

Workers' Compensation Newsletter

November 2009

INSIDE THIS ISSUE:

News	1
Conferences & Seminars	1-2
Settle Dozens of Cases Now!	2
Recent Case Results	2-3
Employer Liable for Stray Bullet Injuries	3-4
Recent Sears EEOC Settlement	4-5

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. Please e-mail us through our website (brycedowney.com) or directly to 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

Elizabeth Alberico has joined our workers' compensation department. Elizabeth received her J.D. from Dayton University in 2008, and worked with us as a paralegal until she passed the bar this past summer on the first try.

Conferences & Seminars

We present a variety of workers' compensation topics at national and local seminars, and also in-house to many of our clients. Here are some examples of recent seminars that we have given:

- *What Rights Do Injured Employees Have & How Do I Deal With Them?*
- *Turning the Tables: Using An Employee's Own Actions as a Defense to Their Workers' Compensation Claim*
- *CSI: Comprehensive Subrogation Investigation*
- *Mitigating Your Litigation: How to Manage High Exposure Workers' Compensation Claims*
- *Evaluating Permanency*

If you would like materials from any of these seminars, or would like us to present a seminar to your workers' compensation team, please contact Rich Lenkov at rlenkov@brycedowney.com. Here are some recent and forthcoming seminars:

Coming up:

- 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.wccconference.com)

Coming up (continued):

- 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. More information is at www.pesilaw.com.
- Rich Lenkov will be speaking on the Retail Panel at RIMS 2010 Annual Conference & Exhibition, April 25-29, 2010, in Boston.

Recently presented:

- Rich Lenkov presented *10 Ways to Lose Your Workers' Compensation Case* at REBEX 2009, the RIMS Regional Risk Management Conference and Exhibition, on October 22, 2009, in Wheeling.
- Storrs Downey presented *Terminating Injured or Disabled Problem Employees* at REBEX 2009 on October 23, 2009.
- Rich Lenkov presented *Obtaining a Winning Medical Opinion* to JPB Medical Marketing's Medical & Legal Issues in the Work Comp Arena Case Managers Education Dinner Program on October 6, 2009.

- Rich Lenkov presented *Litigation 101* to Celina Insurance on September 2, 2009.
- Storrs Downey presented *Balancing Aggressive Pursuit of Lien Recovery with Associated Litigation Expenses* at the 5th Annual National Workers' Compensation Subrogation Strategies ExecuSummit in Uncasville, CT, on August 12, 2009.

Recent Case Results

Success #1: Michael Scully recently received a Commission decision affirming an arbitration decision in favor of Respondent.

Arbitrator Peterson ruled in favor of Respondent, stating that Petitioner was not credible since he was not truthful about a prior workers' compensation case that clearly involved an injury to the low back.

This case was tried before Arbitrator Kinnaman where Petitioner sought past TPD benefits and further medical treatment as recommended by her treating physician Dr. Stamelos. Respondent denied a portion of the TPD benefits and further treatment based on opinions from Dr. Carroll and Dr. Konowitz. Respondent also had an FCE which showed Petitioner did not put forth significant effort during the exam. The arbitrator ruled in favor of

Respondent that Petitioner was at maximum medical improvement, not entitled to TPD benefits after the date of the FCE because she at MMI and was not in need of any further treatment. Petitioner appealed and Commissioners Basurto, DeMunno and Gore affirmed Arbitrator Kinnaman'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, please contact Rich Lenkov at rlenkov@brycedowney.com.

Success #2: Lindsey Strom recently won a case before Arbitrator Lammie in Wheaton on a 19(b) petition. At trial, Petitioner testified that he was transferring a plastic roll to a skid, lost his balance and fell backwards injuring his back. The arbitrator had concerns regarding Petitioner's credibility, as there were several inconsistencies between his testimony and the medical records. The arbitrator denied Petitioner's requests for additional benefits.

Success #3: Michael Scully received a zero award from Arbitrator Peterson in a case where Respondent denied medical treatment and temporary total disability benefits based on the fact that Petitioner was not truthful about a prior injury. Petitioner claimed a low back injury and stated to his treating physicians that he never had a prior back injury, or experienced back pain prior to the alleged date of accident. However, Petitioner testified on direct examination that he never experienced back pain or an injury to the back prior to his accident. Respondent, through the results of a prior claims check at the Commission found that Petitioner did in fact have a prior low back injury as a result of an earlier workers' compensation case with another employer. This was in complete contrast to Petitioner's testimony both on direct and cross examination at trial. Respondent submitted the prior filing into evidence along with an IME by Dr. Singh that Petitioner was not in need of any further treatment.

Petitioner was standing near the bar when a stray bullet fired from outside the restaurant pierced the floor-to-ceiling windows and struck her in the back, paralyzing her from the waist down. Following a hearing, the arbitrator found that Petitioner proved she sustained accidental injuries arising out of and in the course of her employment and awarded permanent total disability (PTD) benefits for life pursuant to Section 8(e)(18) of the Act. The arbitrator also ordered employer to pay for necessary medical expenses incurred by Petitioner. On review, the Commission affirmed and adopted the arbitrator's decision. The circuit court confirmed the Commission's decision and Respondent appealed to the Illinois Appellate Court.

"for an injury to 'arise out of' the employment, its origin must be in some risk connected with or incidental to the employment..."

The issue on appeal was whether Petitioner's injuries arose out of her employment. In urging reversal, Respondent argued that the decision of the Commission was erroneous as a matter of law. The Appellate Court disagreed, explaining that for an injury to "arise out of" the employment, its origin must be in some risk connected with or incidental to the employment so as to create a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 57, 541 N.E.2d 665 (1989).

Employer Liable for Stray Bullet Injuries

In *Restaurant Development Group v. Hee Suk Oh*, 2009 WL 1706557, Petitioner was working as a bartender at Respondent's restaurant in Bucktown, a neighborhood on the near west side of Chicago. While now one of the most desirable neighborhoods in Chicago, at the time Bucktown was a high crime area with frequent gang-related shootings.

There are three types of risk that an employee might be exposed to: 1) risks distinctly associated with the employment; 2) risks which are personal to the employee; 3) neutral risks which have no particular employment or personal characteristics. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App.3d 149, 162, 731 N.E.2d 795 (2000). The risk of being struck by a stray bullet is a neutral risk. *Id.* at 163. Whether an

injury caused by a neutral risk arises out of employment is dependent on whether Petitioner was exposed to a greater risk than to the general public. The comparison should be made with a broad cross section of the public, not to a locality, neighborhood or area. *Id.* at 161.

The Appellate Court stated that “it is not enough that the employment placed [Petitioner] in a particular place at a particular time. This is known as positional risk and Illinois has expressly and repeatedly rejected this doctrine.” (*citing Illinois Institute of Technology*, 314 Ill.App. 3d at 163.) The focus in the instant case was whether the conditions or the environment of the employment increased the risk of being struck by a stray bullet over that of the general public. In relying on *Illinois Institute of Technology*, the Court reasoned that if the only basis for finding that the employee sustained injuries was the fact that the employment placed her in a position where she was struck by a bullet at that time (“but for”), then the injuries would not arise out of the employment and this would be a classic “positional risk” situation. However, if the injury was not just because of where the Petitioner was at that particular time but was coupled with some factor that increased the risk of being struck by a stray bullet, the injury is said to arise out of her employment

The Court stated that whether an injury caused by a neutral risk arises out of Petitioner’s employment is a question of fact to be resolved by the Commission and it would not disturb its finding unless it was against the manifest weight of the evidence. In affirming the circuit court’s decision, the Appellate Court explained that the manifest weight of the evidence established that Petitioner was exposed to a

stray bullet risk to a greater degree than to that which the general public was exposed because the employer’s restaurant was in a high crime area with rival street gangs that had spanned many years.

The statistics revealed that Respondent’s restaurant was located in a district whose crime

rates for violent crimes and shootings placed in the top 25% to 33% of all police districts in the City of Chicago. Furthermore, Petitioner’s employment required her to work late at night and on weekends when most of the shootings were taking place. Therefore, the Appellate Court affirmed the circuit court’s order confirming the Commission’s decision.

“The focus in the instant case was whether the conditions or the environment of the employment increased the risk of being struck by a stray bullet over that of the general public.”

Practice Tip: It is important to keep in mind when determining whether Petitioner’s injury “arose out of” his or her employment, **the conditions or the environment** of the employment and whether those conditions increased the potential risk of harm to Petitioner. If an employee is exposed to a risk common to the general public to a greater degree than other persons by reason of his or her employment, the accidental injury is said to “arise out of” his employment.

Recent Sears EEOC Settlement

Sears will pay a record \$6.72 million to settle a class action lawsuit related to its workers’ compensation leave policy. The EEOC sued Sears, accusing them of firing employees who experienced work injuries rather than reasonably accommodating them under the Americans With Disabilities Act.

The suit resulted from a discrimination charge filed by a former Sears service technician who injured his knees, back and wrist after falling down a flight of stairs at a customer's home. He alleged that he attempted to return to work on a number of occasions but that Sears never accommodated him. When the employee's workers' compensation leave expired, Sears terminated him.

Discovery revealed that hundreds of other Sears employees had taken workers' compensation leave and were terminated without being accommodated. Regional Attorney John Hendrickson of the EEOC Chicago district office said that "the era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA are over. Just as it is a truism that never having to

come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law. Today's consent decree is a bright line marker of that reality."

Practice Tip: It is important that all employers take a fresh look at their workers' compensation leave policy in light of this settlement. Employers should make every effort to accommodate restrictions. If restrictions cannot be accommodated, consider extending the allowable leave, to avoid terminating an employee whose absence is solely due to an injury-related disability. Our Employment Department would be happy to take a free look at your company's policy.

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 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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