

Indiana Workers' Compensation Newsletter

October 2009

INSIDE THIS ISSUE:

News	1
Employer Bears Burden to Prove Basis for Medical Bill Reduction	2
Award of Secondary Medical Treatment for Weight Reduction Was Proper	3
Insurer's Decision to Stop Paying for Specific Treatment Does not Transform Doctor to Unauthorized Physician	4
Settlement of Civil Suit May Not Bar Additional Workers' Compensation Benefits	5
Changes to Indiana WC Forms	6
Current Indiana Rates	6
Current Indiana Mileage Reimbursement	6

Chicago:
200 North LaSalle Street
Suite 2700
Chicago, IL 60601
Tel: 312.377.1501
Fax: 312.377.1502

Merrillville, IN:
2636 West 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
Memphis, TN
Tel: 901.753.5537
Fax: 901.756.9022

Atlanta:
P.O. Box 800022
Roswell, GA 30075
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 in our files. Please e-mail us through our website (www.brycedowney.com) or directly to mkubale@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.

News

Storrs Downey presented at the 5th Annual National Workers' Compensation Subrogation Strategies ExecuSummit in Uncasville, CT, on August 12, 2009, on the topic *Balancing Aggressive Pursuit of Lien Recovery with Associated Litigation Expenses* (www.execusummit.com).

Storrs presented at the REBEX 2009 Regional Risk Management Conference and Exhibition in Wheeling, IL, on October 22, 2009, on the topic *Terminating Injured or Disabled Problem Employees*.

Among other recent seminars Storrs and Justin Nestor have presented to individual clients are Comprehensive Subrogation Investigation in Illinois and Indiana, Permanent Total Disability in Indiana, Back to Basics on Indiana Workers' Compensation and Managing Your Indiana Workers' Medical Care.

Rich Lenkov spoke at the SEAK 29th Annual National Workers Compensation and Occupational Medicine Conference in Hyannis, MA, on July 20, 2009, on *Managing and Closing Workers' Compensation Claims in a Cost-Effective Manner*. (For more information: www.seak.com/semJune09semoverview.htm)

Rich Lenkov will speak at the National Workers' Compensation and Disability Conference® & Expo at McCormick Place, Chicago, on November 19, 2009, on *Closing the Nightmare Case: The Perspective of a Risk Manager and Defense Attorney* (www.wcconference.com)

If you are interested in us providing a free seminar on Indiana workers' compensation or subrogation, contact Storrs Downey at sdowney@brycedowney.com.

From our office in Merrillville, Indiana, we continue to expand our presence in Indiana and routinely handle cases throughout the state, including northern and central Indiana.

The Board has recently issued a mandate that any filed claims that have been pending for longer than three (3) years can no longer be continued by agreement. Any such continuance requests must be made in person at the assigned pre-trial/hearing date.

The attorneys at Bryce Downey & Lenkov are committed to closing every case as quickly as possible. We are very successful in shortening the timeline of a claim by employing methods such as early and aggressive investigation, motions to dismiss, trials and out-of-the-box strategies like settlement days.

If you would like more information on how to get your Indiana case closed as quickly as possible, contact Storrs Downey at sdowney@brycedowney.com.

Employer Bears Burden to Prove Basis for Medical Bill Reduction

In a recent Indiana Court of Appeals case, it was held that the employer bears the burden of proving the basis for a medical bill reduction per IC §22-3-3-5. *Washington Township Fire Department v. Beltway Surgery Center*, 911 N.E. 2d 590 (Ind. Ct. App. 2009).

Washington Township through their workers' compensation carrier, submitted the \$11,563.30 Beltway Surgery Center bill for medical services to Mednet for a bill review. Pursuant to the recommendation of Mednet, \$5,104.27 was paid of the total bill. Beltway filed an Application seeking full payment of the remaining \$6,459.03 of the original bill. For unknown reasons, Mednet then

recommended payment of an additional \$2,230.14 to Beltway which was paid.

After a hearing, the Board ordered payment of the remaining \$4,228.89 bill as it was determined that Washington Township, through Mednet, bore the burden of proof to explain how Washington Township's pecuniary liability had been established. No evidence was introduced at the hearing as to the basis for Mednet's reduction and the Board awarded payment of the full Beltway Surgery bill.

The Court of Appeals ultimately concluded that it is proper to place the burden of proof on the employer to produce evidence as to whether a bill exceeds the 80th percentile standard for reduction of a medical bill per the Indiana Workers' Compensation Act. In support of this ruling, the Court noted that the Workers' Compensation Act specifically provides for use of a billing review service to determine liability for medical bills. The Court noted that IC §22-3-3-5.2 sets forth the specific guidelines a billing review service is required to follow. As such, the Court found it is proper to require the employer to bear the burden of proof as to the basis for the bill reduction as the decision for doing so rests exclusively with the billing review service.

Application of *Washington Township* case reveals that liability for outstanding medical bill balances might be adverse unless you are able to provide specific documentation as to how the reduction was arrived at. Specifically, proof is required that the bill review used the following pursuant to IC §22-3-3-5.2:

- 1) Data based on medical service provide billing charges as submitted to the employer and the employer's insurance carrier from the same community;
- 2) Data used to determine pecuniary liability must be compiled on or before June 30 and December 31 of each year;

- 3) Bill review standards must be revised for prospective payments of medical service provider bills to provide for payment of the charges at a rate not more than the charges made by eighty percent (80%) of the medical service providers during the prior six (6) months within the same community; and
- 4) Bill review standard shall include the billing charges of all hospitals in the applicable community for the service or product.

Essentially, this requires proof of supporting documentation or witness testimony as to how the bill reduction was determined. Merely producing an Explanation of Review without data to support at how the reduction was calculated will likely not be sufficient proof.

Practice Tip: It is imperative to obtain supporting documentation of how a medical bill reduction was determined. Failure to do so can result in a finding of liability for the full billed amount. Also, keep in mind available defenses (i.e., statute of limitations or causation) when faced with such a claim.

Award of Secondary Medical Treatment for Weight Reduction Was Proper

In *PS2, LLC, D/B/A Boston's Gourmet Pizza v. Childers*, the Indiana Court of Appeals held that Plaintiff was entitled to receive secondary medical treatment, specifically a lap-band surgery to help lose weight, as a precursor to back fusion surgery related to the work-related injury. *PS2, LLC, D/B/A Boston's Gourmet Pizza v. Childers*, 910 N.E.2d 809 (Ind. Ct. App. 2009),

Childers was employed as a cook when he was accidentally struck in the back by a freezer door sustaining an injury to his lower back. At the time of the accident, Childers was 26 years old and weighed approximately 340 pounds.

At the hearing evidence introduced revealed that Childers underwent a series of epidural injections for and central disc herniation at L5-S1. Due to severe and worsening pain, physical therapy was stopped and a recommendation was made for a lumbar spine fusion surgery.

Childers underwent an independent medical examination with Dr. Levin who opined that he would not recommend any neurosurgical intervention due to Childers' weight and age. It was recommended that Childers lose weight and undergo spinal decompression procedures instead.

The spinal decompression procedures were performed, but Childers' pain returned after each treatment. During this time, Childers' weight had increased to 380 pounds. His treating physician recommended that he consult a doctor about a lap band or gastric bypass in order to "get his weight down to a more reasonable level."

Evidence introduced at trial recounted that a lumbar fusion surgery had been recommended. Further, the treating physician noted that the recommended fusion surgery presented a "high risk for nonunion and failure" due to Childers' weight.

Childers was unable to lose weight on his own which was the basis for the recommendation that Childers undergo a lap band or gastric bypass procedure.

The Single Hearing Member ordered that Childers undergo a psychological evaluation to determine whether he was a candidate for the lap band procedure. Childers was subsequently found to be a reasonable candidate for the proposed lap band surgery.

Boston's argued that while it was responsible for the treatment related to Childers' lumbar spine work injury, they were not obligated to provide the precursor surgery which would safely allow Childers to undergo the treatment for his work-related injury. Essentially, they argued that

Childers had a pre-existing condition for which they were not obligated to provide medical treatment.

Ultimately, the Single Hearing Member awarded the weight reduction surgery because it was a pre-existing condition combined with a work accident. Further, Childers was awarded TTD during the time Childers was preparing for, undergoing and recovering from the weight loss surgery.

A review by the Board adopted the Hearing Member's decision and affirmed the award.

The Court of Appeals affirmed the award granting the weight loss procedure reasoning that the evidence supported the conclusion of a requisite causal relationship between the work-related injury and the need for the lap band procedure. Specifically, there was evidence introduced that showed Childers sustained a work-related injury in the course of his employment and that non-surgical treatment options failed to reduce his persistent and immobilizing back pain. Boston's argument that Childers' weight was a pre-existing condition failed because Childers' weight at the time of the injury made him "more susceptible" to the immobilization that resulted from his work-related back injury, thereby requiring the lap band treatment as part of the necessary treatment for that injury.

Practice Tip: In light of this decision, the Appellate Court has opened the door to awards for secondary medical care which would not be directly related to the initial work-related injury. Employers and their workers' compensation carriers should be aware of this ruling and closely examine pending or new claims with injured employees who are overweight or smoke as treatment for such conditions could potentially be awarded per this ruling.

Insurer's Decision to Stop Paying for Specific Treatment Does not Transform Doctor to Unauthorized Physician

A January 27, 2009, decision from the Indiana Court of Appeals held that a workers' compensation insurer's unilateral decision to stop paying for a doctor's medical treatments did not transform the doctor from an authorized to an unauthorized physician. *Young, d/b/a Bob Young Logging v. Marling*, 900 N.E.2d 30 (Ind. App. Ct. 2009).

Marling was employed by Bob Young Logging ("BYL") as a logger for over twenty-five years. On April 12, 2004, Marling fell from a log skidder he was operating and injured his back, hips, wrists, legs and shoulders. BYL's insurer began paying TTD and directed Marling to treat with Dr. Kam Tiwari. Dr. Tiwari's treatment of Marling included medications, a TENS unit, examinations, injections, radiofrequency ablations and physical therapy. By July 2005, Dr. Tiwari placed Marling at MMI, and on August 28, 2008 issued a PPI rating of 19%. Thereafter, BYL's insurer stopped paying TTD benefits and Marling requested an IME via a Form 38911.

BYL's insurer contacted Dr. Tiwari in October 2005 and informed him that only medication and no other type of treatment should be prescribed for Marling. However, Dr. Tiwari continued to treat Marling as he had before over the next six to eight weeks.

On October 25, 2005, Marling was examined by Dr. Steiman, who was the Board-appointed IME. Dr. Steiman agreed with Dr. Tiwari that Marling was at MMI, finding that Marling was not a surgical candidate and would not benefit from additional medical care.

In June 2006, Dr. Tiwari issued a report indicating that Marling could not return to work in his present condition. Marling also retained a vocational specialist who opined that Marling was permanently and totally disabled. In October 2006,

Dr. Tiwari then revised his previous finding and determined that while Marling's condition was stable, he was not at MMI. Shortly thereafter, BYL's insurer had Marling examined by Dr. John McLimore, who found Marling to be at MMI and issued a PPI rating of 5%. The following month, Marling retained Dr. Daniel Brown for an examination who found Marling at MMI and issued a 30% PPI rating.

The central issues presented to the Single Hearing Member were whether Marling was entitled to permanent total disability benefits (PTD) and whether BYL was responsible for the medical bills of Dr. Tiwari incurred after August 28, 2005 as well as ongoing medical care. Marling was awarded PTD benefits and ongoing medical care for his chronic pain which included the treatment with Dr. Tiwari after August 28, 2005.

BYL appealed to the full Board who affirmed the single hearing member's decision and award in its entirety.

On appeal, BYL challenged the award for ongoing medical care, but did not challenge the award of PTD benefits. BYL argued that Marling was not entitled to award of Dr. Tiwari's medical bills because the treatments were unauthorized. In support of this argument, BYL reasoned that because their insurer told Dr. Tiwari not to prescribe any treatments for Marling's pain other than medications, the additional treatment provided by Dr. Tiwari after that point was unauthorized. The Court of Appeals found that BYL's insurer's unilateral decision to stop paying for Dr. Tiwari's medical treatments after it had chosen him as an authorized provider did not transform him from an authorized to an unauthorized physician. The Court further noted the record contained ample evidence that Dr. Tiwari had deemed the treatments he prescribed necessary to help relieve Marling's pain and were necessary.

Notably, the Court's decision makes no mention of the other medical opinions, namely those of Dr. Steiman (Board appointed IME), Dr. McLimore (BYL's IME) or Dr. Brown (Marling's IME), all of

which said that Marling was at MMI. Essentially, the Appellate Court seems to be suggesting that once an employer or their insurer selects a treating physician, they are bound to that physician's recommendations and cannot unilaterally chose which treatment they will authorize and what they will not.

Practice Tip: Employers and their insurance carries should carefully select the authorized treating physician pursuant to IC §22-3-3-4 and should avoid unilaterally selecting which treatment with that physician will and will not be authorized. Making such decisions risks an award of payment for any treatment subsequently performed by the originally authorized treating physician.

Settlement of Civil Suit May Not Bar Additional Workers' Compensation Benefits

A February 25, 2009, decision from the Indiana Court of Appeals held for the first time that a third-party civil settlement does not bar additional workers' compensation benefits after a third-party recovery when it occurs before a workers' compensation award has been resolved, and is for an amount less than the anticipated workers' compensation award. *Smith v. Champion Trucking Co., Inc.*, 901 N.E.2d 620 (Ind. App. Ct. 2009).

On August 13, 2003, Smith was driving a tractor-trailer in the course of his employment with Champion Trucking Company ("Champion"), when he was struck by Jeremy Bittner's vehicle. Smith sustained neck and back injuries, but continued working. Champion paid no TTD benefits, but did pay \$4,342.32 in medical benefits. On January 10, 2005, Smith filed an Application for Adjustment of Claim asserting he was unable to work and claiming additional workers' compensation benefits. Smith also pursued a civil suit against Bittner. On July 6, 2005, Champion served written notice on Smith's attorney of Champion's \$4,342.32 lien.

On July 22, 2005, Smith signed a civil release of Bittner and his insurer in exchange for \$10,342.00. Champion's lien for \$4,342.32, less 25% for a statutory share of attorney's fees, was satisfied.

Smith was evaluated on August 16, 2005 by neurosurgeon Dr. David Chanagaris who opined that Smith had a 19% whole person impairment, which would entitle him to additional workers' compensation benefits of \$26,500.00.

On March 1, 2006, Champion filed a Motion to Dismiss arguing the previous civil settlement with Bittner terminated Smith's right to further workers' compensation benefits pursuant to *IC §22-3-2-13*. The Single Hearing Member granted the Motion. Smith appealed the dismissal to the Full Board who remanded the case for a hearing on the merits. A hearing was conducted on May 31, 2007 and post-hearing briefs were submitted. Again, Smith's claim was dismissed and he appealed to the Full Board. On July 25, 2008, the Full Board affirmed the dismissal and Smith's appeal to the Court of Appeals followed.

The issue before the Court of Appeals was whether the "absolute bar" provisions of *IC §22-3-2-13* were applicable. Smith argued that based on the humane purposes of the Workers' Compensation Act, he was entitled to some supplemental payment from Champion after he recovered from Bittner an amount less than the "apparent workers' compensation benefits" before the workers' compensation claim was resolved. Champion contended that Smith forfeited any right to workers' compensation when he settled without having already obtained the 19% PPI rating. Ultimately, the Court of Appeals found that Smith should be allowed to proceed with his workers' compensation claim and remanded the claim to the Board for further proceedings. The only apparent basis for this ruling was the justification that the Act should be liberally construed "so as to not negate the Act's humane purposes."

Notably, Champion appealed this ruling to the Indiana Supreme Court which granted transfer on June 16, 2009 and vacated the Court of Appeals

decision. Most recently, pending further review by the Supreme Court, the Supreme Court heard oral arguments on October 8, 2009, and has yet to issue a decision.

Practice Tip: Employers and their insurers should be aware of this ruling as it is contrary to previous thinking that settlement of a civil suit terminated the employer's liability for any further workers' compensation benefits. We caution our readers that this is not the present state of the law on this issue pending the Supreme Court's decision.

Changes to Indiana WC Forms

Effective immediately, the Indiana Workers' Compensation Board has instituted new forms. They are available on the Board's website at www.in.gov/wcb. Please note the new version of the Form 39811 which you should replace with your existing 38911. Also, there is a new form for a claim denial entitled Notice of Denial of Benefits (State Form 53914). The Board has advised they will only accept the old forms for a short transition period until all are up and running with the new versions.

Please contact Storrs Downey at sdowney@brycedowney.com or Justin Nestor at jnestor@brycedowney.com for assistance with the new state forms.

Current Indiana Benefit Rates

We continually update our "Indiana Rates at a Glance" sheet for our clients. If you would like a copy of our most recent version of it, please contact Storrs Downey at sdowney@brycedowney.com or Justin Nestor at jnestor@brycedowney.com.

Current Indiana Mileage Reimbursement

Effective October 1, 2009, the current Indiana mileage reimbursement rate is \$0.40 per mile.

Indiana Workers' Compensation Newsletter – October, 2009

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
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 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 Indiana Workers' Compensation law, please contact Storrs Downey 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.

Chicago Office: 200 N. LaSalle Street Suite 2700 Chicago, IL 60601 Tel: 312.377.1501 Fax: 312.377.1502	Indiana Office: 2636 W. Lincoln Hwy Suite B Merrillville, IN 46410 Tel: 219.756.8100 Fax: 219.756.5100	Oak Brook Office: 635 Butterfield Road Suite 240 Oak Brook Terrace, IL 60181 Tel: 630.620.9100 Fax: 630.620.9108	Memphis Office: 1922 Exeter, Suite 5 Germantown, TN 38138 Tel: 901.753.5537 Fax: 901.732.6555	Atlanta Office: P.O. Box 800022 Roswell, GA 30075-0001 Tel: 770.642.9359 Fax: 678.352.0489
---	---	--	---	--