

# Illinois Workers' Compensation Newsletter

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## Richard Lenkov to Speak at National WC Conference

Richard Lenkov has, for the second time, been chosen to speak at SEAK's 28<sup>th</sup> Annual National Workers' Compensation and Occupational Medicine Conference. The conference will be held on Cape Cod, in Hyannis, Massachusetts from July 15 to 17, 2008.

Rich will be presenting the topic "Turning the Tables: How To Use An Employee's Own Actions As A Defense To Their Workers' Compensation Claim." This presentation will be held at 2:40 p.m. on July 16, 2008. It promises to be an interesting discussion on how to craft seldom-used defenses to put your case in the best position for a victory.

The National Workers' Compensation and Occupational Medicine Conference is one of the largest and foremost workers' compensation gatherings in North America. It attracts the leading workers' compensation professionals, physicians, occupational nurses, risk management, claims professionals and attorneys to discuss cutting-edge issues. Moreover, it is held on Cape Cod, one of the most beautiful settings in the country.

For more information on the conference, please go to [www.seak.com](http://www.seak.com). We encourage you to attend what promises to be an interesting gathering.

### More Firm News

- We are pleased to announce that Carol A. Cesaretti has become a partner.
- We are happy to report the addition of attorney Justin T. Nestor to our workers' compensation team.
- BryceDowney is expanding to Minneapolis! Details forthcoming.
- Our department has received two more ZERO awards at arbitration over the past few months.
- Carol A. Cesaretti was chosen to speak at the Illinois State Bar Association's Workers' Compensation seminar on February 11, 2008, on the topic of writing an effective analysis letter.

*The attorneys at BryceDowney 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 W. Lenkov at 312.377.1501 or [rlenkov@brycedowney.com](mailto:rlenkov@brycedowney.com), or any member of our Workers' Compensation team. © Copyright 2008 by BryceDowney, LLC, all rights reserved. Reproduction in any other publication or quotation is forbidden without express written permission of copyright owner.*

## BryceDowney Continues to Secure ZERO Awards

- On 10/2/07, Rich Lenkov represented J.C. Penney in a 19(b) trial before Arbitrator Peterson in Chicago. Petitioner was alleging that her lumbar and psychiatric conditions prevented her from returning to work at J.C. Penney. She was seeking 122 weeks of TTD benefits (over \$30,000), payment of past medical bills and authorization for additional lumbar and psychiatric care.

Under cross-examination, Petitioner admitted that she was the one keeping herself off work, rather than offering a medical opinion to that effect. Rich was also able to secure some inconsistent testimony regarding key facts, portraying Petitioner as less than credible.

**Arbitrator Peterson found for Respondent, awarding Petitioner no TTD benefits nor any future medical benefits.**

- On 11/16/07, Carol A. Cesaretti represented SUPERVALU d/b/a Jewel in a trial before Arbitrator Cronin in Chicago. Petitioner was alleging that he sustained a right shoulder strain, right carpal tunnel and a cervical strain as a result of a lifting incident at work. Petitioner underwent conservative care.

Respondent secured an independent medical evaluation with Dr. Zelby, who opined that Petitioner merely sustained a neck strain as a result of this lifting incident. The treating physician diagnosed a cervical strain, right shoulder strain and right carpal tunnel but did not specifically state that all of these conditions were related to Petitioner's work injury.

**Arbitrator Cronin adopted the argument of Respondent in his Decision and found that Petitioner did not meet his burden of proof for the shoulder or the carpal tunnel. Thus, Petitioner was awarded nothing relative to these two body parts.** The arbitrator, however, properly awarded 3% loss of use of man as a whole for the neck strain.

## Petitioner Awarded Permanency In Physical-Mental Case

In *Galatis v. TCF Bank*, 02 ILWC 008424, 07 IWCC 1133 (Ill.Indus.Com'n), the Workers' Compensation Commission overturned the arbitrator's finding of permanent partial disability and, instead awarded 40% loss of use man as a whole based on Petitioner's mental injuries.

On August 9, 2000, Petitioner was sexually assaulted by a supervisor while at work. Subsequent to the sexual assault, Petitioner testified she became depressed, experienced nightmares and flashbacks of the incident, and was anxious, nervous, and unable to function as she had prior to the incident. As of the July 19, 2005 arbitration, Petitioner had not returned to work.

Petitioner began psychiatric care within a few weeks of the incident. Petitioner never sought psychological treatment prior to the accident. Petitioner treated with psychiatrist, Dr. Karimi, and social worker Ms. Wachtel-Shapiro. Dr. Karimi diagnosed Petitioner with post-traumatic stress disorder

## Permanency in Physical-Mental Case (continued)

and major depression. Dr. Karimi found both conditions to be directly related to the work incident, and further found Petitioner permanently disabled from any gainful employment.

Ms. Wachtel-Shapiro's medical records noted a progression from residual post-traumatic stress symptoms to more common psychological concerns not related to Petitioner's employment. Conversely, Dr. Karimi found no improvement in Petitioner's symptoms after three years of treatment.

Respondent's IME physician, Dr. Mosk a clinical psychologist, opined that Petitioner's post-traumatic stress disorder had transitioned into specific phobias and a possible social phobia. Dr. Mosk examined Petitioner for three days in April and June 2004. Dr. Mosk found "that Petitioner had often provided information inconsistent with prior histories and that four different psychodiagnostic instruments identified evidence of an embellishment of her psychological condition." Dr. Mosk opined that Petitioner was able to return to unrestricted work on June 11, 2004. Dr. Mosk further opined that any mild depression and moderate anxiety Petitioner was currently experiencing was not related to work.

In finding Petitioner permanently totally disabled, the arbitrator relied on *Pathfinder Company v. Industrial Commission*, which is the seminal case regarding the compensability of psychological injuries. The arbitrator also relied on *City of Springfield v. Industrial Commission*, which found that nonconsensual sex was a sufficient physical contact to trigger analysis under the physical-mental model. The case of *Juarez v. Ameritech Mobile Communications, Inc.*, rationalized this finding by stating, "the harassment prone co-employee clearly is as much a part of the victim's work environment as a defective tool might be...and is similarly a risk inherent in employment."

Based on the findings of Petitioner's treating physicians and Petitioner's testimony that she suffered no prior mental conditions, the arbitrator found Petitioner to be permanently totally disabled. The arbitrator noted that Petitioner established "that the sexual assault she endured on August 9, 2000, while working for the respondent, is at least a factor in her present disability."

The arbitrator's finding of permanent total disability was appealed by Respondent. In modifying the arbitrator's award to 40% loss of use of a man as a whole, the Commission relied on the opinions of Respondent's IME doctor, Dr. Mosk. The Commission found the opinions of Dr. Mosk more credible than those of Petitioner's treating physician, Dr. Karimi, due to Dr. Mosk's more timely and objectively based examinations, as well as the inconsistencies between the findings of Petitioner's treating physicians, Dr. Karimi and Ms. Wachtel-Shapiro.

**Practice Tip:** *It is difficult to determine the compensability of cases involving mental injuries, and the value of those found to be compensable. To help with this task, as soon as a mental claim becomes apparent, it is important to begin the process of obtaining Petitioner's psychiatric records. In addition, once the records are received, it is important to promptly obtain an IME to assess Petitioner's psychiatric condition. Obtaining surveillance footage can also help to bolster the effect of an IME.*

## Failure to Attend Job Fair No Basis to Terminate Voc Rehab Benefits

An October 12, 2007, decision from the Illinois Workers' Compensation Commission in *O'Toole v. Jewel Food Stores, Inc.*, 02 ILWC 066, 239, held that an employer's termination of vocational rehabilitation benefits was unwarranted, despite Petitioner's failure to attend recommended job fairs and consistently follow up in person with potential employers.

In *O'Toole*, Petitioner was diagnosed with bilateral carpal tunnel syndrome as a result of her work as a bakery sales clerk with Respondent. Following surgery, Petitioner underwent a Functional Capacity Evaluation (FCE) and was placed at a light to medium demand level with restrictions, which were described as permanent by her treating physician, Dr. Meletiou. Respondent could not accommodate Petitioner's permanent restrictions and provided a vocational rehabilitation specialist. Petitioner's vocational rehabilitation program included taking courses at McHenry Community College, pursuing jobs leads provided by the counselor, following up in person with potential employers, and attending job fairs. Petitioner, with the exception of the job fairs and following up in person with potential employers, followed the established program including pursuing all recommended job leads for twelve months. Petitioner did not attend the job fairs or follow up in person with potential employers because she did not have a reliable means of transportation.

Commissioners David L. Gore and Paul W. Rink, in reversing Arbitrator Erbacci, found that Respondent's termination of vocational rehabilitation for lack of cooperation was unwarranted because Petitioner fully participated in the recommended program. As to Petitioner's failure to attend the job fairs, they were only one component of the program. Petitioner's lack of a reliable means of transportation to attend job fairs or to consistently follow up in person with potential employers did not constitute a lack of cooperation. In reversing Arbitrator Erbacci, the Commission awarded Petitioner wage differential benefits pursuant to Section 8(d)(1) based on her permanent restrictions which prevented her from pursuing her usual and customary line of employment. Commissioner Mario Basurto dissented arguing Petitioner did not cooperate with the vocational rehabilitation program and should not be awarded benefits under Section 8(d)(1) as Petitioner was repeatedly advised of the importance of applying in person to employers and refused to follow such advice.

***Practice Tip:*** Employers and their carriers should closely analyze a claimant's cooperation in a vocational rehabilitation program prior to terminating benefits, especially if the termination is based on only one component of the rehabilitation program. Terminating vocational rehabilitation benefits on this basis could expose the employer to penalties under Sections 19(k), 19(l), and attorney fees pursuant to Section 16. The better course of action is to continue paying benefits and request an immediate hearing pursuant to Section 19(b) challenging the employee's rights to continued vocational rehabilitation benefits, thus protecting the employer from a penalties situation.

## Refusal of FCE or Voc Rehab No Basis for Termination of Benefits

An August 20, 2007, decision from the Illinois Workers' Compensation Commission in *Pomelow v. Blaw-Know Construction Equipment Corp.*, 02 ILWC 06, 643 held that an employer does not have the right to terminate a claimant's benefits based on a refusal to attend a Functional Capacity Evaluation or vocational rehabilitation evaluation.

In *Pomelow*, Respondent filed a Motion to Suspend Benefits pursuant to Section 12 of the Act because Petitioner refused to cooperate and attend a functional capacity evaluation and vocational rehabilitation evaluation. The Commission found that Arbitrator Mathis properly denied Respondent's motion. Under Section 12 of the Act, a claimant is required to submit for examination to a qualified medical practitioner, such as a physician or surgeon, not to an industrial rehabilitation consultant or vocational rehabilitation expert. Thus, Respondent did not have the right to terminate Petitioner's benefits after his refusal to attend a functional capacity evaluation and a vocational rehabilitation evaluation.

**Practice Tip:** Do not terminate a claimant's benefits for refusal to attend a functional capacity evaluation or vocational rehabilitation evaluation, as doing so could expose the employer to penalties pursuant to Sections 19(k) and 19(l), as well as attorney fees pursuant to Section 16. Carefully analyze the employee's cooperation in the vocational rehabilitation program and determine whether justification exists to suspend benefits pursuant to Section 19(d) based on the employee's self-injurious practices and/or refusal to submit to recommended medical treatment.

## Interrupted Voc Rehab Stops PTD But Extends Voc

The Illinois Workers' Compensation Commission denied Petitioner's request for an award of permanent total disability where vocational rehabilitation efforts were inconsistent to determine Petitioner's marketability in the workforce. *Bouschard v. Sirloin Stockade*, 2007 IWCC 1107.

Petitioner had been employed with Respondent for four months as an assistant restaurant manager. In August 1994, Petitioner fell at work and suffered a disc herniation. At arbitration, Petitioner received an award for Workers' Compensation benefits. After a complicated history and after several 19(h) and 8(a) reviews, Petitioner sought permanent total disability benefits, which was denied.

In an attempt to return Petitioner back to the workforce, Respondent initiated vocational rehabilitation in July of 2005. A vocational counselor met with Petitioner to start a job search, but the search was placed on hold at Respondent's direction to allow the parties to engage in settlement negotiations. The vocational counselor then reopened the file in December of 2005. However, he was unable to meet with Petitioner until January of 2006. Petitioner and the vocational counselor worked for approximately two months on job searches and the counselor provided Petitioner with job leads. In April of 2006, the counselor again placed the claimant's file on hold. Between January 2006 and April of 2006 Petitioner moved to a more rural location where job availability was scarce and Petitioner was described as putting forth minimal effort. Due to the interruptions in the rehabilitation services and the claimant's move to another town, the Commissioner ordered Respondent to resume rehabilitation services.

**Practice Tip:** It is important to remember that parties need to be consistent when initiating vocational rehabilitation services. Inconsistencies and breaks in vocational efforts may cause the Commission to order Respondent to institute a new vocational rehabilitation program, which will increase costs and slow down the vocational efforts.

## The Smoking Ban and “Smoke Break” Injuries

Gov. Rod Blagojevich (D) signed a statewide public smoking ban in Illinois, making Illinois the 19<sup>th</sup> state to pass a smoking ban. As of January 1, 2008, smoking is illegal in restaurants, bars, nightclubs, workplaces, and all public buildings. Smoking is also banned within 15 feet of building entrances, exits, and windows.

Now that the smoking ban is in effect, how does this potentially affect “smoke break” injuries resulting in workers’ compensation claims?

It is well established that an injured worker must prove that his/her injury: (1) arose out of AND (2) in the course of his/her employment.

For injuries that occur when an employee is on a smoke break, despite the fact that the injury may not necessarily arise out of his/her employment, the case maybe compensable under the personal comfort doctrine. The personal comfort doctrine typically applies to acts such as smoking, using the restroom, coffee breaks, obtaining fresh air, seeking relief from heat or cold, showering and resting.

Cases that are challenged under the personal comfort doctrine must be carefully analyzed, as each fact pattern could result in a different outcome. For example, courts have held that the personal comfort doctrine applies to injuries during breaks and lunch hour if it is considered incidental to employment. Moreover, the courts have held that if the employee’s actions benefited or accommodated his/her employer then the injury may be compensable under the personal comfort doctrine.

To make matters less clear, the courts have held that if the injury falls under the umbrella of the personal comfort doctrine, but the employee voluntarily and in an unexpected manner exposes himself/herself to a risk outside any reasonable exercise of his/ her duties, then the injury is not compensable. However, even if the injury resulted from an unreasonable or unnecessary risk, if the employer had knowledge, acquiesced or did not prohibit the practice or custom, then the injury is compensable.

So, to answer the question how does the smoking ban in Illinois affect workers’ compensation claims: it does not. The same analysis must be applied on a case-by-case basis.

***Practice Tip:*** *Although the personal comfort doctrine will likely apply to an injury suffered during a smoke break, the employee must still prove that his/ her injury arose out of and in the course of his/her employment. Therefore, analyze the facts of each case very carefully before accepting or denying a “smoke break” claim. If the employer has a complete ban on smoking, the policy is in writing and acknowledged by the employee and the policy is strictly enforced, then the employer has a strong argument against compensability.*

*BryceDowney 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, Memphis and Atlanta and attorneys licensed in multiple states, BryceDowney is able to serve its clients’ needs with a regional concentration while maintaining a national practice. Our practice areas include:*

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