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Workers' Compensation Newsletter August 2016

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THE TOP 5 LIST

Top 5 Things That Petitioner's Attorneys Tell You That You Should Question

By: [Rich Lenkov](#)

Chair, Bryce Downey & Lenkov Workers' Compensation Department

1/ "My client is still treating"

This is probably the most common response I hear from opposing counsel as to why they can't settle a case. Often, it's simply not true. Generally, people who treat actually see doctors. If you get this response from opposing counsel, ask them to prove it by producing recent medical records.

2/ "This is my bottom line"

The truth is, there is no such thing as a real bottom line. If an attorney is motivated to settle a case, there is always room for negotiation. Remember: you have the ultimate leverage, which is money, which is the reason that people file claims and lawsuits.

3/ "There is no subrogation potential"

Don't rely on opposing counsel to tell you whether there is any third-party liability for which you may recover. Petitioner's workers' compensation attorney may not know very much about personal injury law, or simply may not have the time to investigate it. It is important that you do your own independent investigation to determine whether there is any possibility of recovering your lien.

4/ "This is a case that we have to try"

Nonsense. There is no such thing as a case that you have to try, only cases where the parties have not tried hard enough to settle. We settle all kinds of cases, big and small, even in the face of obstacles like the fact that the claimant is still treating. That said, it's true on our side that there are some cases that we simply have to take a hard line on and try.

5/ "I'll call you back soon"

Self-explanatory.



By: [Michael Milstein](#)



After 18 months of budget battles, Illinois finally passed a stopgap spending bill.

However, no workers' compensation provisions were debated as part of the bill. This is far from a complete resolution to the budget impasse and legislators will return later this year to work on a larger agreement.

Business activists continue to pressure Governor Rauner to include meaningful workers' compensation reform in the balanced budget. However, we do not expect any reforms until after November's election.



SOUND BITE: Dream Team lawyer Carl Douglas describes the moment he became part of O.J. Simpson's defense team.

Rich Lenkov: You were a younger attorney practicing in Los Angeles at the time you worked with Johnnie Cochran. How did you first get the call that you'd be representing the most famous murder defendant in history?

Carl Douglas: It was funny because, initially, Johnnie Cochran was working as one of the commentators for NBC news, doing national commentary on the preliminary hearing. He was talking about how monumentally steep the hurdle was for O.J. to overcome. I remember then that he got a call from one of O.J.'s colleagues, and then O.J. called. I remember myself and other staff lawyers basically having our ear pressed against the wall to his office, trying to overhear the conversation between he and O.J. because we were very excited at the possibility of our firm becoming involved in that case.

Rich: You were close to O.J. during the trial. What was his demeanor like as the trial was progressing?

Carl: I've been a lawyer for thirty-six years. I've had probably more than a hundred trials, but O.J. was one of the most engaged and intelligent clients that I've ever had. He was particularly adept at trying to present a certain image of himself or his team. O.J. was one of the first pitchmen, someone who was able to create a marketable persona basically out of whole cloth. He had developed a really strong sense of presentation: how to act, how to look, how to stand, how to react. So, he was very much engaged throughout the trial in trying to make sure that his lawyers reflected the image that he thought best to convey.

[Click Here To Listen To The Full Episode:](http://wgnplus.com/category/legal-face-off/)
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Recent Topics:

- O.J. Simpson ESPN documentary
- Justice Ginsburg's vs. Trump
- Rod Blagojevich
- Roger Ailes

Recent Guests:

- Alan Dershowitz
- Carl Douglas, former O.J. Simpson defense attorney
- Professor Louis J. Virelli III, Professor Of Law, Stetson University College Of Law
- Professor Ronald D. Rotunda, Professor Of Law, Chapman University School Of Law
- Josh King, Avvo Chief Legal Officer

[Dream Team lawyer Carl Douglas on the ESPN O.J. documentary, Justice Ginsberg v. Donald Trump, celebrity lawsuits and more](#)

[Supreme Court panel, Led Zeppelin copyright verdict, Orlando PD's response and celebrity lawsuits](#)

[Stanford rape trial, extraditing "El Chapo", Muhammad Ali's estate, Illinois tort reform, Trump's attacks on judge](#)

[The Legal Prep Charter Academy, Benjamin Chaffee discusses Smokeless Tobacco, 'Inside Out' with David Susler and Christina Martini, and The Legal Grab Bag w/ Bill Cosby, Tom Brady and Drew Peterson's murder trial](#)

Please like us on [Facebook](#) and [subscribe in iTunes](#). Send us your questions and we will answer them on air—nothing is off limits.

Upcoming Seminars

- On **8/21-8/24/16**, **Rich Lenkov** and **Justin Nestor** will present at the 71st Annual Workers' Compensation Educational Conference & 28th Annual Safety & Health Conference. [Click Here](#) for more info and to register
- On **9/15/16**, Jeanmarie Calcagno will present **State Law -- Consequences And Outcomes** at the NAMSAP 2016 Annual Meeting & Educational Conference. [Click Here](#) for more info and to register
- On **9/23/16**, **Jeanmarie Calcagno** will present "Lower Back Injury Claims" on behalf of Lorman Educational Services. [Click Here](#) for more info and to register with 50% off
- On **9/28/16**, **Storrs Downey** will present "The Ever Expanding Scope of the ADA: Accommodations, Remote Work, Transgender Issues, Defining Disability in Light of the ADAAA, Intersection of ADA and FMLA and the Interactive Process" at the 12th Annual National Employment Practices Liability Insurance ExecuSummit. [Click Here](#) for more info and to register

Positive Drug Test Kills Compensability

By: [Jessica Rimkus](#)



In *Ek v. Ryan Inc. Central*, 24 ILWCLB 72 (Ill. W.C. Comm. 2015), Petitioner, a heavy equipment operator, was operating a wheeled scraper when he hit a bump and his seat "bottomed out," causing injury to his lower back.

Pursuant to the terms of his union contract, a urine sample was collected 4-5 hours after the accident to determine whether Petitioner had any controlled substances in his system. Petitioner tested positive for marijuana. At the hospital that evening, a second drug test was administered that also revealed the presence of marijuana.

Petitioner testified that, while on layoff for two weeks before the accident, he smoked marijuana three times a day. He claimed to have stopped on the day before his return to work. Following the accident, a mechanic inspected the wheeled scraper and determined that it was functioning properly.

The arbitrator denied benefits because of the rebuttable presumption that Petitioner was intoxicated and that the intoxication was the proximate cause of his injury. As Petitioner failed to overcome this presumption at trial, he was denied benefits.

The Commission affirmed and adopted the arbitrator's decision. It noted the employer's expert credible in opining that, based on the test results, Petitioner had used marijuana within hours of the accident and he was impaired at the time of the incident.

Practice Tip:

Administering a drug test on the day of an accident can result in a total defense of an otherwise work-related accident. It is also important to select credible experts to opine on the drug screen and on whether any equipment at issue was functioning properly.

Beware Of New OSHA Reporting Requirements

By: [Maital Savin](#)



Occupational Safety and Health Administration (OSHA) recently published what some consider to be an aggressive rule regarding work place injury reporting. The new rule will take place in two phases on 8/10/16 and 1/1/17.

Phase 1:

Beginning on 8/10/16, the rule will require employers to have a reasonable procedure for reporting work accidents. Employers' reporting policies must:

1. *Expressly state* that employees have a right to report work injuries and illnesses;
2. Provide a reasonable procedure for employees to report workplace injuries and illnesses;
3. Not discourage employees from reporting injuries or illnesses;
4. Assure employees that the employer will not discriminate or retaliate against them for reporting a work injury or illness.

OSHA will consider unreasonable any rule requiring immediate reporting, especially if this may lead to discipline. OSHA will consider it to be reasonable to require employees to report injuries as soon as reasonably known or recognized by the employee.

OSHA also prohibits employers from providing incentives or disincentives for employees to report workplace injuries. *Notably, OSHA will consider automatic post-injury drug testing to be a disincentive.* Instead, employers who would like to conduct post-injury drug testing must make an individualized assessment of whether the potential use of drugs or alcohol caused the injury.

Phase 2:

On 1/1/17, employers will be required to electronically submit injury and illness reports to OSHA. This means increased exposure for penalties and citations from OSHA. Moreover, OSHA announced it intends to post this information on its website. While some believe that this will incentivize employers to work to reduce injuries and provide public health researchers an opportunity to study injury causation and prevention, this will also make it easy for third-parties, such as Plaintiff's attorneys, to generate increased litigation.

Practice Tip:

Employers who do not have an injury reporting procedure should create one. Employers should carefully revise any policies they may have for automatic post-accident drug testing to provide for an individualized assessment. Additionally, employers should train their supervisors on reporting procedures, how to conduct an individualized assessment and avoiding retaliation.

Arbitrator's Injury Found Compensable Using Quantitative Increased Risk Analysis

By: [Kevin Borozan](#)



In *Hagan v. IWCC*, 24 ILWCLB 68 (Ill. App. Ct. 1st 2016), Petitioner, an arbitrator for the IWCC, was assigned to a specific hearing room where she conducted hundreds of hearings. Her desk was located on a riser, eight inches above the ground. On 2/13/08, as she rose from her chair to retrieve a file, her right foot came down awkwardly, causing her knee to twist before she fell forward. The Appellate Court, reversing the decision of the Commission, found that Petitioner's injury arose out of and in the course of her employment.

The Court used a quantitative increased risk analysis. The Court explained that Petitioner had the burden of proving that she was

exposed to a greater risk than that of the general public. The Court found that Petitioner traversed a narrow passageway while stepping down from a riser to a greater degree of frequency than the general public. Although stepping down from a riser is a neutral risk in itself, the Court emphasized the degree of frequency in traversing the step in deeming the accident compensable.

This case illustrates the fact that the frequency of which an employee performs an act, even if the act itself is a neutral risk, is a factor that the Commission will consider when analyzing compensability. Although case law is unclear with respect to how many repetitions are sufficient to rise to the level of compensability, it is evident that an employee's frequency of undertaking a particular task is relevant to an increased risk analysis.

Practice Tip:

Detailed job descriptions and documentation of the frequency for which an employee performs its job duties is critical in defending increased risk cases.

Rich Lenkov Secures Successful Verdict For Target*

On 7/21/16, Rich Lenkov secured a successful verdict from a Lake County jury for long-time Bryce Downey and Lenkov client Target Corporation. Plaintiff, a 60 yr. old male, alleged that Target was negligent in failing to properly warn him of a slippery substance in the aisle of their Vernon Hills, IL, store. He had knee and shoulder surgeries and presented \$85,000 in damages to the jury.

Target denied liability, presenting 3 employees who testified about several warning devices. Target also denied causation, in large part based on Plaintiff's extensive prior medical history and relying on the opinions of Dr. Brian Cole.

It was a four day trial. Plaintiff asked the jury for \$225,000. After a 90 minute deliberation, the jury found for Plaintiff on liability, but awarded him only \$1,033.00 in damages.

If you have any questions about this excellent result, or you have any other questions about Illinois or Indiana general liability, please contact Rich at rlenkov@bdlfirm.com.

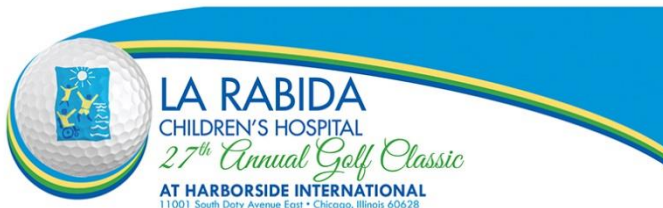
***Prior Results:** In considering prior results, please be aware that: (1) each matter is unique and (2) you should not rely on prior results related to past performance to predict success or results in future

matters, which will differ from other cases on the facts and in some cases on the law.

Giving Back

La Rabida Golf Outing

On 8/1/16, **Tina Paries, Alec Miller, Terry Kiwala** and **Bob Bramlette** participated in La Rabida Children's Hospital's 27th Annual Golf Classic at Harborside International. The outing supported La Rabida's mission to provide care to children with lifelong medical conditions, regardless of their family's ability to pay. La Rabida currently serves approximately 7,500 children annually who require primary and specialty care for chronic illnesses such as asthma, diabetes and sickle cell disease along with developmental disabilities.



Race Judicata 2016

BDL is proud to sponsor Race Judicata's wine tent again this year! Each year, Bryce Downey & Lenkov sponsors Chicago Volunteer Legal Services' Race Judicata 5K Race. This year, the race will take place on **9/15/16**. CVLS is the first and pre-eminent pro bono civil legal aid provider in Chicago. We are currently working on designing this year's t-shirts. Your suggestions are welcome!



Did You Know?

In addition to workers' compensation, we also handle:

- [Business Litigation](#)
- [Business Transactions & Counseling](#)
- [Corporate/LLC/Partnership Organization & Governance](#)
- [Construction](#)
- [Employment & Labor](#)
- [Entertainment Law](#)
- [Insurance Coverage & Litigation](#)
- [Intellectual Property](#)
- [Medical Malpractice](#)
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Free Monthly Webinars

What you said about our 7/28/16 webinar,
"My Toughest Claim: Your Fellow Claims Professionals Discuss Real
Workers' Compensation Cases"

*"It was interesting to hear from the examiners directly about the strategies they use."
"The review of complex cases was helpful because we often face claims that are not 'textbook.'
"Real life cases are always beneficial to discuss in a roundtable format."
"Quick snapshots of interesting cases gave me an opportunity to consider
what I would have done in the situation."*



Upcoming Webinar
8/29/16
Common Workers' Compensation Issues Defined
Rich Lenkov
Ed Jordan
[Click Here to Register](#)

Recent Webinars

- The 5 Factors Determining Illinois Permanency: What Do They Really Mean?
- Reduce Your Legal Expenses NOW!
- WC Horror Stories
- WC Issues Raised By Millennials
- What The Movies Can Teach You About Handling WC Claims
- More Top 5 Lists
- Compensable Or Not? 10 Common Accident Scenarios And How To Defend Them



If you would like a copy of any of our other prior webinars, please email our Marketing Coordinator Jason Klika at jklika@bdlfirm.com.

Cutting Edge Legal Education

If you would like us to come to you for a free seminar,
[Click here now](#) or email Rich Lenkov at
rlenkov@bdlfirm.com

Our attorneys regularly provide free seminars on a wide range of workers' compensation topics. We speak to a few people or dozens, to companies of all sizes and large national organizations. Among the national conferences at which we've presented:

- Claims and Litigation Management Alliance Annual Conference
- CLM Retail, Restaurant & Hospitality Committee Mini-conference
- National Workers' Compensation and Disability Conference® & Expo
- SEAK Annual National Workers' Compensation and Occupational Medicine Conference
- National Workers' Compensation & Disability Conference
- RIMS Annual Conference

Some of our previous seminars include:

- Turning The Tables: Using An Employee's Own Actions As A Defense To Their Workers' Compensation Claim
- Closing The Nightmare Case
- Workers' Compensation 101
- Mandatory CMS Reporting Requirements: What You Need To Know
- Managing & Closing WC Claims In A Cost-Effective Manner
- Top 10 Ways To Reduce Legal Expenses NOW
- The Mediation Process
- Balancing Aggressive Pursuit Of Lien Recovery With Associated Litigation Expenses
- Dealing With Difficult Claimants
- Health-Related Leave: Workers' Compensation, ADA and FMLA

Illinois Rates At A Glance

Effective Dates	Maximum TTD	Minimum PTD & Death	State Average Weekly Wage
7/15/10 - 1/14/11	\$1,243.00	\$466.13	\$925.08
1/15/11 - 7/14/11	1,243.00	466.13	930.39
7/15/11 - 1/14/12	1,261.41	473.03	946.06
1/15/12 - 7/14/12	1,288.96	483.36	966.72
7/15/12 - 1/14/13	1,295.47	485.80	971.60
1/15/13 - 7/14/13	1,320.03	495.01	990.02
7/15/13 - 1/14/14	1,331.20	499.20	998.40
1/15/14 - 7/14/14	1,336.91	501.34	1,002.68
7/15/14 - 1/14/15	1,341.07	502.90	1,005.80
1/15/15 - 7/14/15	1,361.79	510.67	1,021.34
7/15/15 - 1/14/16	1,379.73	517.40	1,034.80
1/15/16 - 7/14/16	1,398.23	524.34	1,048.67
7/15/16 - 1/14/17	1,428.74	535.79	1,071.58

Effective Dates	Maximum PPD	Minimum Rate Death & Total Permanent Disability: 50% of the Statewide Average Weekly Wage
7/1/04 - 6/30/05	\$567.87	
7/1/05 - 6/30/06	591.77	
7/1/06 - 6/30/07	619.97	
7/1/07 - 6/30/08	636.15	
7/1/09 - 6/30/10	664.72	
7/1/10 - 6/30/11	669.64	
7/1/11 - 6/30/12	695.78	
7/1/12 - 6/30/13	712.55	
7/1/13 - 6/30/14	721.66	
7/1/14 - 6/30/15	735.37	
7/1/15 - 6/30/16	755.22	

Maximum Rate Death Benefit:
The greater of \$250,000 or 20 years
Effective 2/1/06 – the greater of
\$500,000 or 25 years

Temporary Total Disability (TTD) Rate:
66-2/3% (.667) x AWW

Permanent Partial Disability (PPD) Rate:
60% (.6) x AWW

*Number if children and/or spouse = number of dependents.

Minimum TTD & PPD	Single	Married	1 DEP.	2 Dep.	3 Dep.	4+ Dep.
TTD & PPD 7/15/10 - 1/14/17	\$220.00	*	\$253.00	\$286.00	\$319.00	\$330.00

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PPD Benefits Schedule Of Body Parts

For Injuries Occurring	Before 7/20/05	7/20/05 - 11/15/05	11/16/05 - 1/31/06	2/1/06 - 6/27/11	On or after 6/28/11
Disfigurement	150	162	150	162	162
Thumb	70	76	70	76	76
First (Index) Finger	40	43	40	43	43
Second (Middle) Finger	35	38	35	38	38
Third (Ring) Finger	25	27	25	27	27
Fourth (Little) Finger	20	22	20	22	22
Great Toe	35	38	35	38	38
Each Other Toe	12	13	12	13	13
Hand	190	205	190	205	205
Carpal Tunnel Due To Repetitive Trauma					28.5 - 57
Arm	235	253	235	253	253
Amputation Above Elbow	250	270	250	270	270
Amputation At Shoulder Joint	300	323	300	323	323
Foot	155	167	155	167	167
Leg	200	215	200	215	215
Amputation Above Knee	225	242	225	242	242
Amputation At Hip Joint	275	296	275	296	296
Eye	150	162	150	162	162
Enucleation Of Eye	160	173	160	173	173
Hearing Loss Of One Ear (Under WC Act)	50	54	50	54	54
Hearing Loss Of Both Ears (Under WC Act)	200	215	200	215	215
Testicle--1	50	54	50	54	54
Testicle--2	150	162	150	162	162

The law places a value on certain body parts, expressed as a number of weeks of compensation for each part.

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