

Workers' Compensation Newsletter

August 2011

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IL WC Reform - UPDATE

- On August 7, 2011, Governor Quinn signed a bill that prohibits workers convicted of reckless homicide or aggravated drunk driving from receiving workers' compensation benefits for injuries resulting from these crimes. The bill stems from the death of two teenage sisters in 2007 when an Illinois State Police trooper driving 126 mph hit their car. The trooper was talking to his girlfriend on his cell phone and received text messages while driving.

The trooper pleaded guilty to reckless homicide and received probation, and was dismissed from the state police force. The trooper has appealed the arbitrator's denial of his workers' compensation claim. The legislation would not retroactive and would not affect this case.

See the article below for further discussion of the arbitrator who heard the case, who was placed on administrative leave and resigned, in part because of her actions involving this case.

- Governor Quinn recently appointed the Workers' Compensation Advisory Board, replacing the existing version. The current board consists of six employer representatives and six employee representatives. One of the main tasks is to recommend arbitrators.

All arbitrators who were terminated on July 1, 2011, are still serving. The WCAB has met on a few occasions, but it is not currently known when any changes will take place. As a reminder, per the changes to the Act, all 31 arbitrators are to be either terminated or re-appointed by Governor Quinn after the advice and consent of the Senate.

- Five arbitrators, Kathleen Hagan, Joseph Prieto, Richard Peterson, Peter Akemann and Gilberto Galicia, recently filed a motion in federal court to enjoin Governor Quinn from terminating them consistent with the new statute. The arbitrators alleged that they were terminated without due process. On July 30, 2011, the motion was denied.
- A key component of the reform package was to allow employers to offer injured workers a network of doctors (Preferred Provider Panels). If the employee opts into this network, he/she can treat with one doctor of their choice. The Illinois Department of Insurance has yet to make any significant movement on the approval of the PPPs. We are constantly monitoring progress of this key piece of reform and will keep our readers posted.

You may download a copy of our PowerPoint presentation on Illinois WC reform at the "News" page of our website, www.brycedowney.com.

For a copy of our recent webinar update (audio & PowerPoint presentation), please email rlenkov@brycedowney.com.



EEOC Again Targets Automatic Leave Policies

In the largest disability discrimination settlement in a single lawsuit in EEOC history, last month Verizon Communications, Inc. agreed to pay \$20 million to resolve a class action suit involving the company's "no-fault" attendance plan. The EEOC charged that Verizon violated the Americans with Disabilities Act by unlawfully denying reasonable accommodation to hundreds of injured employees when they disciplined and/or fired them. EEOC chair Jacqueline A. Berrien said, "An inflexible leave policy may deny workers with disabilities a reasonable accommodation to which they are entitled by law – with devastating effects."

This consent decree follows two other similar ones involving Supervalu and Sears.

What this means for your company is that if you have a similar leave policy, you should carefully review it to make sure that it is not applied inflexibly. Rather, you should look at each employee's situation on a case-by-case basis to determine whether you can accommodate that employee's disability.

For a free review of your company's policy, contact Storrs Downey, the head of our Employment Department at sdowney@brycedowney.com.



Upcoming Seminars



Rich Lenkov will present on a variety of topics at upcoming events:

- ✚ Challenges and Solutions to Multi-jurisdictional Workers' Comp Claims" at the **20th Annual National Workers' Compensation & Disability Conference**, November 9-11, 2011, at the Las Vegas Convention Center. *For more information:* www.wconference.com

- ✚ A mock workers' compensation trial to the **Safety Security and Environmental Group of RIMS Chicago Chapter** on November 15 2011. *For more information:* www.chicagorims.org

- ✚ "Current Trends in Workers' Compensation" at the **National Conference on Workers' Compensation Claims and Litigation**, December 5-6, 2011, in Philadelphia. *More information to follow.*

In addition to these, we have recently presented webinars on Illinois workers' compensation reform that have been attended by over 600 people. We have also presented a number of in-house seminars to clients to on this topic.

If you would like more information on any of these presentations, email rlenkov@brycedowney.com

- ✚ Storrs Downey, Justin Nestor and Paige Toth will be hosting a Medical-Legal Seminar in Indianapolis on September 22, 2011. It promises to be a great event with speakers from the medical and legal Indiana workers' compensation community as well as personnel from the Board. For more information, please email sdowney@brycedowney.com.

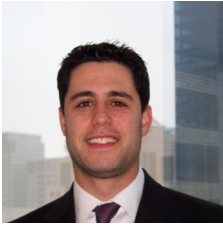


NWCC News

The National Workers' Compensation Coalition will have a booth at the **California Workers' Compensation & Risk Conference** to be held September 26 -28, 2011, at the St. Regis Hotel in Dana Point. The Conference will gather the top risk professionals together to share experiences and gain expertise. This strong educational program will focus on cutting-edge risk management strategies. For more information: lanettehanson@cwcriskconference.org



ARDC Complaint Against Former Arbitrator



By Michael C. Milstein

On July 5, 2011, the Attorney Registration and Disciplinary Commission filed a four-count complaint against former arbitrator Jennifer Carril (formerly Teague). Ms. Carril had been on paid administrative leave since February, after the *Belleville News-Democrat* published portions of her emails obtained under the Illinois Freedom of Information Act. She resigned from her position June 20.

Count I of the complaint alleges that Ms. Carril improperly attempted to expedite payment of a settlement in her own workers' compensation case. The allegations arise from Ms. Carril advising an Assistant Attorney General that his case (*Anderson*) "would never be heard" because she was going to choose to take her mandatory furlough days on the days that would normally be used for the *Anderson* case on the Mt. Vernon docket. The complaint states that Ms. Carril then allegedly sought to have Respondent's attorney speak to an employee at Central Management Services to see if she could get paid on her workers' compensation case without having to wait the required 180-day waiting period. In exchange for the having the waiting period reduced or waived, Ms. Carril would give a setting in the *Anderson* case. Ms. Carril also discussed the same proposition in front of another Assistant Attorney General.

Count II of the complaint alleges improper statements regarding the *Anderson* case. Petitioner's attorney had sent an e-mail to Ms. Carril and Respondent's attorney stating that the widower of Petitioner was being harassed by DOC employees. Before Respondent's attorney could respond or investigate the claim, Ms. Carril sent a reply which stated:

"Let me be EXTREMELY clear: I will tear into these people like they have never seen. Penalties on death benefits would also not be a good scenario. These people are not helping anyone, and it needs to stop."

The complaint states that Ms. Carril's statement that she would "tear into these people" prior to any hearing in the matter, "demonstrated that she had prejudged the actions of the DOC employees in the *Anderson* case."

Count III of the complaint discusses Ms. Carril's alleged efforts to conduct a public hearing away from the media and improper *ex parte* e-mails with Petitioner's attorney. On November 23, 2007, Illinois State trooper Matthew Mitchell was responding to a call when he lost control of his vehicle, crossed a median and struck another vehicle head on, instantly killing the occupants of the other vehicle, a 13 and 18 year old girl. At the time of the accident, Mitchell was driving 126 mph and was sending an e-mail to another officer. Mitchell pled guilty to two counts of reckless homicide and was sentenced to 30 months of probation.

Subsequently, in September, 2010, Mitchell filed an Application before the Commission, generating a substantial amount of publicity. The complaint alleges that in October, 2010, Petitioner's attorney sent an e-mail to Ms. Carril and Respondent's attorney stating that she would not be proceeding with her request for hearing due to the employer's dispute regarding the compensability of the claim. Ms. Teague then allegedly wrote to Petitioner's attorney on an *ex parte* basis stating her disbelief that the case was disputed and discussing the merits of the claim. Petitioner's attorney and Ms. Carril also allegedly sent numerous *ex parte* e-mails regarding their desire to keep a newspaper from attending the hearing by setting it up secretly at an unknown time and place. The case was scheduled to be tried on December 17, 2010 (not a normal setting date for the Belleville docket) at the Collinsville

hearing site. However, 10 minutes into the hearing a reporter appeared and was present for the hearing. Following the hearing, Ms. Carril told both attorneys that if they were asked why the case was specially set they should state that it was due to a scheduling conflict. However, Ms. Carril knew that the actual reason was due to her efforts to conduct the hearing away from the media.

Lastly, **Count IV** of the complaint alleges that Ms. Carril engaged in personal e-mails as well as *ex parte* e-mails regarding pending cases. The *ex parte* e-mails show that Ms. Carril would give the attorneys advice on settlement value, preferential treatment on scheduling and would make disparaging remarks about Petitioner's attorneys, the complaint alleges.



AMA Standards: Impairment vs. Disability



By Frank C. Rowland

Many of the new WC Act changes prompt more questions than answers. There are now five factors to be considered in assessing disability:

1. The reported level of impairment as denoted by the AMA standards;
2. The occupation of the injured employee;
3. The age of the employee at the time of injury;
4. The employees' future earning capacity; and
5. Evidence of disability as contained in the treating medical records.

As used by the AMA, impairment is “an alteration of an individual's health status; a deviation from normal in a body part or organ system and its functioning.” Other definitions are careful to ensure that impairment includes

psychological injury, such as those used by the World Health Organization and even the Social Security Administration.

Alternatively, the AMA defines disability as “an alteration of an individual's capacity to meet personal, social, or occupational demands because of an impairment.” The distinctions are clear. Impairment is essentially a medical term, plain and simple. Disability is a measure of the damage done by impairment to occupational, familial, and other aspects of the afflicted person's life.

For purposes of workers' compensation, the distinctions are important. They are essentially the primary purpose for the Act's existence. For example, a person with severe residual restrictions from major injuries who is fully employed would have substantial impairment, but less substantial disability in the truest sense of each term. Conversely, a brain surgeon who had traumatic arthritis of the hand would have limited impairment, but a high degree of disability. The new provisions of the act on disability assessment takes these factors into account.

The new Illinois law is not unique in either allowing or mandating hearing officers to take into account factors other than pure medical impairment. A number of those states use the AMA impairment rating (most often a percentage loss) as a baseline for disability evaluation. That evaluation can be raised or lowered by application of the other factors. As occurs in most cases, the overlay of the remaining factors- age, future earnings and disability- involves an increase in the overall compensation awarded from that which the empirical impairment level would otherwise warrant.

As noted above, there are far more questions than answers as to how the AMA Standards will be used. However, what is clear is that:

1. Arbitrators will have to consider and likely have to comment on how the standards are applied; and
2. It is incumbent upon those representing employers to ensure that correct and complete evidence of this very important factor provided at trial.

Every Respondent's IME must now include an assessment under the AMA standards. In appropriate cases, the other listed factors should also be the subject of specific commentary in the IME report. If the IME doctor believes that the age, occupation and future earnings of the claimant do not increase disability above the impairment range, the report should so specify very clearly with supportive commentary. In time, treaters may include some of these items in regular treatment records. Until then, the burden is on the employer to affirmatively use the new amendments to such advantage as we can.



CASE RESULTS



Carol Cesaretti gets "Zero" Award

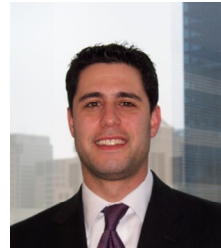
Carol Cesaretti was awarded a "zero" in a case for SUPERVALU d/b/a Jewel Food Stores before Arbitrator Black.

Petitioner, a deli clerk, slipped on a fried potato and fell, striking both knees. At trial Petitioner testified that she was holding a salad when this happened, that she did not drop the salad when she fell, but was able to place the salad into the display case landing on both knees.

Petitioner told Dr. Preston Wolin, her treater, that she was setting down a large tray of broccoli salad to wipe the display case and slipped on the floor. When she slipped on the floor, she first hit her left knee and then her right knee. This was contradictory to her trial testimony, where she stated she fell down striking both knees. Based on this discrepancy, Arbitrator Black found that Petitioner did not meet her burden of *credible proof* on the actual mechanism of the alleged injury. Therefore, he denied Petitioner's claim.



CASE LAW UPDATE



SLIP & FALLS By Michael C. Milstein

The Appellate Court recently denied compensation on two slip and fall injuries in *Cathy Baldwin v. The Illinois Workers' Compensation Commission*, 4-10-0375WC.

On October 8, 2006, Petitioner, a security guard, was descending a metal staircase she slipped and fell, landing on her left side. Petitioner did not know what caused her to fall and there was no defect with the staircase. Petitioner was wearing rubber soles, was not in a hurry and her hands were free. Petitioner stated that she had just walked through a freezer and moisture "might" have been on her shoes.

Petitioner eventually returned to work to inside duty. Petitioner testified that while walking up a flight of stairs her left leg began to cramp and throb. Petitioner attempted to walk back down the stairs, but the cramps became worse and her leg gave out, causing her to fall.

Petitioner filed two separate Applications. After the 19(b) trial, the arbitrator found that Petitioner failed to prove that she sustained injuries arising out of an in the course of her employment. The Commission and Circuit Court affirmed the arbitrator's decision.

The Appellate Court stated that it was necessary to determine what risk Petitioner was exposed to: 1) risks distinctly associated with the employment; 2) risks personal to the employee, such as idiopathic falls; or 3) neutral risks that have no particular employment or personal characteristics.

With regards to the first fall, the record showed that it was clearly not idiopathic. Further, even though Petitioner claimed there "might" have been moisture on her shoes from walking into the freezer, the Court found this to be conjecture and Petitioner could not show more than a mere

possibility that the moisture caused her to slip and fall. The Court stated: “simply put the claimant does not know what caused her to fall on October 8, 2006”.

The Court went on to state, “for an injury caused by an unexplained fall to arise out of the employment, a claimant must present evidence which supports a reasonable inference that the fall stemmed from a risk related to the employment.” “Because the claimant did not present any evidence establishing the cause of her fall on October 8, 2006, or that she was exposed to a risk greater than that faced by the general public, she failed to prove her injury on that date arose out of her employment.”

With regards to the second fall, the Court held that “falls resulting from an internal, personal origin are idiopathic in nature. An injury resulting from an idiopathic fall arises out of the employment only where the employment conditions significantly contributed to the injury by increasing the risk of falling or the effects of the fall.” Because Petitioner did not offer any evidence that any condition of the premises or of the staircase contributed to her fall “or placed her in a position which increased the

dangerous effects of the fall,” her fall was purely idiopathic and not compensable under the Act.

Practice Tip

This is an excellent decision for Respondents and provides a good analysis of when slip and fall cases are compensable. Always be sure to closely review slip & fall claims to determine compensability.



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-minute block between 9 am and 5 pm, over one or two days

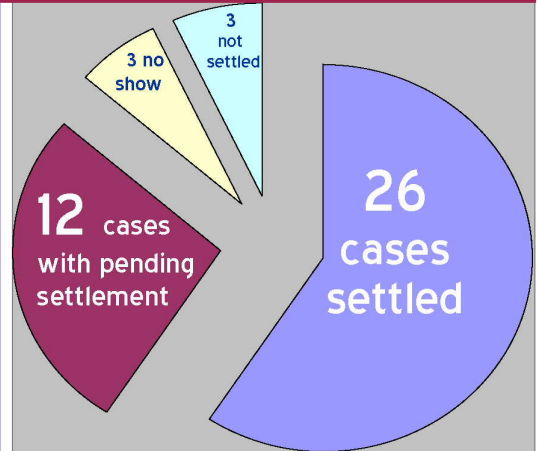
WHY?

Within a 30 day span during May & June 2011, we held 3 settlement days for 3 separate clients. In one, we settled 22 cases IN ONE DAY (*see below*)

SAMPLE SETTLEMENT DAY – MAY 2011

➤ 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@brycedowney.com

BRYCE DOWNEY & LENKOV LLC

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:

- Illinois Work Comp Forum
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- REBEX
- RIMS Annual Conference & Exhibition

Some of the topics we presented -

- *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*

If you would like us to come in for a free seminar, please email Rich Lenkov at rlenkov@brycedowney.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, 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:

Business Litigation
Business Transactions
/Counseling
Corporate/LLC/Partnership
Organization and Governance

Construction
Employment and Labor
Insurance Coverage
Insurance Litigation
Intellectual Property

Medical Malpractice
Professional Liability
Real Estate
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 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 2011 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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