

DEFENSE TALK

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ATTORNEYS AT LAW

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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

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, Act=Colorado Workers' Compensation Act; ALJ=administrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; PPD=permanent partial disability; PTD=permanent total disability; TTD=temporary total disability; WCRP=Colorado Workers' Compensation Rules of Procedure.

Burden of Proof

ICAO affirmed ALJ Mottram's order denying claimant's claim for benefits regarding her left shoulder. Claimant had an admitted injury to her right upper extremity based on "repetitive trauma." She later developed left shoulder symptoms that she attributed to the employer's changing her work station by moving her phone, mouse and other amenities from her right side to her left side after she developed problems with her right shoulder. The ALJ determined that claimant failed to carry her burden to establish a compensable injury. ICAO held that the ALJ's findings were supported by the record and, therefore, binding on review. *Ince v. HCA Patient Account Services Center*, W.C. No. 4-697-764 (ICAO Oct. 6, 2009)

Causation

ICAO affirmed ALJ Friend's order determining that claimant sustained a compensable injury and ordering respondents to pay benefits. The claimant testified that

after working a full day she went to a restaurant and first noticed pain when she pulled out a bar chair. Respondents argued that the ALJ was compelled by the evidence to find that claimant's injury occurred in the restaurant. Held: ICAO must uphold the ALJ's factual findings if they are supported by substantial evidence, and there was substantial evidence to support the ALJ's findings in this case. *Burry v. ARPC Service Source*, W.C. No. 4-778-444 (ICAO Oct. 2, 2009)

ICAO affirmed ALJ Cannici's order determining that claimant sustained a compensable injury. Claimant testified that when she stepped onto the first step of her bus she felt a pop in her left knee. Respondents argued that the injury was precipitated by claimant's pre-existing left knee condition, and the bus steps were not a special hazard of employment because steps are a "ubiquitous condition." Held: When a claimant experiences symptoms while at work it is for the ALJ to determine whether the need for treatment was caused by an industrial aggravation of a preexisting condition or by the natural progression of the preexisting condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO Oct. 2, 2009)

DIMES

ICAO affirmed ALJ Henk's order denying claimant's claim for PTD and additional medical benefits. The ALJ found that claimant had failed to overcome the DIME physician's opinion that her current conditions and need for treatment were not causally related to the admitted work-related injury. ICAO held that when the issue of causation involves an inquiry into the relat-

edness of particular components of a claimant's overall impairment, the opinions of the DIME physician carry presumptive effect. *Martinez v. Senior Resource Center*, W.C. 4-748-216 (ICAO Oct. 14, 2009)

Disfigurement

ICAO affirmed ALJ Krumreich's order awarding benefits for permanent impairment of the hand and for disfigurement. Claimant sustained an admitted injury in which portions of two fingers on his hand were severed. ICAO affirmed the ALJ's award of disfigurement benefits of more than \$4,000 under the statute allowing a higher award for "stumps due to loss or partial loss of limbs." *Lewis v. Glen Lefler d/b/a Skyline Sod*, W.C. No. 4-759-309 (ICAO Oct. 6, 2009)

Occupational Disease

ICAO affirmed ALJ Mottram's order that required Hartford to pay for medical treatment of claimant's occupational disease. Hartford argued that Zurich should be liable for medical expenses incurred while Zurich was the employer's workers' compensation carrier. The ALJ found that the worsening of claimant's symptoms was a natural progression of her occupational disease, which had a date of onset within Hartford's coverage period, and that there was no substantial permanent aggravation within Zurich's coverage period. Held: the insurer "on the risk" for treatment of an occupational disease is the last insurer during whose coverage period the conditions of employment caused, aggravated, or

Please see ICAO on page 4

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Practice Pointer

Deadlines to Watch Out For

By Diane K. Murley

The Colorado Workers' Compensation Act (the Act) and Rules of Procedure (WCRP) are full of deadlines that require quick responses from adjusters. Failure to meet these short deadlines can result in the loss of respondents' right to dispute an issue or the award of penalties against respondents. Here are some deadlines to watch out for:

Penalties generally

The general penalty provision of the Act is § 8-43-304, which provides for a fine of "not more than five hundred dollars per day" for violating any provision of the Act; doing any act prohibited by the Act; failing to perform any duty lawfully mandated within the time prescribed by the director or panel; or failing to obey a lawful order of the director or panel. Penalties have been imposed under this provision for:

- failure to file an employer's first report of injury within 10 days after notice of a compensable injury for which compensation and benefits are payable or immediately if the employee is fatally injured;
- failure to pay disability benefits due as of the date of the admission so that the claimant receives the benefits not later than 5 calendar days after the date of the admission;
- failure to pay periodic disability benefits at least once every two weeks, even when the delay is caused by a computer error;
- failure to provide copies of medical records to the claimant or claimant's attorney within 15 working days of receipt;
- unreasonable delay in responding to a prior authorization request for surgery;
- failure to file a final admission of liability within 30 days after a determination of medical impairment by an authorized Level II accredited physician; and
- failure to file an admission of liability or request a hearing within 30 days of the DIME physician's report.

Penalties for failure to admit or deny within 20 days

The Act requires the insurer or self-insured employer to file an admission of liability or

notice of contest within 20 days of notification of a compensable injury. A copy of the admission or notice of contest must be sent to the claimant at the same time. Failure to meet this deadline can result in a penalty of "up to one day's compensation for each day's failure to so notify." Section 8-43-203(2), C.R.S.

Penalties for failure to pay within 30 days

Benefits must be paid within thirty days of the date an order for benefits becomes final, after all appeals have been exhausted



or when no appeals are filed. The penalty for willfully delaying payments is 8% for delay of payment of medical benefits and 10% for withholding permanent partial disability benefits. The penalty is paid to the Division of Workers' Compensation. Section 8-43-401(2)(a), C.R.S.

Loss of control of medical

In addition to the penalties discussed above, respondents can lose the right to contest an issue if certain deadlines are

missed.

If the employer does not give the claimant a list of two designated providers at the time of injury, the employee has the right to select the authorized physician or chiropractor. Even if a claimant does not want to seek treatment at the time of the injury, the employer should give the designated provider form to the claimant. Section 8-43-404(5)(a)(I)(A), C.R.S.

If a claimant makes a written request to change physicians, the insurer or employer must respond in writing within 20 days or it will be deemed to have waived any objection to the employee's request. Section 8-43-404(5)(a)(VI), C.R.S.

If a healthcare provider requests prior authorization of treatment, the payer (insurer, employer, or designated agent) must respond within 7 business days from receipt of the provider's completed request. Failure to timely comply in full with the requirements of Rule 16-10(A) or (B), is deemed authorization for payment of the requested treatment.

Responding to an application for hearing

When an application for hearing and notice to set is filed, a response to the application or a notice of entry of appearance must be filed *before* the date of the setting. If neither a response nor an entry of appearance is filed before the date of setting, the hearing date does not have to be cleared with your attorney's calendar, and respondents will be barred from raising issues or calling witnesses except by agreement of the parties or with permission of the court.

Although most claimant's attorneys will agree to a late response to application for hearing in most cases, we recommend sending the application for hearing to your attorneys as soon as you receive it, so they can enter their appearance and protect respondents' rights at hearing.

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

Richard A. Bovarnick

In *Solok v. Wal-Mart Stores, Inc.*, ICAO affirmed the ALJ's refusal to permit a change of physicians. Rich successfully argued that claimant's alleged distrust of the quality of the ATP's care did not justify a change to a doctor of the claimant's choosing. ICAO also upheld the ALJ's decision that any ATP is authorized to determine the date of maximum medical improvement.

M. Frances McCracken

In *Colorado Insurance Guaranty Association v. Rykaart*, the workers' compensation carrier (CIGA) obtained a default judgment on its subrogation claim of more than \$420,000 against the tortfeasor (Rykaart). It then filed a writ of garnishment on Rykaart's excess carrier, Philadelphia Insurance Company (PIC). PIC filed a motion for dismissal of the writ of garnishment on the grounds that PIC had not received sufficient notice of the service of process on Rykaart. Fran argued successfully that PIC had received sufficient notice of the service on Rykaart when its attorney received a series of emails from CIGA's former attorney; that CIGA was

not bound by the notification provision's of PIC's policy; and that PIC had consented to receiving notice by email when its attorney responded to an email with "if you effect service ... please notify me." The District Court denied PIC's motion to dismiss the writ of garnishment.

In *Johnson v. Wal-Mart Stores, Inc.*, ALJ Stuber granted respondents' motion to strike claimant's application for hearing. Fran successfully argued that claimant had failed to show good cause to keep her claim open, because she failed to file an application for hearing for more than two years after her last application was stricken and more than three years after the final admission of liability was filed.

Erica A. Weber

In *Mussaw v. Bimbo Bakeries*, ICAO affirmed the ALJ's denial and dismissal of the worker's claim for compensation. ICAO agreed that the evidence Erica presented at hearing was sufficient to support the ALJ's findings about the correct diagnosis of claimant's condition and the lack of a causal connection between the condition and claimant's employment.



- I have kleptomania, but when it gets bad, I take something for it.
- FOLLOW YOUR DREAMS! Except that one where you're naked in church.
- Suicidal twin kills sister by mistake!
- My short-term memory is not as sharp as it used to be. Also, my short-term memory's not as sharp as it used to be.
- I may be schizophrenic, but at least I have each other.
- I am a Nobody. Nobody is Perfect. Therefore I am Perfect.
- When you work here, you can name your own salary. I named mine "Fred."
- Red meat is not bad for you. Fuzzy green meat is bad for you.

Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.



TECH TIPS



More Google Features

In our July newsletter, we featured some Google shortcuts and features. Here are more features you may not know. Search examples are enclosed in [square brackets]. Don't include the brackets in your search.

- You can **limit your search to a particular website** by using the "site:" operator. For example, searching for [news site:cmb-pc.com] will retrieve all mentions of news on the Clifton, Mueller & Bovarnick, P.C. website. You can also limit your search to a particular site or domain by using Advanced Search at http://www.google.com/advanced_search.
- You can **use Google as a calculator**. For example, a search for [27 cm in inches] returns "27 centimeters = 10.6299213 inches." Searching [37 % of

143] gives you "37% of 143 = 52.91." You can also convert currency, do basic arithmetic, or perform advanced mathematical calculations. See How to Use the Google Calculator at <http://www.google.com/help/calculator.html>.

- Use an asterisk as a **wildcard to replace one or more words in a phrase**. This can be helpful if you can't remember or can't spell some of the words in the phrase. For example, ["once upon a * dreary"] will retrieve the line from Edgar Allan Poe's "The Raven."

For more Google shortcuts and features, see Google Help: Search Features at <http://www.google.com/help/features.html> and Google Help: Cheat Sheet at <http://www.google.com/help/cheatsheet.html>.

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

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is published monthly by the law firm of

Clifton, Mueller & Bovarnick, P.C.
Attorneys at Law
Suite 500
789 Sherman Street
Denver, CO 80203
Telephone (303) 988-7692
Facsimile (303) 988-7724

Grand Junction Office
Suite 200
2454 Patterson Road
Grand Junction, CO 81505
Telephone (970) 255-8852
Facsimile (970) 255-8905

John M. Abraham
Holly M. Barrett
Richard A. Bovarnick
James R. Clifton

M. Frances McCracken
Royce W. Mueller
Diane K. Murley
Erica A. Weber

ICAO Update*Continued from page 1*

accelerated the need for medical treatment. **Tarr v. Elyse Klingener, DMD**, W.C. No. 4-775-869 (ICAO Oct. 2, 2009)

PPD

ICAO affirmed ALJ Krumreich's order awarding benefits for permanent impairment of the hand and for disfigurement. Claimant sustained an admitted injury in which portions of two fingers on his hand were severed. An ATP measured claimant's impairment as 29% of the hand, and respondents filed an FAL admitting for 29% impairment of the hand at the wrist. Claimant also had symptoms in his forearm, but the ALJ found that claimant had failed to establish an impairment of his arm above the hand. Held: In the context of PPD, "injury" refers to functional impairment, not the physical situs of the injury. However, complaints of pain without corresponding restrictions of use do not necessarily require a greater impairment rating. **Lewis v. Glen Leffler d/b/a Skyline Sod**, W.C. No. 4-759-309 (ICAO Oct. 6, 2009)

ICAO affirmed ALJ Walsh's order awarding PPD benefits based upon a whole person rating. Claimant sustained an admitted work-related injury to his ankle and foot. The ALJ found that claimant also suffered a functional impairment to his knees, hip and lower back. Therefore, the ALJ determined that claimant had suffered a functional impairment that was not listed on the schedule of disabilities and awarded PPD benefits based up the whole person calculation. Held: Whether the claimant has

suffered an injury enumerated in the schedule of disabilities is a question of fact to be resolved by the ALJ. The terms "injury" and injured "member" do not pertain to the physical situs of the compensable accident, but to that part of the worker's body that is functionally impaired as a result of the compensable accident. **Nichols v. Lafarge Construction**, W.C. No. 4-743-367 (ICAO Oct. 7, 2009)

PTD

ICAO set aside that portion of ALJ Walsh's order that required respondents to pay PPD benefits on a 2003 claim in addition to PTD benefits on a 2007 claim. Held: "A claimant can be no more than totally disabled at any given moment. Therefore, if the claimant did not become entitled to PPD benefits prior to the effective date of the PTD award, she is not entitled to PPD benefits." **Martinez v. City of Colorado Springs**, W.C. Nos. 4-727-623 & 4-752-214 (ICAO Oct. 16, 2009)

Reopening

ICAO affirmed ALJ Walsh's order that both ordered respondents to pay PPD benefits based on a whole person impairment and reopened the claim on the grounds that claimant was no longer at MMI. Respondents had filed an FAL based upon the scheduled impairment rating of the upper extremity. Claimant objected to the FAL and filed a petition to reopen. ICAO held that the ALJ did not abuse his discretion when he relied upon similar factual find-

ings to determine both functional impairment at MMI and worsening of condition after MMI. **Michel v. FreedomRoads Holding**, W.C. No. 4-747-473 (ICAO Oct. 26, 2009)

ICAO affirmed ALJ Harr's order determining that the statute of limitations for reopening was not equitably tolled by an incorrect date in the benefits history section of the FAL. Because claimant did not rely on the date in the FAL in deciding when to file his petition to reopen, the time limit for reopening was not extended by the erroneous date. **Barfoot v. Xcel Energy**, W.C. No. 4-540-676 (ICAO Oct. 14, 2009)

Termination of TTD

ICAO remanded ALJ Jones's order for further proceedings and determination of whether the employer had made a written offer of modified employment within the meaning of the Act, and, if so, whether the claimant refused to begin the employment. ICAO held that even though the offer admittedly did not comply with WCRP 6, it could still be a valid offer of modified work under the Act. If there was a valid offer, and claimant refused to begin the employment, her entitlement to TTD terminated. **Temple v. Kroll Government Services**, W.C. No. 4-761-187 (ICAO Oct. 14, 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.

CLIFTON, MUELLER & BOVARNICK, P.C.

789 SHERMAN STREET
SUITE 500
DENVER, COLORADO 80203