



## Dear Rich



### I have a number of COVID-19 claims; should I accept them?

— Kara L., Joliet, IL

By [Rich Lenkov](#)

Workers' Compensation Practice Chair

No. From a legal perspective, even with the rebuttal presumption in place in Illinois, establishing that COVID-19 arose out of and in the course of one's employment is extremely difficult.

As mentioned in "[Illinois Passes COVID-19 Workers' Compensation Law](#)," even if your claimant falls within the class of first responders or other covered employees, all an employer needs is "some" evidence that the employee contracted the virus from an alternative source to overturn the presumption. The burden then shifts to Petitioner to prove by a preponderance of evidence that it was work that caused the virus. Because COVID-19 is so prevalent, that is a very difficult burden to prove.

Of course, we recognize that many employers will find it cheaper to accept these claims, as they generally do not involve extensive amounts of TTD or PPD. Further, we also understand that many employers will want to bend over backwards to accept claims for employees who are on the front lines fighting this pandemic. That said, from a purely legal perspective, we recommend denying most COVID-19 claims.

Please submit your most pressing workers' compensation questions to [mkt@bdlfirm.com](mailto:mkt@bdlfirm.com) and Rich will respond in the next newsletter.

## Indiana Legislative Update



By [Daniel Korban](#)

Associate

On 3/21/20, Gov. Holcomb signed Public Law 139-2020, enacting changes to the Indiana Worker's Compensation Act within Indiana Code § 22. These changes became effective 7/1/20.

- **Subrogation Correction:** allows an employer-lien holder to join the action within 90 days of notice upon motion of the employer and for the employer's protection. Previously, the law stated that an employer could join the action upon motion of the *employee* and for the *employee's* protection.
- **Benefit Payment Notice and Tender:** requires an employer or the employer's insurance carrier to file a *report* of payment of compensation with the Board electronically and deliver a compensation agreement to the employee or the employee's dependents within 14 days from the date the first installment of compensation is due. The law also specifies that the presentation of payment in the form of a check, draft or electronic payment for the proper amount qualifies as tender of the compensation. Previously, the law allowed for 15 days to file an *agreement* of compensation with the Board and did not outline with specificity the requirement that it be an official report
- **Termination of Benefits:** requires employers to now provide written notice to employees of intent to terminate TTD benefits *for any reason*, and the employer must electronically file said notice with the Board. Previously, the law could be interpreted as requiring that notice be provided to the employee only for reasons not delineated in statute.

- **PPI Rating for Loss of Vision:** for injuries occurring on or after 7/1/91, compensation amounts determined for visual impairments shall be based on the Functional Vision Score, and except in cases of permanent and complete loss of vision by enucleation, be paid as a whole person rating.
- **Record Keeping by the Board:** the Board must retain all papers in files where compensation has been awarded by agreement or upon hearing, for 2 years after the termination of the benefit period. Prior law required only 1 year. Additionally, the new law reduces the time period the Board must maintain records of insurance coverage from 45 years to 35 years.

## De Facto Employment for Sole Client

By [Donn LaHaie](#)

Income Member



In *Qualizza v. Tile Roofs Inc.*, 28 ILWCLB 34 (Ill. W.C. Comm. 2020), the Commission reversed the arbitrator's finding of no employer-employee relationship.

Before he was injured, Petitioner worked for a company which was owned by the same woman who owned Respondent's company. Mortenson Roofing paid

Petitioner's work expenses and provided supplies and a work truck. Petitioner was a foreman for Mortenson and Mortenson operated out of the same building as Respondent.

After Petitioner retired, he opened a business at the request of Mortenson. Mortenson continued to provide supplies and was Petitioner's one and only client. He was injured when he fell from scaffolding. Petitioner did not have workers' compensation insurance and was paid by Mortenson through his company.

The arbitrator determined that no employer-employee relationship existed and denied the case. The Commission reversed and found that the relationship between Petitioner and Respondent was essentially the same as when he was an employee for Mortenson. As such, Petitioner was a *de facto* employee and entitled to benefits.

### Practice Tip:

It is not enough for an employer to simply use the title "independent contractor." Investigate the relationship thoroughly and look for facts showing that the employer does not have, nor exercise control over the worker. Examine how the worker is paid and who provides their materials. A prompt and thorough investigation will provide a solid defense.

## Scar Improvement Reduces Permanency

By [Timothy Furman](#)

Associate



In *Alvarez v. 2542 Inc. d/b/a Select Ultra Lounge*, 28 ILWCLB 51 (Ill. W.C. Comm. 2019), Petitioner was pushed by her supervisor, fell and cut her right arm on a box. Petitioner required 9 stitches and was left with a 3-4 inch long scar. After viewing the scar, the arbitrator awarded 25 weeks of permanent partial disability benefits.

On appeal, Petitioner allowed the Commissioners to view her scar. The Commission then reduced the arbitrator's permanency award from 25 weeks to 15 weeks. The Commissioners reasoned that Petitioner's scar shrunk to 1-1.5 inches, reduced from 3-4 inches at trial.

This Decision is very interesting as the Commission arguably considered new evidence that was not available to the arbitrator. It blatantly violates the very nature of the rules of an appeal and the rules of evidence. The Decision also begs the question of what evidence, if any, the Commissioners would have considered absent Petitioner voluntarily showing her scar at the appeal hearing.

### Practice Tip:

When arguing for a reduced award in a disfigurement case, always introduce evidence demonstrating a reduced scar length, width and/or severity.

## View more information about our [Workers' Compensation practice.](#)

Our other practices Include:

- [Appellate Law](#)
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## Firm News

### Rich Lenkov & Chase Gruszka Secure Summary Judgment on Behalf of Local College



[Rich Lenkov](#) and [Chase Gruszka](#)

recently secured summary judgment in a high exposure premises liability case on behalf of a local private college. Plaintiff alleged that while riding his bicycle on a sidewalk next

to the college, his bike tire struck a deviation in the sidewalk, causing his bike to leave the sidewalk and fall onto the college's property. When he fell, he injured his shoulder, collar bone and sustained several cranial fractures. Plaintiff underwent several surgeries as a result of his injuries.

Rich and Chase filed a motion for summary judgment on the basis that the college owed Plaintiff no duty with respect to the sidewalk or the areas next to the sidewalk. They also argued that even if there was a basis to impose a duty, there was no evidence to even suggest that the college breached such duty.

The court agreed and held that as a matter of law, the college owed Plaintiff no duty. While the court's finding was sufficient to terminate Plaintiff's case against the college, the evidence developed during discovery was so compelling that the court also found that there was absolutely no evidence to support Plaintiff's allegation that the college breached any duty.

### Timothy Furman Secures Dismissal for National Discount Retailer



[Timothy Furman](#) secured a major win on behalf of the firm's longstanding national retailer client. On 9/3/19, Plaintiff filed a premises liability suit following an alleged slip and fall. In his Complaint, Plaintiff alleged a 9/6/17 date of loss. After we removed the case to federal court, Plaintiff attempted to amend his complaint to reflect an 8/31/17 date of loss.

We could not raise a statute of limitations argument without the Complaint being successfully amended, and were left with two options: 1) raise no objection to the amendment and file a Motion to Dismiss following said amendment; 2) object to the amendment itself. We objected to the amendment itself.

In our response to Plaintiff's Amended Complaint, we raised the rarely-cited futility argument. We argued that allowing the proposed amendment would be both prejudicial towards Defendant and futile, as the amended pleading would not survive a motion to dismiss. Plaintiff attempted to argue that the relation-back doctrine applied and that because Defendant was "on notice" of the alleged fall, it was not prejudiced by the amendment.

The judge issued a concise order agreeing with our position in its entirety and dismissed Plaintiff's case.

### Rich Lenkov & Chase Gruszka Secure Early Dismissal for Multinational Financial Services Company



[Rich Lenkov](#) and [Chase](#)

[Gruszka](#) secured an early dismissal in a dog bite case on behalf of a multinational financial services company. Plaintiff alleged that while performing work at a third-party's home, he was attacked

by the third-party's aggressive dog and had to undergo several surgeries due to his injuries.

Early in the litigation, Rich and Chase filed a motion to dismiss Plaintiff's claims on the basis that our client owed no duty with respect to the property or the third-party's dog. The court agreed.

### Rich Lenkov Presents Anatomy of a Lawsuit

Capital member [Rich Lenkov](#) presented "Anatomy of a Lawsuit" with Paul Gamberl for Captive Resources on 7/29/20. Rich and Paul detailed the path of litigation from the initial filing of a complaint, service of the summons, discovery, motions and trial. In addition to the legal process, the presentation also focused on cost control and setting a budget, claims handling and prepping witnesses.



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## Rich Lenkov Highlighted in *Business Insurance* on Presumption Laws for Essential Workers

Capital member [Rich Lenkov](#) was recently featured in a *Business Insurance* article titled, "Questions Remain Over Effect of COVID Presumption Laws." The article highlights the panel Rich participated for Business Insurance on July 16. The panel addressed essential employees' COVID-19 claims and broke down the potential rebuttal presumption they caught the virus from work.

**"(The presumption) was a concession, at least in our state, to incredibly strong labor unions," Rich said. "We already have a basis for workers to prove their case — it's called the Illinois Workers Compensation Act. We don't need to create a separate class of people, especially given the basic understanding of how difficult it is to prove causation. I don't think a rebuttable presumption is necessary."**

[Read "Questions remain over effect of COVID presumption laws."](#)



## Michael Milstein's CLM Panel Highlighted in *Risk & Insurance*

Income member [Michael Milstein](#) was recently featured in a Risk & Insurance article titled, "5 Workers' Comp Litigation Considerations Employers Should Review Before a Claim Heads to Court." The article highlights the panel Michael moderated for CLM's 2020 Workers' Compensation and Retail, Restaurant & Hospitality Conference, which featured Arbitrator Deborah Baker of the Illinois Workers' Compensation Commission, Kevin Adams of General Mills and Jill Wagner of Dispart Law Group.

The article breaks down key takeaways from each panelist's perspective as an arbitrator, claims manager, petitioner's attorney and defense attorney on surveillance, settlement strategies, navigating the court system, psychological claims and COVID-19 claims.

[Read "5 Workers' Comp Litigation Considerations Employers Should Review Before a Claim Heads to Court."](#)



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## Chase Guszka Appointed IDC's Social Media Committee Vice Chair

Associate [Chase Gruszka](#) was recently appointed to Vice Chair of the Illinois Defense Counsel's (IDC) Social Media Committee. As part of his new role, Chase will manage IDC's social media pages along with their internal discussion page, IDC Network. Chase and his team will share event reminders and other valuable information with members to help promote and showcase IDC.

[Learn more about Illinois Defense Counsel.](#)



## Brian Rosenblatt and Donn LaHaie Published in ISBA's *The Policy*

Income members [Brian Rosenblatt](#) and [Donn LaHaie](#) recently authored articles for the June edition of The Policy, ISBA's insurance law newsletter.

Brian's article provided a breakdown of the previously issued emergency amendments for first responders' COVID-19 claims, ensuing lawsuits and the restraining order that stopped enforcement.

Donn's article covered the first COVID-19 wrongful death lawsuit filed in Cook County.

[Read The Policy.](#)



## Jeff Kehl Authors Article on COVID-19 Civil Suits for CLM Magazine

Income member [Jeff Kehl](#) recently published an article for CLM Magazine titled, "Walmart's COVID-19 Problem." Jeff provides a full analysis of the first COVID-19 wrongful death suit filed in Cook County and examines direct civil suits against employers for COVID-19 deaths.

He details the viability of the lawsuit in relation to the Exclusive Remedy Doctrine and its two exceptions. Jeff notes "because of the phenomenal nature of the pandemic, employers are likely to see more employees attempting to pursue civil liability against employers for illness and death because of the virus."

[Read "Walmart's COVID-19 Problem."](#)



## Rich Lenkov Joins Business Insurance's COVID-19 Workers' Compensation Webinar

Capital member [Rich Lenkov](#) presented at Business Insurance's webinar "Workers' Compensation Presumption and COVID-19" on 7/16/20. The panel discussion addressed essential employees' COVID-19 claims and explained the presumption that they caught the virus from work.



## Jeanne Hoffmann and Margery Newman Included in Top Women Lawyers of Chicago

Managing capital member [Jeanne Hoffmann](#) and income member [Margery Newman](#) have both been selected to this year's Leading Lawyers' list of Top Women Lawyers in the Chicagoland area.

Jeanne was included for her work in entertainment, communication, trademark and unfair competition, while Margery was included for her work in construction law.

Bryce Downey & Lenkov is committed to equal employment opportunities, diversity and furthering inclusion in all avenues.

[Click here to view the full list of Top Women Lawyers.](#)



**TOP LAWYERS**  
**WOMEN LEADERS**



**Legal Face-Off** is a fast paced, high energy legal podcast dealing with the hottest issues of the day. Rich Lenkov and Christina Martini provide a point/counterpoint perspective on a variety of breaking legal news topics.

**Sound Bite:** Chicago 2<sup>nd</sup> Ward Alderman Brian Hopkins discusses amendments to the puppy mill ordinance.

**Rich Lenkov:** You have talked about how inhumane and offensive these puppy mills are. Describe for our listeners what goes on in these puppy mills and why it's taken so long to fix this loophole that you tried to fix back in 2014.

**Brian Hopkins:** The reason why it's so difficult is because this is a very lucrative industry. It's a highly profitable industry, especially when you don't provide the animals with the level of care they should receive. People who own pets know that it's not cheap and it isn't easy. It's time consuming and you spend a lot of money making sure that your pets are well cared for and happy: veterinarian bills, food, toys, doggy day care when you go on vacation and all of that. All of these animals that are bred intentionally for resale command a very high price tag. So to the extent that puppy mills can reduce the cost of caring for these animals, it increases their profit margin when they sell these puppies for thousands and thousands of dollars.



[Listen to the full episode here](#)

## Recent Topics

- COVID-19 employment issues, risk waivers & mandatory masks
- Fox News lawsuit
- George Floyd & the BLM movement
- SCOTUS decisions: asylum, DACA, LGBTQ, & abortion rights
- CPD removal from CPS

## Recent Guests

- Ald. Brian Hopkins
- Antonio Romanucci
- Dr. Cedric Alexander
- Paul Smith
- Michael Scodro
- Lee Gelernt

[Scodro on recent Supreme Court cases, Gelent on his Supreme Court asylum case, Levinson on masks, Baker on waivers and much more](#)

[Knight and Shapiro on LGBTQ Supreme Court victory, Johnson on removing CPD from CPS, Inside Out, and much more](#)

[Romanucci on George Floyd, McCord on Antifa, Mulhauser on citizen's arrest laws, Parker on what lawyers for social justice and more](#)

[Lin & Johnson on Justice Thomas, Martin & Lambert on Arbery, Pope on Crundwell and much more](#)



## CONNECT WITH US

Please Like Us on **Facebook**, **Twitter** and **Subscribe on iTunes**. Send us your questions and we will answer them on air — **nothing is off-limits**.

## Cutting Edge Continuing Legal Education

If you would like us to come to you for a free seminar, [Click here](#) or email [Rich Lenkov](#).

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

- Chicagoland Safety, Health and Environmental Conference
- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- RIMS Annual Conference
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- Workers' Compensation Defense Institute (WCDI)
- Workers' Compensation Educational Conference

## Recent Webinars

- How To Get A Zero
- Understanding the New Illinois Workers' Compensation Law
- Workers' Compensation Post COVID-19: Occupational Injuries & Telemedicine
- COVID-19's Impact on Psychological Claims
- WC Spinal and Pain Management Issues
- Top 10 Myths About IL Workers' Compensation
- New Case Law You Need To Know
- Indiana Forms: Taking A Claim From Start To Finish
- How Does The IWCC Work?

If you would like a copy of our other prior webinars, please email us at [mkt@bdlfirm.com](mailto:mkt@bdlfirm.com).

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## Upcoming Events

- **8/11/20** – [Geoff Bryce](#) and [Samuel Levine](#) will present "The Impact of COVID-19 on the Construction Industry" for ISBA's Construction Law Section. The panel discussion will cover force majeure case law and clauses in construction contracts, coverage for potential COVID-19 claims and the pandemic's impact on employment related policies and procedures. For more information or to register, [click here](#).
- **8/18/20** – [Rich Lenkov](#) will present "A Multi-State Analysis of Common Compensability Issues Confronting Workers' Compensation Claims Handlers" with Workers' Compensation Defense Institute at WCI's virtual 3-day forum. For more information or to register, [click here](#).