

# Workers' Compensation Newsletter

## July 2009

### INSIDE THIS ISSUE:

News	1
Recent Case Results	2
Employer Waives Lien Against 3 <sup>rd</sup> Party	2
PPD & PTD Awarded From One Accident	4
Employer Closed for No WC Insurance	4
Life of an Illinois Workers' Comp Claim	5

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### 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 ([brycedowney.com](http://brycedowney.com)) or directly to [mkubale@brycedowney.com](mailto: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

- Justin Nestor will present *Legal Issues & Case Law Updates on IMEs* to Coventry on July 13, 2009.
- Rich Lenkov will speak 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](http://www.seak.com/semJune09semoverview.htm))
- Storrs Downey will speak at the 5<sup>th</sup> 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](http://www.execusummit.com)).
- Rich Lenkov will speak at the 2009 Regional Risk Management Conference and Exhibition (REBEX) at Westin Chicago North Shore, Wheeling, on October 22, 2009 on *Top 10 Ways to Lose Your Workers Compensation Case*. (for info, email [dpederson@sherwood-group.com](mailto:dpederson@sherwood-group.com))
- Storrs Downey will also present at REBEX, on *Terminating Injured or Disabled Problem Employees* (for info, email [dpederson@sherwood-group.com](mailto:dpederson@sherwood-group.com))
- 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](http://www.wcconference.com))

Michael Scully presented to The American Society of Workers Compensation Professionals in

Miami, Florida, on June 19, 2009, on *CMS Mandatory Reporting Requirements: What You Need to Know*.

We present to a number of large organizations like these, but also present a number of in-house seminars to many of our clients. **If you are interested in us providing a free seminar, contact Rich Lenkov at [rlenkov@brycedowney.com](mailto:rlenkov@brycedowney.com).**

### Recent Case Results

#### ***Exaggerated Injury:***

In a recent trial, Rich Lenkov successfully defeated a waitress' claim arising out of a slip and fall outside the restaurant where she worked. Petitioner alleged injuries to her foot, hand and to her person as a whole.

The arbitrator awarded under \$800 in permanency in a case in which Petitioner requested an award of almost \$20,000. The arbitrator's decision remarked on the inconsistencies in Petitioner's testimony that were drawn out on cross-examination and on Respondent's use of surveillance testimony to impeach Petitioner's allegations.

#### ***Overtreatment:***

Justin Nestor successfully tried a recent case which resulted in a denial of further benefits for Petitioner.

Petitioner was employed by Air & Ground Services with job duties of cleaning aircraft at O'Hare Airport. On July 24, 2008, while exiting an aircraft, Petitioner was hit in the back by a bundle of towels and blankets which had been thrown from the plane. Petitioner sought treatment with a chiropractor and underwent regular visits through October 2008. Respondent had Petitioner examined by Dr. Jesse Butler to address Petitioner's ongoing medical care and claimed disability. Dr. Butler indicated that Petitioner's course of treatment was excessive and that Petitioner did not require any additional treatment. Further, Dr. Butler indicated Petitioner could return to work without restriction.

At trial, Petitioner sought additional medical treatment, payment of outstanding medical bills in excess of \$3,600.00, TTD benefits in excess of 36 weeks (\$8,631.36), and penalties against Respondent (\$11,232.00). Arbitrator Carlson found Dr. Butler to be more persuasive than Petitioner's treating physicians indicating that Petitioner had reached maximum medical improvement as of October 2, 2008. Accordingly, he denied Petitioner's claim for ongoing medical care, outstanding medical bills, and TTD benefits. Likewise, Petitioner's claim for penalties was denied.

### Employer Waives Lien Against 3<sup>rd</sup> Party

*Pederson v. Mi-Jack Products, Inc.* 2009 Ill.App. LEXIS 107 illustrates the care that employers must take to protect their liens in any potential third-party case. The procedural morass in this case, when finally untangled, found the employer on the outside of the settlement looking in, unable to recover anything pursuant to Section 5(b) of the Illinois Workers' Compensation Act.

Plaintiff originally brought suit against three defendants: Mi-Jack, the lessor of the crane on which he was working when injured; United Rentals, the original purchaser of the crane (who was voluntarily dismissed shortly thereafter); and Terex, the alleged manufacturer of the crane. Plaintiff's suit sounded in negligence and product liability. Suit was filed two days prior to the expiration of the two-year statute of limitations.

Plaintiff filed an amended complaint shortly thereafter upon discovering that Terex-RO (a Terex subsidiary) was the actual manufacturer of the crane. However, Plaintiff's amended complaint was not filed within the applicable statute of limitations, and Terex-RO was dismissed from the suit.

Mi-Jack and Terex each filed third party complaints for contribution against Plaintiff's employer, Henkels and McCoy.

Plaintiff's counsel withdrew shortly thereafter as they had been named in a legal malpractice action for failure to name Terex-RO prior to the expiration of the statute of limitations.

After more procedural wrangling, Plaintiff moved to have a settlement approved by the court. The court approved the settlement, ordering that Henkels be compensated out of the proceeds of the parties' settlement, in accordance with the terms of the Workers' Compensation Act. The approved settlement awarded Plaintiff \$50,000 for the resolution of his claim against Mi-Jack.

Henkels refused to accept any payment from the settlement, arguing that it was merely a pretext to allow Plaintiff to carry on with his suit against former counsel. The court ordered that Plaintiff receive the full amount of the settlement, finding that Henkels had waived its workers' compensation lien.

On appeal, Henkels contested that the court had deprived it of the protections afforded to employers under Section 5(b) of the Act. Specifically, they argued that being denied the right to remain a party plaintiff and the granting of summary judgment to Terex while discovery was pending circumvented the guarantees of the Act.

The Appellate Court disagreed. They found the language of the Act unambiguous – because Henkels did not file suit within the three-month window leading up to the expiration of the statute of limitations, they had no right to join as a party plaintiff without the consent of Plaintiff.

Henkels also argued that summary judgment was inappropriate while its discovery to Terex was outstanding. The Appellate court disagreed, finding that the discovery issue did not preclude the summary judgment order.

Henkels' final argument was that the settlement should not have been approved because it did not provide for or protect their lien. They argued that

Section 5(b) of the Act requires the consent of the employer for any settlement.

The court agreed that Henkels had never agreed to the settlement. However, the order entering the settlement explicitly recognized Henkels' lien rights by providing that they would "be compensated out of the proceeds of the parties' settlement..." The court order was found to be appropriate protection of Henkels' lien.

Henkels' contention was that the settlement was, in effect, a pretense to allow Plaintiff to proceed in his legal malpractice suit. It appears that the brunt of the liability would have lain with Terex-RO, the manufacturer who had not been named until after the expiration of the statute of limitations.

Henkels' concern was that they would be unable to collect a portion of any award that Plaintiff received from his malpractice suit. In *Woodward v. Pratt, Bradford & Tobin, P.C.* 297 Ill. App. 3d 807 (5<sup>th</sup> Dist., 1997), the court held that no workers' compensation lien attaches to a legal malpractice case. Thus, Henkels' lien would attach only to the \$50,000 settlement and not to any subsequent malpractice settlement or award.

Henkels argued that the court should adopt Minnesota law on this topic, which finds that any settlement entered into without the employer's consent is null and void. The court declined, and entered an order upholding the findings of the court below.

**Practice Tip:** It is imperative to closely monitor the progress of any potential third-party case arising from a work injury. In the case above, the employer could have, at any time in the three months leading up to the expiration of the statute of limitations, filed suit on its own behalf. Had they done so, they would have had the opportunity to name the proper defendants and to direct the course of the litigation. The employer's failure to monitor the progress of the case led to non-recovery of any portion of their lien.

### PPD & PTD Awarded from One Accident

In *Beelman Trucking v. IWCC* 2009 WL 1416103 (Ill.), Petitioner was a driver for Beelman in 1995 when he was involved in a work-related accident causing paralysis in both legs, paralysis below the left shoulder and amputation of his right arm above the elbow. Petitioner was awarded permanent *total* disability (PTD) benefits based on the loss of use of both legs and a separate permanent *partial* disability (PPD) award for the loss of use of his arms.

The Illinois Workers' Compensation Commission (IWCC) increased the arbitrator's award for the right arm only and the circuit court affirmed. The appellate court, however, opined that an employee who has already been awarded benefits for PTD should not also receive benefits for PPD. The appellate court set aside the permanent partial disability awards as to each arm, ruling that this was improper where the arm injuries had been sustained in the same accident as the permanent total disability award.

The Illinois Supreme Court reversed the appellate court on this point and reinstated the IWCC decision awarding PPD to each arm. 2009 WL 1416103 (Ill.)

In reinstating the award, the Court reviewed Section 8(e)(18) of the Act, which provides that the loss of any two enumerated members "constitutes total and permanent disability" as well as Section 8(f), which fixes the amount of compensation and in turn provides that "[i]n case of complete disability, which renders the employee wholly and permanently incapable of work, or in the specific case of total and permanent disability as provided in [section 8(e)(18)], compensation shall be payable at the rate provided in subparagraph 2 of paragraph (b) of this Section for life." 820 ILCS 305/8(f) (West 1994). These provisions plainly reference the loss of only two members and do not address the situation where a worker suffers the loss of more than two members in a *single* accident.

The Court held that Petitioner did not seek to bypass recovery under section 8(e)(18) and recover for three specific losses, nor did he seek a double

recovery for the loss of his legs under both section 8(e)(18) and section 8(e)(12) (820 ILCS 305/8(e)(12) (West 1994). It reiterated that the Act does not allow a worker to avoid section 8(e)(18) by itemizing specific losses that otherwise fall under that section. However, the Act does permit a worker to recover for the loss of two members under section 8(e)(18) as well as for any additional scheduled losses beyond the two losses compensated under that section.

In sum, the Court agreed with Petitioner's contention that he is entitled to recover under section 8(e)(18) for the loss of both legs, and recover under section 8(e)(10) for the loss of earning capacity as a result of the loss of each arm and reinstated the IWCC's award.

**Practice Tip:** In light of this decision, Petitioner may receive both PPD and PTD awards, so be mindful of this issue in cases where Petitioner sustains multiple injuries arising from one accident. It would be wise to settle where you think that an arbitrator would hand out both PPD and TTD award.

### Employer Closed for No WC Insurance

In June, 2009, for the first time, the Illinois Workers' Compensation Commission shut down a business for failure to obtain insurance. The employer, All Good Dogs Petitioner Care in Evanston, IL, was closed after multiple warnings and a hearing. The employer then secured insurance and re-opened the business.

Employers may be fined up to \$500 for each day without insurance, with a minimum fine of \$10,000. Corporate officers also may be held personally liable and/or sent to prison.

**Practice Tip:** Employers in Illinois must carry workers' compensation insurance. Anyone may check an employer's insurance coverage on the IWCC website, or by contacting the Commission.

**Life of an Illinois Workers' Comp Claim**

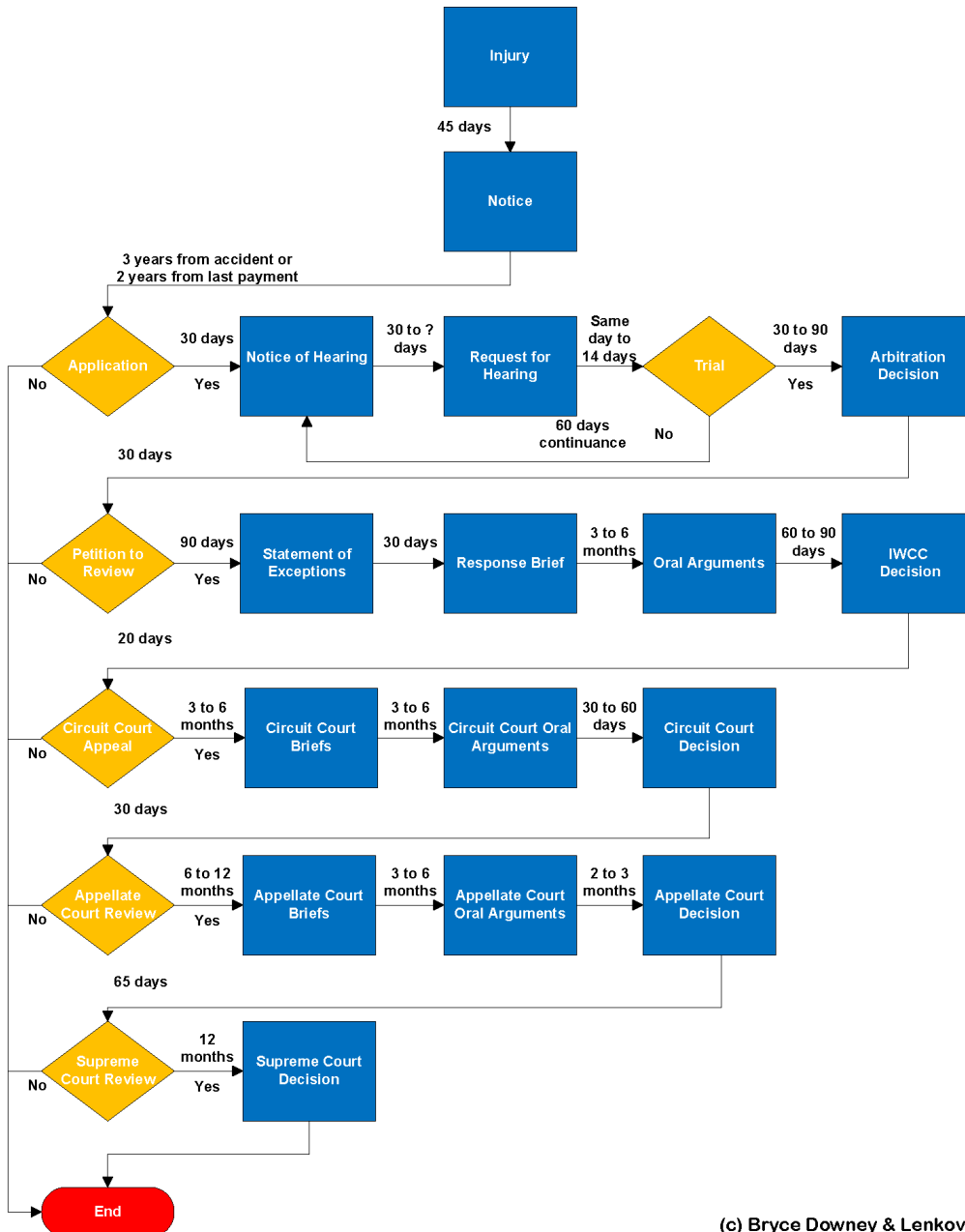
Our clients often ask us why Illinois claims take so long. We have put together the following timeline for a typical claim from its inception through the last possible round of appeal. Of course, not every case follows this timeline.

**The attorneys at Bryce Downey & Lenkov are committed to closing every case as quickly as possible.** We are very successful in shortening this

timeline by employing methods such as early and aggressive investigation, motions to dismiss, trials and out-of-the-box strategies like settlement days. As an example, for one Fortune 200 client, the average life of a workers' compensation case during the last year was nine months.

If you would like more information on how to get your case closed as quickly as possible, contact Rich Lenkov at [rlenkov@brycedowney.com](mailto:rlenkov@brycedowney.com).

**Life of an Illinois Workers' Compensation Claim**



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:

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 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 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 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.*

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