

Illinois Workers' Compensation Newsletter

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Richard Lenkov to Speak at National WC Conference

Richard Lenkov has been chosen to speak at SEAK's 28th Annual National Workers' Compensation and Occupational Medicine Conference. This is his second invitation to speak at this renowned annual conference, which will be held on Cape Cod, in Hyannis, Massachusetts from July 15 to 17, 2008.

Rich will be presenting the topic "Turning the Tables: How To Use An Employee's Own Actions As A Defense To Their Workers' Compensation Claim." This presentation will be held at 2:40 p.m. on July 16, 2008. It promises to be an interesting discussion on how to craft seldom-used defenses to put your case in the best position for a victory.

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. Moreover, it is held on Cape Cod, one of the most beautiful settings in the country.

For more information on the conference, please go to www.seak.com. We encourage you to attend what promises to be an interesting gathering.

RATES:

**We have updated our Illinois Rates At A Glance.
Please see enclosed copy.**

The attorneys at BryceDowney 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 W. Lenkov at 312.377.1501 or rlenkov@brycedowney.com, or any member of our Workers' Compensation team. © Copyright 2008 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.

Recent Case Results

- ***Marocco v. Best Buy:*** On May 10, 2006, Richard Lenkov tried this case before Arbitrator Hennessey in Joliet. Petitioner was employed as a recruiter for Best Buy. He slipped and fell on some ice in a parking lot in Maryland. He sustained a right knee medial meniscus tear for which he underwent surgery consisting of arthroscopy and meniscectomy on June 22, 2004. He also alleged continued problems with his right leg.

Arbitrator Hennessey found for Petitioner, awarding \$75,000 in TTD and medical benefits. The arbitrator also ordered that Best Buy pay for the surgery to the right leg, which was recommended by both the treater and Respondent's IME physician, and was expected to cost between \$25,000 and \$35,000. Best Buy appealed the award. Commissioner Ulrich's panel unanimously overturned the award, finding that several gaps in Petitioner's credibility mandated their decision.

Petitioner has appealed the case to the Circuit Court.

- ***Loftin v Kingston Tile:*** On January 9, 2008, Carol Cesaretti tried this case on behalf of Respondent before Arbitrator Cronin in Chicago.

Petitioner was employed by Kingston Tile as a ceramic tile finisher and tile layer. On August 15, 2006, Petitioner was moving Portland cement on a pallet jack when the pallet jack "got away from him" and rolled over his left foot.

The original diagnosis was a left great toe fracture, yet the treating doctor, Dr. Labanauskas, continued to treat Petitioner for well over a year and stated that Petitioner had complex regional pain syndrome (RSD) of the left lower extremity. It was Petitioner's allegation that he was permanently and totally disabled requiring additional and ongoing medical treatment as well as TTD benefits. Respondent combated this allegation with an IME of Dr. George Holmes and a utilization review report, as well as calling into question the credibility of Petitioner.

Arbitrator Cronin found permanency to the extent of 50% of the great toe, with no additional temporary total disability benefits or medical benefits to be paid by Respondent. Arbitrator Cronin relied on the IME report of Dr. George Holmes as well as the utilization report.

Improper Ex Parte Communication

In *Hostetler v. Lennar Homes*, 05 WC 12403, the Commission reiterated the application of the *Petrillo* holding barring ex-parte communications with a petitioner's treating physician.

In *Petrillo v. Syntex Laboratories*, 07 IWCC 1309, the court promulgated a new rule whose primary effect was to bar defense counsel from ex-parte communication with a plaintiff's or petitioner's treating physician. The ruling was originally based on public policy grounds: the court found that ex-parte communications were likely to undermine the physician-patient relationship.

Six years later, in *Hydraulics, Inc. v. Industrial Commission* 329 Ill. App. 3d 166 (2nd Dist., 2002), this rule was extended to the proceedings of workers' compensation cases. The rationale underlying the *Petrillo* doctrine was found applicable to workers' compensation cases; namely the public policy of discouraging such communications, the availability of alternative methods of acquiring the same information and, to some extent, the implication of a constitutional privacy right.

In *Hostetler v. Lennar Homes*, the Commission slightly expanded the application of this doctrine. In *Hostetler*, defense counsel forwarded a surveillance video of Petitioner to her treating physician. Following the doctor's review of the surveillance video, Petitioner's treating doctor changed his opinions regarding future treatment and causation.

During trial, Arbitrator Dollison found that submitting the surveillance video was communication under the *Petrillo* doctrine. Thus, in accordance with its application to workers' compensation cases as set forth in *Hydraulics*, the treating doctor's amended report, prepared in response to and after the ex-parte communication, was banned from trial.

The holding indicates that any communication, even if limited to the forwarding of material between a respondent and a petitioner's treating doctor, will be viewed as improper ex parte communication. As such, any amended opinions offered by the treating doctor after such communication will be barred from evidence at trial.

The impact of this line of cases is evidentiary. In each of the above-referenced decisions, the treating doctor's opinion changed after the ex parte communication. The effect of the *Petrillo* rule is to keep these subsequent opinions from being admitted into evidence.

The *Petrillo* rule appears fairly inflexible and judges and arbitrators have shown no inclination to adopt a narrow reading that would diminish its impact. Employers, adjusters and defense counsel should bear this in mind when discussing strategies for gathering information. Significantly, the *Petrillo* court made it clear that respondents stand little to gain from ex parte communications that cannot be achieved through legal means.

Practice Tip: *Do not contact a treating doctor without the express written authorization from a petitioner and/or petitioner's counsel, if represented. If you need to gain information from or submit information to the treating doctor, contact defense counsel to discuss strategies for the appropriate means of doing so.*

Repetitive Trauma & Job Description

A September 20, 2007, decision from the Illinois Workers' Compensation Commission in *Ainley v. Pactiv*, 05 W.C. 145646, 07 IWCC 1205, held that an employer's own job description in conjunction with credible medical evidence that the claimant's condition was related to his work activities, was sufficient to support a repetitive trauma claim.

In *Ainley*, Petitioner was employed as a machine operator for Respondent. Petitioner's job required the repetitive handling of paper pizza trays and lifting 70 pound stacks of trays. Additionally, it was necessary to inspect the trays which required flipping them over using both arms to inspect both sides of the tray. At trial, Petitioner offered Respondent's job description which indicated the job required reaching activities on a frequent basis. Further, the job description specified that repetitive use of the wrists, hands and fingers as well as the shoulder and elbow was required. Petitioner also offered medical evidence that his bilateral carpal tunnel syndrome and epicondylitis were related to his work activities. In finding that Petitioner's upper extremity conditions of ill being were related to his work activities, Arbitrator Douglas Holland afforded greater weight to the opinions of Petitioner's treating physicians over Respondent's Section 12 examiner. Importantly, Arbitrator Holland noted that Respondent's own job description indicated that the work was repetitive in nature. Arbitrator Holland's Decision was affirmed and adopted by the entire panel of Commissioners consisting of Kevin W. Lamborn, Barbara A. Sherman, and Yolaine Dauphin.

Practice Tip: *Employers should use caution when creating written job descriptions and avoid using words such as "repetitive" when describing the work activities. The better practice is to describe the work activities in terms of frequency and/or amount of time required for each activity.*

BryceDowney 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, Memphis and Atlanta and attorneys licensed in multiple states, BryceDowney is able to serve its clients' needs with a regional concentration while maintaining a national practice. Our practice areas include:

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