

Indiana Workers' Compensation Newsletter

July 2011

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Save the Date:

We will be hosting a Medical-Legal Seminar in Indianapolis on **September 22, 2011**. It promises to be a great event with speakers from the medical and legal Indiana workers' compensation community as well as personnel from the Board. The official invitation will be going out soon, but feel free to check our website for more information as it becomes available.

News

Justin Nestor has been named a 2011 Board Member for the Northwest Chapter of the Indiana Workers' Compensation Institute (IWCI).

In a recent seminar, **Storrs Downey** and Justin presented to an individual client "Advanced Topics in Indiana Workers' Compensation."

Storrs and **Paige Toth** presented "Turning the Tables: Using an Employee's Own Actions as a Defense to Their Workers' Compensation Claim" and an update on Indiana Forms to an individual client on June 14, 2011.

Storrs and Justin presented Indiana Workers' Compensation 101 to an individual client on June 30, 2011.

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

Recent Case Results

Justin obtained a zero award for a case he tried in Crown Point in May of this year. The claim was accepted and all statutory benefits were provided. Plaintiff's request for additional treatment and in excess of one (1) year of retroactive TTD after the MMI finding was disputed and eventually submitted to a Board IME to address the issue. That IME report was favorable to the employer and no additional benefits were authorized. Plaintiff refused to consider settling the case and it went to hearing, which resulted in the award denying in its entirety Plaintiff's Application for Adjustment of Claim seeking additional benefits.

In a disputed Indiana case, Storrs 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.

Paige settled a case for \$22,000 with a hold harmless on a \$31,000 lien and no future medical care. She was able to negotiate the \$31,000 lien down to \$7,500. Our client paid out \$30,000 total when the original exposure was in excess of \$60,000 plus open medical care for life.

In another disputed case, Justin was able to negotiate a compromise settlement of \$5,000 where the demand was in excess of \$95,000. Plaintiff was trying to relate the need for a cervical spine fusion to the claim, which our client disputed was related. By pushing the case with written discovery and eventually having to file a Motion to Compel, Plaintiffs counsel eventually agreed to accept the cost of defense offer.

Justin recently settled another case for \$25,000 where the original demand was \$75,000. Plaintiff had a medical opinion indicating that he required additional medical care and had a higher PPI rating. Justin was able to negotiate with Plaintiff's counsel to limit the exposure and settle the case for substantially less than the authority granted.

The attorneys at Bryce Downey & Lenkov are committed to closing every case as quickly and efficiently 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 or coordinating a Settlement Day, contact Storrs Downey sdowney@brycedowney.com or Justin Nestor jnestor@brycedowney.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.

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>

Provider Fee Claim Statute of Limitations

On May 9, 2011, the Indiana Legislature enacted SB 576, which effectively alters §22-3-3-5 of the Indiana Worker's Compensation Act with regard to Provider Fee Claims. The change is effective immediately and reads:

“(d) All claims by a health care provider for payment for services are against the employer and the employer's insurance carrier, if any, and must be made with the board under IC §22-3-2 through IC §22-3-6. After June 30, 2011, a health care provider must file an application for adjustment of a claim for a health care provider's fee with the board not later than two (2) years after the receipt of an initial written communication from the employer, the employer's insurance carrier, if any, or an agent acting on behalf of the employer after the health care provider submits a bill for services. To offset a part of the board's expenses related to the administration of health care provider reimbursement disputes, a hospital or facility that is a medical service provider (as defined in

IC §22-3-6-1) shall pay a filing fee of sixty dollars (\$60) in a balance billing case. The filing fee must accompany each application filed with the board. If an employer, an employer's insurance carrier, or an agent acting on behalf of the employer denies or fails to pay any amount on a claim submitted by a hospital or facility that is a medical service provider, a filing fee is not required to accompany an application that is filed for the denied or unpaid claim. A health care provider may combine up to ten (10) individual claims into one (1) application whenever:

- (1) all individual claims involve the same employer, insurance carrier, or billing review service; and**
- (2) the amount of each individual claim does not exceed two hundred dollars (\$200)."**

A recent string of Indiana Spine Group decisions prompted the Legislature to enact these changes and take a stance on the issue of statute of limitations for Provider Fee Claims. The cases defaulted to a ten (10) year timeframe for the providers to file an Application. Historically, the Indiana Worker's Compensation Board ("Board") held providers to the two (2) year statute of limitations set forth in the Indiana Worker's Compensation Act ("Act"). However, The Indiana Spine Group cases brought to light the lack of a true statute of limitations for Provider Fee Claims and forced the Legislature's hand to clarify this issue.

The Act previously contained only two statutes of limitation, I.C. §22-3-3-3 and §22-3-3-27. I.C. § 22-3-3-3 provides injured worker's two (2) years from the date of the accident to bring a claim, while I.C. § 22-3-3-27 provides two (2) years from the date of the last compensation paid to the worker for a modification of the award.

In the string of Indiana Spine Group cases, the Indiana Court of Appeals held that neither of these statutes of limitation applied to Provider Fee Claims, and that absent clarification, the Provider Fee Claim

statute of limitations should be governed by the general ten (10) year statute in I.C. §34-11-1-2.

In *Indiana Spine Group v. Pilot Travel Centers*, the Court held that the Act is "silent on the statute of limitations applicable to claims involving the pecuniary liability of employers to medical service providers." 931 N.E.2d 435, 438 (Ind. Ct. App. 2010).

Expanding from there, in *Indiana Spine Group v. International Entertainment Consultants*, the Court reversed and remanded the decision of the Board to dismiss Indiana Spine Group's Provider Fee Application because it was not filed timely. 940 N.E.2d 380 (Ind. Ct. App. 2011). In doing so, the Court opined that the Legislature enacted the general statutes of limitation for the very purpose of supplying a statute of limitation when one has not otherwise been provided by a more specific statutory scheme. They continued to seemingly support Indiana Spine Group's argument that either the six-year statute of limitation for actions on accounts or the ten-year statute of limitation for actions that are not limited by any other statute should apply. I.C. §34-11-1-2 and §34-11-2-7.

The most recent of the Indiana Spine Group cases, *Indiana Spine Group v. Handleman Company* and *Indiana Spine Group v. Hardigg Industries*, again reversed and remanded a dismissal of Indiana Spine Group's Provider Fee Application due to it being filed after the two (2) year statute of limitations. In these two cases, no mention was made of the six-year statute for accounts, but the Court again seemed to take the position that the ten (10) year general statute of limitations set forth in I.C. § 34-11-1-2 would apply to provider Fee Claims.

In reaching these decisions, the Court thematically repeated that they failed to see the wisdom of tying a medical service provider's ability to seek full payment due under the Act to a date that has no significance to the medical service provider's claim. Applying a two-year statute of

limitations from the date of accident makes no sense in that the Act “specifically envisioned that an employee could very well receive medical services up to the end of the two-year statutory period. In such a case, the medical service provider would then have little or no time to enforce its right to payment for said services. Additionally, the provider receives no compensation, so imposing a two-year statute of limitations on the provider, who likely has no way of knowing the date compensation was last paid to the claimant, could again provide unjust results.

The Legislature appropriately stepped in and limited providers to a two year window following being put on notice of the pending worker’s compensation claim.

Interestingly, the Legislature took this opportunity to impose a filing fee for providers filing an Application. While the filing fee is a relatively nominal amount and can be waived under certain circumstances, the fee seemingly attempts to discourage providers from flooding the Board with litigation on partially paid medical bills.

Practice Tip: Providers are now held to the same two (2) year window to file claims. Employers and their insurance carriers should carefully analyze any such claims to determine whether they were properly filed within the statute of limitations.

Amendments to the Indiana Workers’ Compensation Act

While SB 576 is garnering significant attention for the immediate enactment of the two (2) year statute of limitations for Provider Fee Claims, the bill contains several additional revisions that will impact the Indiana Workers’ Compensation practice effective July 1, 2011.

- Board Members will be required to be attorneys in good standing and admitted to practice law in Indiana. Traditionally, Board

Members were not required to be licensed attorneys.

- With the consent of all parties, the Board may order mediation using a mediator certified by the Indiana Continuing Legal Education Forum, and the Board shall establish a schedule of fees and charges for said mediations.
- The monies remaining in the Second Injury Fund at the end of the fiscal year shall be used for payment of fund liabilities and awards of compensation ordered by the Board against the fund rather than reverting to the general fund.
- The First Report of Injury needs to be filed within seven (7) days of the first disability and the employer’s knowledge of the disability instead of within seven (7) days of the occurrence.
- The Employer shall provide a copy of the record of the injury to the Board upon the Board’s request for the same.
- Violation of the Act by employers will constitute a Class C misdemeanor rather than an infraction.

In addition to the above-mentioned changes, the bill requests that the legislative council assign a commission or committee to research the issue of increasing benefit schedules for workers’ compensation and occupational disease compensation and that the findings be reported with recommended legislation by November 1, 2011.

Court of Appeals Reweighs Evidence in Overturning Board’s Decision

A June 13, 2011 decision from the Indiana Court of Appeals may have signaled a change in the way the Court of Appeals reviews Board decisions.

Typically, the Court does not reweigh evidence, but *Albright*, the Court did to reach a contrary decision. On remand the Court ordered the Board to request additional evidence to determine how long Four Winds was obligated to provide Cymbalta to Albright. *Albright v. Four Winds International*, 2011 WL 2321411 (Ind. Ct. App, June 13, 2011).

Yvette Albright was employed by Four Winds International to wire recreational vehicles. Albright's work required her to lie on a creeper to work overhead. In 2005, she developed neck pain and hand numbness and was subsequently diagnosed with a herniated disc with right radiculopathy. Plaintiff underwent a discectomy and cervical fusion, and was assessed a PPI rating of 18% of the whole person on June 20, 2006. Thereafter, Albright and Four Winds entered into an Agreement to Compensation which listed cervical herniation as the nature of the injury. Four Winds accepted Albright's 18% whole person impairment rating and compensated her \$25,000.

In January 2007, Albright saw Dr. Elizabeth Weston, her primary care physician. Dr. Weston noted Albright was suffering from paresthesias, arising from her work injury with Four Winds and recommended Albright increase her current Cymbalta dosage from 30 mg to 60 mg. to help control the pain associated with paresthesias. Later, Dr. Weston opined that Albright might need Cymbalta (or a similar medication) for the next 20 years as the current dosage seemed to significantly help with Albright's pain.

A year later, Albright met with Dr. Weston as a follow up to her anxiety and depression. The report noted that Albright was doing well on Cymbalta 60 mg, twice daily. Furthermore, Dr. Weston listed Albright as suffering from anxiety and depression, but there was no mention of these diagnoses being related to her work injury.

On July 18, 2008, Albright filed an Application for Adjustment of Claim to resolve the issue of future medical expenses related to the original work related injury.

As part of an IME for Four Winds, Dr. David Poder examined Albright's medical history and opined that the proposed treatment of Cymbalta 60 mg twice daily was appropriate and medically necessary for the paresthesias diagnosis. Further, Dr. Poder felt that continued use of Cymbalta could be expected to relieve some of Albright's pain and return her to function. Dr. Poder recommended authorization of Albright's continued use of Cymbalta pending a report from Dr. Weston documenting how much pain relief Albright had achieved with Cymbalta documentation as to Albright's improvement in quality of life and functional restoration with use of Cymbalta.

In response, Dr. Weston opined that Cymbalta had improved Albright's pain from 60 to 70 percent, and significantly improved her quality of life. Moreover, Dr. Weston felt that Albright still experienced some pain and she would continue to improve if continued on the current dose of Cymbalta.

At hearing, the Single Hearing Member found that Albright reached MMI for the accepted portion of the work injury and was provided all statutory benefits owed to her. However, since no evidence was presented relating the psychological problems or upper extremity symptoms to the cervical spine condition, it was therefore inappropriate for continued medical benefits (i.e., Cymbalta) when it had not been established that the medication would limit or reduce her impairment.

Albright appealed to the Full Board which affirmed the Single Hearing Member's decision.

Albright contended that the evidence did not support the Board's findings and appealed to the Court of Appeals arguing that (1) the Board abused its discretion by allowing Four Winds to submit to the Board evidence that had not been before the Single Hearing Member, and (2) the Board erred when it denied her claim for Cymbalta.

As to the first issue, the evidentiary material before the Board consisted only of the Stipulation,

the parties' briefs, and additional evidence submitted by Four Winds. The decision does not indicate what additional evidence was submitted to the Full Board, but Albright argued only the additional evidence that was submitted could support the Board's denial of her claim. The Court found Albright failed to properly raise any objection to the admission of additional evidence, and as a result, she waived the issue.

As to the second issue, the Court found that Dr. Weston's letter was sufficient evidence as to the reduction in Albright's pain, and therefore, the evidence did not support the Board's finding. Further, the Court disagreed with the Board's finding that Dr. Weston's letter did not adequately report on the improvement of Albright's quality of life or her functional restoration with the use of Cymbalta.

Notably, the Court examined the Board's findings as to compensability. The Board denied a request for Cymbalta to treat depression and anxiety; however, the Stipulation was not limited to that issue. In the Stipulation, the parties agreed that Dr. Weston had prescribed Cymbalta for help in controlling paresthesias and that Cymbalta had also been approved for treatment of depression and generalized anxiety disorder. The record revealed that Cymbalta was prescribed for Albright's pain, but the Board failed to address the question presented in that context. The Board made no findings crediting or discrediting Albright's diagnosis of paresthesias, whether her paresthesias was related to the compensable injury or whether Cymbalta reduced her pain or limited her impairment. Rather, the Board focused on Cymbalta's use for the treatment of psychological issues.

The Court held that the Board should have separately considered each reason for the treatment in determining whether Four Winds is responsible for providing Cymbalta. The undisputed evidence showed that Albright suffers from paresthesias, which is related to her neck injury, and Dr. Weston was prescribing Cymbata to treat the pain arising from

that condition. Therefore, the Board should have entered an award in favor of Albright's request for Four Winds to provide the medication. The Board's decision was reversed and remanded for the Board to enter an award in favor of Albright. The Board is to determine how long Four Winds should be required to provide Cymbalta and in its determination may request and consider additional evidence.

Practice Tip: The result in this decision represents a departure from prior thinking, specifically that the Appellate court would not reweigh evidence submitted at the hearing. Employers and their insurance carriers should be careful as to what evidence is sought to be admitted at all stages of litigation and what the content of the proposed hearing stipulations entails.

Current Indiana Benefit Rates

We have fielded several questions from clients as to whether there have been any changes in the Indiana Rates. There were no changes made by the Legislature in the most recent session, so the rates will remain the same until they do. 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 May 1, 2011, the mileage reimbursement rate has increased from \$0.40 to \$0.44. As was the case in July of 2008, this change has been made to combat the rising costs of fuel.

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:

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| 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 Indiana Workers' Compensation law, please contact Storrs Downey at 312.377.1501 or sdowney@brycedowney.com, Justin Nestor at 219.756.8100 or jnestor@brycedowney.com, or any other 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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