BRYCE DOWNEY & LENKOV LLC

Workers' Compensation Newsletter
February 2014

The Top 5 List: Top 5 Ways to Close a Difficult Illinois Workers' Compensation Claim	1
Bryce Downey & Lenkov Case Results	2
Upcoming Seminars	2
Recent Seminars	3
FREE Webinars	3
Illinois Workers' Compensation Updates	4
Electronic Cigarettes and Your Workers' Compensation Exposure	4
Illinois Chamber of Commerce Ramping Up Efforts to Reform Workers' Compensation System	5
Effect of Illinois' Pot Law On Workers' Compensation Cases	6
Idiopathic Accident Compensable When Work Places Petitioner at Greater Risk	7
Are Injuries Resulting From Recreational Activity Compensable?	7
AMA Ratings	8
Supreme Court Held Petitioner Who Relocated for a Temporary Job was NOT a Traveling Employee	8
Bad Job Search Prevents Odd-Lot PTD Award	9
Poor Testimony Blocks PTD Award	10
Australian Sex Case	10
Texas Court Rules Medicare does not Trump State Law	11
Bryce Downey & Lenkov: Growing!	12
Recent Awards & Accolades	12
Giving Back	12

The Top 5 List: Top 5 Ways to Close a Difficult Illinois Workers' Compensation Claim

By: Rich Lenkov

In what will be a regular feature in our newsletters, here are the Top 5 ways to close that Illinois WC claim that is keeping you up at night.

5. Make a pro-active offer. Conventional wisdom is that you have to wait until your opponent makes a demand before you can settle a case. **That is simply not true.** The reason that many of these claims seemingly live forever is because you are waiting for a demand.

Make an offer, even without a demand. This allows you to be pro-active, and allows you to take control of the claim, rather than being controlled by your opponent. Remember, all attorneys are ethically bound to take all your settlement offers back to their clients, so it's a great way to move your case forward.

4. Use alternative dispute resolution. Pre-trials, settlement days and mediation are all examples of tools that we regularly use to close cases. While some of these techniques, like mediation, are not frequently used in our state, our firm uses it all the time to resolve difficult cases.

3. File a Motion to Dismiss. While some will tell you that there is no provision in the Illinois Workers' Compensation Act or case law that allows an arbitrator to dismiss a case for want of prosecution, we disagree. We have been very successful in dismissing cases where claimants are missing IME's, failing to adhere to vocational rehabilitation or simply failing to move their case forward.

2. Try the case. Don't be afraid to draw a line in the sand and proceed to trial. While most cases do settle, as the most cost effective means of resolving a case, there is also a lot of value to trial. If your opponent knows that you are going to settle every case, your leverage is reduced. Making a firm decision to try a case, especially a questionable one, pays other dividends in questionable claims that may come up down the road. Moreover, despite popular opinion, you can win a case at trial in Illinois.

1. Close that file! Another long held misconception is that you can't close a file without paying some permanency benefits. That's not true. Not every injury warrants permanent partial disability. If you have paid TTD and medical benefits that are due and there is no indication of permanent impairment, you can safely close your file. Of course, be mindful of the risk that doing so will drive the claimant to an attorney, so you should consider a nominal PPD offer to resolve the claim.

Bryce Downey & Lenkov Case Results

Storrs Downey won a good faith settlement motion on behalf of his client. The third party defendant employer was sued for contribution arising out of an accident involving a forklift truck that rolled off a loading dock, causing serious neck and back injuries to the Plaintiff-employee. In addition to getting the third party claim against his client dismissed, he achieved a $1 settlement for permanent disability involving a substantial workers' compensation exposure and recovered a significant amount of the client's workers' compensation lien.

Upcoming Seminars

CLM
CLAIMS & LITIGATION MANAGEMENT ALLIANCE
ADVANCING ETHICS, COOPERATION AND EDUCATION

- On **2/13/14,** Bryce Downey & Lenkov will host the CLM Greater Chicago Chapter's educational & networking event, **"Top 10 Things You Need To Know About CMS."** The event is followed by a whiskey & food pairing. Click Here for more info and to register. Speakers will include:
  - Rafael Gonzales, Director of Medicare Compliance, Gould & Lamb LLC
  - Travis W. Smith, Chair of Medicare Compliance, Burns White

- On **4/10/14**, Rich Lenkov will moderate the roundtable session entitled **"Restaurant Liability: from A-Z"** at the 2014 Claims & Litigation Management Annual Conference in Boca Raton. Speakers will include:
  - Rich Lenkov, Capital Member, Bryce Downey & Lenkov
  - Kurt Leisure, Vice President of Risk Services, The Cheesecake Factory

  - Stephanie Wood, Claims Manager, Wendy's Company
  - Brent Mortensen, Risk Manager, Buffets, Inc.

- On **4/10/14,** Storrs Downey will moderate the roundtable discussion, **"Non Workers' Compensation Issues That Every Workers' Compensation Practitioner Needs To Know."** Click Here for more info and to register
  - Storrs Downey, Capital Member, Bryce Downey & Lenkov
  - Ann Schnure, Vice President, Risk Management, Macy's
  - Bill McParland, Senior Director Risk Management, Kirkland's Home

- On **5/2/14**, Geoff Bryce will present **"Learn To Navigate Through Complex Change Order Procedures - And Prevent Costly Mistakes"** for Lorman Education Service in Chicago. For more information and to register, Click Here

- On **5/9/14,** Rich will present **"How to Avoid Letting Small Details Become Big Problems In Your Premises Liability Case"** at the Claims & Litigation Management 2014 Retail, Restaurant & Hospitality Committee Mini-Conference in Dallas. Stay tuned for more details. Speakers will include:
  - Rich Lenkov, Capital Member, Bryce Downey & Lenkov
  - Renee Ramirez, Senior Claims Specialist, J.C. Penney Company, Inc.
  - Jeffrey Strege, Sr. Director - Risk Management, CEC Entertainment, Inc.

Recent Seminars

- On **12/4/13** Rich Lenkov presented **"Workers' Compensation Update"** with Ed Hart at the Willis Insurance 2014 Forecast for the New Year

FREE Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics.

Upcoming

- **2/11/14** - **Jeff Kehl** will present **"NTSB Accident Investigations."** Click Here for more information and to register

- **2/25/14** - **Rich Lenkov** and **Eva Imrem** will present **"10 Illinois Workers' Compensation Cases You Need To Know."** Click Here for more information and to register

- **3/25/14** - **Rich Lenkov** and **Maital Savin** will present **"Employment Issues In Workers' Compensation."** Click Here for more information and to register

If you would like a copy of any of our prior webinars, please email Jason Klika at jklika@bdlfirm.com.

- **Preferred Provider Programs**
- **Illinois vs. Indiana: 5 Key Issues & How Each State Deals With Them**
- **AMA Guidelines: A Legal And Medical Perspective**
- **Traveling Employees In Illinois Workers' Compensation**
- **Defending Repetitive Trauma Claims In Illinois Workers' Compensation Claims**
- **Turning The Tables: Using An Employee's Own Actions As A Defense To Their Workers' Compensation Claim**

- **Defending Wage Differentials And Permanent Total Disability Awards**
- **Defending Workers' Compensation Psychiatric Claims**
- **Ask An Attorney Anything: Your Most Pressing Workers' Compensation Questions ANSWERED**

Illinois Workers' Compensation Updates

2014 Fee Schedule Posted

The 2014 medical fee schedule rates are now posted online at https://iwcc.ingenix.com/IWCC.asp.

The Workers' Compensation Act provides that, each year, fee schedule rates shall increase or decrease by the percentage change in the Consumer Price Index-U (CPI-U) in the previous year. This year, the rates increased 1.52%. If the fee schedule had tracked medical inflation, rates would be 30% higher than in 2006; instead, rates are 7% lower than 2006.

New Commissioner Panels

- Panel A: Thomas Tyrrell, Michael Brennan, Kevin Lamborn
- Panel B: Charles DeVriendt, Daniel Donohoo, Ruth White
- Panel C: David Gore, Stephen Mathis, Mario Basurto

New Arbitrator Assignments & Appointments

Governor Quinn appointed Arbitrator Stephen Mathis as a Commissioner representing the public. Commissioner Mathis has served as an Arbitrator since 1996.

Effective 2/1/14, Arbitrator Barbara Flores will take over the call in Zone 4 (Geneva, New Lenox, Ottawa), formerly assigned to now-Commissioner Stephen Mathis.

In February, the Chicago call previously handled by Arbitrator Flores will be conducted by several Chicago arbitrators in room 211.

Governor Quinn also appointed Jessica Hegarty as an Arbitrator. Arbitrator Hegarty holds degrees from Loyola University and Chicago-Kent College of Law. She is a partner in the firm, Hegarty and Hegarty. Arbitrator Hegarty will continue to proceed through the formal training program and will assume the call formerly handled by Arbitrator Flores when she completes her training.

Electronic Cigarettes and Your Workers' Compensation Exposure

By: Rich Lenkov

On 1/15/14, the Chicago City Council voted 45-4 to approve a plan backed by Mayor Rahm Emanuel to treat e-cigarettes like other tobacco products under the Smoke-Free Illinois Act. The ordinance limits how the devices can be sold and where they can be used, including banning them from being used indoors. This follows similar laws recently enacted in New York and Philadelphia.

According to recent data published by the Centers for Disease Control and Prevention, the percentage of U.S. middle and high school students who use e-cigarettes more than doubled from 2011 to 2012. The "vaping" industry also recently passed the one billion dollar mark, with many large tobacco manufacturers joining this fast-growing and lucrative market.

The pressing question for the workers' compensation community is **what is the exposure for allowing employees to "vape" indoors? The answer is that the exposure can be significant.** While electronic cigarettes are still relatively new (introduced to the U.S. market in 2007), and therefore their effects are still being researched, most studies show that vaping does carry significant risks both to the smoker and others. According to a Nicotine and Tobacco Research Journal study published in December 2013, e-cigarette vapor contains nicotine and other toxic products found in cigarette smoke.

It is inevitable that employers who allow vaping in the workplace will see second-hand smoke claims. These claims were common for regular smoking until this practice was widely banned inside almost every workplace over the last two decades.

Practice Tip:

Our advice for now to reduce your exposure for second-hand smoke claims is to follow the lead of what will be the trend for most employers and cities, which is to ban indoor e-smoking.

Illinois Chamber of Commerce Ramping Up Efforts to Reform Workers' Compensation System

By: Maital Savin

Currently, Illinois has the fourth-highest workers' compensation insurance premiums in the country. These costs cause many businesses to choose to operate out of state, significantly impacting Illinois' economy. The Illinois Chamber of Commerce has long recognized the need to reform the workers' compensation system and has continually advocated for reform necessary to reduce employers' workers' compensation costs.

The Chamber is ramping up its efforts to reform the state's worker's compensation system, recently issuing a 74-page report, entitled "The Impact of Judicial Activism in Illinois." The Chamber explains that the essence of Illinois' troubled workers' compensation system is due to "judicial activism" and the legislature's failure to pass legislation clearly expressing the legislative intent and parameters of the Act. The purpose of the report is to educate policy makers regarding the extent and effect of expansive and liberal interpretation of the Act by the judiciary, which goes unchecked by the legislature.

The report discusses 19 cases in which decisions limiting recovery by Petitioners were overturned or weakened by Appellate and Supreme Court decisions. In 11 of the 19 cases reviewed in the report, Commission rulings denying benefits were overruled; and in 7 of those 11 cases, the court "overturned or significantly departed from long standing precedent." The report contends that this judicial activism is inconsistent with policy objectives aimed at promoting job growth and has badly hurt Illinois' economy. Under the modern no-fault workers' compensation statutes, workers benefited by receiving payment of medical expenses and lost wages without having to engage in lengthy litigation. In exchange, employers eliminated common law claims for injury, which was supposed to allow employers to assess their exposure for work-related injury claims. However, the report contends that the 19 cases show that the "persistent judiciary expansion of coverage of the Act generally, and the outer limit of compensability, specifically, eliminates predictability of risk and actually incentivizes litigation."

The report calls on the legislature to take action to pass legislation that clarifies the legislative intent and limitations of the Act to ensure that the system is fair and predictable.

In fact, just recently, Senator McCarter introduced Senate Bill 2622, which exempts employers from paying for injuries sustained by workers who are not traveling specifically for work purposes. The proposed legislation provides that that an injured worker could receive compensation only "if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment." The initiative mirrors the recent Supreme Court decision in The *Venture-Newberg* case (see page 8). It has not been assigned to a Senate committee for action.

We will continue to keep you posted with any legislative reforms that may develop.

Effect of Illinois' Pot Law On Workers' Compensation Cases

By: Maital Savin

As of 1/1/14, The Compassionate Use of Medical Cannabis Pilot Program Act, P.A., 98-0122 allows "registered qualifying patients" in Illinois with specific debilitating conditions to legally obtain prescriptions for marijuana.

Despite this new legislation, an employee is barred from recovering compensation for work injuries caused by his or her intoxication, including impairment due to consumption of marijuana. For accidents on or after 9/1/11, recovery is barred if the employee's intoxication was the proximate cause of his injury, or if the employee's level of intoxication was sufficient to constitute a departure from employment. Intoxication is presumed if:

1. An employee's level of intoxication is at a BAC level of .08 or greater;
2. There is evidence of impairment due to ingestion of cannabis or controlled substances; or
3. An employee refuses to submit to a test.

Will workers' compensation carriers be required to pay for medical marijuana? The Commission has yet to address this issue, although it is possible for registered qualifying patients, if a doctor opines that medical marijuana is reasonably required to cure or relieve one the specific debilitating conditions provided for in the Act, which was caused by a work injury. Montana and Vermont have specifically banned the use of medical marijuana in worker's compensation treatment, but Illinois has not done so. We will have to wait and see how the courts rule on this new legislation.

Practice Tip:

Intoxication is still a strong defense against a workers' compensation claim. As such, we recommend that employers conduct drug tests following all injuries. We will continue to keep you updated as this new legislation takes effect.

Please contact us with any questions you may have regarding implementing this new legislation in your workplace.

Idiopathic Accident Compensable When Work Places Petitioner at Greater Risk

By: Maital Savin

In *Hansen v. Barrington Transportation Co.*, 21 ILWCLB 170 (Ill. W.C. Comm. 2013), Petitioner, a bus driver, suddenly lost consciousness while driving and went off the roadway, resulting in injury. The Commission found that although the incident was idiopathic in nature, it was compensable because Petitioner's employment as a bus driver placed her at a significantly greater risk of injury.

Practice Tip:

Generally, injuries that result from an employee's epileptic seizure, fainting or some other disease or injury that is the result of something internal or inherent to the employee, are considered "idiopathic" and are not compensable. However, as we saw in *Hansen*, idiopathic incidents are compensable if the employment significantly contributed to the injury by placing the employee in a position that increased the dangerous effects of the idiopathic incident.

Please contact us with any questions you may have regarding idiopathic injuries.

Are Injuries Resulting From Recreational Activity Compensable?

By: Maital Savin

What happens if an employee is injured while playing on a company-sponsored sports team? Generally, injuries resulting from recreational activity are not compensable under Section 11 of the Workers' Compensation Act. However, this exclusion does not apply when an employee is ordered or assigned by his or her employer to participate in a recreational activity.

In *Campbell v. Taylorville Fire Dept.*, 21 ILWCLB 178 (Ill. W.C. Comm. 2013), Petitioner injured himself while participating in a basketball game on the employer's premises during his 24-hour shift, after his daily activities were completed. Although Petitioner was not required to play basketball, or disciplined for not playing, his shift commander recommended that he play every day as a team building exercise.

The Commission found that because Petitioner was strongly encouraged to participate in playing basketball as a form of exercise, team building and recreation, Section 11 did not exclude the activity from coverage. Instead, the Commission held that the personal comfort doctrine applied and awarded benefits. (The personal comfort doctrine provides that injuries sustained while engaged in activity necessary to the employee's health and comfort, even though they are personal, are considered incidental to the employment and generally are compensable).

Commissioner Lamborn dissented, contending that as Petitioner was not ordered or assigned to play basketball, and there were not consequences for not playing, his participation was voluntary, and therefore, Section 11 excluded coverage under the Act.

Practice Tip:

Employers should exercise caution when encouraging employees to participate in company-sponsored sports teams as any form of encouragement may lead an arbitrator to find that an injury arising out of participation on such a team to be compensable.

Please contact us with any questions you may have regarding injuries resulting from recreational activity.

AMA Ratings

By: Michael C. Milstein

The Illinois Workers' Compensation Commission recently affirmed the Arbitrator's decision in 2 cases involving AMA impairment ratings.

In *Robert Riley v. ConWay Freight* (13 I.W.C.C. 0759), Petitioner, a 46 year-old sales representative, suffered a proximal fibular fracture and an ACL tear which required ACL reconstruction. After treatment, Petitioner returned to his normal job. However, he still needed a hinged knee brace while working but continued to improve. Dr. McIntosh examined Petitioner and provided a 7% impairment rating to the lower extremity (3% whole person impairment). Arbitrator Luskin awarded Petitioner 27.5% loss of use of a leg and the Commission affirmed the award.

In *Curtis Oltman v. Continental Tire* (13 I.W.C.C. 0744), Petitioner, a 49 year-old labor trainer, suffered a non-displaced fracture in his left hand. Less than a month later, he was released to full duty work. Petitioner complained of minor residual symptoms in his wrist. Dr. Brown provided a 0% impairment rating. Arbitrator Luskin awarded Petitioner 5% loss of use of a hand and the Commission affirmed the award.

Practice Tip:

While each case presents different facts and circumstances, we continue to believe that over time, AMA ratings will have a positive effect on PPD awards. As additional decisions are rendered, we will be sure to provide you with an update.

Please contact us with any questions you may have regarding AMA ratings.

Supreme Court Held Petitioner Who Relocated for a Temporary Job was NOT a Traveling Employee

By: Michael C. Milstein

The Illinois Supreme Court recently issued a major decision regarding traveling employees. In *The Venture-Newberg-Pirini, Stone & Webster v. Illinois Workers' Compensation Commission*, 2013 IL 115728, Petitioner took a temporary position with Respondent 200 miles from his home. Petitioner was expected to work 7 days a week, 12 hours a day. Petitioner and another union member decided to stay in a local motel. On their way to work, their vehicle skidded off the road and Petitioner suffered serious injuries.

The Arbitrator found that Petitioner failed to prove that his injuries arose out of and in the course of his employment and that he did not qualify as a traveling employee. In a divided decision, the Commission reversed, finding that although Petitioner was not required to stay in the local area, as a "practical matter," Petitioner needed to stay within a reasonable commuting distance. The Commission held that Petitioner was a traveling employee. The Circuit Court found that the Commission misapplied Illinois law and reversed the Commission's decision. On appeal, a majority of the Appellate Court found that Petitioner was a traveling employee and reinstated benefits.

The Illinois Supreme Court, in a 6-1 decision, overturned the Appellate Court and denied benefits. The Court held that Petitioner was not a traveling employee,

noting that Petitioner was not a permanent employee, was not required to travel out of his union territory to take the position, was not directed by the employer to travel away from the work site to another location and was not reimbursed for travel costs.

Petitioner also argued that his injury occurred in the course of his employment because the method of travel was determined by the demands and exigencies of the job, rather than personal preference. However, as Petitioner was free to choose his own route to work and was not reimbursed for travel costs, the Court found Petitioner was like any other employee who has to drive to work on a daily basis, and held that Petitioner's accident did not occur within the course of his employment.

This is an excellent decision for employers as it prevents employees who choose to relocate to a temporary job from receiving benefits if they are injured on their way to work.

Practice Tip:

Travelling employee cases can be difficult to analyze. Remember, being labeled a "travelling employee" will satisfy the "in the course of" requirement. However, to meet the "arising out of" requirement, the activity the employee was engaged in needs to be reasonably foreseeable to the employer.

Please contact us with any questions you may have regarding traveling employees.

Bad Job Search Prevents Odd-Lot PTD Award

By: Kunal M. Ganti

In *Chernis v. IWCC,* 2013 IL App (4th) 121057WC-U, the Illinois Appellate Court found that Petitioner failed to prove an odd-lot permanent total disability due to a weak job search.

Petitioner injured his neck and shoulder in a work-related accident. He was diagnosed with a C4-C6 disk protrusion and a C6-7 disk herniation. After treating conservatively, Petitioner's treating doctor gave him restrictions of no lifting above the shoulder, no stress to the neck and no looking down for long periods of time. An FCE showed that Petitioner could perform light-duty work. Respondent terminated Petitioner because he could no longer perform his job duties.

At arbitration, evidence showed that Petitioner started to look for a job 18 months after Respondent terminated him. Petitioner applied for 19 jobs over four months. Many of the jobs Petitioner applied for were not available or Petitioner was not qualified for. Petitioner did not produce a vocational opinion. The arbitrator awarded 50% MAW which was reduced on Commission review to 40% MAW. The Circuit Court confirmed the Commission's decision.

The Appellate Court found that no medical evidence was produced to show that Petitioner was permanently totally disabled. The medical evidence showed that Petitioner was able to perform sedentary work. He failed to conduct a meaningful job search and was unable to produce an opinion that there was no stable labor market for him. Petitioner failed to prove that he was only able to perform menial tasks due to his age, skills, experience, education and training.

Practice Tip:

When a permanent total disability award is possible, the best offense is a strong

defense. Employers should challenge the opinions of a treating physician with an independent medical examination, an objective FCE and through depositions. Further, employers should retain vocational rehabilitation experts that will be tough on vocational rehabilitation compliance and will get injured workers back in the job force. As shown in *Chernis,* if an injured worker cannot show a strong job search, then a PTD award could be off the table.

If you have any questions on how to defend your claims and the best course of action to mitigate your exposure, please call us.

Poor Testimony Blocks PTD Award

By: Kunal M. Ganti

In *Decatur Overhead Door v. IWCC*, 2013 IL App (4th) 120639WC-U, the Illinois Appellate Court found that Petitioner failed to prove a permanent total disability due to bad testimony from his treating physicians and credible opinions from Respondent's IME.

Petitioner injured his back in a work related accident. He underwent two surgeries and eventually was diagnosed with failed back syndrome.

At arbitration, the arbitrator found Respondent's IME credible and relied on his opinion that Petitioner could do sedentary-light activities, did not need assistive walking devices, was not bedridden and that the pain was well-managed. The arbitrator also relied on the fact that the vocational expert sent letters to Petitioner regarding open jobs, but Petitioner never responded. The arbitrator awarded 50% MAW. The Commission affirmed, but the Circuit Court reversed and remanded. On remand, the Commission awarded PTD benefits.

The Appellate Court found that the Circuit Court improperly reversed the original Commission decision. The Court explained that Petitioner's examining doctor was not credible because he did not review the medical records of any doctor before him. Further, Petitioner's family doctor was not credible because he had not examined Petitioner's back since 1999.

The Appellate Court reinstated the original Commission decision, relying on the IME'S opinion, the vocational expert's opinion that Petitioner could return to work and the fact that Petitioner did not attend any job interviews.

Practice Tip:

The credibility of experts is crucial. Employers should provide the most complete and up to date records to their experts. As the *Decatur* case demonstrates, a decision could hinge on whether an employer's expert can provide a more detailed opinion based on information or records that the Petitioner's expert does not have.

Please contact us with any questions you may have regarding how to best utilize experts to defend a case.

Australian Sex Case

By: Frank C. Rowland

Several issues ago in this newsletter, we advised of a very interesting case arising out of Australia. In that case, a government employee was on an authorized overnight business trip. While having sex in a hotel room, a light fixture fell from the ceiling and struck her in the face. She filed for workers' compensation benefits, which were granted at the administrative level.

Recently, Australia's highest court reversed and held that this injury was not compensable. The Supreme Court stated that the relevant inquiry was whether the employer induced or encouraged the employee to engage in such activity. In a four-two decision, the Court held that the answer was "No."

So, our newsletter closes the book on this most interesting case . . . and employees and ceiling fixture manufacturers all over the world are resting easier.

Texas Court Rules that Medicare Does Not Trump State Law

By: Eva Imrem

The Texas Workers' Compensation Act provides that a workers' compensation carrier is not liable for medical services requiring pre-authorization unless the authorization is received either from the carrier itself or the commissioner. In *Caldera v. The Insurance Company of the State of Pennsylvania,* 2013 U.S. App. LEXIS 9706, Petitioner injured his back in a work accident in 1995 and was a Medicare beneficiary in 1998. In 2002, the workers' compensation carrier denied Petitioner's claim for additional benefits on the basis that the work injury was resolved and his current condition was unrelated to the accident. Petitioner then underwent two back surgeries costing $66,000.00, which was covered by Medicare. Petitioner did not seek pre-authorization for those surgeries from the carrier.

In April 2011, Petitioner resolved his workers' compensation claim with the carrier. There was no language in the settlement which required the carrier to pay for Petitioner's two back surgeries. Petitioner then filed a claim in the U.S. District Court, seeking double compensation from the insurance company so that he could pay off Medicare and also provide a fee to his attorney.

The District Court and the Fifth Circuit Court of Appeals ruled that the carrier was not required to pay for the surgeries since Petitioner failed to obtain pre-authorization. The court wrote that the MSPA was not intended to "override a primary payer's ability to impose medical necessity requirements in accordance with state law." *Caldera*, 2013 U.S. App. LEXIS 9706, at 15. The court went on to say that a workers' compensation carrier is the primary payor **only** if payment could be expected to be made under the workers' compensation law. In other words, the MSPA would apply only if Petitioner had properly sought authorization from the carrier for his back surgeries.

There are not yet a lot of cases interpreting the MSPA, however this case will hopefully help set a trend that a claimant cannot use the Act to expand coverage.

Practice Tip:

Remember that Petitioners have requirements under the Act too. When they disregard their responsibilities in handling their claim, their future medical rights can be jeopardized.

Please contact us with any questions you may have regarding the MSPA.

Bryce Downey & Lenkov: Growing!

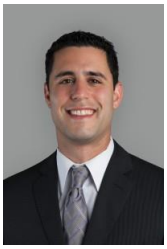
We are pleased to announce the addition of Mollie O'Brien and Suzanne Kleinedler. Mollie represents clients in all aspects of general liability, insurance coverage and business litigation. Suzanne concentrates in Indiana workers' compensation and is based out of our Crown Point office.

Recent Awards & Accolades

The following attorneys were named 2014 Leading Lawyers:

Geoff Bryce
Storrs Downey
Terrence Kiwala
Rich Lenkov
Terrence Madden

This distinction has been earned by **fewer than 5% of all lawyers** licensed to practice law in Illinois.



Michael Milstein has been selected to the 2014 Illinois Rising Stars list. This is an exclusive list, recognizing no more than 2.5 percent of the lawyers in the state.

Rich Lenkov was invited to join the Workers' Compensation Defense Institute advisory board (WCDI). The WCDI is a group of top law firms that commit themselves to representing employers and carriers in the workers' compensation field. Members concentrate on delivering timely and effective claim resolution to ensure great service.

WCDI Workers' Compensation Defense Institute

Giving Back

Rich Lenkov and Juan Anderson Help Legal Prep Academy Students at NIU College of Law

On 11/13/13 Rich Lenkov and Juan Anderson organized an event at Northern Illinois University College of Law. The law school hosted 35 Legal Prep Academy students and staff to a mock trial and seminar on how to prepare for law school. The event was followed by a visit to Huskies Stadium to witness NIU beat up on MAC rival Ball State en route to a 48-27 final.

This is the second event hosted by NIU College of Law for Legal Prep Academy, on whose advisory board Rich serves. Legal Prep Academy is Chicago's first and only legal-themed charter high school. Its student population is over 95% diverse and 90% low-income.

Bryce Downey & Lenkov Hits Sundance

Bryce Downey & Lenkov is a proud sponsor of "Monday on Main Street," the premier annual Sundance Film Festival industry reception. Our firm is active in the entertainment industry. Among our recent projects are "The Rascals: Once Upon a Dream" and "Rock of Ages." Click Here to view more photos of the event.

Team BDL - Ready to Hustle

On 4/13/14, Team BDL will climb 94 floors to help raise awareness and funds for lung disease research, education and advocacy. Last year 19 members of our team participated in the Respiratory Health Association's Hustle up the Hancock. This year Team BDL is 24 strong!

Team BDL Takes the Polar Plunge!

It's that time of the year again. Team BDL is gearing up for a day at the beach… only in March. Last year, we raised over $2,000 for the Special Olympics by jumping into frigid Lake Michigan. On 3/2/14, 10 brave souls will be taking the plunge. Stay tuned for more details.

Did you know? Bryce Downey & Lenkov regularly issues several practice area newsletters. If you would like a copy of any of the below articles from other BDL newsletters, please email our Marketing Coordinator, Jason, at jklika@bdlfirm.com.

General Liability
- Seventh Circuit Requires Indiana Insurer To Show Harm From Untimely Notice
- Illinois Appellate Court Confirms A Narrow Application To "Dual Capacity" Doctrine

Labor & Employment Law
- US Supreme Court Defines "Supervisor" For The Purposes Of Employment Discrimination And Harassment Litigation
- Timing Of Terminating Injured Worker Important In Retaliatory Discharge Cases

Corporate & Construction
- Trade Secrets: If It's Not A "Trade Secret," How Do I Protect It?
- Federal, State And Local Incentives Available For Businesses

ILLINOIS RATES AT A GLANCE

EFFECTIVE DATES	MAXIMUM TTD	MINIMUM PTD and DEATH	STATE AVERAGE WEEKLY WAGE
1/15/04 to 7/14/04	1019.73	382.40	764.80
7/15/04 to 1/14/05	1034.56	387.96	775.92
1/15/05 to 7/14/05	1051.99	394.50	788.99
7/15/05 to 1/14/06	1078.31	404.37	808.73
1/15/06 to 7/14/06	1096.27	411.10	822.20
7/15/06 to 1/14/07	1120.87	420.33	840.65
1/15/07 to 7/14/07	1148.51	430.69	861.38
7/15/07 to 1/14/08	1164.37	436.64	873.28
1/15/08 to 7/14/08	1178.48	441.93	883.86
7/15/08 to 1/14/09	1216.75	456.28	912.56
1/15/09 to 7/14/09	1231.41	461.78	923.56
7/15/09 to 7/14/10	1243.00	466.13	932.25
1/15/10 to 7/14/10	1243.00	466.13	922.45
7/15/10 to 1/14/11	1243.00	466.13	925.08
1/15/11 to 7/14/11	1243.00	466.13	930.39
7/15/11 to 1/14/12	1261.41	473.03	946.06
1/15/12 to 7/14/12	1288.96	483.36	966.72
7/15/12 to 1/14/13	1295.47	485.80	971.60
1/15/13 to 7/14/13	1320.03	495.01	990.02
7/15/13 to 1/14/14	1331.20	499.20	998.40
1/15/14 to 7/14/14	1336.91	501.34	1002.68

EFFECTIVE DATES	MAXIMUM PPD
7/1/03 to 6/30/04	550.47
7/1/04 to 6/30/05	567.87
7/1/05 to 6/30/06	591.77
7/1/06 to 6/30/07	619.97
7/1/07 to 6/30/08	636.15
7/1/09 to 6/30/10	664.72
7/1/10 to 6/30/11	669.64
7/1/11 to 6/30/12	695.78
7/1/12 to 6/30/13	712.55
7/1/13 to 6/30/14	721.66

Minimum Rate Death & Total Permanent Disability:
50% of the Statewide Average Weekly Wage

Maximum Rate Death Benefit:
The greater of $250,000 or 20 years
Effective 2/1/06 – the greater of $500,000 or 25 years

Temporary Total Disability (TTD) Rate:
66-2/3% (.667) x AWW

Permanent Partial Disability (PPD) Rate:
60% (.6) x AWW

MINIMUM	SINGLE	MARRIED	1 DEP.	2 DEP.	3 DEP.	4+ DEP.
PPD before 2/1/06	80.90	83.20	86.10	88.90	91.80	96.90
TTD & PPD 1/15/08-7/14/08	200.00	*	230.00	260.00	290.00	300.00
TTD & PPD 7/15/08-7/14/09	206.67	*	237.67	268.67	299.67	310.00
TTD & PPD 7/15/09-7/14/10	213.33	*	245.33	277.33	319.00	330.00
TTD & PPD 7/15/10-7/14/13	220.00	*	253.00	286.00	319.00	330.00
TTD & PPD 7/15/13-1/14/14	220.00	*	253.00	286.00	319.00	330.00
TTD & PPD 1/15/14-7/14/14	220.00	*	253.00	286.00	319.00	330.00

*number if children and/or spouse = number of dependents

The attorneys at Bryce Downey & Lenkov constantly strive to keep you updated regarding the latest developments in Illinois and Indiana workers' compensation law. If you would like more information on any of the topics discussed above, or have any questions regarding these issues or any aspect of Illinois and Indiana Workers' Compensation Law, please contact Richard Lenkov at 312-327-0032 or rlenkov@bdfirm.com

SCHEDULE OF INJURIES FOR DISABILITY IMPAIRMENT

NOTE: New 2005 rates:

⮜ column indicates the rates for incidents that occurred **before July 19, 2005, and for incidents that occurred from November 16, 2005, through January 31, 2006.**

➢ column indicates the new rates for incidents that occur **on or after February 1, 2006, and for incidents that occurred from July 20, 2005, through November 15, 2005.**

BODY PART	WEEKS		BODY PART	WEEKS	
	⮜	➢		⮜	➢
Man as a Whole*	500	500	8c Disfigurements – Max	150	162
Eye	150	162	Thumb	70	76
Leg	200	215	Index Finger	40	43
Foot	155	167	Middle Finger	35	38
Arm	235	253	Ring Finger	25	27
Hand	190	205	Little Finger	20	22
Great Toe	35	38	Other Toes	12	13
Loss One Testicle	50	54			
Loss Both Testicles	150	162			
Hearing Loss One Ear Accident	50	54	Hearing Loss One Ear Occupational Disease	100	100
Hearing Loss Two Ears Accident	200	215	Hearing Loss Two Ears Occupational Disease	200	200

BODY PART	ADD # WEEKS	
	⮜	➢
Leg Amputation – above the knee	25	27
Leg Amputation – at the hip	75	81
Arm Amputation – above the elbow	15	17
Arm Amputation – at the shoulder	65	70
Eye Enucleation	10	11

STATUTORY FRACTURES	MINIMUM AWARD
Vertebra	6
Facial Bone	2
Transverse Process	3
Skull	6
Nasal Bone	2

SETTLEMENT DAY

Close Dozens of Files NOW!

WHAT?
We invite opposing attorneys and their clients for claims that have languished to meet and discuss settlement

WHERE?
At the Illinois Workers' Compensation Commission in Chicago (*and by conference call if they are not local)*

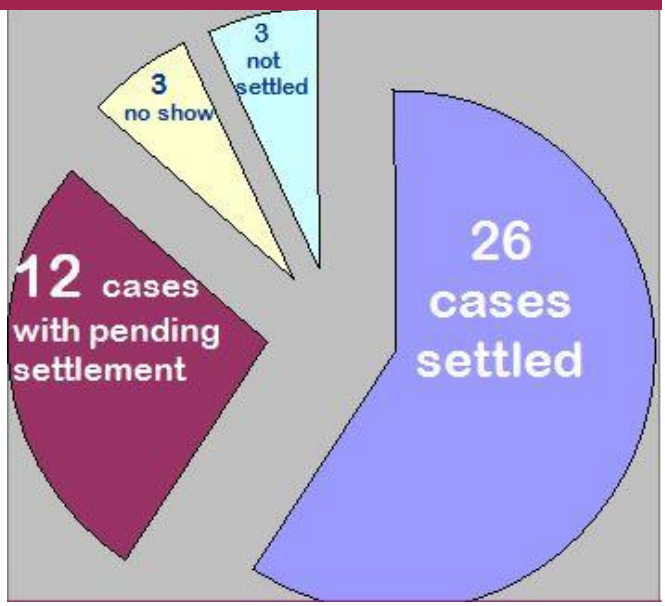
WHO?
Decision-makers from the insured and/or TPA arrive with settlement authority. Bryce Downey & Lenkov attorneys consult together with them to present our best offers

WHEN?
Two or three cases scheduled for each 30-minutes block between 9 am and 5 pm, over one or two days

WHY?
From 3/1/12 – 3/1/13, we closed **99** cases through settlement days.

RECENT SETTLEMENT DAY RESULTS

- We invited 90 attorneys to attend an insurance company's Settlement Day
- 44 cases were scheduled for discussion:
  - 26 settled within 30 days – 22 of those on that day
  - 12 pending settlement (some awaiting the end of treatment or MSA, etc.)
  - 3 did not settle
  - 3 did not show up



If you would like our assistance in closing your claims during settlement days

or through other innovative strategies, please contact

Rich Lenkov at **rlenkov@bdlfirm.com**

BRYCE DOWNEY & LENKOV LLC

Free Seminars!

Our attorneys regularly provide free seminars on a wide range of workers' compensation topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conferences at which we've presented:

- Claims and Litigation Management Alliance Annual Conference
- Illinois Work Comp Forum
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- REBEX
- RIMS Annual Conference

Some of the topics we presented are:

- *Turning The Tables: Using An Employee's Own Actions As A Defense To Their Workers' Compensation Clam*
- *Closing The Nightmare Case*
- *Workers' Compensation 101*
- *Mandatory CMS Reporting Requirements: What You Need To Know*
- *Managing & Closing WC Claims In A Cost-Effective Manner*
- *Obtaining A Winning Medical Opinion*
- *The Mediation Process*
- *Balancing Aggressive Pursuit Of Lien Recovery With Associated Litigation Expenses*
- *Dealing With Difficult Claimants*
- *Health-Related Leave: Workers' Compensation, ADA, and FMLA*

If you would like us to come in for a free seminar, please email Rich Lenkov at rlenkov@bdlfirm.com. We can teach you a lot in as little as 60 minutes.

Bryce Downey & Lenkov is a firm of experienced business counselors and accomplished trial lawyers who deliver service, success and satisfaction. We exceed clients' expectations while providing the highest caliber of service in a wide range of practice areas. With offices in Chicago, Crown Point, IN, Memphis and Atlanta and attorneys licensed in multiple states, Bryce Downey & Lenkov is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

Business Litigation
Business Transactions & Counseling
Corporate/LLC/Partnership
Organization and Governance
Construction
Employment and Labor Counseling & Litigation
Entertainment Law
Insurance Coverage
Insurance Litigation
Intellectual Property
Medical Malpractice
Professional Liability
Real Estate
Transportation
Workers' Compensation

The attorneys at Bryce Downey & Lenkov are committed to keeping you updated regarding the latest developments in workers' compensation law in Illinois and Indiana. If you would like more information on any of the topics discussed above, or have any questions regarding these issues, please contact Rich Lenkov at 312.327.0032, Storrs Downey at 312.327.0007, or any member of the Workers' Compensation team.

Chicago:	Indiana:	**BRYCE DOWNEY & LENKOV LLC**	Memphis:	Atlanta:
200 N. LaSalle Street Suite 2700 Chicago, IL 60601 Tel: 312.377.1501 Fax: 312.377.1502	11065 S. Broadway Suite B Crown Point, IN 46307 Tel: 219.488.2590 Fax: 219.213.2259		1661 International Place Drive, Suite 400 Memphis, TN 38120 Tel: 901.753.5537 Fax: 901.737.6555	P.O. Box 800022 Roswell, GA 30075-0001 Tel: 770.642.9359 Fax: 678.352.0489