

# 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

## LEGISLATIVE UPDATE

The regular session of the Colorado General Assembly adjourned May 6, 2009. Three bills amending Colorado's Workers' Compensation Act were passed. **Senate Bill 09-070** purportedly "clarifies workers' compensation procedures". The Act clarifies a provision already in 8-42-105(2), C.R.S. and provides when a claim is admitted, and involves lost time, the first installment of compensation must be paid no later than the date of the General Admission of Liability. Section two of the Act eliminates C.R.S. § 8-43-301, the statutory provision which terminates the payment of permanent total disability benefits when claimant reaches the age of 65 years. This section was only applicable in those cases where the injury occurred on and after July 1, 1991 and before July 1994. Finally, the

bill amends section 8-47-107, C.R.S., and precludes an Administrative Law Judge from hearing and deciding a provision arising under the Workers' Compensation Act in any instance where the same matter is pending before the Director.

The amendments to the Workers' Compensation Act implemented by **Senate Bill 09-168**, captioned, "Concerning Workers' Compensation Procedures," are farther reaching and have a significant impact on day-to-day claims adjusting. Section one of the bill adds C.R.S. § 8-42-107.2(3)(d) relating to the performance of Division IMEs. The new section prohibits a DIME doctor from contacting any authorized treating physician or any examining or reviewing physician, or requesting any claimant to undergo repeat testing when the test results were valid and the IME has resolved any disparity in the test results. Senate Bill 09-168 adds a **new statute of limitations to the Act** at C.R.S. § 8-42-113.5(b.5). The new paragraph provides that, except in cases of fraud, after the filing of a final admission of liability, any attempt to recover an overpayment shall be asserted within one year of the date the requestor knew of the existence of the overpayment. Fortunately, the statute does not include language indicating the statute begins to run as of the date the requestor "should have known of the overpayment". The bill amends C.R.S. § 8-43-201 to include language indicating that the party seeking to modify an issue determined by a general admission, final admission, summary or full order shall bear the burden of

proof for any such modification. This amendment effectively shifts the burden of proof to the Respondents in many instances. C.R.S. § 8-43-203 was amended to state that, if a Division IME is requested, the claimant is not required to file an application for hearing on any issue that is ripe for hearing until the DIME process is terminated *for any reason*. This amendment should actually serve to bring claims to more rapid closure. In a final amendment of note, the legislature added language to section 8-43-404, C.R.S. requiring all independent medical examinations performed at the request of the employer to be audio recorded in their entirety and retained by the examining physician until requested by any party. If requested, an exact copy of the recording shall be provided to parties. The additions and amendments to the Workers' Compensation Act incorporated by Senate Bills 09-070 and 09-168 apply to claims filed on and after August 5, 2009.

Finally, **Senate Bill 09-243** concerning payment for worker's compensation payments, has not yet been signed or vetoed by Governor Ritter. Because the bill was sent to Governor Ritter on the final day of the legislative session, he has 30 days to act upon it before it becomes law without his signature. Senate Bill 09-243 amends C.R.S. § 8-41-307(2)(b) (the statutory provision limiting mental impairment benefits to twelve weeks) including language noting that nothing in the section limits the determination of impairment for purposes

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# VICTORIES IN THE TRENCHES

## Richard A. Bovarnick

In *Isabel Chariez-Gallegos v. Five Rivers Cattle and Feeding Co. and ACE American Insurance Co.*, re: *Jose Chariez-Gallegos, Decedent*, the claimant's Motion for Summary Judgment was denied as Respondents established credible evidence that the claimant and her purported spouse were voluntarily separated and living apart. Therefore, the Respondents rebutted the statutory presumption of "widow presumed wholly dependent".

In the claim of *Shaun McKee v. Echostar Communications and ACE American Insurance Co.*, Administrative Law Judge Margot Jones agreed with Rich Bovarnick that the 30-day period to file an Application for Hearing to challenge the opinions of a Division IME begins to run from the date of the "Notice of Completion" or the "Notice of Not at MMI," not the date the Division IME report was mailed to the Respondents. ALJ Jones also agreed with Respondents that, because the issue of whether or not the Respondents overcame the DIME was not ripe, the issue of curative medical care in the form of a total knee replacement was also not ripe for determination.

In *Emma Sutton v. Select Remedy Tandem and Broadspire Services*, claimant's counsel alleged a penalty for violation of Rule 5-4(D), W.C.R.P., for Respondents' alleged failure to provide wage records. Counsel for claimant agreed to withdraw the issue, with prejudice, when Respondents' counsel pointed out that the request for wage records was sent to a non-party.

In the District Court civil action cited as *Tyresa Peltz and Rachael Peltz v. Pioneer Building Materials West*, the plaintiffs' motion to add a claim for exemplary/punitive damages was denied by the presiding Judge. Claims for punitive damages are not covered by the comprehensive general damages policy covering the plaintiffs' claims.

In *Michael Lenard v. Wal Mart Stores, Inc. and American Home Assurance*, claimant agreed to withdraw his claim, with prejudice, after receiving a copy of the in-store surveillance tape and the revised co-worker witness statements. Claimant's counsel

agreed that claimant's punching pallets of Welch's<sup>TM</sup> grape juice, resulting in a hand fracture, was an intentional act and not compensable.

In the claim of *Leenah Ali v. Footlocker, Inc. and ACE American Insurance*, after opposing counsel received the findings of Respondents' accident investigation, the claimant agreed to dismiss her claim with prejudice. Opposing counsel agreed the claimant's slip, fall, and resulting facial injuries were not compensable. The claimant fell due to side-effects of her pregnancy.

## M. Frances McCracken

In the claim of *Anthony Boyd v. Wal Mart Stores, Inc. and American Home Assurance*, claimant agreed to withdraw his application for hearing and claim for penalties for alleged violations of Rule 5-4(D), W.C.R.P. Claimant's counsel agreed the alleged penalty claim he was asserting was barred by the applicable statute of limitations.

In the District Court civil action cited as *Joan Patricia Trussel v. Dunton Hot Springs, Inc.*, Judge David Dickinson granted Defendant's Motion to Dismiss the plaintiff's complaint per Rules 41(b)(1) and 121, section 1-10(3).

## Erica A. Weber

In *Cynthia Kundig v. Mesa Airlines and ACE American Airlines*, Administrative Law Judge Bruce Friend ordered the claimant to pay penalties to the Respondents for her failure to timely produce the reports from Independent Medical Evaluations she obtained, a violation of C.R.S. § 8-43-404(2) and Rule 5-4(A)(5), W.C.R.P.

In *Gonzales v. Interstate Brands and ACE American Insurance*, at hearing, the Administrative Law Judge granted Respondents' Motion to Dismiss claimant's request for penalties for an alleged failure to timely pay benefits and mileage reimbursement. The ALJ agreed the penalty claim was barred by the applicable statute of limitations.

In the recent Industrial Claim Appeals Office decision affirming the Administrative Law Judge's Order in *Tebby McLaughlin-Kramer v. Capital Pacific Holdings and*

*ACE American Insurance*, the claimant appealed ALJ David Cain's order denying and dismissing a Petition to Reopen her claim based on a worsened condition. On appeal, the claimant asserted that the ALJ failed to consider the evidence presented. The Panel affirmed Judge Cain's Order, holding that, although the claimant disagreed with the ALJ's factual findings, there was substantial evidence in the records to uphold the determination. The Panel reiterated the longstanding principle that the mere existence in the record of some evidence that could tend to support a different result is insufficient grounds for appellate relief.

In *Salvador Flores v. Halliburton Energy Services, Inc. and ACE American Insurance*, Prehearing Administrative Law Judge Thomas DeMarino dismissed the claimant's claim for failure to comply with an Order compelling him to provide responses to Respondents' Interrogatories and Requests for Production of Documents.

In the claim cited *Craig Liggins v. Harsco Corporation and ACE American Insurance*, Administrative Law Judge Edwin Felter, Jr., denied and dismissed the claimant's claim for temporary total disability benefits, holding the claimant was responsible for the termination of his employment. ALJ Felter found the claimant engaged in insubordinate behavior and directed inappropriate language towards his supervisor, which behavior was voluntary and unprovoked. Therefore, the termination of the claimant's employment was for cause.

In *Stacy Lloyd-Skaggs v. Western Sugar, Inc. and ACE American Insurance*, the claimant appealed Administrative Law Judge Michael Harr's Order entered after remand by the Industrial Claim Appeals Office, which again found the claimant engaged in volitional acts resulting in the termination of her employment. On appeal, the claimant argued the ALJ improperly shifted the burden of proof to her. The Industrial Claim Appeals Office disagreed, adopting Respondents' position that the claimant was attempting to relitigate the judge's credibility findings. The Panel

# Court of Appeals Update

The Court of Appeals was busy these past few months issuing an unusual number of decisions in workers' compensation appeals.

In the case cited *Landeros v. Industrial Claim Appeals Office*, decided April 16, 2009, the Court of Appeals affirmed the order of the Industrial Claim Appeals Office dismissing the claimant's Petition to Reopen as untimely. At issue in *Landeros* was C.R.S. § 8-42-113, C.R.S. The claimant, who was injured in an admitted accident, was sentenced to prison in September 2002. He was in the custody of the Colorado Department of Corrections from November 2002 through February 1, 2007. In March 2006, his claim closed under the provisions of section 8-43-303, C.R.S. Section 8-42-113(1), C.R.S., provides, "Any person who would otherwise be entitled to workers' compensation benefits may not receive and is not entitled to such benefits for any week following conviction during which he or she is confined in a jail, prison, or any Department of Corrections facility. See C.R.S. § 8-42-113(1). Under C.R.S. § 8-42-113(2), when a person is released from confinement, he or she must be "restored to the same position with respect to entitlement to benefits" as he or she "would otherwise have enjoyed at the point in time of [his or her] release from confinement." Claimant contended that this provision tolls the running of the six-year period during which an administrative law judge may review and reopen an award. The court of appeals rejected that argument, concluding that nothing in either

Article 42 or 43 provides authority for tolling the limitation periods provided in section 8-43-303 while a claimant is in prison.

In the case of *Aviado v. Industrial Claim Appeals Office and Ensicon Corporation*, also decided April 16, 2009, the claimant appealed the Order of the Industrial Claim Appeals Office affirming the Administrative Law Judge's denial and dismissal of her claim for permanent total disability benefits. The claimant contended that the ALJ erred by denying permanent total disability benefits based on her refusal to undergo surgery to treat her bilateral carpal tunnel. The ALJ found the claimant's refusal to undergo the surgery unreasonable. The claimant alleged that surgery refusal is an affirmative defense that employer failed to endorse for hearing. However, the court of appeals found no reversible error, noting that the order also contained extensive evidentiary findings supporting the ALJ's additional determination that claimant had failed to meet her burden of proving she lacked the ability to earn any wages. Thus, the findings and conclusions regarding claimant's refusal to undergo surgery were neither essential nor integral to the ALJ's finding that she failed to carry her burden of proof.

The case cited *Iler v. Industrial Claim Appeals Office and Raytheon Technical Services Company*, involves an unusual request for an increase in average weekly wage. The claimant suffered an admitted injury while employed at a scientific research station in Antarctica. The claimant contended the statute provides for an in-

crease in his average weekly wage to reflect the reasonable value of the board, housing or lodging provided by the employer. The claimant argued that the ALJ erred in holding that the absence of comparable market forces in Antarctica precluded him from proving a reasonable sum to support an increase in his average weekly wage based on the replacement value of room and board. The court of appeals agreed and remanded for a determination of the value of the room and board provided by employer.

In *Khuhndog, Inc. v. Industrial Claim Appeals Office*, the Director of the Division of Workers' Compensation on his own motion issued the employer a notice to show compliance with the Workers' Compensation Act. The notice indicated that after 20-days, the Director would issue an order finding whether the employer was subject to fines or other sanctions for violations of the Act. After 20 days, the employer had failed to respond and the Director, relying solely on the information in the Division's file, imposed a fine of \$22,400. The employer objected arguing it never received the notice to show compliance and was deprived of due process because it was denied a hearing on the issue. The Panel upheld the fine. The court of appeals concluded that the procedure utilized by the Division of Workers' Compensation did not violate employer's due process rights, and therefore affirmed. The court did not address the lack of notice argument, but reasoned that the employer's failure to timely request a prehearing conference prevented it from now arguing it was deprived of a hearing. The court concluded that it is reasonable to condition the occurrence of an administrative hearing on an employer's timely request to participate in a prehearing conference. Because the prehearing conference provides an opportunity to speedily resolve or simplify issues, as well as resolve discovery matters and evidentiary disputes, it also provides an opportunity to determine whether any factual issues are in dispute and, thus, a need for an evidentiary hearing.

## WELCOME ANGELIA!

The firm is pleased to welcome Angelia Maria K. Champoux as an associate in the Denver office. In 2002, Angelia obtained a Bachelor of Arts degree in political science from Creighton University in Omaha, Nebraska. The same year, she was commissioned as a Second Lieutenant in the United States Army, where she still serves as a United States Army Reserve Judge Advocate General Officer in the 87<sup>th</sup> Legal Support Organization. Angelia obtained

her *juris* doctor degree from the University of Denver in 2005. In 2006, she was awarded a Master of Laws in Taxation, also from the University of Denver. Prior to her association with Clifton, Mueller & Bovarnick, Ms. Champoux was an associate attorney at Harris, Karstaedt, Jamison & Powers, where she defended civil liability actions. Please join us in welcoming Angelia.

Please see COURT on page 4

## Practice Pointer

## Division IMEs—To Challenge or Not To Challenge

By M. Frances McCracken

We have all received DIME reports in which we are sure the permanent impairment rating must be a typographical error, containing one too many digits. While it is true that the opinions of a Division IME must be overcome by clear and convincing evidence, many of those DIME reports that make the heart sink and the stomach churn should be challenged. When deciding whether to challenge a DIME certain factors should be considered. A Division IME is only binding by clear and convincing evidence on the issues of MMI, whole person impairment, and causation. The opinion of a Division IME is not entitled to any additional weight in cases involving scheduled impairment. The opinion of a Division IME is not entitled to any special weight on the issue of medical treatment

post-MMI. When deciding whether to apply to overcome the DIME's opinions on the issues of MMI and whole person impairment, look for obvious red flags in the doctor's opinion. Does it appear that the rating complies with the *AMA Guides*? Is there an indication that the validity criteria are met? Does the DIME rate the claimant's impairment using the same Tables in the *Guides* as the authorized physician used to rate impairment? Even if the doctor suggests the range of motion measurements are "valid," is the impairment supported by objective findings? Is the DIME doctor's diagnosis reasonably consistent with the Medical Treatment Guidelines? Do the DIME doctor's opinions make logical sense? For example, does the rating appear to assign duplicate impairment -

rating for both loss of strength and loss of range of motion? Does the DIME assign impairment based on valid ROM, despite noting apparent poor effort? Does the DIME assign an extremely high impairment rating, but impose no work restrictions? These are all red flags, which suggest the DIME might be incorrect and subject to challenge. Finally, remember, once a party has carried the initial burden of overcoming any part of the DIME's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. If you have any questions about the DIME process or overcoming a Division IME, contact any of the attorneys at Clifton, Mueller & Bovarnick.

### COURT OF APPEALS UPDATE

Continued from page 3

In *Simpson v. Industrial Claim Appeals Office and Benchmark/Elite*, the Court of Appeals affirmed, in part and set aside in part, the order of the Industrial Claim Appeals Office holding that the Respondents had overpaid benefits to the claimant and were entitled to a credit for the overpayment. The claimant was injured in an April 2000 accident and received admitted TTD and later PTD benefits. The initial carrier went bankrupt and Colorado Insurance Guaranty Association took over the claim. The Respondents later discovered benefits had been overpaid, apparently when duplicate payments were made by the two insuring entities. Claimant applied for a lump sum award. The insurer credited the lump sum against the overpayment. Claimant objected, argued his average weekly wage was incorrect, and requested penalties. Following hearing, the ALJ concluded there had been an overpayment, approved the offset and denied the penalties. The Industrial Claim Appeals Office affirmed the ALJ's findings. On appeal, the court held Sections 8-43-303(1) and (2)(a), C.R.S. permit reopening of a

worker's compensation award on grounds of "overpayment." Therefore, employer and current insurer were entitled to credit for overpayment of claimant's benefits. Under *Avalanche Industries v. Clark*, 198 P.3d 589 (Colo. 2008), a worker's compensation claimant is entitled to have his permanent total disability benefits capped at ninety-one percent of the state AWW that was in effect at "the time of his disablement." The court found that, contrary to claimant's contention, the issue is one of fact that the ALJ must determine, because claimant could have become disabled at the time of his initial accident, *or at some point thereafter*, depending on the facts and circumstances. Accordingly, the court

of appeals affirmed ICAO's findings on the issue of the overpayment and the repayment schedule, but remanded for the ALJ to determine the time of claimant's disablement under *Avalanche Industries*, and the state AWW that was in effect at the time the ALJ determines the claimant became disabled.

### LEGISLATIVE UPDATE

Continued from page 1

of establishing the applicable cap on benefits. The bill also amends sections 8-42-107 and 8-42-107.5 to make it clear that, for the purposes of calculating a claimant's impairment rating to determine the applicable cap for benefits, any mental impairment rating shall be combined with the claimant's physical impairment rating. The bill includes other amendments and new statutory provisions relating to payments under the fee schedule and when medical treatment is deemed authorized. If the governor does not veto this bill, it will become effective, and shall apply to injuries occurring on and after July 1, 2009.



# VICTORIES IN THE TRENCHES

Continued from page 2

determined there was substantial evidence in the record to uphold the ALJ's finding that the claimant was responsible for the termination of her employment when she elected to be absent from work at least six times in her first 24 days of employment, in violation of the company's probationary employment policy.

In the claim of *Bruce Middleton v. Bimbo Bakeries, Inc. and ACE American Insurance*, Administrative Law Judge Margot Jones denied and dismissed the claimant's request for temporary total disability benefits, holding the claimant was responsible for the termination of his employment. ALJ Jones held the Respondents established that the claimant's volitional behavior of refusing to report medically authorized breaks from the work floor to a supervisor, despite being instructed to do so multiple times, was the reason the claimant was terminated and thus was the cause of his wage loss.

**Holly M. Barrett**

In *Rickie Maestas v. Wal Mart Stores, Inc. and American Home Assurance*, Administrative Law Judge Donald E. Walsh granted Respondents' Motion for Summary Judgment and denied and dismissed the claimant's claim for benefits. In support of their Motion for Summary Judgment, Respondents submitted a medical report from the authorized treating physician, which was received after the General Admission of Liability was filed. The report stated that the claimant's symptoms developed approximately two weeks prior

to her alleged work related injury. The ATP also opined that the symptoms that the claimant reported to the emergency room physicians as work related were, in fact, pre-existing and unrelated to her work activities. Based on the documentary evidence submitted in support of the Respondents' Motion, ALJ Walsh specifically found the claimant did not sustain a compensable work-related injury to her shoulder as she alleged.



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# IPSI DIXIT



Why do croutons come in airtight packages? Aren't they just stale bread to begin with?

If people from Poland are called Poles, then why aren't people from Holland called Holes?

If Fed Ex and UPS were to merge, would they call it Fed UP?

What hair color do they put on the driver's licenses of bald men?

Is it true that you never really learn to swear until you learn to drive?

Why do they put pictures of criminals up in the Post Office? What are we supposed to do, write to them? Why don't they put their pictures on postage stamps so the mail carriers can look for them while they deliver the mail?

Now that tax time has come and gone, have you noticed, when you put the words "The" and "IRS" together, it spells "THEIRS"?

*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.*

## MEDICARE ALERT

On April 3, 2009, CMS posted a memo announcing, as of **June 1, 2009**, it would begin independently pricing prescription medications for any file received on or after that date. According to the memo, CMS pricing will be based on average wholesale pricing. No other pricing, discounting, or calculation methods will be recognized in determining the adequacy of prescription drug amounts in Medicare Set Aside proposals.

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