

DEFENSE TALK

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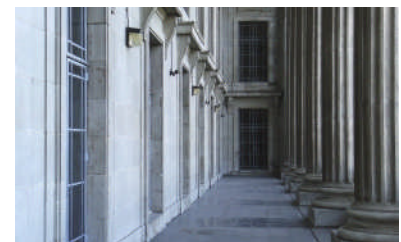
CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

APPEALS COURT SENDS PARTIES PACKING AFTER RULING ON TRAVEL STATUS DOCTRINE

In *Flint Energy Services, Inc. and Liberty Mutual Insurance Company v. Industrial Claim Appeals Office and Randall Burch*, decided August 7, 2008, Flint Energy Services and its insurer sought review of an Order of the Industrial Claim Appeals Office (ICAO) which set aside an order of the Administrative Law Judge (ALJ) and remanded the claim back to the ALJ. The Court of Appeals dismissed the Respondents' appeal. The facts of the *Flint* case are as follows. The claimant, Randall Burch, was a resident of Louisiana. He alleged he contracted West Nile virus while living and working in Colorado on a construction project. Claimant sought worker's compensation benefits, claiming

his illness arose out of his employment. After hearing, the ALJ denied and dismissed the claim, finding the claimant had not met his burden of proving the travel status doctrine applied to him for the time he was living in Colorado. The travel status doctrine generally holds that an employee whose work requires travel away from the employer's premises is held to be within the course and scope of employment continuously during the trip, except when the employee makes a distinct departure on a personal errand. Because the ALJ found the claimant failed to prove travel status, he found the claimant was required to show he contracted the West Nile virus during working hours. The ALJ found the claimant did not prove he contracted the disease during working hours. Therefore, he dismissed the claim. On review, ICAO determined the ALJ misapplied the travel status doctrine. ICAO found the claimant was in travel status *the entire time* he was living and working in Colorado. Therefore the Panel set aside the ALJ's order and remanded the matter for a determination of benefits and compensation payable to the claimant. The employer appealed arguing the Panel erroneously applied the travel status doctrine and overstepped its authority in reversing factual determinations of the ALJ. The Panel filed an answer brief and also filed a Motion to Dismiss arguing its order did not grant or deny benefits and therefore was not final and appealable. At oral argument before the court of appeals, the employer and the claimant argued the employer had paid a medical bill pursuant to the order,

making the order an award of benefits. The parties, including ICAO, signed a stipulation to this effect. Nonetheless, the Court dismissed the appeal finding the order was not final and appealable. The court held that employer's payment of reasonable, necessary, related medical expenses and the parties' stipulation regarding the effect of the order did alter the order. The order did not constitute an award of benefits by the ALJ or the Panel. Consequently, the Panel's decision is not a final order and is not ripe for appellate review. Of course, once the ALJ enters an order on remand, the parties will again be before ICAO and ultimately the Court of



Appeals. The *Flint* case raises some interesting issues which, because of dismissal were not addressed by the Court. The claimant was a Louisiana resident who elected to work for a Colorado company. In finding the claimant was in "travel status", ICAO held that "the travel status doctrine applies to all employees who travel away from home in order to work in a temporary position or on a temporary project". ICAO has effectively expanded the scope of the travel status doctrine to travel over which the employer exercises no control or right of control.

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Practice Pointer

Unilateral Modification of TTD = Penalties

By Katherine M. Holom

The issue of penalties for unilateral modification of a temporary benefits award was addressed by the Industrial Claim Appeals Office in the recent case of *Slobodan Markovic v. Express Personnel Services, Inc.* Section 8-43-304(1), C.R.S. imposes penalties when one “**fails or refuses to perform any duty lawfully enjoined**” in an amount not to exceed “**more than five hundred dollars per day**” (emphasis added). In determining whether to impose penalties, the Director must determine first whether the conduct at issue constituted a violation as described in §8-43-304(1) and, if a violation is found, whether the Respondents’ actions were objectively unreasonable. Failure to comply with the Workers’ Compensation Rules of Procedure is a failure to perform “any duty lawfully enjoined” and thus a violation as described in §8-43-304(1). Rule 6-8, W.C.R.P. states that, “Temporary benefits may not be suspended, modified or terminated **except** pursuant to the provisions of this rule” or pursuant to an order (emphasis added).

In *Markovic*, Respondents appealed from the ALJ’s order to pay statutory penalties in the amount of \$20 per day until compliance with the Director’s order to reinstate benefits. ICAO affirmed. Respondents filed an initial general admission of liability (GAL) admitting to liability for TTD at a \$222.39 weekly rate. A second GAL was filed on May 10, 2007 reducing the TTD rate to \$214.93 per week. The Division notified Respondents twice by letter that it was not permissible to modify the benefit rate unilaterally. On July 20, 2007, a GAL was filed stating that the initial rate was a “clerical error” and that the correct rate was that admitted to in the second GAL. The Division notified Respondents in two additional letters that this conduct was probably in violation of the rules. Respondents did not respond to either letter. On October 10, 2007 the Director issued a show cause order to Respondents requiring that they show why statutory penalties should not be imposed based on the unilateral modification. Respondents timely responded to the show cause order, explaining that after the first GAL was filed the insurer received additional infor-

mation regarding the actual (lower) AWW, and that they therefore filed the second GAL. The insurer also noted that the “actual adjuster” on the claim “may not have received” the correspondence from the Division, that a FAL had been filed admitting to benefits at the rate approved by the Division and that an application for hearing had been filed so that an ALJ could address the issue. An amended response was later filed that corrected the stated initial AWW figure, noted that the initial benefit rate was a “clerical error”, stated again that the adjuster may not have received the correspondence and stated that the imposition of penalties was premature because a hearing had been requested before an ALJ.

The Director entered an order imposing penalties, without hearing, noting that both Respondents’ initial response and amended response “acknowledge that an admitted temporary benefit rate was unilaterally modified” and that no information was supplied to support a finding that Respondents had an objectively reasonable basis for their conduct.

On appeal, ICAO concluded, first, that the imposition of penalties was not rendered premature by the filing of the application for hearing because both the Director and ALJ’s have concurrent jurisdiction over disputes arising under the Act. Although the Director could have voluntarily deferred the penalties issue to an ALJ, he was not required to do so. Additionally, ICAO stated that no evidentiary hearing was nec-

essary where there was “no genuine issue of material fact, and judgment may be entered as a matter of law.” As the Director found, assuming that Respondents’ assertions in their responses were true, that Respondents had still violated the Act and had not provided an objectively reasonable basis for their conduct, the assessment of penalties was warranted.

Second, ICAO held that the Director was correct in the assertion that Rule 6-8 prohibits the unilateral modification of temporary benefits and that Respondents had not supplied an objectively reasonable ground for unilaterally modifying the TTD rate. As such, penalties were appropriate. However, the \$20 per day penalty rate imposed was very close to the minimum of the statutory range allowed under section 8-43-304(1). ICAO stated that the argument that the imposition of penalties here would not serve to punish or deter future conduct would be relevant to the amount of the penalties imposed, but not to the issue of the imposition of the penalty itself. Finally, ICAO held that the fact that Claimant did not object to the FAL that did not admit for penalties did not “moot” the penalties issue. “The final admission cannot invalidate or vacate the Director’s order.”

There are several important lessons to take away from the *Markovic* claim. First, Rule 6 must be followed when modifying a benefit rate in order to avoid penalties. Unilateral modification of benefits is not allowed and will expose Respondents to penalties. Correcting a clerical error still requires adherence to the Rules. Additionally, a penalty cannot be “avoided” by filing a final admission. Once the Director has issued an order it is enforceable. Finally, when correspondence is received from the Division, reply! *If you are in this situation, please review Rule 6 prior to proceeding and feel free to contact an attorney with CMB for guidance.*



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

VICTORIES IN THE TRENCHES

James R. Clifton

In the case of *Caradith Burke Hadley v. Wal Mart Stores, Inc. and American Home Assurance*, Administrative Law Judge William Martinez permitted Respondents to withdraw their admission of liability as improvidently filed and denied and dismissed the claimant's application for benefits. The facts of the claim are as follows. On January 5, 2008, while the claimant was at work a pickup truck crashed through the front door of the store and collided with fixtures in the store before coming to a stop. It was reported that the driver of the vehicle had a heart attack. A co-worker of the claimant was injured in the collision. Claimant and many others went to the area of the collision immediately after it occurred. The claimant and other workers helped clear the debris. That night, the claimant went to the Emergency Room and reported she was struck by the truck at the Respondent employer, injuring her right shoulder, elbow and wrist. The following day, the claimant completed an "Associate's Statement-Worker's Compensation" indicating she had been pushed into the truck while trying to help people. A first report of injury was filed. The Respondent Insurer then filed a General Admission of Liability. The Montrose Police Department initially took custody of the surveillance video of the accident and later returned it to Wal Mart. The video showed the claimant did not come into physical contact with the truck. After claimant reviewed the video, she changed her story about the incident. She testified that although she did not know how she was injured at work, she was sure she was somehow injured while at work on January 5, 2008. After seeing the video, Respondents sought an order permitting them to withdraw their admission of liability. ALJ Martinez found the claimant's testimony inconsistent, incredible and unreliable. He found the testimony of Respondents' witnesses plausible, consistent and credible. ALJ Martinez entered an order permitting Respondents to withdraw their admission of liability and denied and dismissed the claimant's claim for benefits.

In the case cited as *Maria Tamez v. Wal*

Mart Stores, Inc. and American Home Assurance, W.C. No. 4-729-122, Administrative Law Judge William Martinez again allowed the Respondents to withdraw their admission of liability as improvidently filed. In the *Tamez* claim, the claimant filed a July 11, 2007 Worker's Claim for Compensation in which she alleged she injured her left knee when she tripped at work. Based on that information, Respondents filed a General Admission of Liability. One of claimant's co-employees subsequently came forward and wrote a statement disclosing a conversation with the claimant in which the claimant stated she did not suffer an injury at work and that her symptoms were related to an old non-work-related injury. Based on the testimony of this co-worker and the adjuster, the ALJ agreed the Respondents should be allowed to withdraw their admission of liability and denied and dismissed the claimant's claim for benefits.

Jim Clifton continued his streak of reversing the opinions of Division Independent Medical Examiners in the case of *Emilio J. Michel v. Nabors Drilling USA, LP*. Douglas Scott, M.D. conducted a Division Independent Medical Examination and concluded that claimant was not at maximum medical improvement and needed to see a rheumatologist to rule out collagen vascular disorder or fibromyalgia syndrome. He also recommended further treatment including trigger point injections and consideration of acupuncture and microcurrent. After reviewing videotape of the claimant kicking a soccer ball and engaged in other physical activity on the same day as his examination, Dr. Scott concluded that the claimant was in fact at maximum medical improvement with zero percent impairment.

The Industrial Claim Appeals Office handed Jim Clifton his second victory in *Dennis Williams v. Hyland Enterprises, Inc. and Zurich American Insurance Company*. The claimant sought review of Administrative Law Judge William Martinez' Order denying his request for surgery recommended by the authorized treating physician. The claimant alleged a number of errors on the part of the ALJ, including that

the ALJ erred in not applying the "law of the case" doctrine to preclude evidence of a subsequent injury. At hearing, asserting that the law of the case doctrine applied the claimant argued a prior order entered by ALJ Cain precluded Respondents from presenting evidence of any subsequent intervening injury. ALJ Martinez denied the motion, ruling that ALJ Cain's determinations were largely factual ones, and that new facts adduced in the current proceeding persuaded him that ALJ Cain's ruling should not be followed. ICAO perceived no abuse of discretion in ALJ Martinez' denial of the claimant's motion or in any of his findings and affirmed the order denying claimant's request for surgery.

Richard A. Bovarnick

In the case of *Phyllis Jensen v. Wal Mart Stores, Inc. and American Home Assurance*, the authorized treating physician, Dr. L. Brad Lyons, a Level II accredited physician, assigned 38 percent scheduled impairment to the claimant's work-related injuries. The 38 percent rating had a value of over \$17,500. The Respondents filed an Application for Hearing contesting the validity of the rating. Respondents settled the claim for \$7,500, persuading opposing counsel that Dr. Lyons assignment of impairment for arthritis and the claimant's repaired medial and lateral meniscal tears was improper pursuant to the *AMA Guides*.

In *Jeffrey Holt v. Wal Mart Stores, Inc. and American Home Assurance*, after taking the evidentiary deposition of Division Independent Medical Examiner Dr. Eric Ridings, opposing counsel conceded he would be unable to convert the claimant's scheduled shoulder impairment to whole person or overcome the Division IME by clear and convincing evidence. Opposing counsel withdrew his application for hearing on the issues and vacated the hearing.

In the case of *Stanley Grudzinski v. Wal Mart Stores, Inc. and American Home Assurance*, the claimant alleged a January 4, 2007 accident injury to his shoulders while lifting treadmills. The claimant did not report the accident until June 19, 2007. Investigation and discovery of the claim-

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VICTORIES IN THE TRENCHES

Continued from page 3

ant's medical records established the claimant complained of identical symptoms prior to the alleged accident. Claimant's post-accident medical records did not corroborate by history the alleged accident. After providing opposing counsel copies of the claimant's pre- and post- "accident" medical records, claimant agreed to dismiss the claim.

M. Frances McCracken

In the claim of *Genevieve Starr v. Wal Mart Stores, Inc. and American Home Assurance*, Administrative Law Judge Martin Stuber found the claimant violated a reasonable safety rule that required all employees to immediately clean up slip and fall hazards. The ALJ found the employer provided training regarding the rule and strictly enforced the rule. On November 4, 2007, the claimant slipped and fell when she stepped on a piece of raw chicken resulting in injuries to her back and hip. The ALJ found the claimant previously saw the raw chicken on the floor but failed to pick it up because she was rushing. He determined the claimant willfully violated a reasonable safety rule. Claimant's slip and fall resulted from the violation. As a result, Respondents are entitled to a fifty percent reduction in compensation benefits pursuant to C.R.S. § 8-42-112(1).

Holly M. Barrett

In the claims of *William Evans v. Progressive Corporation and/or El Paso County Department of Human Services and Travelers Insurance and Self-Insured*, which were consolidated for hearing, Holly Barrett represented Progressive Corporation and Travelers Insurance. The claimant alleged he suffered bilateral carpal tunnel syndrome as a result of his work activities. The claimant's work at Respondent Employer was that of a customer service representative. He worked only part-time. Although claimant's position required consistent use of the keyboard and mouse, by his own admission, claimant was not a good typist. From these facts, the ALJ inferred the claimant's typing was not intensive. Further, the claimant was an insulin dependent diabetic, obese and 60 years of age. A number of physicians, including

Dr. Jack Rook, Dr. Eric Ridings, Dr. Craig Durck, Dr. Darrell Quick, Dr. Neil Pitzer, and Dr. Joel Boulder offered opinions regarding causation and apportionment of the claimant's occupational disease and need for treatment. Dr. Pitzer testified at the hearing. Citing several Mayo Clinic studies, Dr. Pitzer opined that the primary cause of the claimant's carpal tunnel were the co-morbid factors of diabetes, obesity and age. Dr. Quick agreed with Dr. Pitzer. Ultimately, Administrative Law Judge Donald Walsh found the opinions of Dr. Quick and Dr. Pitzer the most persuasive medical evidence and denied and dismissed the claimant's claim for benefits.

Katherine M. Holom

In *David Anderson v. Labor Ready*, Pre-hearing Administrative Law Judge Thomas DeMarino granted Respondents' Motion to Dismiss the Claimant's Claim for Benefits for Failure to Abide By Order, *With Prejudice*. Katherine Holom repeatedly requested the claimant's counsel provide releases and historical medical and employment information as required by Rule 5-4(C), W.C.R.P. On June 17, 2008, she filed a Motion to Compel compliance with the Rule and production of the requested releases and essential information. An Order granting the Motion to Compel was entered on July 1, 2008. Claimant's counsel failed to comply with the Order. The Motion to Dismiss was subsequently filed. PALJ DeMarino granted the motion. Because of his failure to comply with the Rules of Procedure and discovery obligations, Claimant is forever barred from bringing his claim.



TIMELY FILING OF POSITION STATEMENTS

Just a reminder, according to the Director's interpretive bulletin, timely filing of position statements is determined by date of receipt by the Division. When determining whether a carrier has timely stated a position on a claim, C.R.S. § 8-43-201(1)(a) – Notice concerning liability, requires the insurance carrier . . . notify in writing the division and the injured employee . . . within twenty days after notice or knowledge of an injury to an employee which disables said employee for more than three shifts of three calendar days. . . .” According to *Black's Law Dictionary*, to “notify” one of a fact is to make it known, and is regarded in the law as “actual” when one knows of the particular fact in question. Just as notice to the carrier occurs when the carrier has actual knowledge of a lost time injury, notice to the Division is when the carrier's position is actually known, or when the notice of contest or admission is received by the Division. Failure to timely state a position may subject the carrier to penalty claim under C.R.S. § 8-43-304.

WORKER FATALITY RATE AT HISTORIC LOW

On August 20, 2008, the Bureau of Labor Statistics (BLS) released a report showing a decline in worker fatalities. The rate of worker fatalities has declined by six percent from 2006 to 2007, based on a BLS report. The report released by BLS is using preliminary numbers due to final data for 2007 not being released until April 2009. Based on the preliminary report, fatal injuries reduced nationwide from 5,840 fatalities to 5,488. In addition to a decline in the overall number of fatalities, the rate for 2007 declined to 3.7 fatalities per 100,000 workers. This is the lowest fatality rate in recorded OSHA history.

ICAO DISTINGUISHES REQUIREMENT FOR DESIGNATING ATP

In the case cited as *Maria Tovar v. Swift & Company and Zurich American Insurance*, W.C. No. 4-597-412, the Industrial Claim Appeals Office upheld the order of Administrative Law Judge Bruce Friend denying claimant's request to have her own physician attend her for post maximum medical improvement care. In *Tovar* the Respondents filed a Final Admission of Liability and admitted for medical benefits after MMI. Dr. Reichhardt was the authorized medical care provider prior to the claimant being placed at MMI and he remained authorized after MMI. The claimant requested maintenance medical care at the employer's nurses' station and the employer declined to refer her for care. However, the claimant could have sought care from Dr. Reichhardt without approval from the employer. The claimant's counsel then wrote a letter to the adjuster requesting *Grover* medical care with the authorized treating physician. The adjuster sent a letter stating, "If you are seeking a specific treatment, please advise and I will review for relatedness to the worker's compensation injury." The claimant never responded to the adjuster. The parties proceeded to hearing on the sole issue of *Grover* medical treatment. ALJ Connick entered an order for the insurer to pay for a single follow-up medical visit with Dr. Reichhardt. The insurer arranged an appointment for the claimant to be seen by Dr. Reichhardt. However, the claimant failed to attend. The claimant then sought a change of physician to her personal care provider, arguing the right of selection passed to her when she notified the Respondents that she required maintenance medical care. In support of her position, the claimant cited a number of cases holding that when a petition to reopen is filed and additional medical treatment is sought, the respondents must designate a physician to provide that treatment. Both the ALJ and ICAO rejected this argument. The cases cited by the claimant holding that the respondents must designate a physician to treat the claimant when a petition to reopen is filed are distinguishable because in those cases the claim has been closed. The employer's obligation to provide medical care

terminates at MMI, except where, as here, the employee is entitled to ongoing treatment to prevent a deterioration of her condition. The Respondents admitted to *Grover* medical benefits and designated a treating physician to supply those medical benefits. Dr. Reichhardt remained authorized for post-MMI treatment and the claimant was free to seek treatment with him but failed to do so.

The First Labor Day

Labor Day, the first Monday in September, is a creation of the labor movement and is dedicated to the social and economic achievements of American workers. It constitutes a yearly national tribute to the contributions workers have made to the strength, prosperity, and well-being of our country. The first Labor Day holiday was celebrated on Tuesday, September 5, 1882, in New York City, in accordance with the plans of the Central Labor Union. The Central Labor Union held its second Labor Day holiday just a year later, on September 5, 1883. In 1884 the first Monday in September was selected as the holiday, as originally proposed, and the Central Labor Union urged similar organizations in other cities to follow the example of New York and celebrate a "workingmen's holiday" on that date. The idea spread with the growth of labor organizations, and in 1885 Labor Day was celebrated in many industrial centers of the country. (Article by the U.S. Department of Labor. United States. [The History of Labor Day](http://www.dol.gov/opa/aboutdol/laborday.htm#content). 26 Aug. 2008. <http://www.dol.gov/opa/aboutdol/laborday.htm#content>)



IPSI DIXIT



Police were called to the day care center where a three year old was resisting a rest. To write with a broken pencil is pointless. The short fortune teller who escaped from prison was a small medium at large. A will is a dead giveaway. A chicken crossing the road is poultry in motion. A boiled egg is hard to beat. He had a photographic memory that was never developed. When she saw her first strand of grey hair she thought she'd dye. You'll be stuck with debt if you can't budge it. Acupuncture a jab well done.

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Court of Appeals Upholds Penalty Award Against Claimant

In an unpublished opinion issued August 14, 2008, the Court of Appeals upheld an award of penalties against the claimant. In *Misty D. Case v. Industrial Claim Appeals Office, Manpower International and the Insurance Company of the State of Pennsylvania*, the claimant sought review of the order of the Industrial Claim Appeals Office (ICAO) affirming the order of the Administrative Law Judge (ALJ) imposing penalties on claimant for failing to provide releases as ordered. The court affirmed the award of penalties. The facts resulting in the award of penalties against the claimant are as follows. The claimant suffered an admitted accident. The authorized treating physician (ATP) placed her at MMI with no permanent physical impairment. The claimant requested a Division IME. The DIME doctor recommended an arthrogram of the claimant's shoulder. The ATP subsequently determined the claimant remained at MMI. Claimant then requested a change of physician. Respondents denied the request, but suggested a *Samms'* conference with the ATP. The claimant declined to participate in the *Samms'* conference and sent a letter to the ATP revoking previously provided medical releases.

The Respondents demanded the claimant provide a new release and obtained an order from an ALJ compelling the claimant to do so. The claimant did not comply with the order. In her request for reconsideration, she admitted "she did not pay much attention to it." The ALJ denied the request for reconsideration and a hearing was held on the issue of penalties for the claimant's revocation of the release and refusal to provide a new release as ordered. The ALJ found the claimant violated Rule 5-4(C), W.C.R.P. and the order to compel production of the release. The ALJ found the conduct "objectively unreasonable" and imposed penalties on an increasing scale from \$20 dollars per day up to \$100 per day. ICAO affirmed. On appeal, the claimant contended that her actions were not objectively unreasonable and the ALJ's decision was not supported by substantial evidence in the record. The claimant also argued the penalty award was excessive in relation to her income. The Court disagreed finding the claimant failed to comply with a mandatory Rule of Procedure. She could not simply opt out of the rule. Further, having requested additional treatment and a new medical provider, it was

objectively unreasonable for claimant to revoke her release, fail to provide a new release, and ignore the ALJ's Order requiring compliance with the Rule.

The court also held that penalties imposed against the claimant were not excessive. In a worker's compensation matter, the applicable test is whether the penalty is grossly disproportionate and, thus excessive under the circumstances. Once the right to impose a fine has been proven, the burden of showing that the fine is "grossly disproportionate" shifts to the party upon whom the fine has been levied. The claimant failed to present any evidence of her income. Therefore, she failed to meet her burden of showing the fine was grossly disproportionate to her income. The court further concluded the penalty was not grossly disproportionate under the Workers' Compensation Act, which permits the imposition of penalties up to \$500 per day. The penalty against the claimant was only one-fifth of that permitted under the Act. The claimant presented no evidence demonstrating the penalty exceeded a penalty imposed against a party for a similar violation.

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