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Recovering Treatment Charges in Workers Compensation Cases

There is law which is favorable to chiropractors from both a significant court case and the workers compensation statutes which doctors should be aware of in seeking reimbursement for treatment charges. The case which generated the favorable law is Honthaners Restaurants, Inc. v. Labor & Industrial Review Commission, 240 Wis. 2d 234, 621 NW 2d. 660 (2000). This case was decided in late 2000, but remains as case precedent to the present date.

Chiropractors should insure that this case is given prominent attention in their legal arsenal. This case involved an employee who injured her arm while working at a restaurant. The worker's compensation insurance carrier had no objection to the employee's initial application for worker's compensation benefits and began paying temporary total disability (TTD) benefits while that employee was unable to return to work. The employee received TTD benefits for approximately 6 months from the worker's compensation insurer without any dispute. The employee also received medical treatment during that period of time, which was also paid by the insurance carrier. The injured employee later sought additional TTD benefits, compensation for permanent partial disability (PPD), and payment for additional medical expenses.

As is commonly found in these cases, the worker's compensation carrier **eventually hired a physician** to do an evaluation (in this case, Dr. McCabe) who concluded that the injury was only temporary in nature and that her recovery period would have happened approximately one (1) month after the injury. This report was in sharp contrast to the patient's treating doctors who provided care over a period of time extending over one (1) year from the date of the original injury.

At the worker's compensation hearing, the employer contested the **reasonableness and necessity of medical treatment** after the initial six (6) month period of treatment. The employer argued that the patient had been "over-diagnosed" and "over-treated." This argument is frequently made in worker's compensation cases involving treatment by chiropractors.

The statutory basis for this legal theory is found in Wis. Stats. Sec. 102.42(1) dealing with the costs of treatment for an injured employee. Under the statutory language, an employer must provide all treatment that may be "reasonably required" to cure and relieve the employee from the effects of the injury. The employer must also pay all of the "reasonable expenses" incurred by or on behalf of the employee in providing such treatment.

In addressing this statutory requirement, the Court of Appeals noted that the statute "ordinarily permits compensation only when medical treatment and expenses are reasonably required and necessary." However, the Appellate Court noted **an exception to this general**

rule. The exception permitted by the Wisconsin Supreme Court allows **recovery for medical treatment and expenses that were incurred when the injured employee followed what, in hindsight, appeared to be erroneous medical advice**. This exception provides that the employee is responsible for payment of any unnecessary or unreasonable treatment expenses as long as the employee is **engaged in such treatment in "good faith**." Consequently, the Appellate Court upheld an award for medical expenses incurred after the time found to be reasonable by the insurance company doctor since the patient/employee continued to receive medical treatment from her physician in good faith.

It is interesting to note from this case that the Administrative Law Judge originally hearing the case concluded that the employee had been over-diagnosed and over-treated for her injury. However, the Judge also found that her extensive treatment was undertaken since she subjectively believed herself to have permanent disability and **continued her treatment in good faith reliance upon her treating doctor's recommendations**. The court followed the principle from an earlier case that an employee should not be "faulted" due to the fact that the employee chose to follow erroneous medical advice.

This "**good faith reliance exception**" applies to only certain types of worker's compensation cases. It is generally recognized that this exception applies only to those cases where there is a dispute as to the extent of treatment and not to where there may be a dispute as to the causal relationship of the injury to the work exposure. As such, this exception would not apply to those cases where the employer or its insurance company is initially arguing that the underlying injury bears no relationship at all to the work injury or accident.

Although this case involved treatment by a medical doctor, the principles underlying this case should be applicable to chiropractic treatment of worker's compensation patients. This case law should be applicable in those situations where the worker's compensation carrier paid a portion of the patient's initial treatment, but eventually denied payment of a remaining balance after disputing the issue of when the "**healing plateau**" occurred. The charges for treatment after the initial period through the date of the healing plateau should be recovered by a chiropractor's patient if that patient acted in "good faith" reliance on the treatment recommendations of the chiropractor. Once a "healing plateau" is diagnosed, the patient's ability to acquire additional compensation for treatment is usually extinguished. The healing plateau is defined as that point in time when the patient's condition is getting no better or no worse.

In addition to this case law, a statute in Chapter 102 of the Wisconsin statutes relates to workers compensation law may also be supportive in obtaining prompt payment for treatment

charges. Specifically, Wis. Stat. §102.22 entitles an injured employee to obtain an additional form of compensation reflecting a penalty against an insured for the delayed payment of workers compensation benefits. Wis. Stat. §102.22 provides as follows:

102.22 Penalty for delayed payments; interest.

(1) If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 30 days after the date on which the employee leaves work as a result of an injury and if the amount due is $500 or more, the payments as to which the delay is found shall be increased by 10 percent. If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 14 days after the date on which the employee leaves work as a result of an injury, the payments as to which the delay is found may be increased by 10 percent. If the employer or his or her insurer inexcusably delays for any length of time in making any other payment that is due an injured employee, the payments as to which the delay is found may be increased by 10 percent. If the delay is chargeable to the employer and not to the insurer, s. 102.62 applies and the relative liability of the parties shall be fixed and discharged as provided in that section. The department or the division may also order the employer or insurance carrier to reimburse the employee for any finance charges, collection charges, or interest that the employee paid as a result of the inexcusable delay by the employer or insurance carrier.

NOTE: Sub. (1) is shown as amended eff. 1-1-16 by 2015 Wis. Act 55. Prior to 1-1-16 it reads:

(1) If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 30 days after the day on which the employee leaves work as a result of an injury and if the amount due is $500 or more, the payments as to which the delay is found shall be increased by 10%. If the employer or his or her insurer inexcusably delays in making the first payment that is due an injured employee for more than 14 days after the day on which the employee leaves work as a result of an injury, the payments as to which the delay is found may be increased by 10%. If the employer or his or her insurer inexcusably delays for any length of time in making any other payment that is due an injured employee, the payments as to which the delay is found may be increased by 10%. Where the delay is chargeable to the employer and not to the insurer s. 102.62 shall apply and the relative liability of the parties shall be fixed and discharged as therein provided. The department may also order the employer or insurance carrier to reimburse the employee for any finance charges, collection charges or interest which the employee paid as a result of the inexcusable delay by the employer or insurance carrier.

(2) If any sum that the department or the division orders to be paid is not paid when due, that sum shall bear interest at the rate of 10 percent per year. The state is liable for interest on awards issued against it under this chapter. The department or the division has jurisdiction to issue an award for payment of interest under this subsection at any time within one year after the date of its order or, if the order is appealed, within one year after final court determination. Interest awarded under this subsection becomes due from the date the examiner's order becomes final or from the date of a decision by the commission, whichever is later.

NOTE: Sub. (2) is shown as amended eff. 1-1-16 by 2015 Wis. Act 55. Prior to 1-1-16 it reads:

(2) If the sum ordered by the department to be paid is not paid when due, that sum shall bear interest at the rate of 10% per year. The state is liable for such interest on awards issued against it under this chapter. The department has jurisdiction to issue

award for payment of such interest at any time within one year of the date of its order, or upon appeal after final court determination. Such interest becomes due from the date the examiner's order becomes final or from the date of a decision by the labor and industry review commission, whichever is later.

(3) If upon petition for review the commission affirms an examiner's order, interest at the rate of 7% per year on the amount ordered by the examiner shall be due for the period beginning on the 21st day after the date of the examiner's order and ending on the date paid under the commission's decision. If upon petition for judicial review under s. 102.23the court affirms the commission's decision, interest at the rate of 7% per year on the amount ordered by the examiner shall be due up to the date of the commission's decision, and thereafter interest shall be computed under sub. (2).

History: 1977 c. 195; 1979 c. 110 s. 60 (13); 1979 c. 278; 1981 c. 92; 1983 a. 98; 1985 a. 83; 1993 a. 81; 2015 a. 55.

The department can assess the penalty for inexcusable delay in making payments prior to the entry of an order. The question of inexcusable delay is one of law and the courts are not bound by the department's finding as to it. Milwaukee County v. DILHR, 48 Wis. 2d 392, 180 N.W.2d 513 (1970).

The penalty under sub. (1) does not bar an action for bad faith for failure to pay a claim. Coleman v. American Universal Insurance Co. 86 Wis. 2d 615, 273 N.W.2d 220 (1979).

LIRC's application of sub. (1) was entitled to great weight deference. Beverly Enterprises v. LIRC, 2002 WI App 23, 250 Wis. 2d 246, 640 N.W.2d 518, 01-0970.

Although the penalty is only payable to the employee, treating doctors may be able to persuade workers compensation insurers to promptly pay for treatment charges in order to avoid the consequences of these additional charges through the form of a penalty. If the workers compensation insurers ignore the chiropractor's reference to this statute, the doctor should insure that the patient or the patient's attorney is advised of the availability of this penalty award under Wisconsin workers compensation law.