



BRYCE DOWNEY & LENKOV  
LLC

## Workers' Compensation Newsletter December 2016

Upcoming Webinar!  
1/26/17

New OSHA Regulations  
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### THE TOP 5 LIST

## Top Five Things A Claimant Tells You That You Should Question

By: [Rich Lenkov](#)

Chair, Bryce Downey & Lenkov Workers' Compensation Department

### 1/ "I am still treating"

This is one of the most common reasons why claims don't move quicker. People that legitimately are treating generate medical records. If there is no evidence of treatment, then there is probably none.

### 2/ "I am looking for a job"

If the claimant is off work and receiving benefits, they have an affirmative duty to try to get back to work. If they cannot return to their present employer, they have to look for work. That job search has to be proven by job search logs, interview sheets and other evidence. If they aren't complying, cut their benefits.

### 3/ "I can't do any type of work"

The chances are that even significantly injured claimants can perform some type of work. The longer a person stays off work, the more they become complacent and the harder it will be to find them work. You should aggressively use all means necessary to get that person off his or her couch and back to some sort of employment.

### 4/ "My case is worth a lot more money"

If you are talking directly to a claimant, chances are they don't have counsel. If they don't have counsel, you can bet there is a reason for that. If the case really was worth a lot more than you are offering, rest assured there would be an attorney involved. Moreover, explain to the claimant that the benefit to them in settling the case with you is that they won't have to pay attorney's fees.

### 5/ "I have no prior medical history"

Claimants often deny prior medical history because they are concerned about causation implications. It is important to always do your due diligence and dig deeply into their medical history. There is often something there that might mitigate your exposure.



By: [Michael Milstein](#)

While the Illinois Assembly has not yet acted on any of the pending reforms, the IWCC recently amended its Administrative Rules. A copy of the new Rules can be found at <http://www.iwcc.illinois.gov/rules.htm>. We will update you with an analysis of the rule changes that will have the most impact.

The IWCC announced a project to modernize its 40-year-old paper filing system. The update will be implemented in the next 5 years and will include standardized electronic submission, decreased mailing costs and improved data analytics and metrics. It will be funded by the Workers' Compensation Settlement Fund, which has more than \$27 million available.

Governor Rauner also announced the appointment of 2 new Arbitrators: Michael Glaub and Frank Soto. Mr. Glaub was a defense attorney and Mr. Soto was a petitioner attorney.



**SOUND BITE:** Arcview Group CEO Troy Dayton discusses the outlook for legal marijuana in a Trump administration.

**Rich Lenkov:** It seems like the trend is overwhelmingly towards legalizing recreational marijuana. Approximately three out of five Americans now live in a state with some sort of legal cannabis. It's a \$7 billion industry and growing. There are three or four new states now that have legalized recreational marijuana, including California. The industry is projected to approach \$22 billion by 2020. As new president, would Trump really want to expend political capital on something that seems pretty popular?

**Troy Dayton:** I think it would be political suicide for them to go after an issue that is, not only popular generally, but also hugely popular among the demographics that put Trump in office. Florida, North Dakota, Montana and Arkansas all passed their medical marijuana measures by huge margins and also went to Trump. In all of these cases cannabis got more votes than Trump did. This is clearly popular among conservatives in red states so it would be crazy to go against that. I also think there is a huge opportunity for Republicans to take this issue from the Democrats. They have control of both houses, and the presidency, and this is a hugely popular issue. They can take it away from the Democrats if they really grab it and I think it would be hugely popular.

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

#### Recent Topics:

- How Trump will reshape the Supreme Court
- Obama's overtime rule
- Forgotten baby syndrome
- High school football lawsuit
- Chicago Fire Department alleged gender discrimination

#### Recent Guests:

- Alan Dershowitz
- Gloria Allred
- Troy Dayton, Arcview Group CEO
- Craig Anderson, IHSA Executive Director
- Andy DeVooght, former U.S. Supreme Court Clerk

[Legal Marijuana under Trump, high school football lawsuit, Obama's overtime rule, celebrity chef going to jail and more](#)

[How President Trump will reshape the Supreme Court, "forgotten baby syndrome", Brendan Dassey, Tracy Morgan, Madonna and more!](#)

[Cosby, law firm diversity, Chicago Fire Dept gender discrimination, Cleveland Indians connection to Chicago legal community and more](#)

[Gloria Allred on Trump sexual misconduct allegations, Dennis Hastert victim lawsuit, Ruth Bader Ginsburg, Colin Kaepernick & more](#)

[Erwin Chemerinsky on the presidential election and SCOTUS, the 9/11 victims bill, Sandra Bland, Hurricane Matthew, Derrick Rose, Chicago Cubs playoffs and much more!](#)

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

## Two-Doctor Rule Denies Award Of Petitioner's Medical Expenses

By: [Edward Jordan](#)



In *Franklin v. East St. Louis Police Department*, 24 ILWCLB 163 (Il. App. Ct. 5<sup>th</sup> 2016), the Commission and Appellate Court addressed whether Petitioner exceeded his choice of two physicians and whether Respondent was liable for payment of medical expenses incurred by Petitioner's physician.

Petitioner, a police officer, filed two Applications for Adjustment of Claim for injuries sustained while making an arrest and as a result of a slip and fall. The arbitrator awarded Petitioner all claimed medical expenses and prospective treatment. However, the Commission modified the arbitrator's decision and denied a portion of Petitioner's medical expenses, among other rulings.

The Commission found that Petitioner exceeded his choice of medical providers and denied all medical benefits for treatment outside of Petitioner's first two choices of physicians. The Commission and Appellate Court ruled that Petitioner's last medical provider was his third choice of doctor and Respondent was not liable for any medical expenses for that physician. Petitioner argued that the third doctor was referred by his second choice of physician and therefore within his choice of two physicians and chain of referrals. However, Petitioner's medical records showed that Petitioner was referred to the third doctor prior to the work injury and for treatment related to Petitioner's pre-existing conditions.

### Practice Tip:

The "two-doctor" rule is an underutilized defense in workers' compensation cases. If Petitioner treats with multiple physicians, make sure that you closely review all medical records and referrals and determine if Petitioner has exceeded his two choices of physicians. If so, don't pay for the treatment.

## Lending Employer Collects...At The Commission

By: [Frank Rowland](#)



[Jeanmarie Calcagno](#) recently concluded a case involving an often-overlooked but important part of the Illinois Worker's Compensation Act. Section 1(a)(4) of the Act provides that if a borrowing employer fails to reimburse a lending employer for payments to an injured employee, various remedies exist in favor of the lending employer.

The Act provides, generally, that absent contrary contractual provisions, the borrowing employer (usually the employer for whom the work is actually done) is ultimately responsible for injuries to a worker. However, in the interest of providing immediate benefits to an injured worker, liability is joint and several (i.e., shared) by both employers. As a further inducement to the lending employer to pay such obligations promptly, rights akin to full indemnification are afforded by the Act in favor of the lender against the borrower.



In a recent case, our client was the lending employer and paid substantial benefits to a seriously injured "loaned employee" when the borrowing employer refused to do so. After continued demands for reimbursement were rejected, Jeanmarie placed the matter in formal dispute by filing an Application at the IWCC against the borrower. The borrower contested every issue, including the validity of various contracts unquestionably signed by the parties, as well as items such as amounts actually due and paid on behalf of the employee.

A hearing date was set, which would have involved as many as 8-9 witnesses. However, shortly before trial, an agreement was reached which returned over \$200,000.00 to our client and compelled the borrowing employer to fund all permanent disability to be awarded.

### Practice Tip:

This provision of the Act has gained added importance with the increased use of personnel and employee provider services. While a clear written contract often controls liability under the Act, disputes can arise, as illustrated by this case. Experienced counsel should seek and obtain the remedies provided by the Act.

# Not All Injuries Result In Permanency

By: [Maital Savin](#)



In *Nevin v. Atlas Door Repair*, 24 ILWCLB 151 (Ill. W.C. Comm. 2016), the Commission addressed the issue of permanency for a head injury. Petitioner alleged that he fell at work and injured his head, among other claims. He treated for his alleged head injury in the emergency room, was diagnosed with a mild closed head injury and was discharged. Petitioner sought no further treatment for his head. An MRI was negative for traumatic injury.

At trial, Petitioner complained of occasional facial numbness, but testified that his head was “fine.” The arbitrator awarded 1% MAW for Petitioner’s head injury. On review, the Commission vacated the arbitrator’s award, finding that Petitioner failed to prove that he sustained any permanency as a result of his alleged head injury. The Commission noted that other than his emergency room visit, Petitioner received no other treatment for his head, and the MRI was negative.

## Practice Tip:

Not every injury results in permanency. If a claimant has limited treatment and/or objective diagnostic studies are negative, take a hard line on permanency.

# BDL Is Growing!



BDL welcomes W. Joe Weiler III. Joe focuses his practice in workers’ compensation defense. Prior to joining the firm, he worked in bankruptcy and municipal law. Joe helped thousands of clients restructure hundreds of millions of dollars in combined debt. Joe earned his LL.M. in Child and Family Law and J.D. from the Loyola University Chicago, School of Law. Joe co-founded Loyola’s Sports and Entertainment Law Society and was elected Social Chair of Loyola’s Catholic Lawyers Guild. He earned his B.A. in Political Science from the University of Notre Dame. While at Notre Dame, Joe acted in several student films and plays. In his free time, Joe enjoys traveling with his fiancé, watching Notre Dame football and playing with his dog, Frenchie.



BDL welcomes Paul Koteski. Paul concentrates his practice in workers’ compensation defense. Paul graduated from Valparaiso University School of Law, where he resolved civil matters through his internship with the University’s Mediation Clinic. While earning his Juris Doctor from Valparaiso University, Paul was also employed as an Assistant Director, handling personnel matters including recruitment, training, employee relations, workers’ compensation, strategic planning, organizational development and payroll. In his free time, Paul enjoys spending time with family, friends and also rooting for the Cubs.

## "Forecast For 2017"

On 11/2/16, BDL co-hosted "Forecast for 2017" with Willis Towers Watson. The seminar featured bankers from Inland Bank, The Private Bank, West Suburban Bank and Cook County Department of Economic Development. [Geoff Bryce](#) presented "Drafting Enforceable Additional Insurance & Indemnity Clauses" and [Jeanne Hoffmann](#) presented "Additional Insured Issues in Construction Cases."



## 2016 Cooperator Expo Chicagoland

Congratulations to Charles Cook from [Murphy & Miller, Inc.](#) for winning our table raffle at the 2016 Cooperator Expo Chicagoland. Charles won a signed Jake Arrieta Cubs Jersey and is pictured with [Jeanne Hoffmann](#). GO CUBS GO!



## Upcoming Seminars

- On 1/26/17, **Storrs Downey** will present "Approaching LGBT Issues in Today's Workplace: Heightened Focus On Sexual Orientation, Gender Identity And Gender Expression Discrimination Claims" at the American Conference Institute's 25th National Conference on Employment Practices Liability Insurance in New York, NY. [Click Here](#) for more info and to register

## Law Day 2016 with Agassiz Elementary

[Rich Lenkov](#), a 3-term member of the Local School Council (LSC) at [Agassiz Elementary](#), helped organize a career day for 8<sup>th</sup> graders. The students visited Federal court and spoke with Judge Jorge L. Alonso and Judge Samuel Der-Yeghiayan. The class also had a campus tour at DePaul University College of Law and met with Dean Jennifer Rosato Perea. This was a fantastic opportunity to give the students a better understanding of the legal system.



## Congratulations to Michael Milstein

Congratulations Michael and Carli Milstein on the birth of their new son, Parker! Baby Parker was born a healthy 6lb 9oz. Enjoy your journey into parenthood.



## Rich Lenkov Published In CLM's Workers' Compensation Magazine The Forum



[Rich Lenkov](#) moderates a forum for Workers' Compensation Magazine. "The Forum" features an impressive cross section of workers' compensation leaders discussing hot topics.

[Click Here](#) to view the Oct/Nov article "How do you deal with difficult people?"

# Storrs Downey & Maital Savin Published In DRI In-House Defense Quarterly Magazine

**Storrs Downey and Maital Savin's** article "Religious Accommodations In The Workplace" was published in the Summer 2016 issue of DRI's *In House Defense Quarterly*. [Click here](#) to view the full article.



# Storrs Downey And Maital Savin Published In Professional Liability Defense Federation's Defense Quarterly

**Storrs Downey & Maital Savin's** article "Increased Misclassification Litigation Stresses Importance Of Proper Worker Classification" was published in *Professional Liability Defense Quarterly's* Summer 2016 issue. [Click Here](#) to read the full article.



# BDL Wins Summary Judgment In Federal Employment Case\*

[Storrs Downey](#) and [Maital Savin](#) were successful in having the U.S. District Court for the Northern District of Illinois grant their motion for summary judgment, dismissing the entirety of a federal case brought against one of our clients. The case involved various claims of employment discrimination, including ADA failure to accommodate, discrimination, retaliation and common law retaliatory discharge. The court concluded that the plaintiff failed to establish that he was disabled as defined by the ADA or that there was a causal connection between his OSHA complaint and his discharge.

## 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](#)
- [Professional Liability](#)
- [Real Estate](#)
- [Transportation](#)

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## Free Monthly Webinars

What you said about our 11/09/16 webinar,  
"Indiana Forms: Taking A Claim From Start To Finish"

*"Very informative, everything was explained very well."*

*"Liked the explanation of the 38911"*

*"Covered a lot of territory on filing deadlines affecting acceptance/denial of claim"*

*"I liked the content and the interaction with quiz"*

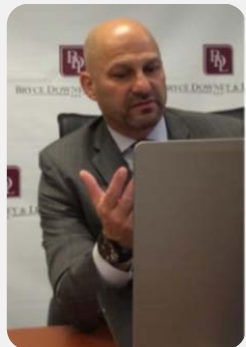


Upcoming Webinar  
1/26/16

New OSHA Regulations  
Rich Lenkov  
Maital Savin

[Click Here to Register](#)

### Recent Webinars



- Common Workers' Compensation Issues Defined
- 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

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