

DEFENSE TALK

SM

A PUBLICATION BY THE LAW FIRM OF

CLIFTON, MUELLER & BOVARNICK, P.C.

APRIL

ATTORNEYS AT LAW

2010

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

Legislative Watch

On March 31 the governor of Colorado signed into law SB 10-163. This new law makes retroactive several workers' compensation procedures enacted by last year's legislature and adds new procedural provisions.

Audio recording of IMEs

Last year's legislature amended the Workers' Compensation Act to require that independent medical examinations for claims filed on or after August 5, 2009, performed at the request of respondents, must be audio recorded in their entirety and retained by the examining physician. The Workers' Compensation Rules of Procedure require respondents or the physician to have claimant sign workers' compensation form WC 036 Rev. 07/09, "Information Regarding Independent Medical Examination." **These requirements now apply to all IMEs requested by respondents regardless of**

the date the claim was filed.

If you have any pending IMEs and you did not advise the doctor of the audio recording requirement, you should do so now. Prior to the IME respondents are required to provide to the examining physician written notice that describes the requirements for recording the examination. Jim Clifton provided a suggested written notice that you may wish to use to comply with this rule in the August 2009 issue of *Defense Talk*, which is available at <http://www.cmb-pc.com/news.htm>. You may also contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C. if you would

like a sample form letter to send to the doctor.

Settlement checks

A new provision that became effective March 31, 2010, requires that **any lump sum payable as a full or partial settlement must be sent** to the claimant or the claimant's attorney **within 15 calendar days** after the date the order approving the settlement is received by the responsible paying party.

We will keep you advised of other new laws as they are passed.

Court of Appeals Update

Premises Liability — Immunity of Statutory Employer

In *Humphrey v. Whole Foods Market*, announced April 1, 2010, the Colorado Court of Appeals affirmed the trial court's grant of summary judgment in favor of the defendant. Plaintiff, a delivery driver, had sued the grocery retailer for injuries he sustained while making his weekly delivery to the store. His employer's workers' compensation insurer intervened in the suit to recover the amounts it had paid in benefits. The trial court found that the defendant store was plaintiff's statutory employer, and therefore was immune from liability for negligence.

employers, including statutory employers, immunity from liability for common law negligence. Statutory employers are employers that lease or contract out part or all of the work of their business. If the lessee, sublessee, contractor, or subcontractor to whom the work is leased or contracted out does not carry workers' compensation insurance, the statutory employer is liable for workers' compensation benefits. If the direct employer to whom the work is leased or contracted out does carry workers' compensation insurance, the statutory employer has no liability under the Act or in common law negligence to an injured employee of the direct employer.

The Workers' Compensation Act grants

Please see COURT on page 3

INSIDE THIS ISSUE:

Practice Pointer	2
Victories in the Trenches	2
ICAO Update	4
New Phones in Denver	5
Ipsi Dixit	5

VISIT US ON THE WEB: WWW.CMB-PC.COM



Pushing a Claim to Conclusion: The 18 Month DIME

By James R. Clifton

It was a dark and stormy claim.* It had been a year and a half since the claimant injured his low back at work and a year since he had non-complicated low back surgery to excise a disk. The surgeon had released the claimant from his care, but the claimant's primary, authorized treating physician wouldn't let go. The physician "treated" the claimant on a monthly basis. His treatment consisted of recording claimant's alleged, unrelenting symptoms and prescribing numerous drugs including Oxycontin, Percoset, Valium, Ambien and Viagra. The physician's reports did not document that he actually examined the claimant, only that the claimant reported chronic unrelenting pain. Occasionally, the physician referred the claimant for additional physical therapy, massage therapy and acupuncture.

Repeated inquires by the claim representative as to whether the physician had conducted a urine drug test to verify that the claimant was actually taking the prescribed medication were ignored by the physician. However, when asked, the physician consistently stated claimant was not at maximum medical improvement and wouldn't be any time soon.

Eight months after his surgery claimant developed a limp which he readily demon-

strated to the physician at each office visit. On his own, claimant borrowed a cane from a relative and began to use it. Surveillance video of the claimant walking normally without a cane was dismissed by the treating physician as non-conclusive and explained away by saying that the patient was having a good day.

If you have a case with facts similar to these, there is an option to bring the case to a conclusion: the 18 month Division Independent Medical Examination (DIME). Section 8-42-107(8)(b)(II), Colorado Revised Statutes allows for a DIME to be requested when: (A) At least 18 months have passed since the date of injury; (B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement; (C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and (D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.

Start by asking the treating physician to respond to a letter in which you ask him to check yes or no to the question "Has claimant reached MMI?", sign, date and

return the response. When he checks no, schedule the claimant for an IME and ask the examining doctor to answer the question of whether claimant has reached MMI. If the examining physician states that claimant has reached MMI, file a Notice and Proposal to Select an Independent Medical Examination (Form WC146). If negotiations to agree on a physician with the claimant, or, if represented, claimant's attorney, are unsuccessful, file a Notice of Failed Negotiations (Form WC165) and follow up with an Application for a DIME (Form WC77).

Finally, cross your fingers and hope the physician selected from the panel issued by the DIME Unit is a reasonable, objective physician who sees through the treating physician's unjustified treatment, is willing to say so, and concludes claimant is at MMI. When the DIME Unit issues its Notice of Completion of IME Proceeding, file a Final Admission of Liability if the DIME physician's rating is acceptable.

If you have any questions about use of the 18 month DIME or other strategies, feel free to contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

*With apologies to Edward Bulwer-Lytton — if an apology is warranted.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Spears v. Nabors Drilling USA*, the prehearing ALJ (PALJ) imposed various penalties on claimant after he failed to keep two DIME appointments. Jim persuaded the PALJ that a Division IME (DIME) is discovery and that discovery penalties should apply. The PALJ ordered that respondents were entitled to offset the amounts they prepaid for claimant's travel and the cancellation fees for the two missed DIME appointments against claimant's future disability benefits. The claimant was also ordered to attend a DIME

appointment as soon as it could be rescheduled and admonished that if he missed the third appointment further sanctions including dismissal of his claim would be considered.

In *Snodgrass v. Wal-Mart Stores, Inc.*, on appeal, the ALJ affirmed the Director's utilization review order, which required a change of provider.

Richard A. Bovarnick

In *Montoya v. Wal-Mart Stores, Inc.*, ALJ Walsh issued a summary order denying and dismissing the claim for workers'

compensation benefits. Rich presented employer and medical records and the testimony of two of claimant's treating physicians to persuade the ALJ that claimant had failed to establish by a preponderance of the evidence that she sustained a work-related injury.

In *Batres v. ABM Industries, Inc.*, ALJ Broniak issued a summary order determining that claimant had not suffered a compensable occupational disease. Rich's expert witness testified persuasively, based on the information from claimant's job

Please see VICTORIES on page 3

VICTORIES IN THE TRENCHES

Continued from page 2

analysis and medical records, that claimant's work duties were not highly repetitive and did not require high exertional force, and that claimant had many non-occupational risk factors for developing CTS. Therefore, the ALJ found that claimant's carpal tunnel syndrome could not be fairly traced to her employment.

In *Parker v. Time Warner Cable*, ALJ Walsh issued a summary order denying and dismissing the claim for workers' compensation benefits. Rich presented the testimony of an expert on occupational diseases, upper extremity cumulative trauma disorders, and carpal tunnel syndrome. The ALJ found the expert's testimony to be credible and persuasive and concluded that claimant had failed to establish by a preponderance of the evidence that she had sustained an occupational disease.

In *Noel v. Hamilton Towing*, Magistrate Clifford of Boulder County Court found that plaintiff did not meet his burden and prove, by a preponderance of the credible evidence, that Hamilton Towing damaged the plaintiff's car. Rich persuaded the magistrate that plaintiff's expert's opinion was suspect as a conclusory opinion.

Holly M. Barrett

In *McIntyre v. KI, L.L.C.*, ALJ Stuber denied and dismissed claimant's request for authorization of shoulder surgery. Holly presented expert testimony to persuade the ALJ that claimant's mechanism of injury would not cause injury to the undersurface of the infraspinatus tendon and that all of claimant's rotator cuff pathology preexisted the work injury.

M. Frances McCracken

In *Boyd v. Wal-Mart*, ALJ Krumreich determined that claimant had failed to overcome by clear and convincing evidence the DIME physician's opinion that claimant was a poor candidate for fusion surgery and had reached MMI. Fran presented medical and psychological evidence to support the DIME physician's opinion and persuade the ALJ that claimant had failed to show that a fusion surgery was likely to

improve his condition.

In *Wingstrom v. Wal-Mart Stores, Inc.*, ALJ Cannici denied and dismissed claimant's petition to reopen. Fran presented medical records and the testimony of respondents' IME physician to persuade the ALJ that claimant had failed to establish that she suffered a change in the condition of her compensable injury or a change in her physical or mental condition that could be causally connected to the original compensable injury. The ALJ also found that claimant had suffered a new injury that constituted an efficient intervening cause for her back symptoms.

Erica A. Weber

In *Kramer v. Industrial Claim Appeals Office*, the Colorado Court of Appeals affirmed the order of the Industrial Claim Appeals Office affirming the denial of claimant's petition to reopen. The court held that the ALJ applied the correct burden of proof and did not abuse his discretion in denying the petition to reopen. Erica had persuaded the ALJ with a detailed analysis of claimant's medical records and the testimony of respondents' IME physician, who testified that claimant's perceptions of increased pain did not necessitate a finding that she was no longer at MMI.

COURT OF APPEALS UPDATE

Continued from page 1

The test of whether an employer is a statutory employer is whether the work leased or contracted out is part of the employer's regular business, considering routineness, regularity, and importance of the contracted service to the business of the employer. "Importance to the employer's total business operation is demonstrated where absent the contractor's services, they would of necessity be provided by the employer's own employee rather than to forgo the performance of the work."

Plaintiff's duties when he made a delivery to a store included inventorying the product, determining the new supply needed, selecting the products to put in stock, removing the outdated items, and arranging the new items on the display shelves for sale. These tasks were part of the store's normal business. If plaintiff had not provided the stocking and inventory services, they would have been provided by the store's own employees. Therefore, the court held that the store was plaintiff's statutory employer and entitled to immunity under the Act.

Calculation of Back Pay for Wrongful Termination

In *Bonidy v. Vail Valley Center for Aesthetic Dentistry, P.C.*, announced March

18, 2010, the Colorado Court of Appeals reversed the trial court's determination of back pay and remanded for calculation of back pay from the date of plaintiff's termination until the date of the first trial on the claim. The trial court had concluded that the back pay period should terminate on the date the plaintiff started her own business.

The Court of Appeals held that the back pay period should only terminate when the wrongfully terminated employee becomes self-employed if the trial court finds that the employee failed to properly mitigate her damages. Here the trial court found that plaintiff's decision to start a business was a proper mitigation of damages when she was unable to find other comparable employment. Therefore, it was error for the trial court to terminate the back pay period on the date plaintiff started her own business. The Court of Appeals noted that under different factual circumstances a different end date for the back pay award might be appropriate.

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.

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; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; PTD=permanent total disability.

Authorized Medical Treatment

ICAO affirmed ALJ Cannici's order that designated the physician selected by claimant as an ATP. When claimant reported the injury to his supervisor, the supervisor transported him to the emergency room, where he was told to take a few days off work. Four days later claimant visited the HR representative and told her that he had designated an ATP. At that time she gave him a "Designation of Medical Providers" that listed two providers. Held: The Act requires employers to provide a list of at least two physicians "in the first instance." The rules requiring employers to provide written notice of the two designated providers within seven days do not change the requirement to provide a list "in the first instance." Because the employer had not provided the claimant with a choice of physicians at the time of his injury or after the conclusion of emergency care, the right to choose the ATP passed to the claimant. *Marcelli v. EchoStar Dish Network*, W.C. No. 4-776-535 (ICAO Mar. 2, 2010)

AWW

ICAO affirmed an order of ALJ Jones that denied claimant's request to increase her AWW by the amount it would have cost to continue her healthcare coverage under COBRA. After claimant's termination, claimant applied for medical care through Medicaid rather than continuing her coverage under the employer's group health plan. AWW includes "the employee's cost of continuing the employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance

plan." Held: Medicaid is a "similar or lesser insurance plan" within the terms of 8-40-201(19), and the ALJ did not commit error by refusing to include in claimant's AWW the cost of continuing the employer's health insurance under COBRA. *Whalen v. Exempla Healthcare, Inc.*, W.C. No. 4-779-033 (ICAO Mar. 16, 2010)

Discovery Sanctions

ICAO set aside ALJ Jones's order that dismissed claimant's claim for violation of discovery orders and remanded for further proceedings. Prior to a hearing on PPD, respondents had conducted discovery by requesting that claimant attend an IME. Claimant failed to attend the IME. An ALJ entered an order requiring the claimant to attend the IME, but claimant failed to attend the second appointment. Claimant also failed to provide answers to interrogatories despite being ordered to do so by an ALJ. ICAO held that dismissal of a workers' compensation claim is a sanction available to the ALJ when a party willfully violates discovery obligations, but "the sanction should be commensurate with the seriousness of the conduct being sanctioned." Because claimant's actions obstructed litigation only on the issue of PPD, ICAO held that dismissal of the entire claim, including future medical benefits, was disproportionate with the seriousness of claimant's conduct. *Garrett v. McNelly Construction Company*, W.C. No. 4-734-158 (ICAO Mar. 29, 2010)

Home Health and Child Care Services

ICAO affirmed ALJ Mottram's order that denied claimant's request for home health care. Claimant's expert testified that claimant needed help with vacuuming, sweeping, mopping, cleaning, and meal preparation. Held: The ALJ applied the correct legal standard in finding that the requested housekeeping services were not reasonable and necessary to cure and relieve the claimant from the effects of her compensable injury. *Parker v. Iowa Tanklines*,

W.C. No. 4-517-537 (ICAO Mar. 2, 2010) ICAO affirmed an order of ALJ Felter that denied claimant's request for reimbursement for child care services. The ALJ found that claimant had presented no persuasive medical evidence that childcare services were essential to the course of her recovery. ICAO held that there was substantial evidence in the record to support the ALJ's factual determination. *Smith v. Concorde Career Colleges*, W.C. No. 4-733-532 (ICAO Mar. 16, 2010)

PPD

ICAO affirmed an order of ALJ Krumreich that denied claimant's request for conversion of an extremity rating to a whole person impairment rating. ICAO held that whether the situs of the claimant's functional impairment was below or above the level of the arms at the shoulders, and therefore whether she sustained a scheduled or whole person impairment, was a question of fact for the ALJ. Claimant had the burden of proving by a preponderance of the evidence she sustained a whole person impairment. *Cassius v. Entegris*, W.C. No. 4-732-489 (ICAO Mar. 26, 2010)

Reopening

ICAO affirmed an order of ALJ Cannici that granted respondents' request to reopen and terminate claimant's PTD benefits, limited claimant's medical maintenance benefits to 8 physical therapy and 8 massage therapy sessions per year near her residence, and found claimant was not entitled to a health club membership. ICAO found that the ALJ's order was supported by substantial evidence, including surveillance video, the medical opinion of a physical medicine and rehabilitation expert, and a vocational consultant's report. *White v. Eastman Kodak Co.*, W.C. No. 4-204-799 (ICAO Mar. 25, 2010)

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.

DEFENSE TALK SM

FOUNDED 1991

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

© 2010 Clifton, Mueller & Bovarnick, P.C.
All rights reserved. Printed in USA.

New Phones in Denver

We have installed a new phone system in the Denver office with an automated call answering and routing feature. Following are new extensions for our Denver attorneys and staff:

T. Lancaster	100	F. McCracken	109
R. Bovarnick	103	B. Duncan	111
H. Barrett	104	J. Abraham	112
E. Weber	105	S. Vargas	113
J. Doebley	107	B. Houseman	114
R. Mueller	108		

Note: Summaries and articles should not be relied upon as authority for a particular case. Consult any of the attorneys at Clifton, Mueller & Bovarnick, P.C., for advice on the application of all the law to the specific facts of your case or legal problem.



**IPSI
DIXIT**



This punny recipe was submitted by Jim Clifton.

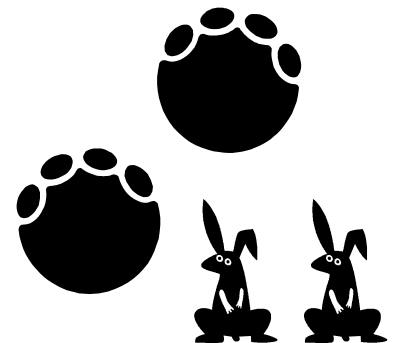
Ingredients

- 1 Elephant
- 2 Rabbits
- Salt and pepper to taste

Directions

Cut elephant into small, bite-size pieces. This should take about 2 months. Add enough brown gravy to cover, cook over kerosene fire for about four weeks at 465 degrees F. This will serve 3800 people. If more are expected, two rabbits may be added, but do this only if necessary as most people do not want to find hare in their stew.

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



TECH TIPS



Telemarketers

If you are bothered by telemarketers, telephone scammers, and other unwanted calls despite having registered with the Do Not Call list, check out these sites:

CallerComplaints.com offers a quick, easy, and free way to file a complaint about any phone number that's calling you. Its telemarketer database is publicly available, so you can also look up a number to find

complaints that have been filed with the website.

PhoneSpamFilter.com is another free service with the goal of developing a complete database of all phone solicitors.

You can register with the Do Not Call list at www.donotcall.gov.

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

CLIFTON, MUELLER & BOVARNICK, P.C.

789 SHERMAN STREET
SUITE 500
DENVER, COLORADO 80203