

# Workers' Compensation Newsletter

## June 2011

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### Illinois Workers' Compensation Reform

After numerous failures, the Illinois legislature finally passed workers' compensation reform on May 31, 2011, the last day of the legislative session. Among the reforms:

1. A 30% reduction in the medical fee schedule. Prior to reform, services were reimbursed at 76% of charges. That figure has been reduced to 53.2%.
2. Arbitrators are now required to consider AMA guidelines as one of five factors (for treatment on or after September 1, 2011) when determining permanent disability (applies to injuries which occur after September 1, 2011).
3. Employers can use preferred provider programs (PPPs) approved by the Illinois Department of Insurance (effective immediately after the bill is signed into law).
  - a. If the employer does not have a PPP, the employee has a right to choose two treating doctors and anyone they are referred to, which is the same as the current law.
  - b. If the employer does have a PPP:
    - i. The employee can **opt out** of the PPP in writing after reporting an injury and choose **one** treating provider and anyone they are referred to;
    - ii. The employee can **opt in** to the PPP and choose **two** treating providers in the PPP and anyone they are referred to.
4. Limits PPD awards for carpal tunnel injuries due to repetitive trauma to a maximum of 28.5 weeks (15% loss of use of the hand). "Clear and convincing evidence" can increase the maximum award to 57 weeks (30%) (effective once the bill is signed into law).
5. Wage differential payments are capped at age 67 or 5 years, whichever is later, rather than for life (claims after September 1, 2011).
6. If drugs or alcohol are involved, the burden of proof shifts to the employee to prove compensability. No compensation is awarded if an employee's intoxication is the proximate cause of injury or if at the time the employee incurred the injury, the intoxication constituted a departure from the employment.
7. Strengthening utilization review.
8. Effective July 1, 2011, arbitrators will serve three-year terms and will be appointed by the Governor with the advice and consent of the Senate. They will also be subject to new ethical standards and training requirements. It is not clear who among the current group of arbitrators will be reappointed.

We feel that this is a good step towards reforming one of the most anti-business workers' compensation systems in the country. While not going far enough (for example, not strengthening the causation burden of proof), it does represent a significant move in the right direction. It remains to be seen whether these changes will result in lower workers' compensation costs and a better environment. The 2005 changes to the Act were supposed to achieve those goals, and did not, and in many respects made the climate worse.

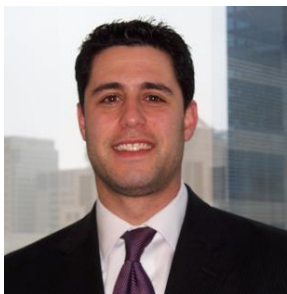
Obviously, the impact of these changes is unknown. As the practice begins to adapt to these changes, we will be sure to keep you updated.



## Upcoming Seminars

- On **June 14, 2011**, Rich Lenkov, Storrs Downey & Paige Toth will present to a client the following seminars:
  - *Turning the Tables: How To Use An Employee's Own Actions As A Defense To Their Workers' Compensation Claim*
  - *Illinois Workers' Comp Reform*
  - *Negotiation Skills*
- On **June 30, 2011**, Storrs Downey & Justin Nestor will present *Indiana Workers' Comp 101* to a client.
- On **November 10, 2011**, Rich Lenkov will be a panelist on *Challenges and Solutions to Multi-jurisdictional Workers' Comp Claims* at the National Workers' Compensation & Disability Conference in Las Vegas. For more information, visit [www.wcconference.com](http://www.wcconference.com).

## Case Law Update



### Two Injuries For the Price of One?

By Michael C. Milstein

In *The City of Chicago v. The Illinois Workers' Compensation Commission*, Nos. 08 L 51149 and 08 L 51550, the Appellate Court recently reversed the decision of the Circuit Court and Commission regarding whether a petitioner is entitled to two awards for injuries to the same body part.

Petitioner Thomas O'Rourke worked as a laborer for Chicago's sewer department. On August 27, 2002, he injured his lower back while pushing a wheelbarrow full of bricks. Petitioner was diagnosed with a herniated disc at L4-5 and underwent two microdiscectomies. Following a functional capacity evaluation and work hardening, he was released to return to full-duty work on July 10, 2003. While working, Petitioner testified that

he was mostly pain-free but experienced pain and muscle spasms in both legs on a daily basis.

Petitioner worked without incident until May 5, 2004, when a trench that he was working in partially collapsed on him. Petitioner underwent another functional capacity evaluation which stated that he could no longer continue his work as a laborer. Petitioner remained off work until May 2, 2005 when he returned to work for the City of Chicago as a night watchman earning \$17.00 per hour (his prior employment paid at least \$29.00 per hour depending on the years worked).

At arbitration, the two cases were consolidated before Arbitrator Carlson per Respondent's motion. The Respondent argued that Petitioner was entitled to only one permanency award (either man as a whole or wage differential) because he suffered from only one condition. Arbitrator Carlson disagreed and stated that "the injuries were different in nature because the claimant had been able to return to work after the first injury but was precluded from returning to work after the second." Arbitrator Carlson awarded Petitioner 20% loss of use of a man as a whole for his first injury and a wage differential for his second injury. Penalties were also imposed for not promptly paying a wage differential when Petitioner took his new job as a night watchman.

The Illinois Workers' Compensation Commission and Circuit Court affirmed the Arbitrator Carlson's award. The Appellate Court, however, reversed the decision regarding the amount of awards Petitioner was entitled to, and affirmed the award of penalties.

The Appellate Court stated that since the issue regarding permanency was a question of statutory interpretation, the issue was reviewed *de novo* (anew). The Appellate Court agreed with the employer that it was impossible to tell which injury was causing Petitioner's current condition of ill-being. The court noted "one very significant detail...at the time of the hearing, the first injury had not resolved itself and clearly was a factor when the claimant suffered the second injury." The court found that although Petitioner sustained two injuries, the evidence established only one

condition of ill-being. Therefore, the Appellate Court vacated the award of 20% loss of use of a person as a whole and affirmed the wage differential award.

### Practice Tip

Respondents who have multiple claims involving the same body part should have them consolidated and argue that there is no way to differentiate which injury is causing a petitioner's current condition of ill-being. Additionally, if a petitioner goes back to work at a lower wage, wage differential benefits are owed *immediately*.



### IME Reports Must be Tended to Opposing Side 48 Hours Prior to Trial

By Noah A. Frank

In *Mulligan v. Ill. Workers' Compensation Comm'n*, --- N.E.2d ---, 2011 WL 1205278 (Ill.App.1st Dist. Mar. 28, 2011), the arbitrator conducted a three-part consolidated hearing. On April 20, 2004, the trial began, the petitioner testified, and proofs were not closed.

On August 17, 2004, the parties appeared before the arbitrator on the employer's motion for a *dedimus potestatum* for its Section 12 expert, Dr. Hopkinson. The employer asserted that the motion was brought pursuant to Commission Rule 7030.60, which permits the arbitrator to order a deposition once trial has begun only for a "good cause." The claimant objected under Section 12, as he had not received Dr. Hopkinson's report 48 hours before the trial began on April 20, 2004. The arbitrator overruled the petitioner's objection, but did not make a good cause finding.

On September 24, 2004, the employer obtained a second Section 12 report from a new expert, Dr. Kornblatt. The petitioner also objected to this report as it was not received 48 hours before the trial began on April 20, 2004. Dr. Hopkinson was subsequently deposed.

On July 27, 2005, the second part of the trial began. The Arbitrator ruled that the 48-hour requirement applied to the day the doctor testified, not the first day of trial, and permitted Dr. Kornblatt to testify in person. On July 31, 2005, proofs were closed, and the trial concluded.

The Appellate Court agreed with the petitioner. Section 12 requires a copy of the report to be furnished to the opposing party no later than 48-hours before the time the case is set for hearing before the arbitrator. The purpose of the rule is to prevent surprise testimony on the day of trial. The 48 hour rule applies to treating, examining, and records review physicians' reports alike. Therefore, any report must have been tendered by April 18, 2004. Rule 7030.60 mandated that, once the trial began, a deposition be denied absent a showing of good cause.

### Practice Tip

Section 12 reports should be tendered to opposing counsel as soon as practicable, but in all instances at least 48 hours prior to trial, by means that provides proof of delivery.



### 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 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.
- ◆ Within a 30 day span during May & June 2011, we will have done 3 settlement days for 3 separate clients. In one of them, we settled **22 cases in one day**.

*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](mailto:rlenkov@brycedowney.com).*

## 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](mailto: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](mailto: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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