



Workers' Compensation Newsletter April 2014

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1. Violation Of Safety Rule

If you can prove that an employee violated a known and enforced safety rule, you can defeat their claim. You have to show that the violation of the safety rule took Petitioner outside the scope of his or her employment. We have successfully won cases at trial using this defense.

2. Intoxication/Drug Use

If an employee tests positive for drugs or alcohol following an injury, the employer gets the benefit of the presumption that it was the drugs or alcohol that caused the injury, not work. This presumption is rebuttable, but the employee has a fairly high burden to overcome. As a practical matter, the positive drug or alcohol test should always be supported by a toxicologist's opinion in order to prevail on this issue at trial.

3. Horseplay

An employee who is injured while engaged in horseplay cannot recover. The more that the action was personal to the employee, rather than related to employment, the more likely it will be held to be horseplay rather than work-related.

4. Fights

In order for a fight to be work-related, the claimant cannot be the one who started it and the fight must relate to a work issue. If Petitioner cannot prove either of these facts, you can successfully deny the claim.

The Top 5 List: Top 5 Ways To Use An Employee's Actions To Defend Their Workers' Compensation Claim

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



Most workers' compensation systems are "no fault systems." Unlike in civil litigation, it is difficult to defend a workers' compensation case based on the employee's fault.

Difficult doesn't mean impossible, however. Here are five ways to use an employee's actions to defend their workers' compensation claim:

5. Detour

Generally, going to and coming from work is not compensable. An exception exists for travelling employees, who are given greater latitude. However, if that traveling employee detours from a work-related activity into a personal activity, his or her injury will not be compensable.

In our March newsletter, I wrote about the top 5 things that need to change about Illinois workers' compensation. 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.**

Rich Lenkov To Speak At The National Workers' Compensation And Disability Conference & Expo In Las Vegas



NOVEMBER 19 - 21, 2014
MANDALAY BAY | LAS VEGAS

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.

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 info. 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 info 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 6/3/14, Rich Lenkov will speak at the 1st Annual Workers' Compensation Law & Practice seminar in Naperville. For more info and to register, [Click Here](#)
- On 6/5/14, The CLM Greater Chicago Chapter will be holding a networking event. Stay tuned for more details
- 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](#)

FREE Webinars

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

Upcoming

- 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 “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

"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!"

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

Case Victories



- **Edward Jordan** recently secured a favorable decision from Arbitrator Milton Black on Petitioner's 19(b) Petition seeking TTD benefits, an increased average weekly wage and vocational rehabilitation.

Petitioner sustained an accepted left foot injury and underwent two surgeries. Respondent terminated Petitioner's TTD benefits as Respondent's IME physician stated Petitioner could return to work regular duty. The case went to trial on Petitioner's 19(b) petition seeking 9 months of TTD benefits, an increased average weekly wage and vocational rehabilitation. Petitioner also claimed he was permanently disabled from returning to full duty work and sought over \$45,000.00 in unpaid TTD benefits, in addition to ongoing weekly benefits.

Ed aggressively defended the case at trial by presenting the evidence deposition of Respondent's IME physician, cross examining Petitioner's treating physician during his evidence deposition and presenting medical records from a prior physician highlighting Petitioner's inconsistent complaints and statements. He also presented the testimony of one of the Respondent's owners to rebut Petitioner's claim that overtime was mandatory.

The arbitrator found that Petitioner was not entitled to any additional TTD benefits, Respondent used the correct average weekly wage, any overtime worked was not mandatory and Petitioner was not entitled to vocational rehabilitation because the IME doctor and prior treating physician stated he could return to work regular duty.

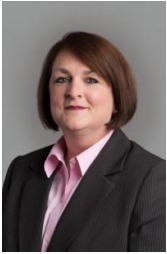
Petitioner has not yet filed a Petition for Review, but we expect the decision to be appealed



- **Storrs Downey** and **Maital Savin** won an appeal of an Illinois Department of Employment Security (IDES) determination on behalf of their client. A former employee had filed a claim for unemployment benefits with the IDES, which was initially denied. The former employee appealed the decision denying benefits. At the appeal hearing, we presented evidence that showed that our client discharged the former employee for misconduct. Specifically, the evidence showed that the former employee violated the employer's rule requiring that he work his entire shift or get his supervisor's permission to leave early, and that such misconduct was willful and deliberate

Compensation Denied To Petitioner Injured While On The Clock And En Route To Her Bus

By: Jeanmarie Calcagno



In the recent case of *Nighohossian v. Agency for Community Transit*, the Commission denied compensation to a petitioner who sustained injuries while clocked in and en route to her afternoon bus route.

Petitioner, a bus driver, completed driving one route and drove back to Respondent's facility to eat lunch. After lunch, Petitioner clocked back in. While walking from Respondent's facility to the vehicle that was to transport her back to her bus, she rolled her foot on the edge of a sidewalk, fell and injured her elbow.

Evidence presented established that Respondent's facility is where employees would clock in and out. The facility also had a cafeteria for employees' use. Members of the general public were typically not at this location, except to visit the lost and found department and/or to purchase bus passes.

The arbitrator denied compensation because Petitioner failed to prove that her accident arose out of and in the course of her employment. The arbitrator ruled that Petitioner was not exposed to any greater risk than the general public, relying on Petitioner's testimony and photos that there was no defect in the sidewalk.

Practice Tip:

In assessing the compensability of your case, always consider whether the risk is confronted by the general public. Do not assume that a case is compensable because

the Petitioner is on the employer's premises and/or on the clock at the time of injury.

Please contact us with any questions you may have regarding defending accidents arising out of and in the course of employment.

Neutral Risk: Why "Inside Your Building" Does Not Always Mean "At Work"

By: John O'Grady



In the recent case of *Mary Grace v. Himes Consulting Group*, the Commission held that Petitioner, who had slipped and fell in the lobby of the building in which Respondent was located, was not entitled to workers' compensation benefits, finding no work-related accident occurred.

On 5/2/11, Petitioner was waiting for an elevator in the lobby of her office building. After pressing the elevator button, Petitioner stepped back and heard her leg "snap." She hit her head and back on the highly polished marble floor, which she claimed was covered with fine, chalky dust. Petitioner was diagnosed with a fractured fibula; she also claimed aggravation of several pre-existing arthritic/degenerative conditions.

The arbitrator noted that the area where Petitioner fell was a common area of the multi-tenant building, accessible to the general public. Even if the chalky dust on the lobby floor was the cause for the slip and fall, the act of waiting for an elevator in the dusty lobby was a "neutral risk." Accordingly, to prevail on her Section 19(b) petition, Petitioner needed to prove that her job duties increased that neutral risk beyond what the general public would

encounter in that lobby. The Commission affirmed the arbitrator's finding that the accident conditions only created a neutral risk, since the employer did not own the building and did not exercise any control over how Petitioner entered the building. The landlord, not the employer, was responsible for maintaining the common areas of the building. Therefore, Petitioner failed to prove that a "work-related" accident occurred.

Practice Tip:

Many claims involve employers that operate out of multi-tenant buildings or malls. It is important to check where exactly the injury occurred to determine whether it occurred in a common area that the employer has no control over. With a little extra scrutiny of the facts, you might end up with a finding of no accident.

Please contact us with any questions you may have regarding claims involving accidents in common areas.

Giving Back

Team BDL - Ready to Hustle



On 3/28/14, Team BDL loaded up on carbs and talked strategy at the Paris Club Bistro and Bar. 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

- 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

- 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

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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