident and causation. Based on the testimony of the petitioner and IME physicians, the Arbitrator denied the case for both dates of accident.



NOTES, EVENTS & VOLUNTEERS

Jim Gallen will be moderating a panel at the ABA WC and Employers' Liability mid-winter conference in March titled "50TH ANNIVERSARY OF THE NATIONAL COMMISSION ON STATE WORKERS' COMPENSATION LAWS". The panel will assess the influence of the National Commission and its relevance today.

On November 6, 2021 Terry Mort of our St. Louis office completed the Bell's Iceman Cometh Challenge. It is a rugged 30 mile mountain bike trail race held in Michigan. The course consists of dirt roads, two tracks, abandoned railed beds and the Vasa Nordic ski trail. The race attracts competitive cyclists from all over the world.



Paul Krauter of our Chicago office completed the Des Plaines River Trail Race 50 mile ultramarathon on October 17, 2021. The course consists of trails from Lake County, Illinois up to the Wisconsin border and back. This was Paul's 11th ultramarathon finish.

GETTING TO KNOW: Jesse Lanshe

HOW LONG HAVE YOU BEEN WITH E&D?

Since 2019

WHAT'S THE TOP DESTINATION ON YOUR MUST-VISIT LIST?

Hawaii

IF YOU HAD TO TEACH A CLASS ON ONE THING WHAT WOULD IT BE?

How To Play The Guitar

WHAT ARE SOME OF YOUR HOBBIES & INTERESTS OUTSIDE OF THE OFFICE?

Seeing Live Music, Reading, Going To The Movies, Karaoke

WHAT'S YOUR FAVORITE TEAM TO ROOT FOR?

Chicago Cubs

WHAT IS SOMETHING ABOUT YOU THAT PEOPLE WOULD NEVER GUESS?

I Once Touched A Bear!

