

## Illinois Workers' Compensation Newsletter

November, 2008

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## REBEX Conference

Richard Lenkov spoke at the October 23, 2008, REBEX (Risk & Employee Benefits Conference & Exposition) conference, presented by RIMS' Chicago Chapter. Rich presented "Turning the Tables: How To Use An Employee's Own Actions As A Defense To Their Workers' Compensation Claim."

This was a very well-received presentation. If you would like us to present this topic to your group, please contact Rich at [rlenkov@brycedowney.com](mailto:rlenkov@brycedowney.com).

## ANNOUNCEMENTS

- We are pleased to announce that Justin Nestor passed the Indiana bar exam on the first try. Justin joins Storrs Downey and Carolyn Kang as BryceDowney attorneys licensed in both Indiana and Illinois. Please continue to contact us with your Indiana needs.
- We are delighted to welcome Lindsay S. Strom as a new associate in our workers' compensation practice group.
- **NEW WEBSITE:** Please visit [www.brycedowney.com](http://www.brycedowney.com) to check out our new and improved website.
- **Settlement Days:** We had a very successful settlement day for one of our insurance carriers on October 14 & 15. Of the 91 invitations we sent out, we had 44 attendees. Of those, we have settled or are very close to settling 32, for a **72% success rate**.

If you are interested in a Settlement Day, please contact Rich Lenkov at [rlenkov@brycedowney.com](mailto:rlenkov@brycedowney.com).

*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.*

## Successful Use of the Fraud Unit

A recent case handled by Mike Scully secured reimbursement to our client after reporting Petitioner to the Fraud Unit.

Petitioner experienced a lumbar strain from lifting at work. The adjuster received a tip that Petitioner may have had another job while collecting TTD benefits and off work from his treating physician. Surveillance showed Petitioner in fact working for another employer performing the same job as a truck driver/delivery man that he was doing for Respondent. After obtaining the surveillance, Respondent suspended all benefits.

We received the case in September of 2007 and Mike and the adjuster aggressively defended this case in preparation for trial. The issue presented was whether or not that information should have been reported to the Fraud Unit at the time Respondent became aware of Petitioner's dishonest actions through surveillance or to wait until after trial to submit to the Fraud Unit. Our office advised Respondent that the necessary evidence to try this case was already in place. The first piece of key evidence was of course the surveillance footage. In addition, we also obtained by subpoena Petitioner's employment records with his current employer. Those records included Petitioner's time sheets that showed he worked full-time and overtime hours on the same dates that he collected TTD benefits from Respondent. This information was immediately delivered to the Fraud Unit.

Respondent made a nuisance offer of \$1,000 that Petitioner rejected. The case was specially set by the arbitrator in September 2008 for trial at our request. Mike was ready to offer the surveillance film. We also subpoenaed Petitioner's current supervisor to testify. After Petitioner's attorney reviewed the surveillance report and employment records, we convinced him that we would prevail. Petitioner's counsel quickly accepted the \$1,000 offer.

Petitioner appeared before the Fraud Unit Investigator on September 22, 2008. Petitioner admitted that he had another job with another employer and did not inform Respondent. He also confessed that he improperly and wrongfully collected several weeks of temporary total disability benefits and obtained medical benefits while working a full-time job with an employer. As a result, Respondent will recover monies paid in temporary total disability benefits, medical benefits, investigation, nurse case management and attorney's fees. Respondent will further be able to recover the \$1,000 settlement that closed the workers' compensation case.

***Practice Tip:*** *If there are questionable facts that lead Respondent to suspect fraud, it is essential to be aggressive in further handling of the case. The Fraud Unit has worked out its "bugs" and is no longer a new unexplained resource. Proper investigation and cooperation with the Fraud Unit can lead Respondent to recover past money paid in action of fraud, and quick closure of a workers' compensation case.*

## CMS August 25, 2008 Memorandum

The Centers for Medicare and Medicaid Services (CMS) recently issued a memorandum addressing several topics in Medicare Set Aside review and administration. The memo was brief but the topics addressed significant changes.

### **Early Termination or Reduction of MSA Prohibited**

CMS rescinded the July 11, 2005 provision that allowed claimants to request the release or reduction of their MSA funds after a five year period, if they demonstrated their condition resolved or dramatically improved. CMS will now no longer allow a reduction or early termination of an MSA account. This provision not only applies future cases, but also to all cases that have settled in the past.

### **Implantable Devices**

The memo also discusses the inclusion of money for future treatment when an implantable device, such as a spinal cord stimulator will be required. CMS began requiring higher amounts for spinal cord stimulators and other similar devices by increasing the frequency at which such devices had to be revised or replaced. CMS also required pricing for trials, implants and revisions, even when a device was not recommended. The recent memo did not correct this problem and it still needs to be addressed. CMS is asking for substantial information that is timely and costly to the payer.

CMS also indicated that when parties want to deviate from the CMS established standard for price of implantable devices they will need to provide all relative information including: the manufacturer, model type and number, life expectancy and evidence to support the costs. This will presents a challenge for parties in cases in which the implantation device has not actually occurred, but is only recommended. This type of information is not practical when there is only a recommendation. If the device is recommended it may take years before it would be implanted, and the costs would change over time making the earlier proposal irrelevant.

### **Parties Cannot Legally Bind Medicare to Terms of a Settlement**

Often, as part of the settlement the primary payer settles the case prior receiving final approval from CMS and the settlement agreement includes the claimant will be responsible for any conditional payments made by Medicare. This language is strongly encouraged and quit helpful, but is not a binding agreement on Medicare. The reasoning is that Medicare is not a party to the contract or settlement agreement and not legally bound by the terms of the contract. This does not limit Medicare's rights to recover money from the primary payer. Additionally, federal law provides that no state court, board or commission has jurisdiction over federal agency. Therefore Medicare can't be made a party of a state action without its full cooperation and Medicare's rights to recover against the primary payer cannot be limited by state entities.

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## CMS (continued)

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Therefore, in order to have optimal protection when funding Medicare an MSA it is always best to have CMS approval prior to having the settlement approved. However, dealing conditional payments are more difficult. It is best, if time allows, to have the vendor review the file for any conditional payments. This would give the parties time to work out the specifics of the conditional payment. It is also good to add language in the settlement stating that conditional payments would be assumed by claimant. However, again Medicare is not bound by that language and it may proceed against the primary payer for past payments if related to the client. There are no set answers on how to deal with conditional payments. Determining the conditional payments, if any, upfront will be helpful. Also, putting language in the document for protection and putting aside money for conditional payments may alleviate substantial problems in the future.

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## Significant Indiana Unexplained Fall Case

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A September 30, 2008, decision from the Indiana Court of Appeals in *Pavese v. Cleaning Solutions*, 894 N.E.2d 570 (Ind. Ct. App. 2008), held that the Indiana General Assembly's 2006 Amendment to IC §22-3-2-2(a), placing the burden to prove every element of the claim on the employee, was constitutional.

In *Pavese*, Plaintiff was employed by Defendant as a custodial worker. On February 22, 2006, Plaintiff began her normal shift which included dust mopping the floor. Thereafter, she put the dust mop away and was returning, empty handed, to retrieve a scrubbing machine. Co-workers discovered Plaintiff fifteen minutes later unconscious on the floor. Plaintiff next remembered waking up in an ambulance. Plaintiff noted at the time that the concrete floor was slick because there was often oil and water on it.

Dr. Holmes, Plaintiff's treating physician, noted that Plaintiff fell backwards causing a laceration to the back of her scalp and a concussion with retrograde amnesia. Dr. Holmes noted no history of fainting/dizziness/lightheaded spells; no history or evidence of seizures; normal EKG in the emergency room; normal CT scan of the brain in the emergency room, except for the right posterior scalp hematoma; and normal/negative drug test in the emergency room. Accordingly, Dr. Holmes' diagnosis was "syncopal episode, etiology uncertain." Dr. Holmes later admitted that he could not rule out that Plaintiff had slipped on the floor which in turn caused her to fall backwards.

Plaintiff appealed the decision to the full Board who affirmed and adopted the hearing member's findings and conclusions. Plaintiff then appealed the Board's decision to the Appellate Court.

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## Indiana (continued)

Plaintiff filed an Application for Adjustment of Claim alleging that she sustained an injury to her head on February 22, 2006. The case proceeded to hearing and the single hearing member found that Plaintiff experienced an unexplained syncopal episode and resulting concussion and laceration of her scalp as described by the treating physicians. Further, Plaintiff testified the floor was slick sometimes with oil or water on it, but did not point to anything on the floor which could have caused her to trip or fall. Accordingly, the hearing member found that Plaintiff failed to sustain her burden of proving an accidental injury occurring in the course and scope of her employment as she experienced a wholly personal event. As such, Defendant was not liable for her medical care under the Workers' Compensation Act.

Plaintiff raised two issues on appeal. First, whether the Indiana General Assembly's 2006 Amendment to *IC §22-3-2-2(a)* was constitutional as Plaintiff argued it deprived her of due process of law and placed on her a burden which she could not meet. Second, Plaintiff argued she met her burden of proving that her injury arose out of her employment.

The Court first noted that Plaintiff presented no analysis of the constitutionality of the 2006 Amendment to *IC §22-3-2-2(a)* in her brief. As a result, the Court indicated that Plaintiff waived this issue and did not meet her burden of proving the statutory amendment was unconstitutional. Notwithstanding, the Court analyzed the constitutionality of *IC §22-3-2-2(a)* and noted that the General Assembly was within their prerogative as the right to workers' compensation is a creature of statute. Further, there was no precedent indicating that the positional risk doctrine was constitutionally mandated. Accordingly, Plaintiff's constitutional challenge to the 2006 amendment failed.

Next, the Court addressed whether Plaintiff met the burden of proving that her injury arose out of her employment. The Court noted that the single hearing member concluded that Plaintiff's injury was due to a personal risk rather than a risk associated with her employment. In support of this finding, the Court noted that Plaintiff presented two possibilities for her fall, (1) syncopal episode (personal risk not covered by workers' compensation) and (2) slipping on the floor (neutral risk generally covered by workers' compensation). Because there was evidence of two grounds for Plaintiff's fall and the burden of proof was on her to prove that her injury arose out of her employment, the Court affirmed the full Board's decision that Plaintiff experienced a syncopal episode. Consequently, she experienced a personal event which was not compensable under the Workers' Compensation Act. The Court further noted that the General Assembly made a policy decision to keep the burden of proof on employees in amending *IC §22-3-2-2(a)*.

***Practice Tip:*** Employers can deny benefits where the injured employee was injured during an unexplained fall as the burden of proof remains on the employee to prove the injury arose out of the employment. Employers should still conduct a thorough investigation to determine whether alternative causes for an unexplained fall exist, as they could provide the basis to deny the claim.

## Victory Upheld by Commission

In a recent Mike Scully trial, Petitioner alleged injuries as a result of an altercation with another employee while at work. The arbitrator entered an award in favor of Respondent and ruled that the evidence clearly indicated that Petitioner was the aggressor. Petitioner appealed to the Commission claiming that he was prejudiced in not being allowed to enter medical records into evidence at trial. He also alleged that Respondent did not respond to his request for production of employment documents.

Commissioners Sherman, Rink and Lindsay ruled that Petitioner was not prejudiced in not being allowed to enter various records into evidence, since they were not properly certified under the Illinois Workers' Compensation Act. They also ruled that the fact that Respondent did not produce certain documents did not prejudice Petitioner and would not be a valid basis to reverse the prior decision. Further, the Commission went on to state that even if Petitioner's records were allowed in to evidence, the records as whole, still would have supported the findings and the conclusion that Petitioner was the aggressor.

Petitioner did not appeal the case to the Circuit Court and the unanimous decision by Commission stands in favor of Respondent.

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*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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