

Workers' Compensation Newsletter

January 2011

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Seminars

- On **March 24, 2011**, Rich Lenkov will present at CLM's Annual Conference in New Orleans:
 - Session 1*: "Difficult Situations, Real-World Solutions: Thorny Issues the Defense Industry Struggles with Every Day"
 - Session 2*: "Premises Liability – Shopping for Answers to Effective Retailer Risk Management"<http://www.litmgmt.org/annual-conference>
- On December 2, 2010, Rich Lenkov presented "Top 10 Ways to Screw Up a Workers' Compensation Claim" hosted by Marsh's Retail/Wholesale, Food & Beverage Practice.
- On December 2, 2010, Justin Nestor presented "Legal Ethics in Indiana Workers' Compensation Cases" at Diamond Mark's Solutions to Challenging Workers' Compensation Cases in Indiana seminar held at the Horseshoe Casino in Hammond, IN.
- On November 17, 2010, Justin Nestor presented "2010 Legal Updates in Indiana" to the Northwest Chapter of Indiana Workers' Compensation Institute.
- On November 11, 2010, Rich Lenkov presented "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 in Las Vegas.

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

Recent BDL News

- We are proud to announce that Michael J. Scully has been named a partner. Mike joined the firm in 2007 and concentrates his practice in workers' compensation defense.
- We have also added two new associates in the workers' compensation department. Paige Toth will be working in our Merrillville, Indiana office and brings five years of experience to our firm. Rita Mulcahy has joined our Illinois practice after graduating from Chicago-Kent College of Law in 2010.
- Justin Nestor has recently been named a 2011 Board Member for the Northwest Chapter of the Indiana Workers' Compensation Institute (IWCI).
- Carol Cesaretti was recently named as one of the "Top 100 Women of 2010" by *Princeton Global Network Magazine*. She is listed under the Finance and Law section as part of "The Leaders Who Shaped Society in Business."
- Carol Cesaretti, Michael Scully, Kelly Gross and Joseph Mulvey have been selected as Rising Stars in the 2011 edition of *Illinois Super Lawyers*. *Super Lawyers* is an annual publication whose inclusion is dependent on nomination by peers with whom the attorneys have worked.

Recent Case Results

- In a disputed Indiana case, Storrs Downey was able to obtain a voluntary dismissal with prejudice following Plaintiff's deposition. After Storrs was able to draw out several inconsistencies that supported our denial of the accident, Plaintiff's attorney withdrew. Shortly thereafter, Plaintiff agreed to dismiss his case.
- Joseph Mulvey recently received a defense verdict for a self-insured client. He successfully argued that Petitioner's injuries were limited to a cervical strain and avoided liability for over \$100,000 in medical bills and over one year of TTD.

Latest News from the National Workers' Compensation Coalition



The National Workers' Compensation Coalition recently re-launched their website:
www.nwccoalition.com

The NWCC recently hosted a roundtable / networking event in Miami, Florida on January 20, 2011. The event was a great success with an excellent discussion on issues affecting the Florida defense industry.

The NWCC has two additional roundtable / networking events coming up in the next few weeks:

- February 10, 2011: Chicago, Illinois
- February 17, 2011: Atlanta, Georgia

For more information:

<http://www.nwccoalition.com/nwcc/events>

The NWCC is a not-for profit organization dedicated to representing the interests of employers in the workers' compensation arena. If you would like to become a member of the NWCC, please use the following link to join:

<http://www.nwccoalition.com/nwcc/become-a-member/join-now>

Legislative Update

Possible Changes to the Illinois Workers' Compensation Act



By Joseph Mulvey

Despite the fact that the Workers' Compensation Amendments were not passed in January, 2011, we anticipate the bill being revitalized and moving towards passage this spring. The following are the major proposed changes to the Act:

1. Utilization Review

Two amendments have been proposed to the Utilization Review section of the Act. The first would require the reviewing doctor to be licensed in Illinois while the second would create a rebuttable presumption of the validity of the doctor's opinions.

2. Employer-directed care

Employers will direct the health care of injured workers. Obviously, this will greatly enhance an employer's ability to monitor and impact a claimant's treatment.

This amendment effectively decreases employees' choices in medical care from two free choices to one. The chain of referral rights will remain unchanged.

3. Fee schedule reduction

The fee schedule is to be reduced by 15% across the board. This will translate into sizable savings for all medical care.

4. Alcohol and drug testing

The Act will be amended to create a presumption that any employee who fails an alcohol or drug test immediately following an injury will not be permitted to seek compensation. This will change the standard with respect to alcohol and drug testing, which currently requires the employer to show that the intoxication was the cause of the injury.

5. Wage Differential

The amendments to the wage differential section have two distinct impacts. The first amendment drops the age at which benefits cease to 67 years old, or five years after the award, whichever is later. This is clearly a significant gain for Illinois employers as wage differentials are currently paid through the life of the injured worker.

The second change allows either side to petition for investigation into changed economic circumstances underlying an award; i.e. seek a recalculation of benefits based on changed circumstances (employment). This amendment is more of a mixed bag as it will allow the claimant to seek greater benefits at any time following a wage differential award.

We have reviewed the final legislation and participated in several meetings and discussions with leaders in the Illinois business community. Our take is that these will be largely positive, if imperfect, changes in the Act.

We will continue to monitor the progress of any further amendments and will keep you informed of any changes.

UPDATE: Indiana Workers' Compensation Board Position Regarding Utilization Review

By Paige Toth



The Indiana Worker's Compensation Board recently clarified its position on utilization review based on an official release from Chairperson Linda Hamilton. The Board will not automatically award bad

faith when medical care is denied based on a utilization review. However, the Board will consider penalties when the medical care is unreasonably denied or delayed, and each case will be decided on the facts of the individual case.

We still advise employers and their insurance carriers to proceed with caution when denying medical care based on a utilization review alone, particularly when care is clearly recommended by the authorized treating physician. Because the employer has the right to direct medical care, employers and their insurance carriers should select a physician they have confidence in and provide all

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 rilenkov@brycedowney.com.

recommended treatment by that physician. If there is a legitimate question as to the care recommended, a utilization review is a tool to use; however, we think that perhaps an IME or redirecting care to another physician may be the safer choice. That said, to avoid the appearance of doctor shopping, we caution against overuse of second opinions.

Case Law Update

Keating Hearings

By Joseph Mulvey

In *Keating v. 68th and Paxton*, the Appellate Court has specified the procedure that an injured worker must follow in order to bring a claim in the Circuit Courts. The plaintiff was injured while working on a commercial property. He filed suit in the Circuit Court, naming his employer as a defendant, and alleging that it knowingly failed to provide workers' compensation insurance.

The Appellate Court affirmed the lower dismissal of the suit pursuant to Section 4(d) of the Workers' Compensation Act, which states that an injured worker has recourse in the civil system if his employer knowingly fails to provide insurance.

On review, the Appellate Court found that prior to bringing a case in Circuit Court, an injured employee must first go before the IWCC and receive a finding that (A) the putative defendant was a statutory employer per Section 4(d) of the Act, and that (B) they knowingly failed to acquire workers' compensation insurance.

This is a victory for employers, both with and without insurance. For those employers who have complied with the law and are insuring their employees, this will allow them to avoid the additional cost of litigating the issue before the Circuit Court. For those few uninsured employers, this inserts a layer of procedural requirements ahead of a civil suit and affords a longer window for settlement discussions.

Denied Benefits Following Car Accident

By Joseph Mulvey

In *Menard v. IWCC*, The Appellate Court found that an injury suffered following an IME was non-compensable as Petitioner's employment had been terminated prior to the examination. Petitioner argued that she was in the course of her prior employment as she was attending a Respondent-mandated examination. The Court disagreed and found the fact that she had been terminated was dispositive.

Recently Published Articles

"Defense Attorney Reveals Strategies to Cut Legal Expenses in Workers' Comp," *Workers' Compensation Report*, October 19, 2010

By Richard Lenkov



The number one way to reduce your legal expenses is not to incur them in the first place. That blatantly obvious suggestion comes from someone who makes his living as an attorney.

Richard Lenkov has focused his practice on defending companies in workers' comp cases since joining the Illinois bar 14 years ago. He's not worried that business will dry up if employers and insurers are wiser in their approach to the legal aspects of the system. "Let your adjusters adjust and your attorneys practice, and keep their roles separate," is one of Lenkov's top tips to reducing legal expenses. "Often attorneys are asked to perform basic investigative tasks, which is OK, but it's cheaper for claims handlers to do so."

Lenkov outlines specific ways to reduce legal expenses by employers, insurers, and other system participants.

Attorney involvement boosts claim costs by 12 to 15 percent and attorneys are involved in 5 to 10 percent of all workers' comp claims in most states, according to the Insurance Information Institute. With these costs continuing to rise, Lenkov offers insights to help eliminate waste, cut through legal jargon, and get to the bottom line as quickly as possible.

Understand state differences. While there are universal issues, every state handles some elements of workers' comp differently. Claims handlers should be empowered to make decisions on their own. By communicating internally and holding roundtable discussions on difficult issues, you can exhaust your internal resources before hiring counsel.

"Many adjusters handle multiple states, and it's tough to keep track," Lenkov said. "But to the extent you can, you're going to save money rather than sending it to counsel."

Communication is essential. Where there are undisputed benefits, Lenkov recommends paying them as soon as possible. For other claims, understanding the fine art of negotiating is vital.

"My overall theme for negotiations is to try to avoid any conflict to the degree you can because that costs money," he said. "On the other hand, sometimes you want to take a different approach and be more aggressive. For example, a claim with a lot of issues in dispute."

The more complex the claim, the larger the bill. One way to avoid a claim becoming more complicated is through good communication. As Lenkov points out, "vinegar is more expensive than honey. Good communication between the claims handler and claimant and with the claimant's attorney is key."

Lenkov makes it a point to stay in touch with the plaintiff's attorney regularly to make sure he's not missing anything. "Having that five-minute phone call rather than getting surprised is well worth it," he said. "The bottom line is plaintiff lawyers who are angry are going to cost the claim money."

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. We can teach you a lot in as little as 60 minutes.

Likewise with claimants themselves. "Check in with the claimant every couple of weeks," he said. "If you're not communicating, people aren't going to be happy, and the case is going to stagnate."

Out-of-the-box strategies. Waiting for the claimant to make the next move can be costly and is unnecessary, Lenkov said. He suggests various options for moving a case forward, such as settlement days.

"You have a bunch of cases brought up in one day, and have the decision-makers for the employer invite the claimants to settle," he said.

Another idea is to file motions to dismiss. "Instead of waiting for the claimant to respond, if they're not responding or not attending treatment file a motion to dismiss the case," he said. Pretrials are another option

to get the case in front of a judge and dispose of it quicker rather than waiting for the trial to begin.

He also suggests not waiting to make an offer. "There's nothing wrong with making an offer before you get a demand," he said.

Lenkov also recommended:

- Reading all vendors' bills carefully.
- Demanding accurate budgets from day one, as well as periodic updates.
- Considering records review versus a full-blown IME.

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 Business Transactions
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 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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