

Workers' Compensation Newsletter

July 2010

INSIDE THIS ISSUE:

Seminars	1
News from BDL	1
News from IWCC	2
Recent Case Results	2
Case Law Update	2-5

Seminars

- On April 27, 2010, Rich Lenkov spoke on the Retail Panel at **RIMS 2010** Annual Conference & Exhibition, April 25-29, 2010, in Boston.
- On May 26, 2010, Storrs Downey presented *The Mediation Process* to Acuity Insurance, sponsored by the **Council on Litigation Management**.
- Rich Lenkov presented *Negotiation Strategies for Claims Professionals 2.0* on July 14, 2010, to Safe Auto, and on July 15, 2010, to Motorists Mutual Insurance Group, sponsored by the **Council on Litigation Management**.
- Rich Lenkov will be presenting *Cost-Cutting & Negotiation Strategies* at **REBEX 2010**, the Regional Risk Management Conference and Exhibition, September 21-22, 2010.
- Rich Lenkov will be presenting *The 2005 Illinois Workers' Compensation Act Amendments 5 Years Later: Has Anything Really Changed?* to Chicago RIMS monthly meeting on October 11, 2010.
- Rich Lenkov will be presenting *Point/Counterpoint: Key Workers' Compensation Issues From the Perspective of an Employee Attorney and an Employer Attorney* at the **19th National Workers' Compensation and Disability Conference & Expo**, November 10 - 12, 2010 in Las Vegas, NV.

If you would like us to present any of these seminars to your team, please email Rich Lenkov at rlenkov@brycedowney.com

News from BDL

We are pleased to announce that we have added Francesca D. Larsen and Carter Esterling as the newest members of our workers' compensation team.



Francesca received her undergraduate degree from Purdue University and her J.D. from DePaul University. She has practiced workers' compensation defense for three years.

Carter Esterling brings over four years' experience handling complex workers' compensation cases as an Illinois assistant attorney general. In that capacity, he has tried dozens of cases and we are fortunate to have him join our team.



The addition of Francesca and Carter brings our workers' compensation team to 12 attorneys handling Illinois and Indiana workers' compensation cases, making our workers' compensation department one of the largest in either state.

We are thankful for our ability to grow so quickly and are pleased to continue providing our clients with aggressive, cost-effective service.

News from IWCC

On May 7, 2010, the Senate confirmed Mitch Weisz as chairman.

Chairman Weisz holds a B.A. degree in History from Northwestern University and a J.D. degree from IIT Chicago-Kent College of Law. He worked as an attorney concentrating in workers' compensation for 25 years, and has banking and business experience.

Chairman Mitch Weisz announced the following changes in arbitrator assignments, effective September 1st, 2010:

- ✦ Arbitrator Erbacci will be assigned to take over the entire Waukegan call.
- ✦ Arbitrator Andros will remain in DeKalb and will take over Arbitrator Erbacci's duties in Wheaton.
- ✦ Arbitrator Lee will cover Woodstock and one quarter of the Rockford call.
- ✦ Arbitrator Lammie will take over the Chicago call handled by Arbitrator Lee.
- ✦ Arbitrator Fratianni will temporarily handle the Chicago status call, pro se contracts, and other matters currently handled by Arbitrator Lammie.

Additionally, effective January 1, 2011, the Lawrenceville call, one of the smallest calls in the state, will be discontinued. Those cases will be reassigned to Mattoon and Mt. Vernon.

Want to Close Dozens of Files NOW?

- ◆ Do you have a large block of cases that seem to languish forever?
If so, consider holding a settlement day at the Illinois Workers' Compensation Commission. Settlement days involve claimants and their attorneys meeting us at the Commission to resolve claims.
- ◆ The attorneys at Bryce Downey & Lenkov are experts at organizing and conducting successful settlement days. We have done so with as few as 10 cases or as many as 80. We are generally successful in resolving upwards of 70% of cases at settlement days.
- ◆ If you would like our assistance in closing your claims during settlement days or through other innovative ways, please contact Rich Lenkov at rlenkov@brycedowney.com.

Recent Case Results

- Justin T. Nestor recently obtained a dismissal on a workers' compensation claim. The claim was disputed from the beginning and the claimant's former counsel withdrew, leaving him unrepresented. Justin was able to posture the claim for dismissal given the claimant's lack of cooperation in pursuing the claim.
- Storrs W. Downey and Justin T. Nestor recently obtained a voluntary dismissal on a claim for a medical bill of \$11,806.10. The medical care at issue was for a cardiac condition that was found to be not related to the accepted portion of the claim. Storrs and Justin retained a medical expert who opined that the claimant's cardiac treatment was due to a preexisting condition. Armed with the expert's opinions, they were successful in convincing the provider's attorney to dismiss the Application, resulting in no payment of the claimed medical bill.

Case Law Update

IWCC Distinguishes Supreme Court Heart Attack Ruling

By Joseph Mulvey

In *Patricia Dragovan, Widow of Thomas Dragovan (deceased) v. Western Utility Contractors, Inc.* 06 IL. W.C. 31304 (2009), the Commission distinguishes a prior Supreme Court ruling outlining the applicable test for causal connection in heart attack cases.

The Supreme Court case, *Twice Over Clean, Inc. v. The Industrial Comm'n et al.* 241 Ill. 2d 403 (2005) created a very loose standard for proving a causal connection between employment and heart attacks. Essentially, a heart attack is compensable if the arbitrator can infer that the occupational activity contributed to the disabling condition.

The specific issue dealt with in both of these cases is the causal connection between physical exertion and a heart attack suffered by an employee

with pre-existing and unrelated arterial blockage. In the *Twice Over Clean* case, evidence showed that Petitioner's right coronary artery was 90% blocked at the time of the accident and that Petitioner was **"basically a heart attack waiting to happen."**

Despite the pre-existing risk factors, and medical testimony showing that Petitioner could have suffered a heart attack at any time, regardless of his level of exertion, the Supreme Court found the claim to be compensable. Their reasoning explicitly disavows what had been known as the "normal daily activity" exception, i.e. that an accident arising from a physical condition that has deteriorated to the point that the condition of ill-being could have been produced by normal daily activity is not compensable.

The Supreme Court found that there was competent medical evidence to show that the exertion preceding the heart attack was sufficient to aggravate the pre-existing condition and that the ensuing attack was therefore work-related.

In *Dragovan*, the Commission distinguished the *Twice Over Clean* ruling by focusing on the lower level of exertion leading to the heart attack. Whereas the petitioner in the *Twice Over Clean* case had been carrying 40-50 lb. bags of asbestos in extremely cold conditions, the petitioner in *Dragovan* had been shoveling and clearing loose soil for a relatively short amount of time in temperate conditions.

Ultimately, the distinction rests on a slim factual basis and seems to ignore the Supreme Court's clear directive that medical evidence showing that the activity may have aggravated or exacerbated the underlying condition is sufficient to show a causal connection between the work activity and the heart attack.

Practice Tip

This decision is noteworthy for employers and offers a strong argument that heart attacks occurring during work hours are not per-se related to the employment. It is important in such cases to mine the factual record for details surrounding the accident itself, particularly with respect to the environmental conditions and the level of work preceding the heart attack.

Z Z Z

Intoxication Is Not A Slam Dunk Defense For Respondent

By Francesca Larsen

In *Lenny Szarek, Inc. v. The Workers' Compensation Commission*, 396 Ill.App.3d 597 (2009), Petitioner Daniel Rub was employed by Respondent as a journeyman carpenter. On the day of the accident, Petitioner was framing the exterior walls on the second floor of a new house. Since the house was still under construction, there was a nine foot by nine foot opening in the center of the building. The opening was marked with paint but did not have a guard rail around it. While working, Petitioner fell through the opening in the center of the house and landed in the basement. Immediately following the incident, Petitioner was transported to the hospital. His only recollection of the incident was that he thought he was "going to die." Petitioner was rendered a paraplegic as a result of the accident.

While in the hospital, Petitioner tested positive for both marijuana and cocaine. Petitioner admitted a history of substance abuse to the hospital worker, but denied recent abuse. Petitioner's co-worker testified that on the morning of the incident he did not observe anything unusual about Petitioner when he arrived for work. He further stated that Petitioner did not stumble or slur his words and nothing about his appearance indicated that he was intoxicated or impaired. Petitioner's supervisor also stated that there were no noticeable signs that claimant had consumed alcohol or drugs.

Respondent retained Dr. Jerold Leikin, a toxicologist, to render opinions as to Petitioner's alleged intoxication the morning of the incident. Dr. Leikin testified that Petitioner's medical record revealed positive tests for both marijuana and cocaine. Dr. Leikin opined that Petitioner's test results were "consistent with impairment due to marijuana" and that such results were indicative of "proximal use." Dr. Leikin testified that Petitioner's use of such controlled substances would result in "some visual acuity deficits," such as Petitioner's impaired ability to judge distance. Dr. Leikin ultimately opined that the reason Petitioner "might or could have" mistakenly stepped into an

open stairway was from an impaired visual response or cognitive impaired response.

Respondent denied benefits based on the intoxication defense. The arbitrator rejected the respondent's intoxication defense and found that Petitioner had sustained an injury arising out of and occurring in the course of his employment. The Commission adopted the decision of the Arbitrator and noted that Dr. Leikin only opined that Petitioner's fall "might or could" have been due to his marijuana use. The Commission reiterated the fact that Dr. Leikin could not state the Petitioner's consumption of controlled substances was the only cause of the accident. The fact remained that there were other factors of Petitioner's employment that could have also caused his accident; namely the unguarded opening in the floor.

The Illinois Appellate Court affirmed the Commission's decision based on the fact that Petitioner's drug usage was a mere *contributing factor* and not the *sole cause* of his injury. The Court stated, "A Petitioner is not required to prove that employment was the sole principle cause, but only that the employment was a causative factor."

Practice Tip

Intoxication is not a slam dunk defense for a respondent. In order to prevail, a respondent must show that intoxication was the sole cause of the injury. In order to satisfy this burden a respondent can show that the intoxication was excessive. A respondent would benefit from providing testimony from the alleged intoxicated employee's co-worker or supervisor that the employee's intoxication impaired his abilities to perform his job duties. Such facts may persuade an arbitrator to rule that the intoxication was the sole cause of the accident.

Z Z Z

How Much Control Is Too Much: The Employer-Employee Relationship

By Elizabeth Alberico

In *Skzubel v. Illinois Workers' Compensation Com'n* 927 N.E.2d 1247 Ill.App. 1 Dist.,2010.Four M, newspaper distributor for the *Chicago Sun-Times*, claimed to use independent contractors to deliver

newspapers, prepare and distribute bills and collect payments from subscribers. Four M would enter into a contract with the delivery drivers that specifically stated that the driver was not an employee. Four M provided the drivers with a specific route, which could be amended at anytime, without notice by the company. The driver used his own vehicle. The rate per paper, per driver was set in the contract, but could be changed at anytime without notice by Four M. Drivers had to give seven days notice to cancel the agreement, but Four M could terminate the agreement with the drivers at anytime. Each morning before deliveries were made, Four M would provide the drivers with special instructions.

Petitioner was hired by verbal agreement as a driver for Four M. Because of Petitioner's pending immigration status, her husband signed the contract with Four M and the paychecks were issued in his name. Petitioner worked exclusively for Four M for two years and never held herself out as an independent contractor.

The arbitrator found that no employee-employer relationship existed, but never addressed the issue of whether Petitioner was an independent contractor. He reasoned that because Petitioner's husband, not Petitioner, signed the contract for employment and his name appeared on the checks, there was no contractual relationship between the employer and Petitioner.

A majority of the Commission agreed with the arbitrator, with one commissioner dissenting. The dissenting commissioner noted that the employer waived the right to claim that Petitioner was an independent contractor because of their dishonest actions in avoiding her immigration status. He examined all factors and focused on the degree of control the employer exercised over Petitioner as well as whether the job performed by Petitioner was essential to the business of the employer. The commissioner found that these components were enough to support an employee-employer relationship. The trial court affirmed the decision of the Commission.

The issue before the court was whether Petitioner was an employee or independent

contractor. The Appellate Court examined a multitude of factors to determine whether an employee-employer relationship existed.

The Appellate Court began by examining the employer's right to control the Petitioner. This well settled principle has time and again been considered the most important factor in determining whether an employee is an independent contractor. Four M had the right to terminate Petitioner without notice, change the rate per paper without notice, provided each driver with special instructions every morning, and could amend a route without notice to the driver.

Another important factor the court examined was the nature of the work in relation to the business of the employer. The court found that the more essential the job duties are to the success and operations of the business, the more likely it is that an employee-employer relationship exists. In this case, the business of Four M was delivering newspapers. Four M relied on their drivers to carry out the operations of the business. Therefore, Petitioner's job performance was essential to the success of Four M.

The court considered the label of employee versus independent contractor, in an employment agreement, to hold very little weight in the analysis of whether an employee-employer relationship exists.

The court found that the conclusion of the trial court was against the manifest weight, as an examination of the facts clearly led to the conclusion that Petitioner was an employee. The court agreed with the dissenting commissioner and found that the Petitioner was an employee of Four M.

The court placed the most emphasis on the amount of control the employer had over the Petitioner as well as the work Petitioner performed in relation to the type of business the employer engaged in.

Practice Tip

When an employer controls the actions of an employee and the work performed by the employee is crucial to the operation of the employer's business, an employee-employer relationship exists.

Z Z Z

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. In 2009 and 2010, we spoke at:

- National Workers' Compensation and Disability Conference® & Expo
- Illinois Work Comp Forum
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- REBEX
- RIMS 2010 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. With these seminars, we can teach you a lot in as little as 90 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, 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:

Business Litigation	Insurance Litigation
Business Transactions/Counseling	Intellectual Property
Corporate/LLC/Partnership Organization and Governance	Medical Malpractice
Construction	Professional Liability
Employment and Labor	Real Estate
Insurance Coverage	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 2010 by Bryce Downey & Lenkov LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

Chicago: 200 N. LaSalle Street Suite 2700 Chicago, IL 60601 Tel: 312.377.1501 Fax: 312.377.1502	Indiana: 2646 W. Lincoln Hwy Suite B Merrillville, IN 46410 Tel: 219.756.8100 Fax: 219.756.5100	Oak Brook: 635 Butterfield Road Suite 240 Oak Brook Terrace, IL 60181 Tel: 630.620.9100 Fax: 630.620.9108	Memphis: 1922 Exeter, Suite 5 Germantown, TN 38138 Tel: 901.753.5537 Fax: 901.732.6555	Atlanta: P.O. Box 800022 Roswell, GA 30075-0001 Tel: 770.642.9359 Fax: 678.352.0489
--	--	---	--	---

Paperless Newsletters:

We are switching from mailing to e-mailing this and all our newsletters. If you received this by U.S. mail, it means we do not have your e-mail address. Please e-mail us through our website www.brycedowney.com or to kkramer@brycedowney.com to get newsletters by e-mail. If you prefer to be removed from our newsletter list, just let us know. You will always be able to access our past, present and future newsletters on our website, in the News section.

