



Workers' Compensation Newsletter July 2014

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Here are some common mistakes and ways to avoid them:

1. Failing to preserve evidence

Whether it be a piece of equipment that was involved in an accident, an in-store surveillance video or an accident report, the employer (as well as the TPA, insurance adjuster and defense attorney) have an affirmative duty to preserve it. Illinois recognizes negligent spoliation of evidence, which means that any possessor of evidence has a responsibility to protect evidence if a reasonable person would think that it would be relevant to future litigation. So if you have such evidence, put it aside, create a chain of custody log and give the claimant and opposing counsel ample opportunity to inspect it.

2. Failing to properly investigate a claim

By the time an adjuster or attorney gets a claim, it may very well be days, weeks, months or years after the accident occurred. By that time, key evidence may be gone and witnesses may disappear. It is therefore, very important for the employer to conduct a thorough investigation the day that a claim occurs.

3. Failing to give legitimate claimants their due

Employers will often take an antagonistic approach to an injured claimant from the beginning. However, a legitimately injured claimant should be treated well. After all, your employees are one of your most important resources. If they are legitimately injured on the job, get them their benefits,

The Top 5 List: Top Five Mistakes Employers Make in Handling Workers' Compensation Claims

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



Employers are in the business of producing and selling goods and services. They are not in the business of litigation. So it's easy to see why mistakes are easy to make when handling workers' compensation claims.

get them healed and back to work. Of course, there are ample occasions where the claim is not completely legitimate. On those occasions, the employer should take a more aggressive approach.

4. Failing to communicate

Communication is the key to the success of any workers' compensation claim. Be it communicating with the claimant, your TPA, insurance carrier, defense counsel and even opposing counsel, it is important to engage all of the stakeholders early and often. This avoids confusion, misdirection and solves most issues that come up in the life of a claim.

5. Failing to hire a lawyer right away

JUST KIDDING – Actually, many employers make the mistake of hiring defense counsel too early. Just because an employee files a claim, or even files an Application with the Illinois Workers' Compensation Commission, does not mean that you need to send it out to defense counsel. The employer and TPA can handle most issues that arise on their own, even if the claimant hires their own attorney. It is only once litigation gets more involved, such as when the case is going to be heard before an arbitrator, that the necessity of defense counsel arises.

As always, this is not an exhaustive list and we would like your tips on winning a workers' compensation claim. If you email them to me at rlenkov@bdlfirm.com, I will publish them in our August newsletter.

IWCC News

The Chicago IWCC is hosting an open house on 9/9/14 and 11/13/14. After an overview

of the workers' compensation process, visitors will observe arbitration hearings and review-level oral arguments. Then there will be a question-and-answer period with commissioners.

There is no charge to attend, but registration is limited. To sign up, please email Susan Piha susan.piha@illinois.gov with the subject "open house" and the desired date.

Upcoming Seminars



- On **8/14/14**, The CLM Greater Chicago Chapter will be holding a networking event. Join us for patio dining and BBQ sauce tasting at Old Crow Smokehouse in Chicago's Wrigleyville neighborhood. For more info and to register, [Click Here](#)



- On **8/20/14**, Rich Lenkov, Justin Nestor and Maital Savin will be speaking 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 **10/24/14**, Rich Lenkov, Robert Baer and Grant Dixon will present "Point/Counterpoint: Key Workers' Compensation Issues from the Perspective of an Employee Attorney and an Employer Attorney" at the CLM 2014 Workers' Compensation Conference in Costa Mesa, CA. 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

FREE Webinars

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

“Good reminder points on what to do early in the claim to investigate and preserve the subrogation potential.”

- 6/12/14

“I always enjoy your webinars. Always interesting.”

- 6/12/14

“Valuable information presented in an entertaining way.”

- 6/12/14

“The webinar was excellent and well worth the hour. I was especially interested in the probability discussion around types of accidents as well as the components of recoverable WC liens.”

- 6/12/14

“I liked the topic, because it is something I have not had to deal with a lot until I took over the Management position and I feel it was very informative.”

- 6/12/14

- 7/17/14 – Rich Lenkov and Dr. Yousuf Sayeed will present “**Defending Pain Claims: A Medical & Legal Perspective.**” [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
- Risky Business: Drugs, Sexual Orientation And Guns In The Illinois Workplace
- Workers' Compensation Negotiation Strategies
- Subrogation Basics for Workers' Compensation Professionals

No Compensation for Employee Injured While Taking Shortcut to Parking Lot

By: Jeanmarie Calcagno



In *Hanson v. Trinity Express Care & IWCC*, 2013 IL App (3d) 120989WC-U, the Appellate Court affirmed the Commission's denial of benefits to Petitioner, who sustained injuries while climbing down a retaining wall on her way back from a parking lot to Respondent's building.

Petitioner was employed as a Front Desk

Clerk. She clocked in and realized that she left her computer login passwords, which were necessary to access Respondent's computer system, in her car. In order to retrieve the passwords, Petitioner left through the employee exit, walked across a grassy area to a retaining wall and jumped to a grassy area below. After retrieving the passwords from her car, Petitioner walked back across the parking area and injured her knee while trying to climb up a retaining wall. Petitioner testified that this was the most direct route to her car.

The Arbitrator determined that Petitioner sustained injuries arising out of and in the course of her employment. The Commission reversed, reasoning that Petitioner's injuries resulted from exposure to an increased personal risk that was undertaken solely for her own convenience. The Circuit Court affirmed the Commission's decision.

Petitioner testified that Respondent knew that she and others took the shortcut route, which involved climbing over the retaining wall. Petitioner testified that she negotiated the retaining wall "almost every single time" she worked.

The Appellate Court agreed with the Commission's conclusion that Petitioner's injuries resulted from her exposure to an increased personal risk. This was a danger entirely separate from her employment responsibilities and was an act solely for her own convenience. The Court rejected Petitioner's argument that Respondent was aware of the practice and did not advise her that the route was unacceptable. The Court determined that an employer's acquiescence alone cannot convert a personal risk into an employment risk.

Practice Tip:

By providing employees with a safe route to and from their designated work areas, you can minimize and hopefully, eliminate the dangers to be encountered when shortcuts are undertaken.

When Special Hazards Become Part of the Employment

By: Maital Savin



In *Brais v. IWCC*, 2014 IL App (3d) 120820WC, the Illinois Appellate Court held that hazards that employees encounter on the sole or usual route to an employer's premises due to the demands of employment become part of the employment.

Petitioner's office was located in the county courthouse. While returning to her office from a work-related meeting, her heel got stuck in a defect in the sidewalk, less than two feet from the stairs leading to the front entrance to the courthouse. Petitioner fell, injuring her wrist. Petitioner testified that employees typically enter the courthouse through an employee entrance, which was locked at the time of the accident.

The arbitrator held that the injury was not compensable as the accident occurred on a public pathway and that Petitioner was at no greater risk than the general public. The Commission affirmed the arbitration decision, which was also affirmed by the Circuit Court.

The Appellate Court reversed. The Court found that Petitioner was on the sidewalk where she was injured due to the demands of her employment, which required her to attend a meeting off her employer's premises. Furthermore, the Court found

that Petitioner did not freely choose her route as the employee door was locked and the front door was the only access point to the courthouse. Accordingly, the Court reasoned that the hazard become part of the employment and therefore, that Petitioner's injuries arose out of her employment.

Practice Tip:

Employers that are aware of special hazards, such as cracked sidewalks or loose railings, should remedy these hazards to prevent workers' compensation claims. If such hazards are off the employer's premises, employers should instruct their employees to use alternative routes.

Please contact us with any questions you may have regarding special hazards.

The Weight Given to “Return to Work” in Terminating TTD Benefits

By: Jessica M. Rimkus



In *Sunny Hill of Will County v. IWCC*, 2014 IL App (3d) 130028WC, the Illinois Appellate Court addressed the issue of whether Petitioner's “return to work” could justify terminating TTD benefits.

Petitioner, a nurse, injured her neck and back at work. Respondent eventually terminated Petitioner's employment because she had been off work for more than a year. While Petitioner was still treating and had not been released to return to work, surveillance revealed that Petitioner had been spending time at a flower shop, which she co-owned with her daughters. Respondent motioned to terminate TTD benefits, arguing that Petitioner's time spent at the flower shop

amounted to returning to work. The arbitrator found that Petitioner's work at the flower shop was too infrequent to constitute “return to work.” The Commission and Circuit Court affirmed the arbitrator's decision.

The Court relied on *Interstate Scaffolding, Inc. v. IWCC*, which held that in determining whether TTD benefits are due, the primary issue is whether Petitioner is at MMI. The Court held that returning to work is only one factor in determining whether Petitioner is at MMI. The Court did not find that Petitioner's work at the flower shop was enough to suggest that she was at MMI and awarded continued TTD benefits.

Practice Tip:

Remember, when deciding whether to terminate TTD benefits, the main question you should focus on is whether Petitioner is at MMI. Whether Petitioner has returned to some form of work is relevant, but it is only one factor that the arbitrator will consider in determining whether benefits are due.

Please contact us should you have any questions regarding terminating TTD benefits.

Intoxication Bars Claimant's Attempt at Benefits

In *Scoggins v. IWCC*, 2014 IL App (5th) 130198WC-U, the Illinois Appellate Court found that Petitioner's intoxication served as a departure from his employment and was the sole cause of the accident and denied benefits.

On 7/13/08, Petitioner, a fireman, attempted to lift a 1,000 pound kiln door after it had come off of its hinges. The door

fell on Petitioner's ankle causing a dislocation and fracture.

At the hospital, blood was drawn and his blood alcohol level was .194. Petitioner subsequently tested positive for opiates and benzodiazepines. Petitioner testified that he did not remember taking a blood test and that the hospital gave him morphine for pain.

Respondent's expert testified that Petitioner's blood alcohol level would have been .179 at the time of the accident and that would cause impairment in vision, cognitive function, reaction time, attention, muscular coordination and judgment. The expert testified that Petitioner would not have been able to adequately notice or comprehend what was happening with the kiln door at the time of the accident.

The Commission denied benefits and found that the intoxication was so severe that it was actually the sole cause of the accident.

The Illinois Appellate Court affirmed the Commission's decision and rejected the argument that there were decisions with higher blood alcohol levels that were found compensable. The Appellate Court found that the expert's report was persuasive. Moreover, based on the report, the concentration of alcohol was so high that it was either the only cause of, or significantly contributed to the injury, as the level of intoxication rendered Petitioner unable to perform his job duties.

Practice Tip:

A post-accident drug and alcohol testing program can allow employers to come to the proper compensability determination. Also, hiring a toxicology expert to testify on the level of drug/alcohol metabolites and impairment can further strengthen the

argument that the intoxication was the sole cause of the work accident.

Please contact us with any questions you may have regarding how to implement post-accident drug testing.

Giving Back

YMCA National Judicial Competition



Bryce Downey & Lenkov attorney Maital Savin has volunteered to be a trial rater for the YMCA National Judicial Competition on 7/31/14 – 8/1/14. The YMCA National Judicial Competition will bring some of the most talented, articulate and enthusiastic young leaders to Chicago for mock trial and appellate competitions. High school students from around the country will gain a deeper understanding for our legal system and their responsibility within that system.

Race Judicata 2014



Each year, Bryce Downey & Lenkov proudly sponsors Chicago Volunteer Legal Services' Race Judicata. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago. In addition to our sponsorship, this year Bryce Downey & Lenkov will be underwriting the wine tent and chose CVLS' Junior Board to staff it.

Rich Lenkov at FIRMA Chicago Conference



On 6/18/14, Rich Lenkov presented "Navigating the Constantly Changing Legal World: A Legal Update" at the Foodservice Industry Risk Management Association's Chicago conference.

Meet the Team

Michael Milstein

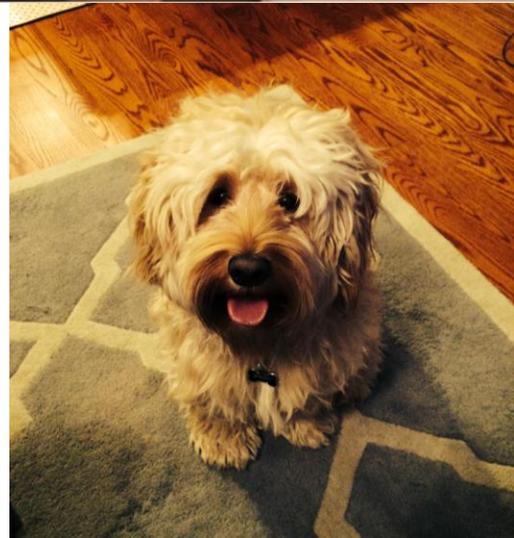


I focus my practice on workers' compensation. My journey to becoming a lawyer started at the University of Illinois, where I graduated with a major in political science and a minor in history. From there, I attended Chicago-Kent College of Law. I have been working at Bryce Downey & Lenkov for over three years and couldn't be happier. I was recently selected to the 2014 Illinois Rising Stars list. Each year, no more than 2.5 percent of the lawyers in the state are

selected by the research team at Super Lawyers to receive this honor.

Away from the office I am happily married to my beautiful wife, Carli. We recently were told that the venue from our wedding is featuring a picture of us in an advertisement (so I guess I am a part-time model as well). We rescued our dog, Buddy, about a year ago and he has been the greatest addition to our family. We are looking forward to a great summer, spending time with our family and friends. There is no better place in the world than Chicago in the summer.

A little more about me: I am an avid Chicago sports fan (Cubs, Bulls, Bears and Hawks) and sitcom viewer (all-time favorites are Seinfeld and The Office).



Bryce Downey & Lenkov is Growing



We are pleased to announce the addition of **Jessica M. Rimkus**. Jessica focuses her practice on workers' compensation and general liability.

Around the Office

Last month we debuted our new photograph of Tower 18 that hangs in our Small Conference Room. I think we can all agree that "Small Conference Room" is a pretty bland way to refer to ANY space. After much heated debate, we decided on a new theme for our conference rooms: Chicago sports! Introducing:

Da Bulls



Da Bears



Da Hawks



Over the next several months, we'll be adding memorabilia celebrating our favorite moments with our favorite teams. And no, we couldn't agree which baseball team deserved a conference room, Cubs or Sox.

As we continue to redecorate our Chicago office, we'll share some of our new features that make our space unique. Feel free to stop by any time to take a look at our progress!

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

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.

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. The content of this newsletter has been prepared by Bryce Downey & Lenkov LLC (the Firm) for informational purposes and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. You should not act upon this information without seeking advice from a lawyer licensed in your own state of country.

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