

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

Despite DIME, Claimant Must Prove Compensability

In *Eller v. Industrial Claim Appeals Office*, decided September 3, the Colorado Court of Appeals affirmed the Industrial Claim Appeals Office's order affirming the ALJ's denial and dismissal of claimant's claim for benefits.

Employer provided medical treatment but did not admit liability. After the authorized treating physician (ATP) placed claimant at maximum medical improvement (MMI) and provided a permanent impairment rating, employer filed a notice of contest and obtained a prehearing order relieving it from the time requirements for admitting liability and initiating the division-sponsored independent medical examination (DIME) process. Claimant filed an application for hearing on the issue of compensability and other issues. The ALJ discredited claimant's testimony, credited testimony of several of employer's witnesses, and determined that claimant had failed to show it was more probable than not that she suffered an injury at work.

Claimant argued that, because employer did not initiate the DIME process to challenge the ATP's opinions on MMI and

permanent impairment, the ATP's opinion that claimant sustained a work injury was binding and the ALJ did not have jurisdiction to consider the issues of causation and compensability. The court disagreed, holding that on the threshold issue of whether claimant sustained a compensable injury the ATP's opinion on causation carries no special weight. Claimant has the burden of

proving by a preponderance of the evidence that she sustained an injury arising out of and in the course of the employment.

Claimant also raised equal protection and due process challenges to the DIME statutory scheme. The court rejected both challenges.

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; AH=application for hearing; ALJ=administrative law judge; ATP=authorized treating physician; DWC=Division of Workers' Compensation; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; TTD=temporary total disability.

Director's Authority

ICAO affirmed an order of the Director of the DWC that ordered claimant's AH to be stricken and any hearing set pursuant to the AH to be vacated. Claimant had entered into a full and final settlement agreement with respondent. A few months later he filed an AH seeking penalties against certain healthcare providers and the medical director of the DWC for the alleged issuance of an improper medical report. At a prehearing conference, claimant's attorney stipulated that the respondent would not be a party to the hearing, and a PALJ approved the stipulation. Held: the Director has the authority to strike an AH on a

closed claim when reopening has not been endorsed as an issue and when indispensable parties have not been joined. *Sanders v. Dept. of Labor & Employment*, W.C. No. 4-675-284 (ICAO Aug. 20, 2009)

Penalties

ICAO affirmed ALJ Krumreich's order imposing a penalty on the insurer of \$250 for a single day's violation of the Act. The insurer had filed an FAL without stating the date of MMI, attaching a medical report to the FAL, or stating a position on the provision of medical benefits after MMI. Held: The ALJ had the discretion to treat the violation of the rules as occurring on a single occasion rather than as a violation of a continuing nature. *Heupel v. Academy School District*, W.C. No. 4-721-564 (ICAO Aug. 20, 2009)

Responsibility for Termination of Employment

ICAO affirmed ALJ Broniak's determination that claimant was not responsible for his termination. Claimant had been placed

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on corrective action plans regarding his job performance before his injury. He was terminated some time after he returned to modified duty. His supervisor admitted that the time claimant spent away from work for medical treatment of his work-related injury was a factor in her decision to terminate his employment. She also admitted that she began the termination process within five days of becoming claimant's supervisor and she was gathering data to support a termination. **Carpenter v. Kaiser Permanente**, W.C. No. 4-740-802 (ICAO Aug. 12, 2009)

ICAO affirmed ALJ Stuber's order denying the claim for TTD. The ALJ found that claimant was responsible for his termination and concluded that claimant had failed to prove that his wage loss was due to the work injury rather than due to his termination from employment. After claimant's termination he took a construction job with a different employer. The ATP subsequently imposed work restrictions that resulted in claimant's termination from his

new employment. In completing the workers' compensation form, the ATP did not comment on the causation of any worsening or analyze the construction work claimant did at his new job. **Enciso v. C.F. Meier Composites, Inc.**, W.C. No. 4-764-288 (ICAO Aug. 12, 2009)

ICAO affirmed ALJ Felter's order denying TTD benefits. The ALJ found that claimant was terminated for violation of company policy and insubordinate behavior. Claimant argued that because there were only two witnesses to the confrontation that resulted in his termination, claimant and the branch manager, the question of responsibility for termination should have been resolved against respondents, who had the burden of proof. Held: Whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is a question of fact for the ALJ. The fact that there were two conflicting witnesses does not mean that the ALJ could not resolve the competing testimony.

Liggins v. Harsco Corporation, W.C. No. 4-757-911 (ICAO Aug. 12, 2009)

TPD

ICAO affirmed ALJ Henk's order requiring respondents to pay TPD benefits from the date claimant's hours were cut because the employer's sales had dropped. Respondents argued that claimant's wage loss was not related to the injury but was economic wage loss. Held: because claimant had not reached MMI, was not at fault for her termination, and had not been offered modified employment within her work restrictions, there were no grounds for discontinuing TPD. Claimant was not required to treat with her ATP to be entitled to an award of TPD benefits. **Gaitan v. Pita Subway**, W.C. No. 4-726-194 (ICAO Aug. 26, 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 **Wolfe v. Nabors Industries, Inc. and Liberty Mutual Insurance Company**, the ALJ found that claimant's subjective complaints were not supported by the medical records, which he credited over claimant's testimony, and that claimant had failed to prove it was more probably true than not that his condition had worsened since he was placed at MMI. In reaching his conclusion, the ALJ held: "The mere fact that claimant may at times experience an increase in his symptoms necessitating additional maintenance treatment that is authorized by Respondents, however, does not result in claimant's entire claim being reopened." Jim tried the case and Diane wrote the position statement following the hearing.

Richard A. Bovarnick

In **Quintana v. Minnequa Medcenter and Ace American Insurance**, the ALJ found that claimant had failed to prove she was entitled to post-MMI medical benefits.

Rich presented evidence that one of the treating physicians noted claimant no longer needed any medications, two physicians discharged her to return only if her condition worsened and she needed further treatment, and the DIME physician agreed that she needed no maintenance care.

In **Dolph v. ABF Freight Systems, Inc.**, the ALJ found that claimant's B-12 injections were not reasonable and necessary medical treatment for his condition. Rich presented evidence from the IME physician that the scientific literature does not support the use of B-12 as a treatment for pain, and the ATP admitted that there is no objective scientific evidence to support its use.

Holly M. Barrett

In **Esquivel v. Five Rivers Ranch Cattle Feeding, LLC**, the ALJ allowed the insurer to reduce TTD benefits by 50% for claimant's willful violation of a safety rule. The ALJ also found that claimant was responsible for his termination after his return to work and therefore not entitled to addi-

tional TTD benefits. Holly presented testimony of the employer's general manager and employment records to prove that claimant was aware of the safety policies he violated, that he willfully violated them, and that he would not have been injured had he followed the first rule he violated. On the issue of PPD, the ATP had given claimant two separate impairment ratings, a hand rating at 104 weeks and a wrist rating at 208 weeks. The ALJ held that claimant sustained one continuous injury to his upper extremity and ordered respondents to pay PPD for the combined rating at 208 weeks.

M. Frances McCracken

In **Hoffman v. Wal-Mart Stores, Inc.**, the ALJ denied claimant's claim for TTD, several emergency room visits, and a two-level cervical fusion. Fran presented the deposition of claimant's previous primary care physician and evidence from many healthcare provider reports to establish that

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VICTORIES IN THE TRENCHES

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much of claimant's treatment was not reasonably needed to cure and relieve the effects of the compensable injury. In reaching his decision, the ALJ noted claimant's inconsistent complaints, dishonest histories, extreme pain behaviors, and requests for narcotics.

In *Masa v. Wal-Mart*, the ALJ denied claimant's claim for TTD benefits because she was responsible for her termination. Fran presented employer records and testimony to establish that claimant engaged in a volitional act that she reasonably should have known would result in her termination. The ALJ found that Claimant knew of the employer's policy against use of profanity toward other persons, because she had received verbal and written coaching for profanity and not respecting individuals. The ALJ also found that although the ATP increased claimant's restrictions after her employment was terminated, the modified job that had been offered to claimant complied with the increased restrictions.

Erica A. Weber

In *Middleton v. Bimbo Bakeries*, ICAO affirmed the ALJ's dismissal of claimant's request for TTD benefits. ICAO agreed

that the evidence Erica presented at hearing was sufficient to establish that claimant was responsible for his termination due to his repeated failures to advise his supervisor when he needed to leave the workplace due to illness, despite numerous warnings. The Panel refused to reverse the ALJ's finding that the claimant acted volitionally, and thus was responsible for his wage loss.

In *Gonzales v. Interstate Brands Corp.*, the ALJ granted respondents' motion to dismiss the claims for penalties asserted by claimant. Erica made the motion when claimant rested, halfway through the hearing. The ALJ agreed that claimant failed to present any evidence to support her request for penalties under CRS 8-43-401(2) (failure to pay benefits within 30 days of an order) and W.C.R.P. 5-5(B) (requirements for filing a medical-only admission).

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.



Apparently desperate for a defense, some people have turned to blaming their pets for the crimes with which they are charged.

In June, a woman from Arlington, WA was accused of accessing her ex-husband's bank account. She reportedly told the police that she had no choice but to take the money from her ex-husband's account because her dog had eaten all her personal checks. (And you thought dogs only ate homework!)

In August, a south Florida man was charged with downloading child pornography on his computer. The man told detectives that his cat jumped on the keyboard when he left his computer, thus downloading the 1,000+ pornographic images.

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




TECH TIPS



Keyboard Shortcuts

Keyboard shortcuts are computer key combinations that let you perform frequent actions without moving your fingers from the keys to the mouse in order to click on a menu or button. For example, instead of clicking on the File menu and selecting Save, you can hold down the Ctrl key while you press and release the S key. This shortcut is frequently shown as Ctrl + S. If you don't already use Ctrl + S, give it a try. It is much faster, and you will quickly get into the good habit of saving frequently.

My favorite shortcut is Ctrl + Z, which undoes your last action. Ctrl + Z does the same thing as clicking on the Edit menu

and selecting Undo, or clicking on  in the button bar. The next time you make a mistake, especially if the mistake involves deleting something, don't panic. Just Ctrl + Z. You can Ctrl + Z repeatedly to undo

more than one action, all the way back to the last time you saved your document. Ctrl + Z works in most Windows applications, including some Solitaire games.

Here are some other keyboard shortcuts you might like:

- Ctrl + Y re-does the last thing you undid;
- Ctrl + A selects (highlights) all the text in a document;
- Ctrl + C copies the selected text;
- Ctrl + X cuts the selected text;
- Ctrl + V pastes the text you copied or cut to where the cursor is;
- Ctrl + F opens the Find dialog box;
- Ctrl + P opens the Print dialog box.

What are your favorite shortcuts?

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

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Practice Pointer

Reserving for Impairment Pursuant to the Impairment Rating Tips

By Richard A. Bovarnick

Until recently, we all knew how to reserve PPD for the typical shoulder or low back injury. The shoulder PPD could be reasonably reserved at a 15% scheduled rating: $.15 \times 208 \text{ weeks} \times \254.06 (DOI 7-1-09 or after) = \$7,926.67. The low back could be reasonably reserved at a 15% whole person rating: $.15 \times 400 \text{ weeks} \times \text{TTD rate (e.g., \$400)} \times \text{age factor (e.g., 1.5 for a 35-year-old)} = \$36,000$.

The Colorado Division of Workers' Compensation updated its Impairment Rating Tips in November 2008. These "Tips" were written by the Division's medical director for level-II accredited physicians, whether ATP or DIME, to follow when assigning impairment ratings. In the case of shoulder surgery, the tips now provide for an additional 10% upper extremity impairment for a distal clavicle resection.

For a back injury where the claimant undergoes a rhizotomy (also known as a radiofrequency medial branch neurotomy or RF neurotomy), the tips add a rating under table 53IIC of another 7%. This additional impairment is recommended even though a rhizotomy is not considered a surgical procedure, causes only minimal anatomic disruption, and may not be permanent. If 3 or 4 levels are performed then an additional 1% is added to the 7%. If 5 or 6 levels are preformed an additional 2% is added.

In the shoulder example above, the additional 10% scheduled rating for a distal clavicle resection is worth an additional \$5,284.45. In the low-back example, the additional 7% whole person rating for a 1- or 2-level rhizotomy is worth \$16,800, and each additional 1% is worth \$2,400.

Defenses to This Development

In the case of *Ortiz v. Service Experts, Inc.*, W.C. No. 4-657-974 (ICAO Jan. 22, 2009), the Industrial Claim Appeals Office panel upheld the ALJ's award of an impairment rating based in part on the Division's impairment rating tips. Under the Colorado Workers' Compensation Act, medical impairment is to be rated pursuant to the *AMA Guides* 3rd ed. revised, which do not include ratings for either distal clavicle resections or rhizotomies. Nevertheless, in *Ortiz* the ICAO panel held that it was not an abuse of discretion for the ALJ to give the impairment rating tips, as applied by the rating physician, "the weight he considered appropriate under the circumstances."

We believe the ICAO decision in *Ortiz* is in error and should be challenged in the appropriate case. If an ATP or DIME physician relies upon the Division's impairment rating tips to increase a claimant's

impairment rating beyond the *AMA Guides*, an expert should be retained to testify about how and why ratings based on the *AMA Guides* are appropriate and that application of the impairment rating tips is unnecessary and improper.

Strategy

An alternate strategy to litigation is to negotiate a compromise of PPD, keeping in mind the additional impairment exposure and the costs of litigating.

To review any reserve issues or strategies to decrease exposure and bring files to closure, please contact any of the attorneys at Clifton, Mueller & Bovarnick.

Reminder: Grand Junction Office Moving

Effective September 18, 2009 the Grand Junction office address will be:

2454 Patterson Road, Suite 200
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The phone and fax numbers will not change, but we will be without phone service at the Grand Junction office from September 18 until September 20.

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