

Workers' Compensation Newsletter

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ANNOUNCEMENTS

- We are pleased to announce that our firm name is now Bryce Downey & Lenkov LLC.
- We are very pleased that associate Kelly Gross was voted by her peers as a *2009 Illinois Rising Star* in workers' compensation by *Illinois Superlawyers Magazine*. Of the more than 85,000 lawyers listed in Illinois, only 2.5% are listed as *Rising Stars*.
- We have opened a new office in Northwest Indiana to further serve our clients in that state. The office is at 2636 W. Lincoln Highway, Suite B, Merrillville, IN 46410, telephone 219.756.8100, fax 219.756.5100. For more information, please contact Storrs Downey at sdowney@brycedowney.com.

Recent/Upcoming Seminars

- *Evaluating Permanency*, February 4, 2009, Frankenmuth Insurance: Richard Lenkov & Justin Nestor
- *Turning the Tables: How To Use An Employee's Own Actions as a Defense to Their Workers' Compensation Claim*, March 6, 2009, Illinois Workers' Compensation Forum, Chicago: Richard Lenkov
- *Top 10 Ways To Screw Up Your Workers' Compensation Case*, April 15, 2009, Acuity Insurance: Richard Lenkov & Carol Cesaretti

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The attorneys at Bryce Downey & Lenkov constantly strive to keep 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 or any aspect of Illinois and Indiana Workers' Compensation law, please contact Richard Lenkov at 312.377.1501 or rlenkov@brycedowney.com, or any member of our Workers' Compensation team. © Copyright 2009 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

Seminars (continued)

- *Managing and Closing Workers' Compensation Claims in a Cost-Effective Manner*, July 20, 2009, 29th Annual National Workers' Compensation and Occupational Medicine Conference, Hyannis, MA: Richard Lenkov. The National Workers' Compensation and Occupational Medicine Conference is one of the largest and foremost workers' compensation gatherings in North America. It attracts the leading workers' compensation professionals, physicians, occupational nurses, risk management, claims professionals and attorneys to discuss cutting-edge issues. For more information, go to www.seak.com.

If you would like us to provide your team with one of these free seminars, or on any other topic in Illinois or Indiana workers' compensation law, please contact Richard Lenkov at rlenkov@brycedowney.com.

IWCC Changes

As of January 1, 2009, several Arbitrators have been reassigned within Illinois. The reassignment is intended to allow for faster resolution of cases and to speed the conclusion of cases above the red line.

Venue	Old Arbitrator	New Arbitrator
Geneva	Akemann	Hennessey, Kinnaman
Rockford	Akemann & Andros	Giordano
DeKalb	Falcioni	Andros
Ottawa	Andros	Giordano
Kankakee	Dollison	Giordano
Waukegan	Erbacci	Andros, Fratianni
Danville	White	Holland
Woodstock	Andros	Erbacci
Wheaton	O'Malley	Erbacci

Of further note, the Carlyle and Taylorville calls have been eliminated and their cases re-assigned to nearby venues. The entire calendar is available on line at <http://iwcc.il.gov/news.htm#cal>.

Commissioners Rink and Dauphin have switched panels with Commissioner Rink moving to Panel A and Commissioner Dauphin to Panel B. The new panels are as follows:

Panel A	Mason, Dauphin, Lindsay
Panel B	Sherman, Rink, Lamborn
Panel C	Gore, DeMunno, Basurto

TTD & the Odd Lot Theory

In *Economy Packing Company v. Illinois Workers' Compensation Commission* 2008 WL 5205004 (1st Dist., 2008), the Appellate Court held that undocumented workers are entitled to workers' compensation benefits, specifically PTD benefits, and that such treatment of undocumented workers is not preempted by Federal law and the Supremacy Clause of the Constitution. *Economy Packing Company* presents an issue of first impression in Illinois: can an undocumented worker receive permanent total disability benefits under the odd-lot theory?

Petitioner was injured in 2002 while working without the necessary paperwork to legally gain employment in the United States. Petitioner suffered an injury to her shoulder that required surgery and, when fully healed, left her with permanent restrictions. However, Petitioner's vocational rehabilitation counselor found that she was not a viable candidate for vocational rehabilitation.

At arbitration, Petitioner was awarded permanent total disability benefits for life under the odd-lot theory. The arbitrator found that Petitioner's restrictions, lack of education, transferable skills and inability to speak English rendered her unfit for all but the most menial jobs, for which no stable labor market existed. The decision was affirmed by the Commission.

On appeal, Respondent argued that the Commission applied an incorrect standard in determining that Petitioner was a candidate for odd-lot permanent total benefits. Respondent argued that, because the Immigration Reform and Control Act of 1986 (IRCA) makes it illegal to hire an undocumented worker, any undocumented alien is per se unemployable and, thus, a candidate for odd-lot benefits. Respondent argued that Petitioner should be required to show that she is unemployable due to age, training education and experience in a country in which she is legally entitled to work.

Petitioner did not dispute the finding that she had violated IRCA in obtaining employment. The central issue was whether IRCA preempted state legislation dealing with undocumented workers. Field preemption occurs when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it." *Cipollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992)

IRCA does not preempt all state laws dealing with undocumented workers. Rather, it preempts all laws imposing civil or criminal sanctions upon those who employ such workers. Because workers' compensation laws are intended to benefit workers, rather than punish employers, the Court found that this preemption did not encompass the workers' compensation scheme.

Likewise, the Court found that IRCA did not pose a case of conflict preemption which occurs when compliance with both Federal and state laws is a physical impossibility or when the state law stands as an obstacle to the accomplishment of Congress' intent. The Court concluded that the legislative intent behind IRCA (diminishing the attractiveness of illegal employment that draws aliens to the country) was not in conflict with the availability of workers' compensation benefits, stating that such benefits are likely not a major incentive to unlawfully enter and work in the United States.

Odd Lot (continued)

Having determined that IRCA did not preempt the state workers' compensation scheme, the Court turned to the issue of whether or not an undocumented worker could prove odd-lot permanent disability with the traditional test, i.e. showing that she is unable to make some contribution to the work force sufficient to justify the payment of wages.

The Court held that an undocumented worker could prove that she belongs in the odd-lot category provided that the lack of prospects for employment is unrelated to her immigration status. The Court noted that none of Petitioner's vocational rehabilitation counselors had noted her immigration status when determining the feasibility of finding employment. Rather, the conclusions were based on factors completely unrelated to the legality of working in the United States. Therefore, the Court found that Petitioner, due to her inability to find work based on factors unrelated to her immigration status, was permanently disabled and eligible to receive benefits.

Practice tip: For the first time, the Illinois Appellate Court has affirmed that an illegal alien is entitled to permanent total disability benefits if he or she can prove that the disability is unrelated to immigration status. In order to prevent an injured worker from collecting PTD benefits, an employer will have to prove either that the employee is able to work or that the inability to work is attributable to the immigration status of the worker.

Maximizing Third Party Lien Recovery: First Impression

In *Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390 (2008), the Supreme Court of Illinois granted certiorari to resolve an issue of first impression. Petitioner had been injured in a car accident while in the course of his employment. The car accident was the fault of an uninsured motorist.

Petitioner sought workers' compensation benefits from his employer and settled his claim for \$162,588.33. He then turned to Pekin Insurance Company, who provided both the workers' compensation and uninsured motorist coverage for the employer.

At arbitration in his civil suit, Petitioner was awarded \$250,000.00. Pekin Insurance delivered a check in the amount of \$87,411.67 to Petitioner— the amount awarded at arbitration less the settlement in the workers' compensation case.

Petitioner filed a complaint in Circuit Court seeking an additional \$40,467 – the amount of attorneys' fees payable on the original workers' compensation settlement. Petitioner's argument was based on the terms of the insurance policy and on Section 5(b) of the Workers' Compensation Act.

The insurance policy stated that, in a claim against a third party, the insurance company would pay 25% of any award to the claimant's attorney in a situation where the liability was caused by some person other than the employer.

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First Impression (continued)

Pekin Insurance filed a motion to dismiss, arguing that neither the insurance policy nor the statute provided for fees in this situation. The complaint was dismissed by the trial court and reversed by the Appellate Court which found that Section 5(b) of the Act was applicable because the insurance policy broadly incorporated “workers’ compensation law.”

The Supreme Court reversed the Appellate Court and the complaint was dismissed.

The Supreme Court found that the language of Section 5(b) prohibited the payment of attorneys’ fees in this instance due to the lack of liability on the part of a third party. The Court held that “Section 5(b) clearly specifies that where legal proceedings are instituted against a person, *other than the employer*, who is liable for damages, and judgment is obtained and paid, or settlement it made with such other person, the employer is to be reimbursed the amount of workers’ compensation benefits paid or to be paid by the employee.” *Taylor v. Pekin Insurance Company* 231 Ill. 2d 390 (emphasis in original, internal quotation marks omitted) (2008)

Because the presumptive third party was an uninsured motorist, the claim had only been made against the employer’s insurance agency. The Court held that there was no third party claim, action or suit and that therefore Section 5(b)’s provision for attorneys’ fees was not triggered.

Practice Tip: *This is a case of first impression and a good result for employers and their insurers. In cases where there is no third party, any award against the employer’s insurance carrier in civil court may be fully offset by the amount of the workers’ compensation award, maximizing recovery on the lien. Thus, no attorney fees are owed.*

Bryce Downey & Lenkov LLC 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, Oak Brook, Merrillville, 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:

- Appellate Advocacy
- Commercial Litigation
- Business Organization and Operation
- Commercial Transactions
- Complex Litigation
- Construction Law
- Creditor/Debtor
- E-Commerce
- Employment
- Environmental Law
- Estate Planning and Administration
- General Counseling
- Insurance Coverage
- Integrated Legal Management
- Intellectual Property
- International Transactions
- Labor
- Patent
- Personal Injury
- Premises Liability
- Products Liability
- Professional Liability
- Property Damage
- Real Estate
- Subrogation
- Toxic Tort
- Transportation and Commercial Vehicle Accidents
- Workers’ Compensation