



Bryce  
Downey  
& Lenkov LLC

# Workers' Compensation Newsletter

March 2021

## Three Questions With... Mike Jackson



Workers' compensation practice chair, [Rich Lenkov](#), interviews CCMSI's National Account Executive, [Mike Jackson](#), on *McAllister*, COVID-19 claims and workers' compensation trends.

**Rich:** In *McAllister*, the Illinois Supreme Court weakened the "no increased risk" defense. What are your thoughts?

**Mike:** This ruling is certainly going to have a negative impact on employers and increase the cost of workers' compensation claims in Illinois. This will obviously result in increased premiums and other costs, which will further harm Illinois employers and inhibit economic recovery after the pandemic.

**Rich:** Have you seen an impact on claims from COVID-19 and the overall economic downturn?

**Mike:** Yes, most industries have experienced a reduction in frequency and severity, due to the shutdown over the last 12 months. Conversely, certain industries like health care and municipalities have witnessed an increase in claim frequency, mainly related to COVID-19 exposure claims.

**Rich:** Any other trends you are seeing?

**Mike:** We are seeing more telemedicine utilization and telePT during the pandemic, as injured employees are less willing to have in-person visits. We are also seeing that with the decrease in claims and claim costs, insureds have more time and resources to evaluate their insurance programs and make changes in internal processes and claims-handling arrangements.

## Illinois Legislative Update



By [Michael Milstein](#)  
Income Member

On 2/19/21, [HB3654](#) was introduced, which denies benefits to anyone who refuses to obtain the COVID-19 vaccination and subsequently gets sick or dies from exposure to COVID-19.

Gov. Pritzker also recently announced changes to the IWCC administration. Arbitrators Deborah Baker and Christopher Harris were promoted to Commissioners while Commissioner Doug McCarthy retired and Commissioner Elizabeth Coppoletti was not reappointed. Arbitrator Raychel Wesley will take over cases from Commissioner Baker. They have not announced who will handle Commissioner McCarthy's cases.

## Indiana Legislative Update



By [Kirsten Kaiser Kus](#)  
Income Member

The Board has transitioned filing the SF 36097, Notice of Worker's Compensation and Occupational Diseases Coverage to an online submission rather than paper mail submission. **[The form must be filed online, effective 4/19/21.](#)**

The form requires the insurer's Federal Identification Number (FEIN), policy number and coverage period. Any change in the coverage and policy period should be updated with the state.

If you have questions about filing this form or determining whether a claim is compensable under the Indiana Worker's Compensation or Occupational Diseases Acts, [please contact us](#). We are seeing an increase in COVID-19 claims under the Occupational Diseases Act, so being up to date on this information is crucial.

Follow us on [Facebook](#), [LinkedIn](#) & [Twitter](#) for more important timely updates.

# Indiana Senate Bill 1: Civil Immunity Related to COVID-19

By [Daniel Korban](#)

Associate



Gov. Holcomb signed Indiana Senate Bill 1 into law on 2/18/21. The bill's intent is to provide civil immunity to individuals, associations, institutions, corporations, companies, trusts, limited liability companies, partnerships, political subdivisions, government entities, nonprofit corporations and any other organization or entity from COVID-19 related tort-based

lawsuits.

Specifically, the bill limits tort actions which include actual, alleged or possible exposure to or contraction of COVID-19 while on the premises of an individual/entity, or while participating in an event sponsored by the individual/entity. The immunity extends to COVID-19 related services, treatment or other actions. The immunity does not extend to actions or omissions that constitute gross negligence or willful or wanton misconduct; worker's compensation is specifically excluded.

In addition, the bill establishes immunity for manufacturers and suppliers of COVID-19 protective products, which include:

- personal safety equipment
- medical devices
- equipment or supplies, even if used or modified from their approved use, to treat or prevent the spread of COVID-19
- medication used to treat COVID-19, including those prescribed or dispensed for off-label use; and
- cleaning and disinfecting products

This immunity also excludes actions or omissions that constitute gross negligence or willful or wanton misconduct, as well as worker's compensation claims.

Finally, the bill prohibits class action lawsuits based on the above. In practice, Senate Bill 1 provides sweeping immunity for most tort actions related to both the transmission and treatment of COVID-19, as well as any damages arising from medication or products intended to assist in the treatment of COVID-19. This includes transmission from employees to business patrons, patron to patron while on the businesses' premises and transmission in health care and assisted living facilities. It also appears to include immunity for health care providers from medical malpractice claims for damages arising from COVID-19 medical treatment.

The bill potentially leaves the door open for liability if an entity disregards available safeguards to prevent the transmission of COVID-19.

The bill is set to expire 12/31/24.

## Proof of Intoxication

By [Natalie Christian](#)

Associate



In *Green v. City of Chicago*, (IWCC 10/6/20) the Commission reversed the finding that Petitioner's refusal to take a drug test amounted to failure to overcome the intoxication rebuttable presumption.

Petitioner was a motor pool driver for the City of Chicago and sustained an injury to his right arm when he pulled on a tractor hitch. Petitioner testified that at the ER he was not asked, nor did he decline, to take a drug test.

Although the medical records were silent on this issue, a billing statement created four days after the work accident included the term "refusal" next to a drug test itemization on the bill. Additionally, Petitioner did not explain why he left the ER and subsequently tested positive for cocaine use while treating at a pain center. However, there was no medical or factual evidence showing that Petitioner was intoxicated at the time of the work accident.

In reversing, the Commission noted that the medical records provided no evidence of a drug test refusal. Rather, the Commission reasoned that while Petitioner's actions could be construed as a refusal and Petitioner subsequently tested positive, the probative value of these facts was limited due to the remoteness to the time and date of the work accident. Moreover, there was no evidence to show that Petitioner was actually intoxicated at the time of accident. The Commission concluded that proof of refusal in the form of medical records or direct testimony is essential to enforcing the intoxication rebuttable presumption.

### Practice Tip:

Thorough investigation is a key element to any defense. In *Green*, investigating Petitioner's behavior on the date of the accident, the accident itself and Petitioner's post-accident actions were all crucial to pursuing an intoxication defense.

Proving intoxication requires more than circumstantial evidence. Implementing a general practice of drug testing after every work accident can pay off by conclusively determining whether an employee was intoxicated at the time of the accident, or by documenting an affirmative refusal.

# No Causation...With No Reimbursement

By [Chase Gruszka](#)

Associate



In *Jordan v. City of Peoria*, 28 ILWCLB 195 (Ill. W.C. Comm. 2020), the Commission found that Petitioner failed to prove a causal connection between a left shoulder condition and the work accident. However, the Commission also denied Respondent's request for a no-show fee credit after Petitioner missed a Section 12 examination.

In *Jordan*, Petitioner sustained a left shoulder injury during a trip and fall while working as a police officer. Medical authorization for Petitioner's left shoulder treatment and Respondent's request for reimbursement due to Petitioner's failure to attend a Section 12 IME were both at issue. The arbitrator found that Petitioner's left shoulder rotator cuff tear was causally related to the work accident and awarded prospective medical care, including surgery. The arbitrator denied Respondent's request for reimbursement.

On appeal, the Commission reversed and highlighted that Petitioner treated for eight months without complaining of left shoulder pain. They further noted that the treating doctor's opinions were based on Petitioner's accident history and lacked documentary support. The Commission found that Petitioner failed to prove a causal connection between his left shoulder condition and his work accident, and denied prospective medical treatment.

However, the Commission concurred with the arbitrator's denial of Respondent's request for credit. Respondent argued that it was entitled to a \$1,200 no-show fee credit for a missed Section 12 IME. Respondent contended that Petitioner and his attorney were faxed notice of the exam and a mileage check, yet Petitioner did not appear. Relying on *King v. Industrial Commission*, 189 Ill. 2d 167 (2000), Respondent argued that Petitioner unreasonably refused to comply with its request for the Section 12 examination. The Commission disagreed and found that Petitioner did not have notice of the examination and knew nothing about it until after the appointment date had passed. Because there was no evidence of a deliberate refusal to comply with the IME, Respondent was not entitled to the no-show fee.

## Practice Tip:

Although the Commission found for Respondent on the issues of causation and prospective medical treatment and against Respondent on its reimbursement request, the Commission left the door open for credit requests where facts may be slightly different. Make sure that you provide adequate notice well in advance of the IME and obtain written confirmation that Petitioner will attend. If Petitioner is a no-show after confirming their attendance and cashes the mileage check, then you have a compelling case for reimbursement.

## Firm News

### Bryce Downey & Lenkov Attorneys Selected to Super Lawyers and Leading Lawyers

We are pleased to announce that 15 Bryce Downey & Lenkov attorneys have been recognized as 2021 Super Lawyers. 12 of our attorneys have also been selected for Leading Lawyers' 2021 rankings across multiple practice areas.

Super Lawyers recognizes attorneys who exhibit excellence in their practice based on professional achievement and peer recognition. Leading Lawyers provides rankings of the most respected and experienced attorneys nationwide. No more than 5% of all attorneys in each state are selected for either distinction.

[Geoff Bryce](#), [Rich Lenkov](#), [Michael Milstein](#), [Margery Newman](#), [Brian Rosenblatt](#), [Tim Alberts](#) and [Samuel Levine](#) have been selected to both exclusive lists.

[Read the full press release.](#)

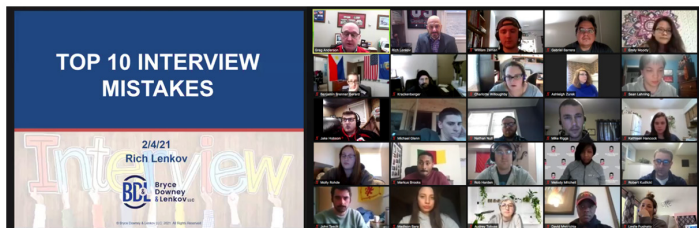




## Rich Lenkov Presents Top Interview Mistakes to NIU College of Law

Capital member [Rich Lenkov](#) presented “Top Interview Mistakes” to Northern Illinois University (NIU) College of Law’s “Intro to Legal Professionalism” class on 2/4/21. Rich detailed his own experiences as both an interviewer and interviewee.

120 students turned in for the Zoom presentation. Rich is a 1995 alumni and has served on NIU’s College of Law Board of Visitors for 13 years.



## Jeff Kehl Authors Article on Landmark Ruling Protecting Workers’ Compensation Carriers for CLM Magazine

Income member [Jeff Kehl](#) authored “Discovering New Protections.” Jeff breaks down *Burdess v. Cottrell, Inc.*, a case of first impression Jeff successfully argued before the Illinois Appellate Court. The case examined whether a workers’ compensation lienholder is subject to written discovery from a party in an existing lawsuit.

Jeff provides an in-depth analysis of Section 5(b) of the IL Workers’ Compensation Act and IL Supreme Court Rule 201(d)(3), demonstrating why the case serves as a valuable precedent for employers and carriers in third-party civil suits going forward.

[Read “Discovering New Protections.”](#)



# CLM

## Rich Lenkov and Kirsten Kaiser Kus Present at WCDI COVID-19 Webinar

Capital member [Rich Lenkov](#) and income member [Kirsten Kaiser Kus](#) presented at Workers’ Compensation Defense Institute’s webinar, “COVID Claims, Compensability and Vaccines, Oh My!” on 2/19/21. The multi-state webinar covered COVID-19 compensability analysis, tips on moving COVID-19 cases forward and mandating vaccinations.

[Watch the recording.](#)



## Bryce Downey & Lenkov Supports Legal Prep’s 9th Annual Trivia Night

Capital member [Rich Lenkov](#) led a team including income member Juan Anderson and firm clients for Legal Prep Charter Academy’s 9th Annual Trivia Night. NIU College of Law Chief of Staff and Assistant Dean of Strategic Communications Melody Mitchell also led a team of students for the event.

All ticket sales benefitted Legal Prep’s support and enrichment programs, offering scholarship opportunities for Legal Prep students and alumni. The West Side high school uses a law-themed curriculum to prepare young adults for college, grow their professional careers and positively impact society.

Rich and Melody’s teams tied for 3rd place.



[Learn more about Legal Prep.](#)

## Our Indiana Office Has Moved!

Our Indiana office has moved! We have relocated to 11055 Broadway, Crown Point, IN effective 2/1/21. Our service, phone number and fax number remain the same.

We are always available to assist with your claims and thank you for your continued confidence in our firm.



View more information about our **[Workers' Compensation practice.](#)**

Our other practices Include:

- [Appellate Law](#)
- [Business Law](#)
- [Condominium Law](#)
- [Construction Law](#)
- [Entertainment Law](#)
- [General Liability](#)
- [Healthcare Law](#)
- [Insurance Law](#)
- [Intellectual Property](#)
- [Labor & Employment](#)
- [Products Liability](#)
- [Professional Liability](#)
- [Real Estate](#)
- [Transportation Law](#)

## Upcoming Events

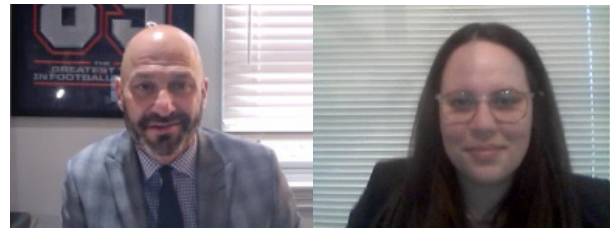
- **4/19/21** - [Michael Milstein](#) and Stanley Steemer's Eric Spalsbury will present at RIMSLive, Risk and Insurance Management Society's virtual conference. For more information or to register, [click here](#).
- **4/30/21** - [Rich Lenkov](#) and [Kirsten Kaiser Kus](#) will present at Workers' Compensation Defense Institute's webinar, "Tips from the Trenches." The multi-state webinar will cover how to properly investigate and defend COVID-19 claims, remote/work from home injuries and moving claims forward in today's remote world. For more information or to register, [click here](#).

## TAKE OUR SURVEY!

1. Are you currently implementing a mandatory COVID-19 vaccine for your workforce?

- ☐ Yes
- ☐ No
- ☐ Not yet, but I plan to

Watch our latest webinar:  
**[Worst Year Ever: 2020 Lessons & 2021 Solutions](#)**



## Recent Webinars

- Defending Hip Claims: Medical & Legal Perspective with Dr. Benjamin Domb
- Always Be Closing: Top Indiana Workers' Compensation Tips
- What Horror Movies Teach Us about Workers' Compensation
- IL Workers' Compensation in the COVID-19 Era
- How To Get A Zero

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

# Legal Face-Off

Legal Face-Off is a fast paced, high energy legal podcast dealing with the hottest issues of the day. Rich Lenkov and Christina Martini provide a point/counterpoint perspective on a variety of breaking legal news topics.



**“Ordinarily when one woman and then another comes forward against the same accused person, it’s likely that the floodgates may open and more women will come forward, because as I always say, ‘courage is contagious.’ It takes courage for these women to speak about it...this is a big issue and it may be that more women will come forward or *have* come forward in the confidential investigation process. This problem is only getting bigger and more and more questions are being asked.”**

**– Gloria Allred on Andrew Cuomo Civil Rights Lawyer, Author**

[Listen to the full episode here](#)

Want to be a guest on a future episode? [Contact us.](#)

## Recent Topics

- Cuomo harassment allegations
- Springsteen DWI
- Floyd civil settlement & trial
- Trump election lawsuits
- U.S. Supreme Court selection

## Recent Guests

- Alan Dershowitz
- Amanda Vinicky
- Alex Vogel
- Ben Crump
- Elie Honig
- Jill Wine-Banks

[Garber and Howell on Trump Acquittal](#), [Belkin on Biden’s Supreme Court Reform Commission](#), [Sepowitz on Springsteen’s DWI](#), [Sheehan on Vanilla Lawsuits](#), and much more

[Ald. Coleman on carjacking](#), [Stein on Robinhood lawsuit](#), [Professor Sherry on impeachment trial](#), [State Rep. West on sexting legislation](#)

[Dershowitz on Trump](#), [Denber on Alexei Navalny](#), [Crump on \\$411 Million Zoom Trial Verdict](#), [Vinicky on 2021 IL Laws](#), [Jackler on Workplace Vaccinations](#), and much more

[Bowman and Honig on Trump’s Georgia call](#), [Gillers on Barr](#), [Whelan on Barrett and Soble on vaccinating inmates](#)



## CONNECT WITH US

Please Like Us on **Facebook**, **Twitter** and **Subscribe on Apple Podcasts**. Send us your questions and we will answer them on air — **nothing is off-limits**.