



Workers' Compensation Newsletter March 2014

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The Top 5 List: Top 5 Things That Need To Change About Illinois Workers' Compensation

By: Rich Lenkov

**Chair, Bryce Downey & Lenkov Workers'
Compensation Department**



In June 2011, Illinois Governor Pat Quinn signed into law the most sweeping workers' compensation reform package in years. While there have been some positive results of this legislation, they are still not having enough of an effect on what is widely regarded as one of the most liberal

workers' compensation jurisdictions in the country.

With that in mind, here are 5 additional things that I think need to be changed:

1. Make it easier and quicker to get cases to trial

Currently, given the literally tens of thousands of cases in the system, it is very difficult to get to trial. This is true even though cases that are 3 years old (a.k.a. "above the line") technically have to be tried or dismissed. Parties that are ready for trial should actually be allowed to try the case, rather than dealing with an endless series of continuances.

2. Formalize alternative dispute resolution

Illinois is one of the few workers' compensation systems where alternative dispute resolution, such as mediation or arbitration, is not used. There is no logical reason for this, as ADR is a tried and true method of resolving cases without the need to go through an expensive and lengthy litigation process. Our firm has successfully been using mediation in workers' compensation for years, but we are the exception.

3. Allow Respondents to pursue penalties and attorney's fees

Currently only employers are at risk for penalties and attorney's fees for "vexatious" behavior, (i.e. denying benefits without good cause). However, why shouldn't employers also have the right to pursue penalties and attorney's fees against

Petitioners and their attorneys who fail to attend IME's, fail to comply with vocational rehabilitation and put other similar roadblocks in the way of moving a case to completion. Workers' compensation was not meant to be a years-long process, and there should be some penalty for employees who treat it as such.

4. Enforce AMA Ratings

One of the most important changes of the 2011 reform was to introduce AMA ratings in Illinois. However, a review of all litigated cases where AMA ratings were at issue reveals that in almost none of them did the rating even come close to what the actual award was. We understand that impairment and disability are different, and also that AMA ratings are only 1 of 5 factors that the IWCC is supposed to consider. That said, AMA ratings need to have a greater emphasis.

5. Enforce Motions to Dismiss for Want of Prosecution

While some arbitrators have granted employers' motions to dismiss a case when an employee is not pursuing his or her claim, the fact is that this kind of motion is the exception. As it exists in civil cases, either party should be allowed to have a case dismissed instead of it dragging on forever.

I am sure our readers have dozens of other things they would like to change about our state's workers' compensation system. **Please email me your suggestions and we will publish them in our May newsletter.**

Illinois Gubernatorial Candidates Talk Workers' Compensation Reform

By: Rich Lenkov

Illinois voters go to the polls today to elect a Republican candidate for governor for the November election. The 4 candidates are:

- Senator Bill Brady
- Businessman Bruce Rauner
- Senator Kirk Dillard
- State Treasurer Dan Rutherford

At the last debate before the election on 3/13/14, the candidates were asked their opinion about the biggest challenge facing Illinois businesses. Each one of them answered the same thing: **workers' compensation**. They all agreed that in order to be competitive against neighboring states like Indiana, Illinois has to reform its workers' compensation system. Specifically, they all agreed that Illinois' liberal causation standard had to be fixed.

It is likely that whoever gets the Republican nomination will continue to push workers' compensation reform in the general election. However, Democratic Governor Pat Quinn is unlikely to make this issue a priority, especially given how difficult it was to accomplish a 2011 reform package.

We agree that our state's system needs to be improved, and will continue to report on this issue as November approaches.

Upcoming Seminars

- On 4/10/14, Rich Lenkov will moderate **"Restaurant Liability: from A-Z"** at the 2014 Claims & Litigation Management Annual Conference in Boca Raton. [Click Here](#) for more information. Additional speakers:

- Kurt Leisure, Vice President of Risk Services, The Cheesecake Factory
- Stephanie Wood, Claims Manager, Wendy's
- Brent Mortensen, Risk Manager, Buffets, Inc.

- On 4/10/14, Storrs Downey will moderate **"Non Workers' Compensation Issues That Every Workers' Compensation Practitioner Needs To Know."** [Click Here](#) for more info and to register. Additional speakers:

- 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 Lenkov 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. [Click Here](#) for more details. Additional Speakers:

- Renee Ramirez, Senior Claims Specialist, J.C. Penney Company, Inc.
- Jeffrey Strege, Sr. Director - Risk Management, CEC Entertainment, Inc.
- David Vasterling, Claims Manager & Senior Claim Advisor, Marsh

- On 8/20/14, Rich Lenkov, Justin Nestor and Mital Savin will speak at the 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety & Health Conference in Orlando. For more information and to register, [Click Here](#)

Recent Seminars

- On 2/13/14, Bryce Downey & Lenkov hosted the CLM Greater Chicago Chapter's educational & networking event, **"Top 10 Things You Need To Know About CMS."** The event was followed by a whiskey & food pairing



FREE Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics. Here's what some of our attendees have to say about past webinars:

"Great webinar yesterday! Great case study examples and explanation of how they relate to our companies..."

"Thanks for making these so fun."

"...I actually just discussed your webinar in a meeting that our HR department had last week. We have several situations that your webinar really shined some light on so I wanted to also thank you for the opportunity to listen to the presentation. It was really helpful!"

Upcoming

- 3/25/14 - Rich Lenkov and Maital Savin will present "Employment Issues In Workers' Compensation." [Click Here](#) for more information and to register
- 4/24/14 - Rich Lenkov and Michael Milstein will present "Permanent Partial Disability." [Click Here](#) to register
- 5/7/14 - Storrs Downey and Maital Savin will present "Drugs, Sexual Preferences & Guns." [Click Here](#) for more information and to register
- 5/20/14 - Rich Lenkov and Jeanmarie Calcagno will present "Workers' Compensation Negotiation Strategies." [Click Here](#) to register

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

- 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

CMS To Apply New Life Tables To WC MSAs Beginning 3/31/14

By: Eva Imrem



On 1/29/14, the Centers for Medicare & Medicaid Services (CMS) announced that beginning 3/31/14, it will start referencing the Center for Disease Control (CDC) Life Table 1 (Life Table for the total population: United States, 2009) for workers' compensation MSA life expectancy calculations.

The link to new life table is: http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_07.pdf.

Idiopathic Falls

By: Eva Imrem

In *Bowers v. Belvidere YMCA*, the Commission denied benefits to a petitioner for a claimed trip and fall at work.

Petitioner, a cleaning woman, fell while walking down a hallway at work. Petitioner claimed the bottom of her shoe became caught on a piece of metal trim raised

above the floor tile, causing her to fall forward and sustain multiple fractures. Respondent produced witnesses to testify that Petitioner's shoe was not off at the scene of the incident (contrary to Petitioner's testimony) and a medical report indicating that Petitioner's condition of dehydration and anemia were the cause of her fall.

Practice Tip:

When disputing accident, it is important to fully investigate Petitioner's allegations as soon as possible after the incident. If Respondent had waited months, or even years, to talk to Petitioner's co-workers, they may not have recalled that her shoe was still on her foot after the fall – a key fact that the arbitrator relied on in assessing Petitioner's credibility.

Please contact us with any questions you may have regarding conducting post-accident investigations to dispute accident.

Caution: Penalties!

By: Michael Milstein



In *Haep v. City of Chicago*, the Appellate Court recently issued an opinion awarding penalties and attorney's fees to Petitioner due to Respondent's delay and underpayment of benefits. The case involved a carpenter who sustained an injury to his left knee when he fell while entering an elevator at work while carrying a heavy tool box. Petitioner continued to work his job until he underwent surgery. Petitioner was kept off work for approximately three months following surgery. Respondent did not issue any TTD benefits until after Petitioner returned to work. Furthermore, the benefits that were issued only constituted a

partial payment (1.71 weeks remained unpaid).

At the hearing, Respondent disputed causal connection, but did not present any evidence to rebut Petitioner's claims. The Commission found that Respondent's failure to pay Petitioner TTD for the period he was off work, coupled with the underpayment, warranted 19(k) & 19(l) penalties and Section 16 attorney's fees.

Practice Tip:

If you want to dispute causal connection, you need to present some evidence (generally an IME report) supporting your position. Withholding, delaying or underpaying TTD benefits without evidence to support that decision will likely lead to penalties and attorney's fees.

Please contact us should you have any questions regarding how to avoid penalties and attorney's fees when disputing causal connection.

Illinois Workers' Compensation Is Not Always A "No-Fault" System: Using Petitioner's Own Actions To Defeat Their Claim

By: Edward Jordan



Although Illinois Workers' Compensation is a no-fault system, there are various defenses that employers can use which involve the employee's own actions to defeat the claim. One such defense is when an employee engages in an intentional violation of a known safety rule.

In the recent case of *Reese v. Prairie Farms Dairy* (21 IL W.C. Comm. 2013), the Illinois Workers' Compensation Commission

denied benefits to Petitioner, who was injured after he violated a safety procedure by intentionally overriding a safety device. At trial, Petitioner admitted his intentional violation of the safety procedure, testifying that he did not wish to go through the trouble of following all safety procedures. The plant superintendent testified that Respondent didn't have any knowledge of Petitioner's violation of the safety procedure and that Petitioner's actions did not further Respondent's business.

The Arbitrator denied benefits, ruling that Petitioner's intentional violation of the safety procedure took him out of the course and scope of his employment and caused his injuries. The Arbitrator also noted that Petitioner's intentional violation of a safety rule was for his own convenience and provided no benefit to Respondent. The Commission affirmed the Arbitrator's decision.

Practice tip:

The employer was successful in this defense because of quick and thorough investigation of Petitioner's alleged accident. The keys to successfully defending this type of claim are investigating the accident and locating witnesses to testify regarding the intentional violation of a safety rule. Petitioner's actions were egregious and he admitted to intentionally manipulating a safety device for his own convenience in performing his job. Although this decision is favorable, not every violation of a safety rule is reason to deny benefits; only when the safety rule violation is intentional and provides no benefit for the employer, will this defense be successful.

Please contact us with any questions you may have regarding using a Petitioner's own actions to defeat their claim.

Don't Forget To Check Jurisdiction!

By: Maital Savin



In order for a petitioner to succeed on a Workers' Compensation claim in Illinois, the Commission must have proper jurisdiction. So what is required to assert proper jurisdiction in Illinois?

According to the Act, jurisdiction is only proper in Illinois where:

1. The injury occurred in Illinois;
2. Petitioner's employment was principally localized within Illinois; or
3. The "contract of hire" was made in Illinois. The location of a contract for hire depends on the "last act necessary to give finality to the contract for hire." Often, the last act necessary is a drug test.

Practice Tip:

Don't forget to check jurisdiction. If jurisdiction is improper, you can successfully motion to dismiss the case. Considering Illinois' Petitioner-friendly climate, motioning to dismiss a case, even if it is ultimately refiled in another state, can be an effective strategy for reducing your overall exposure. Additionally, even if the facts are unclear as to what state has proper jurisdiction, raising the issue with opposing counsel can help drive down the value of the case during settlement negotiations.

Please contact us with any questions you may have regarding proper jurisdiction.

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!

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:
 $66\frac{2}{3}\%$ (.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

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

Advertising Material

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 Claim*
- *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. © Copyright 2013 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

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