

DEFENSE TALK

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CLIFTON, MUELLER & BOVARNICK, P.C.

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ATTORNEYS AT LAW

2009

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

Industrial Claim Appeals Office Update

The cases summarized here are only a selection of the cases decided by the Industrial Claim Appeals Office. In these summaries, AH=application for hearing; ALJ=adminstrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; MMI=maximum medical improvement; MUR=Medical Utilization Review; PPD=permanent partial disability; TTD=temporary total disability.

Authorized Medical Treatment

ICAO affirmed ALJ Cain's order requiring respondents to pay for home health services, even though there was no request for prior authorization. Held: respondents are liable for authorized medical treatment that is reasonable and necessary to cure and

relieve the effects of the industrial injury. The purpose of prior authorization under W.C. Rule of Procedure 16-9 is to facilitate a determination of reasonableness of treatment in advance of the treatment. Here there was a valid referral for home health services by an ATP. The failure of the physician to comply with Rule 16-9 does not bar claimant from obtaining an order requiring respondents to pay for treatment. *Farber v. Washington Inventory Service*, W.C. No. 4-615-836 (ICAO June 11, 2009)

ICAO affirmed ALJ Cannici's order that right to select a treating physician passed to the claimant when the respondents failed to designate a physician willing to treat the claimant's worsened condition upon her

filing a petition to reopen her claim. *Caraveo v. David J. Joseph Co.*, W.C. No. 4-358-465 (ICAO June 8, 2009)

Death Benefits

ICAO affirmed ALJ Cannici's order finding respondents had overcome the presumption that claimant was wholly dependent on the decedent by proving that claimant and the decedent were voluntarily separated and living apart at the time of his death. The ALJ awarded claimant only a portion of the decedent's PPD benefits. Held: dependency status and amount of benefits are fixed at time of death, not time of injury. *Stephen Nilsen (deceased) and*

Please see ICAO on page 2

Proposed Rules on Recordings of IMEs

In the April-May issue of *Defense Talk*, we reported on an amendment to C.R.S. § 8-43-404(2), that requires 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. The Department of Labor and Employment has proposed rules to implement the statute, which will apply to claims filed on or after August 5, 2009. A hearing was held on the proposed rules July 15, 2009.

The proposed rules require the employer or insurer to ensure that the examining physician is aware of the recording requirement. The Division of Workers' Compensation will issue a form that must be signed by the

claimant before the examination can take place, and the examining physician must verbally notify the claimant that the examination will be audio recorded. Failure of the claimant to sign the form constitutes refusal to submit to the examination.

The proposed rules also cover how much the physician may charge for making the recording and for each copy, who may request copies, when copies may be requested, and who must pay if the recording is inaudible. The claimant is given the opportunity to allege that the recording contains medical information that is not relevant to the workers' compensation claim and should remain confidential. The proposed rules set forth detailed procedures that must be followed if the claimant raises an allegation of confidentiality.

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ICAO Update*Continued from page 1*

Linda Teter (spouse), W.C. No. 4-711-855 (ICAO July 1, 2009)

DIMES

ICAO affirmed ALJ Cannici's order that claimant, who countered DIME physician's determination of MMI with the report of a physician who recommended further testing, had failed to produce clear and convincing evidence to overcome the DIME physician's opinion. **Garcia v. Industrial Welding & Supply Co.**, W.C. No. 4-691-723 (ICAO July 2, 2009)

ICAO affirmed ALJ Stuber's order denying a claim for additional PPD. The DIME physician's rating on the DIME Examiner's Summary Sheet, based on the AMA Guides, was significantly higher than he believed appropriate. He stated his disagreement with the range of motion measurement in a letter to the Director that he sent with the Summary Sheet and in his deposition. The ALJ found that the DIME physician's rating was the lower rating stated in his letter and deposition and that the claimant had failed to overcome the rating by clear and convincing evidence. Both questions were issues of fact for the ALJ, so ICAO had no basis to set aside the ALJ's order. **Riffle v. Current USA**, W.C. No. 4-753-985 (ICAO June 19, 2009)

ICAO affirmed ALJ Cannici's order finding that claimant failed to overcome the DIME physician's opinion on MMI. The ATP and DIME physician stated that claimant had reached MMI in January 2006 with no impairment or work restrictions. The DIME also stated that claimant did not require medical maintenance. Claimant testified that physical therapy after January 2006 relieved her lower back symptoms. Held: question of whether claimant has overcome DIME by clear and convincing evidence is one of fact for ALJ's determination. ALJ's determination is supported by substantial evidence, so ICAO had no reason to disturb the determination on appeal. **Manchego v. Residence Inn by Marriott, Inc.**, W.C. No. 4-705-137 (ICAO June 17, 2009)

Issue and Claim Preclusion

ICAO affirmed ALJ Krumreich's order

partially granting respondents' motion for summary judgment on the issue of AWW. ALJ Jones had previously issued an order determining AWW. Claimant sought to have AWW recomputed based on an earlier, and higher paying, period of employment for the respondent employer. ALJ Krumreich denied claimant's attempts to re-litigate AWW based upon her earnings for the employer prior to the injury. However, ALJ Krumreich permitted claimant to litigate an increase to her AWW based on the loss of employer's health insurance coverage, which had not previously been litigated. ICAO agreed that the doctrine of issue preclusion barred re-litigation of AWW but not litigation of the new issue of increasing AWW by the cost of continuing employer's health insurance. **Villa v. Lepirino Foods**, W.C. No. 4-735-985 (ICAO July 10, 2009)

ICAO affirmed ALJ Cannici's order determining that claimant's claims were barred by the doctrine of claim preclusion. Claimant had filed three claims against the employer alleging an injury and two occupational diseases. After a hearing on one of the occupational disease claims, ALJ Broniak awarded benefits for claimant's elbow condition but concluded that she had not sustained an injury or occupational disease to her shoulder or cervical spine. When claimant subsequently set for hearing her claims alleging an injury and an occupational disease to her cervical spine, ALJ Cannici dismissed the claims. Claimant raised five arguments before ICAO, but ICAO was not persuaded that ALJ Cannici had committed reversible error. **Sandoval v. Cargill Meat Solutions**, W.C. Nos. 4-730-533 & 4-729-809 (ICAO July 9, 2009)

MUR

ICAO affirmed ALJ Stuber's order denying claimant's request for attorney fees. The MUR committee found that the care of the ATP was not reasonably appropriate, and the Director ordered a change of provider. After a hearing ALJ Krumreich found that the claimant had failed to overcome, by clear and convincing evidence, the MUR panel's findings and the Director's order. While claimant's appeal of the MUR order was pending, respondents attempted to have a new ATP designated.

The parties did not reach agreement on a new provider, and the Director could only find one physician willing to treat claimant. Respondents agreed to that provider and set an appointment. When the claimant did not complete the new-patient paperwork and told the new ATP's office staff that he did not wish to switch physicians, that physician also declined to accept claimant as a patient. The Director would not provide an additional list of physicians because the MUR process was closed. Respondents set the case for hearing "so that when all appeals are exhausted ... a new ATP will be ready to resume care. Respondents are seeking order from ALJ regarding new ATP." Claimant requested attorney fees on the grounds that the issue was not ripe for hearing. Held: the prohibition in § 8-43-501(2)(e), against requesting a hearing on certain medical issues until the MUR proceedings are final, did not prohibit respondents' AH while an appeal was still pending. The ALJ found there were issues about whether the new ATP declined to treat for a non-medical reason and whether claimant had exercised his right to remain under the care of the old ATP and face the possibility he might be liable for medical costs during the appeal period. Therefore issues regarding a new ATP were ripe for adjudication, and the ALJ did not err in denying the request for attorney fees. **Franz v. Brookharts, Inc.**, W.C. No. 3-966-319 (ICAO June 29, 2009)

Penalties

ICAO affirmed ALJ Cain's denial of penalties against the insurer for its alleged failure to respond to a request for prior authorization for medical treatment within seven business days of receipt of the provider's "completed request." The ALJ found that the claimant failed to prove when the insurer received the letter recommending vocational rehabilitation. He also concluded that the letter did not constitute a "complete" request for prior authorization as required by W.C. Rule of Procedure 16-9(E). Furthermore, since the insurer did not violate Rule 16-9, the request for vocational rehabilitation was not "deemed authorized." **Farber v. Washington Inventory Service**, W.C. No. 4-615-836 (ICAO June 11, 2009)

ICAO Update*Continued from page 2***Reopening**

ICAO affirmed ALJ Stuber's order granting claimant's petition to reopen and ordering respondents to pay TTD benefits. The ATP placed claimant at MMI and assigned an impairment rating, and respondents filed a FAL. Less than three months later, claimant filed a petition to reopen based on error or mistake. However at hearing claimant clarified that the petition to reopen was based on change of condition. Claimant had returned to work after MMI and began to experience increased instability, pain, and swelling in his ankle. The ATP said claimant had nonunion of the fracture and incomplete union of the allograft and that claimant was no longer at MMI. The ALJ found that claimant's condition had worsened as a natural consequence of the incomplete healing of the work injury. Held: reopening is within the discretion of the ALJ and is binding on appeal in the absence of fraud or clear

abuse of discretion. *Wix v. Pro Drivers, Burkhart v. First Transit Transportation*, W.C. No. 4-662-476 (ICAO June 17, 2009)

Responsibility for Termination of Employment

ICAO affirmed ALJ Stuber's order requiring respondents to pay TTD benefits when the ATP increased claimant's work restrictions two weeks after claimant's resignation. Held: whether claimant's condition has worsened and whether claimant's wage loss is caused by the worsened condition or the termination for which she is responsible are questions of fact for the ALJ. Claimant must show that the additional restrictions caused a limitation on her earning capacity. When the ALJ finds that after claimant's resignation her condition worsened resulting in increased work restrictions, his determination must be upheld if supported by substantial evidence.

Right to Defend

ICAO affirmed ALJ Cannici's order denying claimant's request for workers' compensation benefits. Claimant took the position that the ALJ should not have considered the report of respondents' IME physician, arguing that respondents were not entitled to a non-DIME IME when compensability was contested. Held: respondents retain the right to obtain an IME outside the DIME process even when they contest compensability. ICAO recognized respondents' right to defend a claim of compensability with an expert of their choosing. *Black v. Homestead Village*, W.C. No. 4-732-596 (ICAO July 6, 2009)

The orders summarized here are on file with the editor. If you would like a copy of any order, contact Diane Murley at dmurley@cmb-pc.com or 970-255-8852.

VICTORIES IN THE TRENCHES**James R. Clifton & Diane K. Murley**

In *Robert Shelton v. Halliburton Energy Services, Inc. and Ace USA/ESIS*, claimant filed a petition to review the ALJ's computations of average weekly wage and temporary partial disability benefits. After both parties submitted briefs, the ALJ issued a supplemental order correcting some minor mathematical errors. The ALJ did not accept claimant's arguments that vacation pay and medical leave of absence pay should not have been included in his post-injury earnings, which would have resulted in a much higher TPD rate. Jim tried the case and Diane wrote the brief in opposition to claimant's petition to review.

In *Dora Belanger v. Caterig, Inc.*, Jim successfully defended the employer at hearing in an unemployment compensation claim that is a companion claim to a pending workers' compensation claim. The hearing officer agreed that claimant's responsibility for termination barred her entitlement to unemployment benefits.

Richard A. Bovarnick

In *Shaun McKee v. Echostar Communica-*

tions Corp. and Indemnity Insurance Company of North America, ALJ Jones issued a corrected order imposing a penalty of \$1 per day for the accidental termination of TTD. She reduced the penalty from \$100 per day to \$1 per day, accepting Rich's argument that the violation was not reprehensible, but an error, and the claimant had presented no credible or persuasive evidence that he was injured by the adjuster's mistake.

In *Teresa Bianchi v. Wal Mart Stores, Inc., and American Home Assurance*, PALJ Fitzgerald agreed with respondents and ordered the claimant to attend a follow-up medical appointment at the authorized treating provider over the objections of claimant's attorney. Judge Fitzgerald denied claimant's request that respondents be required to schedule and pay for a follow-up appointment with another physician chosen by claimant.

Royce W. Mueller

In *Anthony Dejoy v. The Shaw Group*, the Industrial Claim Appeals Office affirmed ALJ Walsh's order denying claimant's

claim for additional TTD benefits. The ALJ and ICAO accepted Royce's position that claimant failed to prove he was entitled to TTD benefits beyond those admitted, despite the DIME physician's opinion that claimant was not physically fit to return to work, because the authorized treating physician had returned claimant to work.

M. Frances McCracken

In *Anthony Boyd v. Wal Mart Stores, Inc. and American Home Assurance*, ALJ Harr granted Fran's Motion to Hold Payment of Disfigurement Award in Abeyance. On May 29, 2009, the claimant was awarded \$1,600 in disfigurement benefits. Previously in the year, ALJ Jones had granted the respondents' Petition to Modify, Terminate or Suspend Benefits. However, because claimant appealed ALJ Jones's order, respondents were required to continue paying TTD benefits, running up a significant overpayment. ALJ Harr's order permits respondents to hold the disfigurement payment until the ICAO rules on the appeal of ALJ Jones's order, and to credit

Please see VICTORIES on page 5

Practice Pointer

Recorded Interviews

By Royce W. Mueller

When performed correctly, a recorded interview can be a very effective tool in claim investigation. A recorded interview forces the claimant to commit to certain facts with respect to the mechanism of injury and the injuries that were sustained. While the transcript of the statements made during a recorded interview are most likely not admissible at hearing or trial, they can be used to impeach a claimant's testimony.

Many insurance professionals find it useful to follow a prepared guide or checklist with respect to questions to ask during the interview. Your checklist should include, at a minimum, questions about the following: date and time of injury; detailed description of how injury happened; physical location where injury happened; full names of witnesses to injury; conversations with witnesses/employer representatives immediately after the incident; all body parts injured; full names of health care providers who have treated or examined claimant; whether claimant sustained any previous injury to same body part, and if so, full names of all treating healthcare providers.

Your checklist should be tailored to fit the facts of each particular case. For example,

if you suspect a safety rule violation, you will want to ask detailed questions that address the issue.

Federal law permits the recording of phone calls with the consent of at least one party to the call. Thirty-eight states (including Colorado), and the District of Columbia, permit individuals to record conversations to which they are a party without informing the other parties that they are doing so. These laws are referred to as "one-party consent" statutes, and as long as you are a party to the conversation, it is legal for you to record it.

Twelve states require consent of all parties to a conversation before it can be recorded. Those are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington.

At the beginning of the interview, the insurance professional should confirm that the claimant is not represented by counsel. If claimant is represented, the conversation must end, and permission for the recorded interview should be requested from claimant's attorney.

We recommend the insurance professional ask the claimant to confirm her awareness that the telephone interview is being recorded, and that the claimant gives express permission to do so. These confirmations should be made while the tape is running. At the end of the interview, it is wise to confirm once again that the claimant understands the interview was recorded, and that permission was given.

Of course, the recorded interview is worthless if it is not saved and transcribed. We recommend prompt transcription by a professional. A copy of the interview should be provided to claimant upon request.

Finally, it is almost always illegal to record a conversation to which you are not a party, do not have consent to tape, and could not naturally overhear. This is known as wiretapping, and it's a felony in Colorado. See C.R.S. § 18-9-903.

A good recorded interview can greatly assist with claim investigation, as well as legal defense in the event the claim proceeds that far. Please contact the attorneys of Clifton, Mueller & Bovarnick, P.C., with questions or comments about taking recorded interviews.



TECH TIPS



Google

This month we introduce a new column to *Defense Talk*. In the Tech Tips column, we plan to share tricks we have learned for using technology more productively. We begin with that popular search engine, Google, and tell you about some shortcuts and features that you may not know.

Search examples are enclosed in [square brackets]. Don't include the brackets in your search.

- To find a **definition**, rather than just any mention of your search term, put the word "define" followed by a colon at the beginning of your search. For example, a

search for [define: "reflex sympathetic dystrophy"] will retrieve definitions of "reflex sympathetic dystrophy."

- Enter an **address**, including zip code or city and state, in the search box, and your top search result will be a Google map. For example, if you search for [200 Grand Ave., Grand Junction, CO], your results page will begin with a Google map of the area around the Grand Junction office of Clifton, Mueller & Bovarnick, P.C.

- Include a city or zip code in your search to retrieve **local results**. If you search for [80203 coffee], your results page will begin with a Google map dis-

playing coffee shops near our Denver office. For local weather information, search for "weather" followed by the city or zip code, e.g., [weather Denver, CO].

- Search for a telephone **area code** to find a map of the region included within the area code. For example, the search results for [719] will begin with a map of the area codes for Colorado. Searching for an entire telephone number sometimes works to identify the source of harassing or fraudulent calls.

If you would like to suggest a topic for Tech Tips, send it to the editor at dmurley@cmb-pc.com.

VICTORIES IN THE TRENCHES

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the overpayment against the disfigurement award if the ICAO affirms the order granting the Petition to Terminate.

In *Donna Nelson v. Wal Mart Stores, Inc. and American Home Assurance*, ALJ Purdie granted Fran's Motion to Strike Objection to Final Admission of Liability and Notice and Proposal to Select Division IME. Claimant had failed to advise respondents and the Division of her change of address and, even after a copy of the final admission was hand-delivered, had failed to object within 30 days.

Erica A. Weber

In *Paula Rhoads Hook v. U.S. Home Corporation, et al.*, a Colorado District Court case in which the plaintiff sued twelve defendants alleging seven torts for a series of events that allegedly occurred beginning on January 13, 2000, Erica represented three of the defendants. Erica succeeded in having all claims against her clients dismissed with prejudice for failure to state a claim.

In *Kent M. Lockhart v. Tetra Technologies and Ace American Insurance Co.*, the Industrial Claim Appeals Office affirmed ALJ Felter's order holding that respondents had overcome the DIME physician's opinion that claimant had not reached maximum medical improvement from his industrial injury. The ALJ had determined in a previous hearing that claimant had failed to prove that his shoulder problems after a temporary aggravation were work-related. Claimant later obtained a DIME physician's opinion that his ongoing shoulder problems were related to his industrial injury and that he had not reached MMI. The ALJ and ICAO accepted Erica's arguments that the DIME physician's opinion on causality was clearly erroneous and that the doctrine of issue preclusion barred re-litigation of the issue of whether claimant's need for continuing medical treatment for his shoulder problems was work-related.

In *Edward Mussaw v. Bimbo Bakeries*, ALJ Friend denied and dismissed claimant's claim for compensation for an asserted occupational disease (weakness and atrophy of his left shoulder) because claimant failed to present evidence that the medical condition was caused by the work activities. Judge Friend found incredible

two physician reports stating causal relatedness because they contained inaccurate diagnoses for the complaints. Judge Friend then found that the reports of the two physicians who credibly diagnosed the cervical radiculopathy contained no opinion on causation. Therefore claimant failed to meet his burden of proof.

In Other News...



At 1:16 p.m. on Monday, July 20, 2009, Jim Clifton became a grandfather for the first time. Andrew James Clifton weighed 9 lbs. 14 oz. and was born to Jim's son Ian and his wife Allison.

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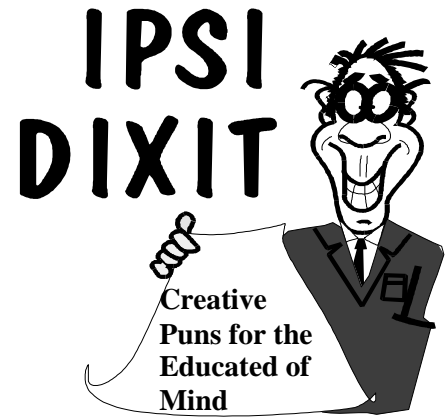
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Note: Summaries and articles should not be relied upon as authority for a particular case. Consult your attorney for advice on the application of all the law to the specific facts of your case or legal problem.



Jim Clifton loves puns. Here are some of the puns a friend recently sent to Jim.

The roundest knight at King Arthur's round table was Sir Cumference. He acquired his size from too much pi.

I thought I saw an eye doctor on an Alaskan island, but it turned out to be an optical Aleutian.

She was only a whiskey maker, but he loved her still.

A grenade thrown into a kitchen in France would result in Linoleum Blownpart.

Two silk worms had a race. They ended up in a tie.

Two hats were hanging on a hat rack in the hallway. One hat said to the other, "You stay here; I'll go on a head."

A chicken crossing the road is poultry in motion.

The short fortune-teller who escaped from prison was a small medium at large.

The man who survived mustard gas and pepper spray is now a seasoned veteran.

Sports News

On July 10, 2009, Clifton, Mueller & Bovarnick, P.C., went bowling for its annual summer outing. Royce Mueller's team (Royce, Holly, Erica, Angelia, and Bea) edged out the teams of Rich Bovarnick (Rich, Marie, Tara, Karen, and Fran) and Jim Clifton (Jim, Kathy, Diane, John, and Judy) with the highest team score. Tara had the individual high score. Although some of the bowlers showed talent, none of them threatened to give up their day jobs.



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