



BRYCE DOWNEY & LENKOV  
LLC

## Workers' Compensation Newsletter May 2017



### THE TOP 5 LIST

#### **Top 5 Misconceptions About Illinois Workers' Compensation Law**

By: [Rich Lenkov](#)

Chair, Bryce Downey & Lenkov Workers' Compensation Department

##### **1/ You Can't Defend A Case On Causation**

The perception is that causation in Illinois is an incredibly liberal standard that employers never win. The legal standard is "might or could work have caused, aggravated, exacerbated" the condition. That said, we successfully dispute causation all the time, particularly for injuries like repetitive trauma or psychiatric claims. Petitioner still has the burden to prove causation, so don't concede on that issue.

##### **2/ All Arbitrators Are Liberal**

The days of conceding an issue because of the arbitrator assigned to your case are over. Very few arbitrators allow their personal backgrounds influence how they'll handle a case. Most arbitrators will give each side a fair shot based on evidence.

##### **3/ Every Case, No Matter How Minor, Involves Some Permanent Impairment**

Even in Illinois, Petitioner has the burden to prove permanent, partial disability. That is a 3 part test, and if Petitioner doesn't prove all 3 parts, he doesn't recover. So, you can take the position that certain minor injuries do not involve any permanency, and you don't have to pay anything on them after you pay medical and TTD. We have obtained a zero on such minor cases on multiple occasions.

##### **4/ The Arbitrator Always Follows The Opinion Of A Treater Vs. An IME**

This perception is wrong. There are a plethora of cases where the Respondent's retained expert was found more credible than the treater. This is especially true when you can argue that the IME doctor had more information, saw Petitioner more recently, was more qualified in the particular body part and was truly independent.

##### **5/ You Cannot Control Medical Costs**

Not true. There are several ways to do so, including: Applying the fee schedule, questioning and denying unreasonable treatment/ bills, UR, nurse case management and IMEs.



By: [Michael Milstein](#)

The last month has seen little activity by way of new bills being introduced or agreements being reached. However, the tone out of Springfield has been turned more hopeful recently. In fact, Governor Rauner and House Speaker Madigan recently vowed to work together in solving the budget impasse and making reforms to the workers' compensation system.

House Speaker Madigan assigned four of the House members to work on several of the Governor's "Turnaround Agenda" which includes workers' compensation. Additionally, Republican Senate Leader Christine Radogno recently stated her belief that both sides are close to settling their differences on these issues.

While we welcome the new tone, it must be followed by action. The legislative calendar ends on 5/31/17. We hope to have a major update for you next month. Stay tuned.



**SOUND BITE:** Legal legend Alan Dershowitz returns to Legal Face-Off to defend Trump's firing of FBI Director James Comey.

**Rich Lenkov:** Why do you think Trump did not obstruct justice when he fired James Comey earlier this week?

**Alan Dershowitz:** In order to obstruct justice you have to do something illegal and Trump didn't do anything illegal. He fired Comey as he had a right to do, even Comey acknowledges that, and I don't think we want to put peoples' minds on trial. We don't want to say "what was he really motivated by?" We'll never know that and, as a civil libertarian, I wouldn't want to see the obstruction of justice law stretched so far that it could get somebody for doing something legal. Today it would be used against Trump; tomorrow it would be used against someone else we have different feelings about.

**Rich Lenkov:** I don't think anyone questions the president's authority to fire any of his employees. I think the question, as you know, is whether he did so with the requisite criminal intent of obstructing justice. In your opinion he didn't.

**Alan Dershowitz:** I don't think you put people on trial for what they intended or what their purpose was. You put them on trial for what they did and what Trump did here was lawful. I don't think you can turn a lawful act into an unlawful act, magically, by looking into the person's mind and saying he had a bad intent or motive. There's a case actually in Chicago in the Seventh Circuit that says you can, but I think it's a mistaken case, and there are cases that go the other way. I would be very upset if the laws of obstruction of justice were stretched to the point where a president could be charged with it for fulfilling his constitutional and statutory duty. It would create a terrible and dangerous precedent.

## [Click Here To Listen To The Full Episode:](#)

### Recent Topics:

- Trump's firing of FBI Director
- Feds investigate Fox News
- Fyre Festival
- Illinois House Bill 40
- Trump's travel ban

### Past Guests:

- Alan Dershowitz
- Gloria Allred
- Jesse Jackson
- Sheriff David Clark

[Alan Dershowitz on Trump/Comey, feds investigate Fox News, Fyre Festival, Penn State hazing liability and much more](#)

[Illinois gubernatorial candidate on abortion funding, minimum wage increase, new book explores injustice and more.](#)

[Legalizing marijuana, Eli Manning sued, law school trends, Bennifer, Blago & Aaron Hernandez in this week's Legal Face-Off](#)

[Trump U settlement, Gorsuch hearings, Rahm email scandal, Facebook live assault & more.](#)

[Gloria Allred on the Marine nude photo scandal, Trump fires all U.S. attorneys, Trump Hotel lawsuit, Neil Gorsuch and more.](#)

[Illinois budget deal collapses, Uber & Kay Jewelers sexual harassment allegations, does Trump understand FISA?, OJ's release & much more.](#)

[Logan Act, Airbnb ordinance, NFL concussion settlement and more.](#)

[Dept of Justice comes down hard on the Chicago PD, Chinese hack US law firms, Obama fails to pardon Blagojevich, El Chapo extradited, Paul McCartney v Sony and more!](#)

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

# Appellate Court Vacates Commission Award Of Medical Expenses, Penalties And Attorney's Fees

By: [Jeanmarie Calcagno](#)



In **Millennium Knickerbocker Hotel v. Illinois Workers' Compensation Commission and Rudy Guzman**, 2017 IL App (1st) 161027WC, No. 1-16-1027WC, opinion filed 4/14/17, the Appellate Court vacated the Commission award of medical expenses, penalties and attorneys' fees on the basis that Petitioner waived his request for

penalties, and that the matter was improperly motioned before the Commission for enforcement of the award.

In **Millennium**, the parties executed a settlement contract which reflected that Respondent paid all of the Petitioner's medical bills and was released from all liability under the Act for medical and hospital expenses incurred or to be incurred, known or unknown. Respondent signed the contract on 7/31/07, and Petitioner and his attorney signed on 10/11/11- four years after Respondent. On 10/27/11, the Commission approved the contract.

On 4/2/14, Petitioner filed a Motion to Enforce Contract and Penalties before the Commission and demanded payment of any and all pending medical bills and an award for penalties and attorney's fees. Respondent denied liability for payment of the subject bills on the basis that 1) the bills were previously denied, 2) the contract did not contain language indicating Respondent agreed to assume liability for same, 3) the bills were for treatment rendered after the contracts were signed and for treatment to body parts not included in the subject accident, and 4) for treatment that was not reasonable or necessary. Respondent also argued that Petitioner was barred from seeking payment based on the doctrines of equitable estoppel and estoppel by laches.

The matter proceeded to a hearing before the Commission on 5/15/14 & 6/19/14. At the initial hearing, Petitioner's Counsel stated that he didn't think penalties was an issue and was not asking for penalties. On 8/12/15, the Commission awarded Petitioner \$16,618.88 in medical expenses, \$8,309.44 in 19(k) penalties, and \$3,323.78 in Section 16 attorney's fees. The Commission found Respondent liable for payment of the medical charges as the contract indicated that all medical bills were paid, and determined that Respondent's failure to pay the bills was unreasonable and vexatious. Respondent appealed

to the Circuit Court and on 3/10/16 the Circuit Court agreed with the Commission's decision.

Respondent then appealed to the Appellate Court. The Appellate Court found that the Commission had no power to enforce the approved settlement contract and that Petitioner could not seek penalties and attorney fees. The Appellate Court ruled that Petitioner must file a Section 19(g) Petition with the Circuit Court to enforce an approved settlement contract. The Court also ruled that although Petitioner's motion was titled "Motion to Enforce Contract and Penalties," Petitioner waived his request for penalties when his attorney responded, "(t)here are no penalties asked for," and did not seek penalties or attorney fees during the hearing before the Commission.

## Practice Tip:

- Settlement offers should remain open for a specific defined period of time
- Settlement terms must be consistent and accurate
- Settlement contracts may require a term stating that they are null and void if not approved before a specific date
- Never rely on opposing counsel to draft your settlement contracts
- Call us for assistance and advice regarding your particular settlement and contract issues.

## Lack of Effort In FCE Sinks Petitioner's Wage Claim Differential

By: [Timothy Alberts](#)



In *Levato v. IWCC*, 25 ILWCLB 15 (Ill. App. Ct. 1st 2017), the Appellate Court upheld the Commission's decision denying wage differential benefits and reinstated its previous award of loss of person as a whole.

Petitioner alleged that he sustained a lumbar spine injury and was permanently totally disabled. He worked for the City of Chicago's sanitation department. Petitioner underwent an FCE that indicated that he could work at a sedentary physical demand level. The physician who conducted the FCE indicated that Petitioner did not demonstrate his true capabilities in the test.

The Arbitrator found that Petitioner failed to prove he was permanently totally disabled and awarded permanent partial disability under Section 8(d)2 as a loss of the person as a whole. The Commission agreed.

Originally, the Appellate Court vacated the PPD award and remanded the case to resolve the issue of whether Petitioner was entitled to wage differential benefits under Section 8(d)1. On remand, the Commission declined to award wage differential benefits and reinstated the PPD award for loss of the person as a whole. The Circuit Court confirmed the Commission's decision. The Appellate Court also affirmed.

The Appellate Court determined that when a Petitioner is seeking a wage differential award, but is not employed, the Commission must determine what employment is suitable and the average amount he could earn. Here, the Appellate Court noted that, due to Petitioner's varied efforts in the FCE, the Commission was unable to determine his true physical capabilities. Thus, the Commission was unable to determine what employment was suitable for Petitioner.

The Appellate Court also noted that the only evidence that addressed the issue of the amount Petitioner could earn was the labor market survey that Respondent provided. However, the Commission concluded that the range of job wages was too great to appropriately assess wage differential.

#### Practice Tip:

- If Petitioner is alleging wage differential, and alleging permanent restrictions based on an FCE, ensure that the examination shows Petitioner's true and accurate strength and abilities
- If Petitioner does not provide credible evidence to show he is entitled to wage differential, make sure you highlight it to the arbitrator

## Firm News

### Rich Lenkov sworn into SCOTUS

On 5/15/17 [Rich Lenkov](#) joined several fellow Northern Illinois University College of Law Alumni to be sworn into the United States Supreme Court in Washington, D.C. Rich was welcomed to the highest court in the land by Chief Justice John Roberts and 6 associate justices (Justices Sotomayor and Gorsuch were absent).

The highlight of the morning was Justice Ruth Bader Ginsberg greeting the new admittees after the swearing in. Justice Ginsberg graciously explained the history of the building and reminded the group of the importance of the oath they just took.





## A Night Under The Stars



On 5/6/17, [Kirsten Kaiser Kus](#) attended "A Night Under the Stars" charity gala for [Hannah's Hope](#) in Portage, Indiana with executives from [Trout Glass & Mirror](#).

Hannah's Hope raises money to assist families in Northwest Indiana with children with special needs and this event was to help raise funds to build an all-inclusive playground. This playground will be one of only two in the United States.

## WCOE 2017 Leadership Conference



[Jeanne Hoffmann](#), [Margery Newman](#) and [Tina Paries](#) attended the [Women Construction Owners & Executives 2017 Leadership Conference](#) in Washington D.C. from 4/2/17 - 4/4/17.

Our attorneys met with Representative Brad Schneider (D-IL) on Capitol Hill.

## Maital Savin Presents To IMA On Workplace Violence

On 4/18/17, [Maital Savin](#) recorded a presentation on "Workplace Violence" for the [Illinois Manufacturers' Association's](#) video reference library.

[Click Here](#) to view the presentation.



## 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](#)

## Free Monthly Webinars

What you said about our 4/20/17 webinar,  
"Case Law Update"

*"I thought the case samples were very good. Very good range in scenarios"*

***"Great discussions on how to evaluate if something is compensable"***

*"Very informative! I liked the Q/A parts. I also got a lot of good info on how AMA ratings can be weighted in a ruling."*

***"... being able to guess some outcomes before the answer was given made it even more interesting."***



### Recent Webinars

- The Ups & Downs Of Upper & Lower Extremity Claims
- Illinois Workers' Compensation Reform
- New OSHA Regulations
- 1<sup>st</sup> Annual Great American BDL WC Quiz
- Common Workers' Compensation Issues Defined
- Indiana Forms: Taking A Claim From Start To Finish
- My Toughest Claim: Your Fellow Claims Professionals Discuss Real Workers' Compensation Cases
- The 5 Factors Determining Illinois Permanency: What Do They Really Mean?
- 10 Common Causation Scenarios & How To Defend Them
- Reduce Your Legal Expenses NOW!
- WC Horror Stories
- WC Issues Raised By Millennials

If you would like a copy of any of our other prior webinars, please email us at [mkt@bdlfirm.com](mailto:mkt@bdlfirm.com)

## Cutting Edge Legal Education

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

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
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
1/15/17 - 7/14/17	1,435.17	538.19	1,076.38

Effective Dates	Maximum PPD
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
7/1/16 - 6/30/17	775.18

### Minimum Rate Death & Total Permanent Disability:

50% of the Statewide Average Weekly Wage

### 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 - 7/14/17	\$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.

### Disclaimer:

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