

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

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=administrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; OAC=Office of Administrative Courts; PALJ=prehearing administrative law judge; PPD=permanent partial disability; TTD=temporary total disability.

Authorized Medical Treatment

ICAO affirmed ALJ Felter's order finding that the right of selection of a medical provider had passed to claimant. The ALJ gave alternative grounds for his decision. ICAO disagreed that the right of selection passed to claimant when she was unable to contact one of the designated providers but sought treatment with the other designated provider. ICAO held that even if the right to designate a physician was waived by the

respondents for failure to list the names of two physicians willing to treat, that waiver does not vitiate the requirement that subsequent changes of physician must be approved in accordance with WCRP 8. However, ICAO held that the right of selection passed to the claimant when the other designated provider refused to treat claimant for non-medical reasons and respondents failed to appoint a new ATP. *Miller v. Rescare, Inc.*, W.C. No. 4-761-223 (ICAO Sept. 16, 2009)

Burden of Proof

ICAO affirmed ALJ Krumreich's order denying and dismissing claimant's claim for workers' compensation benefits. The ALJ found claimant's testimony that she was injured was not credible and was rebutted by her non-physiologic medical examination. *Ruiz v. Total Long Term Care, Inc.*, W.C. No. 4-773-710 (ICAO Sept. 23, 2009)

Causation

ICAO affirmed ALJ Harr's order denying and dismissing claimant's claim for workers' compensation benefits. The ALJ found that claimant had failed to show it was more probably true than not that her knee injury arose out of either the normal conditions and circumstances of her job or a work-related activity or hazard of her employment. The "arising out of" test is one of causation. The ALJ found that claimant's fall was unexplained and unassociated with the circumstances of her employment. *Ybarra v. Thompson School District RJ-2*, W.C. No. 4-777-145 (ICAO Sept. 25, 2009)

ICAO affirmed ALJ Harr's order denying and dismissing claimant's claim for workers' compensation benefits. The ALJ found that claimant was symptom-free following his last work shift, and that the onset of claimant's symptoms occurred at home when he awoke the next morning, and not at work. The ALJ relied on expert testimony that if claimant had sustained the disc herniation at work, it was medically probable that he would have experienced significant contemporaneous pain and functional compromise. *Howden v. Chaco, Inc.*, W.C. No. 4-767-485 (ICAO Sept. 24, 2009)

ICAO affirmed ALJ Mottram's order finding that claimant sustained a compensable injury. Claimant suffered a loss of consciousness that was unrelated to his employment. However, because his fall of five feet from the equipment he operated to the ground was a special hazard of employment, his injury arose out of and in the course of his employment. *Almeda v. La Farge Construction*, W.C. No. 4-774-216 (ICAO Sept. 14, 2009)

DIMES

ICAO affirmed ALJ Jones's order finding that respondents had overcome by clear and convincing evidence the DIME physician's impairment rating. The ALJ found that the DIME physician was unaware of medical records from out-of-state doctors showing that claimant had full range of motion both before and after the DIME appointment. The ALJ also credited the testimony of another physician who testi-

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fied that the DIME physician had improperly applied the *AMA Guides* in arriving at the rating. Held: whether the DIME physician properly applied the *AMA Guides* and whether the rating has been overcome by clear and convincing evidence are issues of fact for the ALJ, and the ALJ's findings of fact will be upheld if supported by substantial evidence. ***Boateng v. First Transit, Inc.***, W.C. No. 4-720-290 (ICAO Sept. 14, 2009)

Employee Status

ICAO affirmed ALJ Jones's order denying and dismissing claimant's claim for workers' compensation benefits. The ALJ found that there was no employment agreement between claimant and respondent-employer. Claimant was injured during a pre-employment fitness test, the third of six steps in the application process. He had not completed the meeting in which wages, schedules, and start dates are decided; the payroll process; or the Homeland Security check. Even if he had successfully completed all steps in the application process, budgetary and other issues would have influenced whether he could be hired. ***Lopez v. Colorado State University***, W.C. No. 4-772-544 (ICAO Sept. 29, 2009)

Occupational Disease

ICAO affirmed ALJ Mottram's order that Liberty Mutual pay for all reasonable, necessary and related medical treatment of claimant's occupational disease. Liberty had argued that Pinnacol should be liable for medical expenses incurred while Pinnacol was the employer's workers' compensation insurer. The ALJ found that the onset of claimant's disability occurred while Liberty was the insurer; that claimant's job duties were modified shortly thereafter; and that claimant did not suffer a substantial permanent aggravation of her shoulder condition while Pinnacol was the insurer. 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 accelerated the need for medical treatment. ***Garcia v. Chaco, Inc.***, W.C. No. 4-736-727 (ICAO Sept. 15, 2009)

PALJ's Authority

ICAO set aside ALJ Stuber's order precluding claimant from filing further applications for hearing. A PALJ had previously granted respondents' motion to dismiss with prejudice for failure to abide by a discovery order. Held: orders of a PALJ are properly reviewable by an ALJ pursuant to an AH rather than by ICAO pursuant to a petition to review. Claimant was entitled to review of the PALJ's order by an ALJ in the OAC. ***Anderson v. Labor Ready***, W.C. No. 4-517-260 (ICAO Sept. 9, 2009)

Penalties

ICAO affirmed in part and reversed in part ALJ Friend's supplemental order requiring the insurer to pay certain penalties. ICAO held that because claimants are not



"providers" under WCRP 16-11(A), respondents are not liable under rule 16(A) for failure to timely reimburse the claimant for mileage. Therefore, a penalty should not have been awarded for a non-willful failure to reimburse mileage within 30 days. However, ICAO upheld the penalty for failure to pay TTD benefits when due, because the insurer was aware of the computer problem that allowed payments to "fall off" the automatic payment system but did not fix it. ***Higuera v. Bethesda Foundation***, W.C. No. 4-683-101 (ICAO Sept. 22, 2009)

Reopening

ICAO affirmed ALJ Jones' order granting respondents' petition to reopen on the basis of mistake, determining that respondents had established by clear and convincing

evidence that the DIME rating was incorrect, and ordering claimant to repay respondents for overpaid PPD benefits. Respondents had filed an FAL based on the DIME rating of claimant's lumbar spine. They later learned that claimant had been given a similar rating for a previous work-related lumbar injury that she had not revealed to her ATPs or the DIME physician. ***Krauth v. Great West Life & Annuity***, W.C. No. 4-744-278 (ICAO Sept. 25, 2009)

Responsibility for Termination of Employment

ICAO affirmed ALJ Cannici's order that determined respondents had failed to establish claimant was responsible for her termination from employment for excessive absenteeism. The ALJ found that pain associated with claimant's work injury had caused many of her absences. ***Morales v. Wal-Mart Stores, Inc.***, W.C. No. 4-770-910 (ICAO Sept. 21, 2009)

Safety Rule Violation

ICAO affirmed ALJ Mottram's order denying respondents' request for an offset for a safety rule violation. Held: the ALJ's ruling on the safety rule violation was not precluded by ALJ Cannici's previous ruling that claimant was responsible for the termination of his employment, because the issues were not identical and there was no final order in the previous proceeding. Although claimant's termination for cause arose out of the accident that occurred because he wasn't wearing his safety harness, the grounds for termination were not claimant's willful failure to obey the safety rule. ALJ Mottram's finding that respondents failed to prove that claimant *willfully* failed to wear his safety harness was upheld because it was supported by substantial evidence. ***Wilkinson v. Colowyo Coal Co.***, W.C. No. 4-723-603 (ICAO Aug. 28, 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

In *Benton v. Shaw, Stone & Webster, Inc.*, the prehearing ALJ granted Jim's motion to dismiss with prejudice for failure to comply with a discovery order.

Richard A. Bovarnick

In *Inks v. Time Warner Cable*, the claimant alleged an occupational disease, carpal tunnel syndrome, due to "excessive" keyboarding. Rich obtained an ergonomic assessment and set up an IME, providing all the records. The IME physician determined no causal relationship, and counsel for claimant chose not to pursue the claim.

Holly M. Barrett

In *Riffle v. Current USA and Pacific Indemnity Company*, the ALJ denied claimant's request for wage-loss benefits incidental to attending DIME and IME evaluations, holding that the Workers' Compensation Act of Colorado provides no authority for such an award.

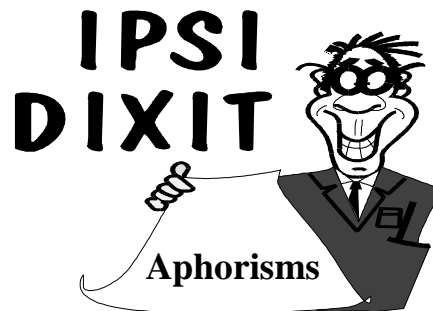
In *Kuon Ung v. United Natural Foods*, Dr. Stieg performed a DIME and said the claimant was not at MMI. Prior to the DIME, the claimant's attorney had made a demand alleging the claimant was permanently totally disabled. Holly filed an application for hearing to overcome the DIME and had opposing counsel and Dr. Stieg review video surveillance of the

claimant. After reviewing the surveillance video, Dr. Stieg reversed his opinion and said that the claimant was at MMI. Claimant also dropped his permanent total claim. The case then settled based upon PPD benefits and waivers.

John M. Abraham

In *Ramirez v. Wal-Mart Stores, Inc. and American Home Assurance*, ALJ Cannici found that the claimant did not sustain a compensable injury within the course and scope of her employment. Claimant had alleged that she injured her back while lifting boxes of bakery supplies in the freezer while working with her supervisor. John presented the testimony of several of claimant's supervisors and co-employees who testified credibly that the claimant was injured outside of her employment and possibly while wrestling and "dog-piling" with her children. In reaching his findings, Judge Cannici credited the testimony of the employer witnesses and relied upon the medical documentation that demonstrated it was more probable than not that the claimant was injured outside of work.

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.



Aphorism: a pithy observation that contains a general truth or astute observation. Here are some examples from *Eats, Shites & Leaves*, by A. Parody:

No one is listening until you make a mistake.

A clear conscience is usually the sign of a bad memory.

Death is Nature's way of telling you to slow down.

Hell hath no fury like the lawyer of a woman scorned.

You never really learn to swear until you learn to drive.

"If at first you don't succeed, so much for skydiving." (attributed to Henry (sic) Youngman)

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

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TECH TIPS



The Wayback Machine

Have you ever tried to look at a website but couldn't because the site was down, either temporarily or permanently? Have you tried to locate information on a website only to find that the information has been removed?

When a website is down or the information you want has been removed you are not necessarily out of luck. The site you seek may have been archived at the Internet Archive, and you may be able to find it by using the "Wayback Machine" at <http://www.archive.org>. Just type in the web address for the page you want and click on

"take me back." If the site you are trying to find has been archived, you will see a list of the archived dates that are available. Click on one of the dates to see the website as it looked on that date.

Most search engines, including Google and Bing, also save copies of web pages they have searched in a cache. (When you run a web search, the search engine actually searches this cache rather than the web to save time.) Look for a link to the cache in your search results to see the most recent version of the web page that has been saved in the cache.

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

Practice Pointer**Investigation Prior to the Division IME***By John M. Abraham*

When a claimant applies for a Division IME, it is the respondents' job to send claimant's medical records to the Division IME physician. Respondents must submit the Division IME "packet" to the Division IME physician no later than fourteen days prior to the date of the scheduled examination. Respondents have until no later than seven days prior to the examination to supplement the medical records, if necessary.

When preparing for a Division IME, it is important for the physician to have a complete medical history and background as possible. There are several reasons for this. One reason is that it allows the Division IME physician to obtain a complete picture of the claimant's medical history so that a proper diagnosis can be made. Some physicians rely on key pieces of information from a claimant's medical history in making their diagnoses. The right piece of evidence can make all the difference.

Another reason to have a complete picture and as many records as possible is that it eliminates the need to incur additional costs after the Division IME is completed. Costs in the form of depositions, correspondence to the Division IME physician, additional motions, and further litigation from opposing counsel can be avoided by painting a complete picture of the claimant's medical history prior to the Division IME report. Quite often, a Division IME physician will indicate that a claimant has stated something in his/her medical history which does not correlate with the medical

records that are reviewed prior to the examination. The Division IME physician will often request to see the additional records or opine the dreaded phrase that a claimant is "not at MMI" because additional records and diagnostic testing are needed. Too many times, to respondents' dismay, a Division IME physician will draft a report based upon the medical evidence that was submitted. After the report has been received, certain medical records are discovered or come into possession which would have drastically changed the Division IME physician's opinion had the physician had the records beforehand or during the examination.

The solution to these common dilemmas is to utilize the time-frames that are statutorily prescribed in the Act and gather as much medical information for the Division IME physician as possible. When a Final Admission of Liability is filed, the claimant has thirty days to object and file a Notice and Proposal to Select an Independent Medical Examiner. Once the Notice and Proposal is filed, respondents have thirty days to file a Notice of Failed IME Negotiation. The claimant then has thirty days from the date of the Notice of Failed IME Negotiation to file an Application for a Division IME.

Rather than hurriedly filing a Notice of Failed IME Negotiation and awaiting claimant's Application for a Division IME, respondents should utilize the thirty-day window to conduct an investigation into

the claimant's prior medical history if it has not already been conducted. During the investigation, a claimant's medical records should be fully compiled to provide to the Division IME physician. Some providers can take millennia to provide copies of a claimant's medical records once requested. Requesting a medical release and a list of providers who have treated the parts of the body that are in question at the onset of the claim IS NOT considered discovery per W.C.R.P. 5-4. Respondents need not seek an order from the Division to request this information when a claimant is pro se. In the event that a claimant or counsel does not comply with the requests for a medical release and a medical history prior to the Division IME, W.C.R.P. 11-3(N) allows a party to file a motion to hold the Division IME in abeyance. This rule allows a party to resolve a dispute that may affect the outcome of the Division IME. Once the motion is filed, (always copy the Division IME Unit), the Division IME process is held in abeyance until the issue is resolved by an ALJ.

In the long run, saving on litigation costs is key. With Division IMEs, it is always better to be proactive than reactive. The more medical history that can be provided, the better. If at any time you need answers regarding the Division IME process and certain deadlines, contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C. for advice.

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