

DEFENSE TALK

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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

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; GAL=general admission of liability; ICAO=Industrial Claim Appeals Office; TTD=temporary total disability; WCRP=Colorado Workers' Compensation Rules of Procedure.

Authorized Medical Treatment

ICAO affirmed ALJ Friend's finding that the surgeon who performed surgery three months after claimant's injury was not authorized and the surgery was not in the normal progression of authorized treatment. Claimant argued that because the surgery was performed on an emergency basis, which was reasonable and necessary to cure or relieve the effects of her injury, the insurer must pay for the surgery. Held: The ALJ found the surgery was not reasonably needed. Therefore, the medical emergency exception to the need for au-

thorization does not apply. The ALJ also explicitly rejected claimant's argument that the emergency doctrine applied. The question of whether a bona fide emergency exists is one of fact for the ALJ. *Hoffman v. Wal-Mart Stores, Inc.*, W.C. No. 4-774-720 (ICAO Jan. 12, 2010)

Causation

ICAO set aside ALJ Harr's order denying and dismissing the claim for compensation. Claimant was injured while returning to work after leaving the employer's premises to have lunch with a friend. Walking from the parking lot toward the door of the building in which she worked, she misjudged the curb, lost her balance, and fell while stepping up onto the sidewalk. The ALJ found that claimant's injury had occurred in the course of her employment, because "she was hurrying back into the police building after returning from lunch in order to relieve a fellow worker from covering telephones," but determined that she had failed to show her injury arose out of her employment. ICAO held that because claimant's fall was precipitated by the circumstances or conditions of her employment, not by a preexisting non-industrial condition, it was not necessary for her to demonstrate the existence of a special hazard employment in order to prove that her injury arose out of her employment. *Pieper v. City of Greenwood Village*, W.C. No. 4-675-476 (ICAO January 20, 2010)

ICAO affirmed ALJ Friend's order that determined claimant's injury was compensable. Claimant slipped and fell in the

free parking lot owned and maintained by the City and County of Denver for airport employees and employees of its contractors, including respondent employer. The parking lot is not available to the general public. Held: Whether an injury arose out of the employment is a question of fact for the ALJ, and the ALJ in this case could logically infer that use of the lot was an incident of claimant's employment. *Nigusie v. Standard Parking Corp.*, W.C. No. 4-788-774 (ICAO January 27, 2010)

Safety Rule Violation

ICAO affirmed ALJ Mottram's order granting respondents' motion for summary judgment. Respondents had filed a GAL admitting for TTD but claiming a 50-percent offset for an alleged safety-rule violation. Following a hearing, ALJ Walsh determined that respondents had failed to prove the elements necessary for the offset. Claimant then sought penalties, claiming that respondents had frivolously taken the offset. Held: The insurer is allowed to take an offset for a safety-rule violation without awaiting adjudication of the issue by an ALJ. Respondents did not violate any provision of the Act or the WCRP by filing a GAL claiming a safety-rule violation, and therefore penalties could not be awarded. However, ICAO noted that if the insurer had engaged in bad faith, it could be subject to civil liability. *Carr v. Pasco/SW, Inc.*, W.C. 4-751-083 (ICAO Jan. 5, 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.

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Practice Pointer

The Importance of Doing an Investigation Before Admitting a Claim

By Holly M. Barrett

An employer has ten days after receiving notice of an alleged injury to complete an Employer's First Report of Injury and to file it with the Division of Workers' Compensation ("Division"). An insurer has twenty days after an Employer's First Report of Injury is, or should have been, filed with the Division to file either a General Admission of Liability or a Notice of Contest. This time should be used to investigate the claim.

It is important to investigate an alleged injury before the evidence becomes stale.

Often if there is video surveillance of the premises where the alleged injury occurred, that surveillance footage is copied over after just 24 hours. The sooner you begin your investigation, the more likely you are to preserve that surveillance footage. Similarly, some employers have high turnover rates for employees, so investigating early allows you to interview potential witnesses and obtain statements from them about what they may have witnessed. Even obtaining copies of a claimant's medical records early can help you avoid admitting

to a claim that otherwise should have been denied.

Too often, claims are admitted without a proper investigation. Once a claim is admitted, unless you can show the claimant committed fraud, any withdrawal of an admission by an Administrative Law Judge is prospective only. In other words, you cannot get back what you have already paid out. A proper investigation, conducted prior to admitting or denying a claim, can preclude this problem.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Gircsis v. Shaw, Stone & Webster, Inc.*, Jim successfully petitioned to close the case for lack of prosecution. The Director of the Division of Workers' Compensation issued an order to show cause, which automatically closed the claim when claimant did not file a written statement showing good cause within 30 days.

Royce W. Mueller

In *Collins v. The Shaw Group, Inc.*, the prehearing ALJ denied claimant's motion to add "neck and depression" as body parts to be evaluated by the DIME physician. Royce successfully argued that the medical records claimant attached to his motion did not support the addition of those issues and that in his answers to interrogatories claimant stated only that he had pain in his upper and lower back.

Richard A. Bovarnick

In *Rosario v. Wal-Mart Stores, Inc.*, ALJ Krumreich agreed with Rich's argument that although claimant's supervisor failed to provide her with the choice of physician form required by rule 8-2, only the first provider who treated claimant following her injury became authorized. Claimant did not have the right to change to another physician, to whom she was referred by her attorney, without obtaining permission from the insurer or an ALJ.

In *Wood v. Wal-Mart Stores, Inc.*, ALJ

Friend granted respondents' motion to withdraw their admission of liability. Rich presented medical records and testimony to establish by a preponderance of the evidence that the claimed accidental injury was not compensable.

In *Bisson v. Labor Ready*, ALJ Jones determined claimant's average weekly wage to be \$123.76, rather than the claimed \$309.40. Rich presented evidence that the employer contracted with claimant to work one day at a time; that claimant was not a credible witness about his employment history; and that claimant's employment history had large gaps during which he was not employed.

In *Poston v. Labor Ready*, the prehearing ALJ granted Rich's motion to strike claimant's Notice and Proposal to Select Independent Medical Examiner when claimant unilaterally "postponed" the DIME appointment. Rich argued successfully that it was obvious claimant had no intention of proceeding with a DIME and the filing of the Notice and Proposal was done merely to protect claimant's rights.

John M. Abraham

In *Boggio de Morelos v. Wal-Mart Stores, Inc.*, ALJ Cain denied and dismissed claimant's request for reimbursement of expenses she incurred for post-MMI medical treatments. John presented medical reports and the testimony of the IME psychiatrist to persuade the ALJ that claim-

ant's industrial injury played no significant causative role in claimant's need for the treatments; that the alleged worsening of her symptoms was caused by an unrelated psychological condition; and that further treatment of claimant's physical complaints was likely to perpetuate rather than relieve them.

Holly M. Barrett

In *Anderson v. Labor Ready*, ALJ Stuber dismissed the claim for compensation and benefits with prejudice. Holly had moved to dismiss the claim because of claimant's repeated failures to obey the prehearing ALJ's order compelling claimant to provide respondents with a list of providers who had treated claimant within the previous five years. The ALJ commented on the inexplicable conduct of claimant's counsel and concluded that "claimant has obstinately and willfully failed to comply with the PALJ order. Dismissal of the claim is the reasonable remedy for the repeated willful failure to comply."

M. Frances McCracken

In *Hoffman v. Wal-Mart Stores, Inc.*, ICAO affirmed ALJ Friend's denial of claimant's requests for certain medical benefits and for temporary total disability benefits. ICAO held that the ALJ's findings that claimant's two-level cervical fusion three months after her injury and sev-

Please see VICTORIES on page 4

Legislative Watch

In this column we will alert you to bills that have been introduced in the Colorado General Assembly on topics of interest to employers and insurers.

Senate bill 10-012: would double the per-day penalty from \$500 to \$1,000; change the mental state requirement from “willfully” to “knowingly”; and allow the Director or ALJ to apportion penalties among the aggrieved party, the provider, and the workers’ compensation cash fund.

House bill 10-1011: would require Division IME physicians to disclose “any business, employment, financial, or advisory relationship” with an insurer or self-insured employer when requested; prohibit the payment of incentives to deny or delay a workers’ compensation claim, medical care or medical treatment; and prohibit a treating physician from communicating with the insurer or employer unless the claimant is present or the communication is in writing.

House bill 10-1012: would prohibit surveillance of a workers’ compensation claimant “unless the insurer or employer has a reasonable basis to suspect that the employee has committed fraud or made a material misstatement concerning the claim;” require the insurer or employer to provide all materials collected during the surveillance to the claimant; and require anyone conducting surveillance to answer the claimant’s questions truthfully.



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.



Clifton, Mueller & Bovarnick welcomes Maribeth Hughes to its Grand Junction office. Maribeth joined the firm as the new receptionist/legal assistant on February 8. She has extensive legal experience, having worked in the legal field for more than fifteen years. She has also worked as an administrative claims manager for a major insurance company and, most recently, as a pharmacy technician.

John M. Abraham	M. Frances McCracken
Holly M. Barrett	Royce W. Mueller
Richard A. Bovarnick	Diane K. Murley
James R. Clifton	Erica A. Weber

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Fark.com is an edited news website that selects “the funny and weird notable news -- and not-news -- of the day” from thousands of items submitted by the site’s readers. Although the news items are real, Fark’s headlines are usually better than the originals. The following are some of the top headlines of 2009:

18: India loses contact with an unmanned spacecraft conducting its first moon mission. Support techs ask Mission Control to confirm that the spacecraft is turned on and that it is currently plugged in

17: Bolivian animal rights activists succeed in banning circuses from using animals, but now have to figure out what to do with 22 useless lions, a problem Detroit has faced for years

15: One killed, six injured in pie factory explosion. Blast heard up to 3.14159265 miles away

13: Plane crashes in Florida panhandle, no pilot found. Well there’s your problem

To see the entire list, go to fark.com and search for “Congratulations to the winners of Fark’s 2009 Headline of the Year contest”.

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



TECH TIPS



Last summer Microsoft unveiled its new search engine, Bing, which has been adding features and gaining fans ever since. If you haven't tried Bing yet, check it out at www.bing.com.

One feature of Bing that you may like is its health-information search. Bing's search algorithm focuses on authoritative resources including The Mayo Clinic, The American Cancer Society, MD Consult, Gold Standard, the NIH's NCCAM and MedlinePlus. Bing also provides "Quick

Tabs" to help you refine your search. For example, a search for "carpal tunnel syndrome" displays "Quick Tabs" links to carpal tunnel syndrome tests, carpal tunnel syndrome prevention, and carpal tunnel syndrome prognosis in the left column.

Another feature that has received positive reviews is Bing Maps (www.bing.com/maps). In the top Maps search box, enter an address or city for a basic map or two locations for directions (e.g., "Denver to Grand Junction, CO"). If you want your

map to include traffic information, include the word traffic (e.g., "Denver traffic"). Once you retrieve a map, use the Aerial pull-down to choose Aerial or Bird's Eye view. If Bing's directions don't quite meet your needs, you can edit the route by dragging.

To learn more about the features of Bing, go to www.bing.com/explore.

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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eral emergency room visits were not reasonable and necessary to cure or relieve claimant from the effects of her compensable injury, that the surgeon was not authorized and the surgery was not in the normal progression of authorized treatment, and that claimant had failed to establish she was disabled as a result of the injury were supported by substantial evidence and plausible inferences drawn from

the record.

In *Handson v. Northwest Pipe Co.*, ICAO affirmed ALJ Krumreich's order denying and dismissing claimant's petition to reopen and his claim for additional benefits for lack of prosecution and lack of evidence. Claimant failed to appear at hearing and on Fran's motion the ALJ issued an order dismissing the case for lack of prosecution unless claimant showed good cause

why it should not be dismissed. Claimant responded that he had not appeared for the hearing because he was in jail. Claimant had not attempted to reschedule or notify the ALJ or opposing counsel of his situation. ICAO upheld the ALJ's determination that claimant failed to act in a reasonably prudent manner to make arrangements for dealing with his claim while he was incarcerated.

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