

# DEFENSE TALK<sup>SM</sup>

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CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

## Community corrections outside benefit suspension law

*City and County of Denver v. ICAO*, 03CA804 (August 12, 2004): In May 2000, claimant suffered an industrial injury. Employer filed a final admission of liability on February 12, 2002, and paid medical impairment benefits over the next two months. Claimant was convicted of a felony and received a six-year community corrections sentence on February 11, 2002. Claimant was taken into custody and temporarily confined in a county detention facility. When bed space became available on February 15, 2002, claimant was admitted to a privately-owned community corrections program that leased space at the county detention facility. Claimant was

housed at the detention center, but was at liberty to leave the premises to go to work. Employer requested repayment of the benefits paid to claimant, alleging that he was not entitled to receive them while he resided in the county detention facility.

The administrative law judge (ALJ) found that residency in the county detention building, pursuant to a community corrections program, was the equivalent of confinement in jail. The ALJ held that under C.R.S. § 8-42-113(1), claimant was ineligible to receive benefits. The ALJ ordered claimant to repay the benefits. The industrial claim appeals office (ICAO) set aside the ALJ's order and held that claimant was

not required to repay the benefits.

The court of appeals agreed with ICAO, and concluded that § 8-42-113(1), which mandates the suspension of benefits during confinement in a jail, prison, or department of corrections (DOC) facility, does not apply and that claimant is not required to repay benefits. The court reviewed the definition of the term "community correction program" in C.R.S. § 17-27-102(3) and determined that because a community corrections program is not a jail, prison, or DOC facility, it does not fall within the suspension of benefits provision of § 8-42-113(1).

## COLA calculation subject to max rate

*Guido v. ICAO*, 03CA1519 (August 26, 2004): Claimant sustained an admitted injury in 1993 and began receiving permanent total disability (PTD) benefits in 2002. Claimant's weekly benefits were capped at the maximum rate, \$414.05, although her actual average weekly wage (AWW) was \$708.46. Claimant argued that she was entitled to a 2% cost of living allowance (COLA) increase based on her actual AWW rather than the maximum rate. Under C.R.S. § 8-42-111(4), for injuries between July 1, 1991 and July 1, 1994, the AWW used to calculate PTD awards "shall be increased by two percent per year effective July 1 of each year."

An ALJ held that claimant's benefits should be increased by a COLA adjustment applied to the maximum rate rather than the actual AWW. ICAO affirmed.

The court of appeals also affirmed. The

court recognized that C.R.S. § 8-42-111(1) limits PTD benefits to the same maximum rate applicable to temporary disability benefits. The court held that in cases where the earned AWW entitles the claimant to the maximum compensation rate at the time of the injury, that computed maximum rate becomes the claimant's AWW for purposes of calculating PTD benefits and the two percent COLA increase.

### **Lobato lives a little longer**

*Lobato v. ICAO*, 03SC556 (August 3, 2004): The supreme court will be determining whether the court of appeals correctly held that C.R.S. § 8-42-107.5 requires a claimant, with a final admission of liability filed before the effective date of the statute, to request a Division independent medical examiner within 30 days of the effective date of the statute.

## Employer not liable for additional benefits

*City and County of Denver v. ICAO*, 03CA1769 (August 26, 2004): Claimant, a police officer, sustained a compensable injury on December 6, 2001. At the time of the injury, claimant held concurrent employment as a security guard. Employer admitted liability for medical benefits and temporary total disability (TTD) benefits for two and a half weeks. On February 4, 2002, claimant was transferred to limited duty within his physical restrictions. As a condition of the limited duty, claimant was not allowed to continue his concurrent job. While on limited duty, and pursuant to employer's wage continuation plan, claimant received full pay and benefits which exceeded the maximum temporary disability rate until

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## VICTORIES

**Fran McCracken** earned three victories. In *Ledoux v. Tuffy Security Products and Colorado Insurance Guaranty Association*, Judge Felter denied claimant's petition to reopen. In *Thomas v. Club Telluride Owners' Association and Sierra Insurance Co.*, Judge Martinez denied a claim for penalties and allowed insurer to recoup overpayments. On appeal in *Vernon v. Delta Foreside Inn and California Indemnity Insurance Co.*, ICAO affirmed Judge Martinez' finding that claimant failed to prove he sustained a compensable injury.

**Richard Bovarnick** also had three wins. In *Stemas v. Wal-Mart*, Judge Stuber denied compensability of the claim. In *Scheibeler v. Wal-Mart*, claimant withdrew his occupational disease claim based on an opinion by Dr. Lawrence Repsher. In *Davis v. Wal-Mart*, claimant withdrew an occupational disease claim based on an opinion by Dr. Michael Kosnett.

**James Clifton** won two hearings. In *Wells v. Kwiki Tire Service and California Indemnity Insurance Co.*, Judge Martinez dismissed the claim. In *Boyet v. Wal-Mart*, Judge Felter denied a request for medical benefits.

**Cheryl Martin** beat a claim for medical benefits before ALJ Harr in *Loyda v. Farthing and Superior National Insurance*.

**Harvey Flewelling** won on appeal in *Gonzales v. Louisiana Pacific*. ICAO affirmed ALJ Martinez' order that denied a claim for medical benefits.

## CONTINUATION

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he reached maximum medical improvement. Claimant initially utilized sick leave for part of the period he worked on limited duty, but the sick leave ultimately was reinstated because the injury was work-related.

Claimant requested temporary partial disability (TPD) benefits for the loss of income from the concurrent job. An ALJ denied the request pursuant to C.R.S. § 8-42-124(2)(a), which provides that any employer who continues to pay a sum in excess of the TTD benefits prescribed by the Workers' Compensation Act and has not charged the employee with any earned vacation, sick leave, or other similar benefits, shall be reimbursed or shall take credit to the extent of all moneys that such employee may be eligible to receive as compensation for TPD or TTD. The ALJ held that employer was entitled to a credit against its liability for TPD benefits because it had paid claimant a sum in excess of the TPD benefits owed. The ALJ also concluded that employer had not charged claimant with sick leave under the meaning of the statute because it had returned the benefit to claimant.

ICAO set aside the ALJ's order and concluded that once an employer effects a decision to charge an employee sick or vacation leave, it may not recapture the statutory credit by reinstating the benefit.

The court of appeals reversed ICAO. The court held that the legislative purpose of § 8-42-124(2)(a) is to encourage employers to adopt wage continuation plans that benefit injured employees, and such purpose is not violated by the ALJ's conclusion that employer did not charge claimant for any earned such leave and therefore was not liable for further TPD benefits.

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