

Workers' Compensation Newsletter

February 2010

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BREAKING NEWS:

Critical New TTD Decision

Interstate Scaffolding v. IWCC: Light-Duty Employees Now Entitled to TTD Benefits After Termination for Cause

In 2003, a union carpenter sustained work-related injuries to his head, neck and back. The employee received TTD benefits from 2003-2005 and then maintenance benefits to satisfy the difference between his pre-injury wage and his light-duty wage. In 2005, while on light duty, the employee was fired for spray-painting company property. After the employee was terminated, his employer also stopped TTD benefits.

The arbitrator found that the employee was not entitled to temporary total disability benefits after being terminated for misconduct unrelated to his injury. The Illinois Workers' Compensation Commission reversed the arbitrator's findings, ruling that the employee was entitled to TTD benefits subsequent to the firing, as his condition had not stabilized. The employer appealed and the Circuit Court affirmed the decision of the Commission. The Appellate Court reversed the Circuit Court's findings

and held that an employee terminated for misconduct, voluntarily taking himself out of the workforce, is not entitled to collect temporary total disability benefits. The employee appealed to the Supreme Court.

The issue before the Supreme Court was whether an employer may terminate TTD benefits subsequent to terminating an employee for volitional acts of misconduct unrelated the work injury. This issue was a case of first impression in Illinois.

The employer argued that an award for benefits should be terminated "if the injured employee commits a volitional act of misconduct that serves as justification for his termination." The employee argued that an award for benefits should be decided by a determination of whether the employee's condition had stabilized.

The Supreme Court agreed with the employee, stating that it is a well-settled principle that one must determine whether the employee's condition has stabilized when deciding to award TTD benefits. The Court reasoned that an employee's right to TTD benefits is solely governed by the Workers' Compensation Act, which does not contain any provisions providing for suspension, denial or termination of TTD benefits after terminating an employee. The Court found that the ultimate test for awarding TTD benefits is "whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force," not whether the employee was terminated for cause.

The Court held that an employee terminated for misconduct unrelated to his injury is still entitled to benefits and reinstated the Commission's award.

Practice Tip: An employee will be entitled to TTD benefits, even if he is terminated for misconduct, as long as the employee has not reached MMI. This is a dramatic ruling in favor of employees and represents the further erosion of business rights in Illinois. While you can still terminate an employee for cause, doing so now

carries additional risk. We advise you to contact us or another attorney prior to terminating an employee who has filed or may file a workers' compensation claim.

Upcoming Seminars

- Rich Lenkov will present two seminars, *Evaluating Permanency and Obtaining a Winning Medical Opinion* at the PESI 2010 National Conference, Workers' Compensation Top Medical & Legal Issues, February 15 & 16, 2010, at Caesar's Palace in Las Vegas. Click [here](#) to open the link.
- Rich Lenkov will be presenting *Managing & Closing Workers' Compensation Claims in a Cost-Effective Manner* at the Illinois Manufacturer's Association Breakfast Briefing on February 18, 2010, at Mon Ami Gabi in Oak Brook. Click [here](#) to open the link.
- Rich Lenkov will be speaking on the Retail Panel at RIMS 2010 Annual Conference & Exhibition, April 25-29, 2010, in Boston. RIMS is the foremost gathering of risk managers, claims professionals and legal professionals in the country. Click [here](#) to open the link.

Workers' Compensation Commission News

- Chairman Masters has assembled a group of attorneys, arbitrators and commissioners to conduct a review of IWCC rules. Once the rules revisions are formalized, they will be voted upon by the Commission and proceed through the formal rule-making process, during which the public will have an opportunity to review and comment.
- Click [here](#) to open a link to the 2010 calendars for Illinois arbitrators.
- Click [here](#) for our updated Illinois Rate Sheet (see publications at bottom of page).

Recent Case Results

Justin Nestor recently received a Commission decision affirming an arbitration decision resulting in a denial of further benefits.

Petitioner sought past TTD benefits in excess of 36 weeks (\$8,631.36), outstanding medical bills in excess of \$3,600.00, ongoing medical care and penalties against Respondent (\$11,232.00).

Respondent denied a portion of the past medical benefits, ongoing TTD benefits and further treatment based on opinions from Dr. Jesse Butler. Arbitrator Carlson found Dr. Butler to be more persuasive than Petitioner's treating physicians, indicating that Petitioner had reached maximum medical improvement. Accordingly, he denied Petitioner's claim for ongoing medical care, outstanding medical bills and TTD benefits. Likewise, Petitioner's claim for penalties was denied.

Petitioner appealed and Commissioners Sherman, Rink and Lamborn unanimously affirmed Arbitrator Carlson's decision in favor of Respondent.

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 you 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 rlenkov@brycedowney.com.

How to Pay NOTHING on a Permanency Case

There is a perception that every compensable injury, no matter how small, warrants some sort of permanency award. This perception is especially prevalent in Illinois, long considered one of the three or four worst states in which to defend workers' compensation cases in the country.

That perception has some truth to it. Most compensable injuries do result in some sort of permanency award, even if it is only 1 to 2% of that body part. Moreover, there is no denying that Illinois is not very kind to employers, and in many respects is getting worse.

Having said this, however, **it is still possible to defend a case on permanency alone.** If you have a compensable injury where certain factors are present, e.g., little or no lost time, little or no medical treatment, a minor injury that has resolved and a return to full-duty employment, **those are good cases on which to take the position that there is no permanent impairment.** After all, the AMA defines permanent impairment as one that has "reached maximum medical improvement (MMI) and is well stabilized and unlikely to change substantially in the next year with or without medical treatment." (*Cocchiarella L, Lord SJ. Master the AMA Guides Fifth: A Medical and Legal Transition to Guides to the Evaluation of Permanent Impairment, Fifth Edition. Chicago, Ill: AMA Press; 2001*). This definition certainly does not seem to fit a minor back strain, for example.

We are not suggesting that you go to trial on every injury where permanency is questionable. We believe in closing every case as quickly as possible, and the speediest and most expeditious way of doing so is usually via settlement. That said, however, there is certainly a benefit to defending certain cases on certain issues, and permanency is often one of them.

Bottom Line: The next time you have a case that seems to have no permanency, consider denying that issue. You may be forced to try that case, but there is probably a real value to doing so.

If you would like to discuss this concept further, please contact Rich Lenkov at rlenkov@brycedowney.com or any member of our workers' compensation team.

AWW for # Weeks Worked

In the case of *Washington District 50 Schools v. McLees*, 17 ILWCLB 179 (Ill.App. 3rd 2009), Petitioner was an elementary school teacher who injured her hand while at work. An issue arose as to the correct average weekly wage. Although Petitioner only worked 39 weeks out of the year, she opted to receive her salary paid out over 52 weeks. Therefore, Petitioner argued that her average weekly wage should be based on the average of her salary divided by the 39 weeks worked. Respondent argued that average weekly wage should be based on Petitioner's salary divided by the 52 weeks that she received payment of her salary.

The Arbitrator agreed with Petitioner. The Commission, Circuit Court and Appellate Court all upheld the Arbitrator's finding that when a petitioner works less than 52 weeks a year, average weekly wage is to be calculated based on the amount of weeks worked and not based on the amount of weeks wages were paid. The Appellate Court relied on Section 10 of the Illinois Workers' Compensation Act, reasoning that as Petitioner was only hired to devote and/or apply her time and energy to her job for 39 weeks, only those 39 weeks worked should be used in the calculation of average weekly wage.

Practice Tip: When an employer allows its employee to extend his/her pay period over a period longer than that worked by the employee, it should be on notice that TTD and permanency payments and/or awards will be based on the higher average weekly wage.

Robbery victim owed benefits




In *Bergen v. TCF Bank*, 17 ILWCLB 181 (Ill. W.C. Comm. 2009), Petitioner was physically assaulted and robbed while attempting to collect past due loans by appearing at the debtors' place of resident. Petitioner testified that she feared for her life during the robbery and developed depression, anxiety, flashbacks, nausea and trouble sleeping. She treated with a psychiatrist who restricted her from banking work and prescribed psychotropic medications. The psychiatrist recommended returning to work in a different industry at only two hours per day. Respondent's Section 12 examiner opined that Petitioner would not likely be persuaded to return to her work of collecting mortgage debts and that if she did return to work at a bank, she should not perform any activities that involved contact with customers.

Respondent did not pay temporary total disability benefits. Petitioner was later terminated for misconduct with a loan. She had conducted a job search but was unable to find employment by the time of the trial. Petitioner argued that she was entitled to benefits from the date of accident through the date of trial. Based on the opinions of Petitioner's and Respondent's physicians regarding returning to work as well as the need for ongoing care and medications, the arbitrator awarded temporary total disability benefits.





Practice Tip: Although this is not a favorable holding, it is a reminder how tricky psychological cases can be. It is important that action is taken to ensure that Petitioner has proper treatment right away, a Section 12 opinion is obtained (in most cases) and that there is close monitoring of Petitioner's treatment and recovery in order to avoid large temporary total disability and permanency exposure.

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 alone, we spoke at:

-  National Workers' Compensation and Disability Conference® & Expo
-  Illinois Work Comp Forum
-  SEAK Annual National Workers' Compensation and Occupational Medicine Conference

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*
-  *Top 10 Ways to Lose Your Workers' Compensation Case*
-  *Mandatory CMS Reporting Requirements: What You Need To Know*

If you would like us to come in for a free seminar, please email Rich Lenkov at rlenkov@brycedowney.com. With these seminars, we can teach you a lot in as little as 90 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, 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	Insurance Litigation
Business Transactions/Counseling	Intellectual Property
Corporate/LLC/Partnership Organization and Governance	Medical Malpractice
Construction	Professional Liability
Employment and Labor	Real Estate
Insurance Coverage	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 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 2010 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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