

Workers' Compensation Newsletter

April 2011

INSIDE THIS ISSUE:

Illinois Workers' Compensation Reform	1
Upcoming Seminars	2
Recent BDL News	2
News from the NWCC	2
IWCC News	2-4
Case Law Update	4-7

Illinois Workers' Compensation Reform

On April 1, 2011, Illinois Governor Pat Quinn proposed several reforms to the Illinois Workers' Compensation Act, many of which had been previously proposed but failed to pass in January. Quinn, a Democrat, stated "we need a system that works for everyone. The continued protection of our workers is essential to any reform."

Among Quinn's proposals:

- Personal claims made by arbitrators and Commission employees will be heard by the Illinois Court of Claims, instead of fellow arbitrators
- Arbitrators must be licensed attorneys and adhere to the Code of Judicial Conduct
- Arbitrators will serve three years instead of six
- Carpal tunnel syndrome total disability payments will be capped at 20 weeks
- Claims by workers injured by their own intoxication will be denied
- A dedicated Assistant Attorney General will be assigned to investigate fraud and assist the Department of Insurance, which will be given more authority to investigate and prosecute fraud
- Reducing medical fees by 30%

However, many of the key reforms that most consider central to reforming one of the most anti-business environments in the country have not been addressed by Governor Quinn, including:

Establishing work as the primary factor causing disability, rather than a possible factor.
Capping wage differential awards at work life, rather than life.

We encourage our readers to contact their legislators to encourage much-needed reform. We will continue to keep you posted. **The National Workers' Compensation Coalition will also be holding an Illinois workers' compensation reform forum on May 9, 2011. Among the panelists will be Illinois Senate Minority Leader Christine Radogno. For more information, contact Rich Lenkov at rlenkov@brycedowney.com**

Seminars

- On **March 16, 2011**, Rich Lenkov presented "Avoiding the Top 10 Mistakes Illinois Manufacturers Make in Handling Workers' Compensation Claims," at the Illinois Manufacturers' Association Breakfast Briefing. The event was held at Ditka's Restaurant in Oak Brook, IL.
- On **March 24, 2011**, Rich Lenkov presented 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"
- On **March 25, 2011**, Michael Scully presented "Illinois Workers' Compensation Caselaw Updates" to Berkley Net Underwriters.

■ On **April 13, 2011**, Rich Lenkov will co-present a webinar for the National Retail & Restaurant Defense Association (NRRDA) on “Negotiation and Mediation Strategies.” Please visit www.nrrda.org and click on ‘Events.’

■ On **April 14, 2011**, Rich Lenkov will present at the 2011 Spring Symposium presented by the Illinois Association of Defense Trial Counsel (IDC) and the Illinois Insurance Association (IIA). Rich Lenkov is a Chairman of the Conference which will be attended by over 300 prominent defense attorneys and members of the Illinois insurance community. <http://www.iadtc.org/displayconvspecific.cfm?convnbr=9427>

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 pleased to announce that three new attorneys have joined our Workers' Compensation team: Noah Frank, Brian Hindman and Michael Milstein.
- Justin Nestor received a favorable decision on an Illinois claim where the claimant sought in excess of \$51,000 at trial. He successfully argued that the claimant's injuries were limited and that her medical care and claimed time loss were excessive. The Arbitrator found that Respondent's examining physician was more credible than the treating physician which helped to limit the employer's exposure significantly. The award was for just over \$10,000 and the claimant opted not to appeal.
- Rich Lenkov has been invited to serve on the Program Advisory Board of the 20th Annual National Workers' Compensation and Disability Conference & Expo. The Conference is the foremost workers' compensation gathering of its kind. It will take place from September 9 – 11, 2011 in Las

Vegas. For more information, go to www.wcconference.com.

Latest News from the National Workers' Compensation Coalition



The NWCC recently hosted a roundtable / networking event in Chicago. The event had a large turnout with an excellent discussion on issues affecting the Illinois defense industry.

SAVE THE DATE: The next NWCC roundtable / networking event will be in **Dallas** on June 7, 2011. Check the website for more information: <http://www.nwccoalition.com/nwcc/events> Please email Karen (kkramer@brycedowney.com) if you are interested in attending.

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>

Illinois Workers' Compensation Commission News

Effective 3/1/11, Chairman Weisz has reassigned territories in the southern part of Illinois as follows:

ARBITRATOR- NEW TERRITORY

Dibble - Bloomington and Mattoon
 Nalefski - Whittington/Herrin
 Neal - Collinsville
 Teague - Springfield, Quincy and Winchester
 Tobin - Carlinville, Decatur and Urbana
 White - Belleville and Mt. Vernon

In the past, pro se settlement contracts have been approved before the case was assigned a case number. As of 3/1/11, this procedure will end and

contracts will only be approved if the case number and setting are on the face of the contract. This will undoubtedly slow down the pro se settlement contract approval process. That said, however, we can usually get these contracts approved within a matter of days if need be.

Downstate Newspaper Shines Light on Commission Practices



By Carter Esterling

The Illinois Workers' Compensation Commission has come under legislative scrutiny recently, due in large part to a series of reports in the Belleville, IL *News-Democrat*. Having obtained arbitrators' emails and other information

pursuant to a Freedom of Information Act request, in February the *News-Democrat* began reporting on the workers' compensation hearing of former Illinois State Trooper Matt Mitchell. The hearing of ex-Trooper Mitchell was controversial because of the nature of the accident for which he sought benefits: he had been driving on the highway at speeds of up to 126 miles per hour in his squad car, while texting and emailing, before ultimately crossing the median and striking another vehicle. Two sisters from Collinsville, IL were killed in the accident. Emails sent by Arbitrator Jennifer Teague and partially published in the *News-Democrat* reflect that she told her court reporter that she wished to hold Trooper Mitchell's workers' compensation hearing "on the sly with no press" due to what she perceived as a "media frenzy" surrounding the case. Arbitrator Teague arranged with the apparent cooperation of the attorneys for Trooper Mitchell and the State of Illinois to schedule the hearing outside of her normal trial cycle, and at a separate location. Reporters from the *News-Democrat* were alerted to this hearing and arrived as it was in progress.

The *News-Democrat* also reported on its findings that 8 of the 32 Commission arbitrators have filed at least one workers' compensation claim. Among

them were Arbitrator Teague. According to one report in the *News-Democrat*, emails between Arbitrator Teague and the Assistant Attorney General assigned to her courtroom indicate that she attempted to use her authority to set a hearing date requested by the AAG as leverage to speed the process of receiving a settlement of her own cubital tunnel syndrome claim. Further emails published by the *News-Democrat* reveal that Arbitrator Teague had also provided *ex parte* advice to at least one Petitioner's attorney regarding the settlement value of certain injuries, as well as how to handle a motion pending before another arbitrator. On February 15, 2010, Arbitrator Teague was placed on paid administrative leave. She will continue to draw her \$115,800 per year salary while on leave.

Placed on paid administrative leave that same day was Arbitrator John Dibble, who had previously presided over the Whittington/Herrin call. As reported in the *News-Democrat*, Arbitrator Dibble

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.

had approved nearly \$10 million in settlements or arbitration awards to more than 155 employees of Menard Correctional Center, many of which were repetitive trauma claims filed on behalf of guards claiming symptoms related to the manipulation of locks and doors in the 132-year-old prison. Many of these employees were represented by attorney Thomas Rich. According to the *News-Democrat*, emails recovered from Arbitrator Dibble's computer revealed correspondence with Thomas Rich in which the latter mentioned having received an inquiry from Arbitrator Dibble's wife regarding the availability for purchase of tickets to a performance of 'South Pacific' at the Fox Theater in St. Louis. Arbitrator Dibble is one of the 8 arbitrators with his own workers' compensation claim, having received \$48,790 in settlement from the state subsequent to an unwitnessed slip and fall accident at the Herrin hearing site allegedly resulting in post-traumatic carpal tunnel syndrome.

As of this writing, the *News-Democrat's* reporting has sparked investigations by the Inspector General of the Illinois Attorney General's Office, the Illinois Department of Insurance, and the Commission itself, all of which appear to be ongoing. In addition, state representatives have sponsored a bill in the Illinois House directing the state's Auditor General to investigate the claims filed by Menard Correctional employees, as well as those filed by the arbitrators.

We will continue to keep you posted on these issues.

Case Law Update

Appellate Court Award Benefits Finding That Claimant's Personal Deviation From Course Of Employment Was Insubstantial



By Justin T. Nestor

A December 20, 2010, decision from the Illinois Appellate Court revisited the standards for traveling

employees and found that the claimant's deviation on his way home when involved in a motor vehicle accident was insubstantial, and that the proper question to be addressed was whether the facts established that the claimant was on his way home at the time he was injured. *Cox v. IWCC*, 941 N.E.2d 961 (1st Dist. 2010).

Jeffrey Cox was employed by Berger Excavating Contractors (Berger) as a foreman of a six person crew assigned to work at jobsites away from Berger's premises. Cox was provided with a company truck which carried tools, equipment, and supplies for use at the jobsites. Further, Berger's company name was on the side of the truck and Berger paid for all licensing fees, insurance and fuel. Cox was in possession of the truck twenty-four (24) hours per day and drove it to and from work. According to Dale Berger, Berger's owner, employees were expected to carry money to pay for incidental expenses which they incur for the company and are reimbursed out of Berger's petty cash fund. Similarly, Berger does not advance cash to its foreman for payment of incidental expenses.

On July 27, 2006, Cox started his day at Berger's office and later left for a jobsite. At approximately 1:00 p.m., Cox left work, with Berger's permission, for a personal doctor appointment. Cox testified he left the jobsite driving his company truck and traveled northbound on Route 12 on his way home to pick up his personal vehicle. On his way home, Cox stopped at a bank to make a withdrawal for money (1) to purchase a cooler for storage of drinks on his truck for his crew and (2) to pay for carpenters who were performing work on his kitchen at home. Cox estimated that the distance he had driven off of Route 12 to the bank was several hundred feet.

After making the withdrawal, Cox got back into his truck and drove back onto Hartigan Road, where he would need to make a left turn to get back onto Route 12. As he was turning left turn back onto Route 12, a southbound vehicle ran the red light striking his truck. Cox sustained injuries

to his face, left shoulder, left ribs, chest, both knees, and his left foot.

Following a hearing, an arbitrator found that Cox did not sustain injuries that arose out of and in the course of his employment with Berger, but rather while he was engaged in a personal deviation. Specifically, the arbitrator found that Cox' testimony as to his intentions for withdrawing the money for purchase of a water cooler lacked credibility. Further, the arbitrator found that Cox's accident occurred when he was reentering his regular route home, but that he had not yet returned to Route 12 which was his regular way home. As a result, it was found that Cox was still engaged in a personal deviation that removed him from the course of his employment and his claim for benefits was denied.

Cox filed a Petition for Review and the Commission in a unanimous decision affirmed and adopted the arbitrator's award. Cox filed a Petition for Judicial Review in the Circuit Court of Cook County which also affirmed the decision. Cox' appeal to the Appellate Court followed.

At the outset, the Appellate Court noted that different rules apply for traveling employees. As a general rule, a traveling employee is held to be in the course of his employment from the time that he leaves home until he returns. However, a finding that a claimant is a traveling employee does not relieve him from the burden of proving that his injury arose out of and in the course of the employment. The test for determining whether a traveling employee's injury arose out of and in the course of the employment is the reasonableness of the conduct in which the employee was engaged and whether the conduct might normally be anticipated or foreseen by the employer. Under this analysis, a traveling employee may be compensated for an injury as long as the injury was sustained while he was engaged in an activity which was both **reasonable and foreseeable**.

Notably, the Court said the real issue to be determined was whether at the time of this injury, Cox was in the course of his employment with

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 we've spoken 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.

Berger. The Court disagreed with the original decision against compensability finding that the evidence was more than sufficient to support the inference that Cox went to the bank for personal reasons and not to withdraw money for any purpose connected to his work. However, the Court felt that the fact that Cox deviated several hundred feet from his route home for personal reasons did not necessarily resolve the question of whether Cox' injuries arose out of and in the course of his employment. Ultimately, the Court held that Cox' deviation from the least direct route home in order to go to the bank for personal reasons was "insubstantial." Essentially, the Court found that Cox' deviation was slight and that he had reentered the course of his employment when the accident occurred. Accordingly, the Court rejected the Commission's finding and said the proper question is whether the facts establish that he was on his way home when he was injured. Finding that Cox' deviation was insubstantial and that he had returned to the course of his employment, the Court reversed the Commission decision denying benefits.

Practice Tip

Cases involving traveling employees are often very fact specific. Employers and their insurance carriers should conduct careful and detailed investigations in such cases to determine whether denial of the claim is proper as even an insubstantial deviation from the course of the employment can lead to a claim being found compensable.



Petitioner Awarded Benefits on Basis of Increased "Street Risk"



By Michael C. Milstein

The Illinois Appellate Court, in Metropolitan Water Reclamation District v. Illinois Workers' Compensation Commission, No. 1-09-2546WC, recently awarded benefits to

Petitioner in deciding a highly disputed case revolving around a trip and fall while traversing a public sidewalk.

Petitioner, an account clerk for the district, filed a workers' compensation claim after she was injured while walking on a public sidewalk to make a deposit at a bank, which was a part of her required duties. The bank was approximately 1.5 blocks away from her office, and she was not required to take a certain path. Petitioner stumbled on a 6 inch driveway, that had a U-shaped "dip", fracturing both of her wrists. The arbitrator found that although Petitioner was injured while performing a task that was required by her work, the accident did not arise out of her employment because she had not established that her job duties exposed her to a risk greater than that faced by the general public. Accordingly, the arbitrator found that Petitioner was not entitled to benefits under the Workers' Compensation Act.

The Commission reversed the arbitrator's decision, finding that Petitioner's fall did arise out of her employment duties due to the fact that she was regularly required to traverse the streets in order to make bank deposits and, therefore, was exposed to the risk of the "dip" in the driveway with greater frequency than were members of the general public. On administrative review, the circuit court reversed the Commission's decision stating that Petitioner was not exposed to a risk greater than that faced by the general public.

The Appellate Court reversed the Circuit Court's decision and reinstated benefits. The Appellate Court stated that the Petitioner was exposed to a "neutral risk" which does not have any particular employment or personal characteristics. Injuries which result from a neutral risk are only compensable when the employee was exposed to the risk to a greater degree than the general public. These increased risks can either be qualitative, "such as some aspect of the employment which contributes to the risk" or quantitative "such as when the employee is exposed to a common risk more frequently than the general public."

However, the Appellate Court stated that Petitioner’s injuries were compensable under the “street risk” doctrine, which states that “where the evidence establishes that the claimant’s job requires that she be on the street to perform the duties of her employment, the risks of the street become one of the risks of employment, and an injury sustained while performing that duty has a causal relation to her employment.” The Appellate Court reasoned that while tripping and falling due to the six-inch “dip” is a risk faced by the public at large, “it was a risk to which the claimant, by virtue of her employment, was exposed to a greater degree than the general public.” The Appellate Court went on to say that if Petitioner were required to prove that she faced an increased risk, she had met her burden because she was exposed to the risk of the “dip” with greater frequency than members of the general public (increased quantitative risk).

Respondent has appealed to the Illinois Supreme Court. It is unknown whether the Illinois Supreme Court will review the decision. Please stay tuned for further updates.

Additional Workers' Compensation News

Workers' Compensation and Radiation Exposure

The press coverage given the problems in Japan have referenced the federal Price-Anderson Act as providing basic relief to anyone who might be impacted by a large radiation escape in the United States. It is very important to note that the Price-Anderson Act expressly does NOT apply to workers’ compensation cases alleging radiation exposure or radiation-caused injuries. Second, many states allow for an extended limitations period within which an employer can file a workers’ compensation action claiming radiation injuries. In Illinois, the period is 25 years.

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 | Construction | Medical Malpractice |
| Business Transactions | Employment and Labor | Professional Liability |
| /Counseling | Insurance Coverage | Real Estate |
| Corporate/LLC/Partnership | Insurance Litigation | Workers' Compensation |
| Organization and Governance | Intellectual Property | |

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.

<p>Chicago: 200 N. LaSalle Street Suite 2700 Chicago, IL 60601 Tel: 312.377.1501 Fax: 312.377.1502</p>	<p>Indiana: 2646 W. Lincoln Hwy Suite B Merrillville, IN 46410 Tel: 219.756.8100 Fax: 219.756.5100</p>	<p>BRYCE DOWNEY & LENKOV LLC</p>	<p>Memphis: 1922 Exeter, Suite 5 Germantown, TN 38138 Tel: 901.753.5537 Fax: 901.732.6555</p>	<p>Atlanta: P.O. Box 800022 Roswell, GA 30075- 0001 Tel: 770.642.9359 Fax: 678.352.0489</p>
--	--	--	---	---