



Workers' Compensation Newsletter May 2014

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2. "This is my bottom line."

The truth is, there is no such thing as a real bottom line. If an attorney is motivated to settle a case, there is always room for negotiation. Remember: you have the ultimate leverage, which is money, which is the reason that people file claims and lawsuits.

3. "There is no subrogation potential."

Don't rely on opposing counsel to tell you whether there is any third-party liability for which you may recover. Petitioner's workers' compensation attorney may not know very much about personal injury law, or simply may not have the time to investigate it. It is important that you do your own independent investigation to determine whether there is any possibility of recovering your lien.

4. "This is a case that we have to try."

Nonsense. There is no such thing as a case that you have to try, only cases where the parties have not tried hard enough to settle. We settle all kinds of cases, big and small, even in the face of obstacles like the fact that the claimant is still treating. That said, it's true on our side that there are some cases that we simply have to take a hard line on and try.

5. "I'll call you back soon."

Self-explanatory.

In our March Newsletter, I gave you the top 5 things that I think should change about Illinois' workers' compensation system and asked for your thoughts. Many

The Top 5 List: TOP FIVE THINGS THAT PETITIONER'S ATTORNEYS TELL YOU THAT YOU SHOULD QUESTION

By: Rich Lenkov
Chair, Bryce Downey & Lenkov Workers' Compensation Department



Believe it or not, opposing counsel sometimes tells you things that aren't 100% accurate. Here's my top five:

1. "My client is still treating."

This is probably the most common response I hear from opposing counsel as to why they can't settle a case. Often, it's simply not true. Generally, people who treat actually see doctors. If you get this response from opposing counsel, ask them to prove it by producing recent medical records.

of you wrote in and had some great suggestions, including:

- Reducing the rates of the Illinois Medical Fee Schedule to be more in line with other states' fee schedules
- Providing for the offset of workers' compensation benefits with pensions or Social Security benefits
- Allowing employers to direct medical care

Thanks for joining in the conversation! Email me your "Top Five Things That Petitioner's Attorneys Tell You That You Should Question" at rlenkov@bdlfirm.com.

Upcoming Seminars

- 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 info and to register, [Click Here](#)
- On 6/3/14, Rich Lenkov will present **"Legislative and Law Update"** at the 1st Annual Workers' Compensation Law & Practice seminar in Naperville. For more info and to register, [Click Here](#)
- On 6/18/14, Rich Lenkov will present **"Navigating the Constant Changing Legal World: A Legal Update"** at the Foodservice Industry Risk Management Association's Chicago conference. For more info and to register, [Click Here](#)
- On 8/20/14, Rich Lenkov, Justin Nestor and Maital Savin will speak at the 69th Annual Workers' Compensation Educational Conference and 26th Annual Safety & Health Conference in Orlando. For more info and to register, [Click Here](#)
- On 11/19/14, Rich Lenkov & Jill Dulich, Senior Director of Marriott Claims Services, will present **"Top 10 Ways to Reduce Legal Expenses Now"** at the National Workers' Compensation & Disability Conference in Las Vegas. This seminar will give you real-world, practical takeaways to mitigate your litigation expenses. [Click Here](#) for more info on the conference



NOVEMBER 19 - 21, 2014
MANDALAY BAY | LAS VEGAS

Upcoming CLM Seminars

- 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 8/14/14, The CLM Greater Chicago Chapter will be holding a networking event. Stay tuned for more details

FREE Webinars

Bryce Downey & Lenkov hosts monthly webinars on pressing issues and hot topics. Here is what past attendees have had to say:

"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!"

- 5/7/14 – Storrs Downey and Maital Savin will present **"Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace."** [Click Here](#) for more info and to register
- 5/20/14 – Rich Lenkov and Jeanmarie Calcagno will present **"Workers' Compensation Negotiation Strategies."** [Click Here](#) for more info and 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
- Employment Law Issues Every Workers' Compensation Professional Needs To Know
- Permanent Partial Disability

Mental injury: When It Is Just Everyday Stress

By: Rick Warner



In the recent case of *Job v. Illinois, State of / Ann Kiley Center*, 22 ILWCB 15 (Ill. W.C. Comm. 2013), the Commission denied compensation to Petitioner, who alleged disabling depression and anxiety resulting from supervisory harassment and stress caused by an increased workload.

Petitioner, a residential services supervisor at two state-run homes for adults with developmental disabilities, testified that she complained to two supervisors and requested that her workload be reduced as her load was too stressful. Later, when she objected to additional work, she was told by her supervisors that she would "face the consequences" if her work was not completed. Petitioner filed an incident report with her company, alleging that the supervisors harassed her, yelled at her and threatened her job. She contended that over the following 10 days, she felt sick and anxious, sought mental health treatment and was ultimately diagnosed with major depression and anxiety.

The arbitrator noted that mental disability without physical injury may be compensable, but only if there is a sudden, severe, emotional shock, traceable to a definite time, place and cause. The arbitrator cited *City of Springfield v. Industrial Commission*, wherein the Illinois Appellate Court held that stress-related conditions resulting from a heavy workload, disputes between employees and supervisors of a personal nature, unsatisfied expectations or political activity are not compensable.

The arbitrator found that Petitioner failed to prove a sudden, severe, emotional shock traceable to a definite time, place and cause, and failed to prove that her stress was more than just everyday stress, emotion, and tension that all employees experience. Accordingly, the arbitrator held Petitioner did not sustain a compensable accident, which was affirmed by the Commission.

Practice Tip:

When evaluating a claim for mental disability arising without physical injury, consider whether there was a sudden, severe, emotional shock, traceable to a definite time, place and cause. If not, the claim will likely fall outside of the scope of employment and be chalked up to everyday stress.

Please contact us with any questions you may have regarding defending allegations of mental injury.

Causation Opinions: Are They Necessary?

By: Michael C. Milstein



The Commission recently clarified when a causation opinion is necessary in *Zeiger-Willis v. State of Illinois* (22 ILWCLB 5).

Petitioner spent 75% of her day using her keyboard and mouse and the other 25% grading applications, which required her to repetitively flip pages in grading books. In July 2007, she filed an Application, alleging repetitive trauma caused her carpal tunnel syndrome. In the initial arbitration decision from 2007, the arbitrator noted that the parties had waived findings of fact and they stipulated that Petitioner had sustained an accident that arose out of and in the course of employment with Respondent. The arbitrator awarded Petitioner 17.5% loss of use of the right hand and 7.5% loss of use of the left hand. The decision was not appealed and became final.

In March 2012, Petitioner filed an 8(a) Petition. At the hearing, Petitioner testified that after the 2007 Arbitration, she had a recurrence of carpal tunnel syndrome, which was supported by her physician. Petitioner sought treatment and eventually underwent another surgery for carpal tunnel syndrome. Petitioner also testified, and the records confirmed, that Petitioner had not worked for Respondent for six years prior to that surgery.

The Commission held that “although medical testimony as to causation is not necessarily required, where the question is one within the knowledge of experts only and not within the common knowledge of laypersons, expert testimony is necessary to show that claimant's work activities

caused the condition complained of.” The Commission found that Petitioner did not prove that her condition was causally related to her employment, noting that Petitioner did not offer any causation opinions.

Practice Tip:

Although causation reports are “not necessarily required,” if Petitioner fails to produce a causation report, you should argue that the issue requires expert knowledge and move that the case be dismissed. Furthermore, some caution is warranted with obtaining an IME when Petitioner has not produced a causation opinion as it may result in a causal connection opinion.

Please contact us with any questions you may have regarding causal connection.

What Happens When an Unpaid Intern Gets Injured?

By: Maital Savin



With summer around the corner, you may be wondering whether an injury sustained by an unpaid intern is compensable under the Act. Courts have consistently held that a true employment relationship does not exist in the absence of payment or expected payment of consideration in some form by the employer to the employee. In *Bd. of Ed. of City of Chicago v. Indus. Comm’n*, 53 Ill. 2d 167, 290 N.E.2d 247 (1972), Petitioner performed 100 hours of volunteer work for Chicago Public Schools as part of a university requirement. Petitioner was not paid. Upon arriving at the school each day, she reported to the principal, who told her where she was to go and what she was to

do that day. On days that she could not come in, she phoned the office to let them know she would not be there. The Supreme Court held that Petitioner was not an “employee” and thus, not entitled to receive compensation under the Act for injuries she sustained when she fell down the stairs in the course of her volunteer work.

However, courts have also “repeatedly held that there is no single fact that controls the existence or non-existence of an employment relationship.” *Village of Creve Coeur v. Industrial Comm’n*, 32 Ill.2d 430, 432, 206 N.E.2d 706, 708 (1965). To determine whether an employment relationship exists, you must look beyond consideration to additional factors such as the right to control the manner in which the work is done, the right to discharge, the skill required to do the work and the furnishing of tools, material and equipment.

Practice Tip:

While generally unpaid interns will not be considered employees and not be entitled to benefits under the Act, it is important to carefully scrutinize the facts of each case to determine whether the unpaid intern would be considered an employee and entitled to benefits.

Please contact us with any questions you may have regarding whether the Act applies to unpaid interns.

Medical Marijuana Interview

Ringler Radio podcast host Larry Cohen interviewed Rich Lenkov about medical marijuana within the workforce. [Click Here](#) to listen to the full interview.



Giving Back

Team BDL – Hustles up the Hancock



On 4/13/14, Team BDL climbed 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 had 19 full and 6 half climbers. Together, we raised over \$6,000 for lung cancer research!

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 jklrika@bdlfirm.com.

General Liability

- Illinois Court of Appeals Broadens Distraction Exception to Open and Obvious Doctrine
- Two Illinois Appellate Courts Reach Different Conclusions in Accumulation of Ice Cases

Labor & Employment Law

- Medical Marijuana Update: Eye on the Pot
- Game Changing News: NLRB Rules Northwestern Football Players are Employees

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:
 $66\frac{2}{3}\% (.667) \times \text{AWW}$

Permanent Partial Disability (PPD) Rate:
 $60\% (.6) \times \text{AWW}$

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 2014 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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