DEFENSE TALK℠

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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

Appeal does not automatically stay PALJ's order

Kennedy v. ICAO, 03CA1891 (September 9, 2004): Claimant sustained a back injury in March 2001, and employer admitted liability for temporary total disability benefits. On June 4, 2002 the treating physician placed claimant at maximum medical improvement (MMI) and rated claimant's permanent impairment at 20% of the whole person. Employer applied for a Division of Workers' Compensation-sponsored independent medical examination (DIME) and requested that it be conducted in Denver by a physiatrist. Although claimant lived in Colorado Springs, the Division selected a Denver physician to conduct the DIME.

Claimant's attorney William Alexander then notified employer that claimant would not attend the DIME and applied for a hearing to determine whether Denver was the proper location for the DIME. Prior to the hearing, employer filed a motion to compel claimant's attendance at the DIME, and on November 12, 2002, a prehearing administrative law judge (PALJ) ordered claimant to attend the DIME that was scheduled for the following day. Claimant again refused to attend and applied for a hearing to appeal the PALJ's order. The administrative law judge (ALJ) imposed a $500 penalty under C.R.S. § 8-43-304 against claimant for violating the PALJ's order to attend the DIME.

The court of appeals affirmed the penalty. The court rejected claimant's argument that an ALJ may not assess penalties against a claimant for refusing to abide by a PALJ's order pending review by an ALJ. The court held that the rulings of PALJs are binding on the parties under C.R.S. § 8-43-207.5(3), and there is no provision that stays interlocutory orders entered by a PALJ pending review by an ALJ. A party may not elect, without fear of consequences, to ignore a ruling of the PALJ in the hope of obtaining a more favorable ruling from the ALJ. The court noted that claimant did not file a motion to stay the PALJ's order pending his appeal. The court also rejected claimant's argument that the Division may not appoint a Denver physician to perform the DIME in a Colorado Springs case.

Ambiguous settlement requires extrinsic evidence

Moland v. ICAO, 03CA815 (September 23, 2004): Claimant sustained industrial injuries in 1994 and 1995. In April 2000, claimant applied for a hearing to seek payment of a $191.25 medical bill and penalties against employer for nonpayment of the 1999 bill. The hearing was vacated after the parties stipulated to the payment of outstanding bills. On January 23, 2001, the parties entered a full and final settlement of the workers' compensation claim. However, employer neglected to pay the 1999 medical bill after the settlement was reached. Claimant again requested a hearing. ALJ Harr denied all penalty claims.

The Industrial Claim Appeals Office (ICAO) reversed and remanded for the ALJ to reconsider whether employer should be penalized for nonpayment of the bill and whether good cause existed for employer's untimely assertion that the settlement agreement barred any penalties for nonpayment prior to its execution. ALJ Harr then assessed penalties of $20 per day for nonpayment from May 17, 2001 through February 5, 2003.

ICAO held that the settlement agreement was ambiguous regarding whether penalties had been waived for nonpayment after the settlement was entered, and again remanded for determination of whether penalties were due for nonpayment after January 23, 2001. On remand, ALJ Jones held that the ambiguous settlement terms should be construed against employer and that it did not clearly bar penalties for nonpayment for a substantial period after the settlement was executed. ALJ Jones levied penalties totaling $90,800 for the delay in payment of the $191.25 bill, and ordered that 25% of the penalty was payable to the Subsequent Injury Fund (SIF) pursuant to C.R.S. § 8-43-304(1).

On further appeal, the court of appeals rejected claimant's argument that the statutory requirement that 25% of the penalty be paid to SIF is an unconstitutional taking of property. The court agreed with employer that ALJ Jones and ICAO erred in construing the ambiguous settlement terms against employer and in concluding that claimant did not waive his right to seek penalties for actions occurring after the settlement was executed. The court remanded for further proceedings to allow extrinsic evidence of the parties' intent on whether penalties were waived.

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Claimant's extremity rating limited to schedule

Warthen v. ICAO, 04CA506 (September 9, 2004): Claimant sustained a shoulder injury. Based on the treating physician's impairment rating, employer filed a final admission of liability (FAL) for the payment of a scheduled disability award for 48% loss of use of the arm at the shoulder. Claimant requested a Division-sponsored independent medical examination (DIME).

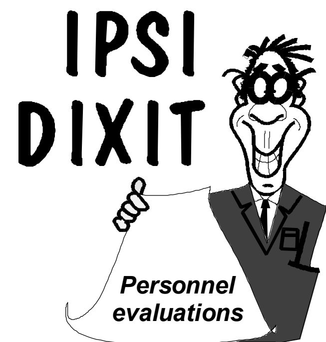
The DIME physician agreed that claimant sustained a 48% impairment of the right upper extremity (RUE) and noted that this rating converted to a 29% whole person impairment. Unlike the treating physician, however, the DIME physician found that claimant had sustained a 7% whole person impairment of the cervical spine. Accordingly, employer filed an amended FAL for a scheduled disability award based on a 48% RUE impairment, as well as the 7% whole person impairment. Claimant objected to the amended FAL, arguing that he was entitled to compensation based on the converted whole person rating for the RUE, or 29%. The ALJ found that claimant failed to prove that the situs of the RUE impairment extended beyond his right arm, and concluded that C.R.S.§ 8-42-107(7)(b)(II) precludes an award of medical impairment benefits for the RUE based on the whole person conversion of the upper extremity rating.

The court of appeals affirmed. Under C.R.S. § 8-42-107(1), a claimant is limited to a scheduled disability award if his injury is described in the schedule in § 8-42-107(2). A claimant is entitled to compensation for whole person impairment only for non-scheduled injuries, as provided in § 8-42-107(8). Where, as here, a claimant sustains both scheduled and non-scheduled injuries, § 8-42-107(b)(II) requires that the scheduled injury be compensated as a scheduled disability, and the non-scheduled injury as a whole person impairment. The relevant issue at hearing was whether claimant's scheduled impairment rating should be converted to a whole person impairment based on functional impairment to the RUE beyond the extremity. The court held that the evidence supported the ALJ's determination that all of the impairment outside the RUE was encompassed in the cervical impairment rating and was fully compensated by the 7% whole person rating.

Equity axed from workers' compensation subrogation

Reliance Insurance Company v. Blackford, 03CA774 (September 9, 2004): Claimant was injured in a car accident while acting in the course and scope of his employment. Employer was insured under a workers' compensation policy issued by Reliance (insurer). Claimant received workers' compensation benefits from insurer and employer. Claimant brought a personal injury action against the driver of the other car involved in the accident. Insurer and employer were permitted to intervene in the action to assert subrogation rights to the extent of the benefits they had provided claimant. The personal injury action settled for $100,000 and claimant moved for an evidentiary hearing to determine the portion, if any, of the proceeds the insurer would be entitled to receive. The trial court found that claimant was entitled to retain the entire amount of the settlement, in part because his economic damages were over $600,000.

The court of appeals reversed, holding that the trial court erred in failing to apportion the settlement proceeds between economic and non-economic damages, and in failing to recognize the insurer's subrogation rights. When a settlement is reached with a third-party tortfeasor, the insurer's subrogation interest extends to the settlement proceeds. The insurer's subrogation interest is limited to the claimant's right to recover economic damages. The trial court improperly relied on equitable considerations, finding that because claimant's non-economic damages exceeded the settlement amount, he should receive the entire amount. Colorado law does not require the claimant be fully compensated before subrogation rights may be exercised. The case was remanded for the trial court to determine the actual amounts of claimant' economic and non-economic damages, and apportion the settlement proceeds accordingly.



****He's so dense, light bends around him.***

****Got into the gene pool when the lifeguard wasn't looking.***

****His men would follow him anywhere, but only out of morbid curiosity.***

****This young lady has delusions of adequacy.***

****Wheel is turning, but the hamsters are all dead.***

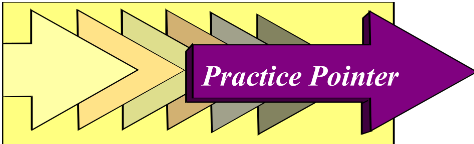
****Takes him an hour and a half to watch 60 Minutes.***

DOAH news: moves and more

The Division of Administrative Hearings and Prehearing/Dispute Resolution Unit of the Division of Workers' Compensation in Denver will be relocating from the 14th Floor of 1120 Lincoln Street to 633 17th Street. The move will take effect in May of 2005. A ten-year, $30 million lease has been signed.

ALJ Edward R. Martinez of DOAH's Western Regional Office in Grand Junction has announced his retirement effective April 30, 2005. He stated that he expects to preside over hearings until the middle of March 2005.

ALJ Ruthanne Gartland of the Durango hearing venue is no longer presiding over hearings. She has resigned her position effective September 30, 2004. Currently neither ALJ position has been posted for applicants.



Responsibility for termination

By Tiffany L. Scully, Esq.

Oral arguments were held on 09/14/04 before the Colorado Supreme Court in the case of Anderson v. Longmont Toyota and Krause v. Sorter. Richard A. Bovarnick, Esq., argued on behalf of respondents in Longmont Toyota. The issue before the supreme court is whether the court of appeals correctly interpreted § 8-42-105(4), C.R.S., which states: "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury."

In Longmont Toyota, the court of appeals held that the claimant, who had been terminated for cause from his first employer, was not entitled to temporary disability benefits when he suffered a "worsening" of his medical condition that prevented him from working for a subsequent employer. In Krause, the court of appeals denied temporary disability benefits to a claimant who was responsible for termination of employment, but who later became totally disabled as a result of undergoing surgery.

The supreme court will issue its rulings in both cases in the next one-to-three months. Based upon the oral argument, it is unclear how the justices will rule on the issue. It is undisputed that when a worker is responsible for their termination (such as failing a post-injury drug test, violating a sexual harassment or attendance policy, or quitting for reasons unrelated to the injury), the termination acts as an initial bar to temporary disability benefits. However, the supreme court will determine whether respondents are required to reinstate temporary disability benefits where, subsequent to the employment termination, the claimant has a worsening of the work-related medical condition, or undergoes surgery for the work injury, that causes lost wages. Until the supreme court issues its opinion, the court of appeals' holdings remain the law, and application of § 8-42-105(4) is a permanent bar to post-termination temporary disability benefits.

If you currently have a claim where the injured worker was responsible for termination from employment, and the injured worker has alleged a worsening or inability to work due to the injury, you may want to consider attempting to settle the claim, or at least to settle the issue of whether the claimant is entitled to a closed period of temporary disability benefits for an alleged worsening after the termination.

If the supreme court reverses the court of appeals holdings, litigation in cases involving claimants who are responsible for termination will increase due to the need for hearings about claimants' subsequent entitlement to temporary disability benefits. Thus, insurers and self-insured employers could face additional liability exposure for temporary disability benefits as well as legal fees.

General contractor immune; other subcontractor liable

Elliot v. Turner Construction Company, 2004 WL 1879946 (10th Cir., August 24, 2004): Plaintiff worked as a consultant on a bridge construction project. The general contractor on the project, Turner, entered an agreement with plaintiff's employer, Mabey, for rental of bridge parts and for plaintiff's services. Turner also subcontracted with B&C Steel to construct and launch the bridge. Plaintiff's job was to demonstrate how the bridge should be put together and launched, and to inspect it.

On August 7, 1999, while the bridge was suspended over the river by a crane, plaintiff observed a retaining wall that was supporting the crane was beginning to collapse. He also saw that B&C's owner was about to remove a nylon strap attached to the bridge. Concerned that the bridge would fall into the water if the strap was removed, plaintiff walked across the bridge and gave a signal to stop and not move anything. However, the bridge moved, plaintiff fell and sustained injuries.

Plaintiff sued Turner and B&C in Colorado state court for negligence and negligent supervision. The action was moved to federal district court. B&C moved for summary judgment because it was not foreseeable that plaintiff would walk across the bridge as it was being moved by a crane. Turner moved for summary judgment on the grounds that the claim was barred by the exclusivity provisions of the Workers' Compensation Act. The district court denied both motions, and the jury returned a verdict in favor of plaintiff.

The 10th Circuit court of appeals reversed the verdict against Turner and affirmed the verdict against B&C. The court held that Turner was immune as plaintiff's statutory employer under C.R.S. § 8-41-401(1)(a) because Mabey was essentially a subcontractor and the plaintiff's services were part of Turner's regular business.

The court rejected B&C's argument that plaintiff's actions were not reasonably foreseeable and it did not owe plaintiff any duty of care. The court concluded that B&C should have reasonably foreseen that its attempt to remove the nylon strap holding the bridge would cause plaintiff's injury.

Note: Summaries and articles should not be relied upon as authoritative for a particular case. Consult your attorneys for advice on the application of all the law to the specific facts of your case or legal problem.

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