

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, ALJ=administrative law judge; AWW=average weekly wage; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; PPD=permanent partial disability.

PPD

ICAO affirmed in part and set aside in part ALJ Harr's order requiring respondents to adjust claimant's AWW for various periods of disability, and remanded for further proceedings. ICAO held that the ALJ had not erred in requiring respondents to compute claimant's AWW based on claimant's increased wages for merit raises and the cost of claimant's COBRA benefits after the date in injury. However, ICAO held that the ALJ erred in requiring an adjust-

ment of AWW after the period of PPD benefits had begun. Because the total amount due for PPD is calculated using a single TTD rate based on a single AWW, the ALJ's order requiring respondents to use different AWWs for different periods of disability makes it impossible to discern the exact amount of PPD benefits respondents are obliged to provide. Therefore, ICAO remanded the matter to the ALJ for

determination of which AWW should be used in calculating PPD benefits. *Mathews v. City of Glenwood Springs*, W.C. No. 4-692-272 (ICAO June 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.

In the Courts

Workers' Compensation— Division IMEs—Conflicts of Interest

In *City of Manassa v. Ruff*, announced June 21, 2010, the Colorado Supreme Court held that neither membership in the insurer's SelectNet organization nor status as a medical advisor to the insurer, in and of itself, constituted a disqualifying conflict of interest or apparent conflict of interest under the Division of Workers' Compensation rules governing Division IMEs (DIMEs).

Editor's note: In its most recent legislative session, the Colorado General Assembly amended the DIME statute to require physicians listed on a DIME panel to disclose, when requested, summarized information about business, financial, employment, or advisory relationships with the insurer, self-insured employer, or claimant. The director has adopted rules to implement

this requirement. The new rules provide that the summary disclosure shall be provided on a Division form; that no requests for any other information regarding a physician's business, financial, employment or advisory relationships shall be granted under this rule; and that the information will not be used as a basis for the Division to remove a physician from the DIME panel. You can find the new rules on the Division's website (www.colorado.gov/cdle/dwc).

Personal Injuries— Collateral Source Rule

In *Crossgrove v. Wal-Mart Stores, Inc.*, announced June 24, 2010, the Colorado Court of Appeals held that the common law collateral source rule prohibits introduction before the jury of evidence of the amount discounted or written off by a



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Practice Pointer

Employers Must Act Promptly to Keep Choice of Physician

By Diane K. Murley

The Colorado Workers' Compensation Act allows the employer or insurer to designate the treating physician for a work injury by providing the employee with a list of at least two physicians or medical providers "in the first instance." If the services of a physician are not tendered "at the time of injury," the right to select a physician or chiropractor passes to the employee. Section 8-43-404(5)(a)(I)(A).

The industrial claim appeals office and administrative law judges have been strictly interpreting this provision. If the employee is not immediately provided with a designated provider list when he or she reports an injury, the employer or insurer risks losing control of medical at the very beginning of the claim. The list should be provided even if the employee declines medical treatment when reporting the injury.

In a medical emergency, an employee may seek treatment without reporting the injury, but the employer retains the right to select the first non-emergency physician. Similarly, the employer may take the employee for emergency treatment before providing a designated provider list, but it must give the employee the list as soon as possible, ideally before the employee is released from the emergency facility.

The following are examples of cases in which the right to select the treating physician passed to the employee before the employer designated a provider.

Claimant was taken to the emergency room by his supervisor. In the emergency room claimant was told to take a few days off work. Before returning to work claimant sent a letter to employer designating his own physician. The ALJ found that the employer had not provided employee with the list of designated physicians before his injury or at the conclusion of emergency care. Respondents were required to pay for treatment by claimant's designated physician.

Claimant sought treatment with her authorized treating physician before reporting the injury. However, neither the employer nor the insurer referred the claimant to a designated provider after they received notice of the injury and before claimant underwent surgery by her personal physician. Respondents were required to pay for treatment by claimant's personal physician.

Claimant was reluctant to undergo the employer's required drug screening, so she told the employer representative that she would think about whether she wanted treatment for her injury. She then sought treatment from her personal physician. Respondents were required to pay for treatment by her personal physician.

In order to avoid losing the right to designate a claimant's treating physician, the employer should:

- Provide a pre-injury designation of authorized medical providers

by posting a "Notice to Employees" poster in one or more conspicuous places on the work site. The insurer should provide the poster to the employer.

- Provide the employee with a designated provider list as soon as an injury is reported, even if the employee does not think he or she needs treatment. If the employee is taken for emergency treatment, provide the employee with a designated provider list as soon as possible, preferably by the time emergency treatment is completed.
- Separate the procedures for required drug screening from referral for medical treatment. An employee who refuses to submit to drug screening should still be taken or referred for medical treatment. The refusal should be handled as a separate incident with appropriate discipline. Medical treatment should never be withheld or postponed because of a drug screening requirement.

If you have any questions about designating a medical provider for a work injury, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In *Prieto v. ABM Industries*, ALJ Felter denied and dismissed claimant's claim for workers' compensation benefits. Rich presented three employer witnesses who testified credibly and persuasively that claimant did not report an injury to them in the days following his alleged work injury and that claimant did not appear to be having problems with his back. The ALJ found that claimant did not report his alleged injury or seek medical care until three

weeks later, after his request for vacation had been denied. Rich also cross-examined the ATP, and the ALJ found that the ATP had failed to render a medically probable opinion of work-relatedness. Therefore, the ALJ found that claimant had failed to prove by a preponderance of the evidence that he sustained a compensable injury.

In *Rodriguez vs. Ford Motor Credit*, ALJ Walsh denied and dismissed claimant's claim for benefits. Rich presented expert testimony to persuade the ALJ that claim-

ant had failed to establish by a preponderance of the evidence that she sustained a compensable occupational disease to her upper extremities arising from her job duties as a collection operator, a desk/computer job. The ALJ found respondents' expert's opinion to be more credible than other medical or lay evidence.

In *Burciaga vs. ABM Janitorial Services*, ALJ Stuber denied and dismissed claim-

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VICTORIES IN THE TRENCHES

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ant's claim for PPD benefits. Rich presented expert testimony to persuade the ALJ that claimant had failed to prove by a preponderance of the evidence that she suffered any permanent medical impairment as the result of her admitted work injury. The ALJ found the opinions of respondents' expert to be more persuasive than those of the DIME physician.

Holly M. Barrett

In *McIntyre v. KI, LLC*, ICAO affirmed ALJ Stuber's order denying and dismissing claimant's request for authorization of shoulder surgery. Holly presented medical records of claimant's previous work-related shoulder injury and the Rule 16 report of the doctor who had performed a

medical records review in response to the request for prior authorization of shoulder surgery. The reviewing doctor stated that the mechanism for injury in claimant's recent work injury would not cause injury to the undersurface of the infraspinatus tendon and that all of the claimant's rotator cuff pathology preexisted the work injury. ICAO held that the Rule 16 report and the comparison of the MRA imaging following the two injuries provided substantial evidence supporting the ALJ's findings that the compensable accident did not cause, aggravate or accelerate the claimant's need for shoulder surgery.

In *Valdez v. Five Rivers Ranch Cattle Feeding, LLC*, ALJ Felter denied and dismissed claimant's claim for additional PPD benefits based upon conversion of the scheduled impairment rating to a whole person rating. Holly submitted medical records to establish that the site of claimant's work-related permanent functional impairment at the time of MMI was limited to his left shoulder and did not affect the whole person.

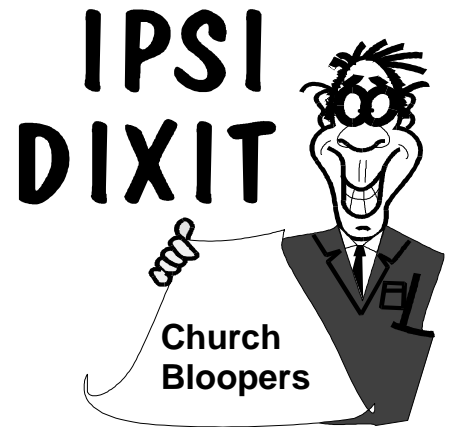
In *Geary v. L-3 Communications*, ALJ Stuber denied and dismissed claimant's claim for additional PPD benefits. Holly persuaded the ALJ that claimant did not suffer a functional impairment to his low back due to an altered gait and that he had failed to prove by a preponderance of the evidence that he suffered any additional scheduled impairment other than the 21% of the leg assigned by the ATP.



COURT UPDATE

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healthcare provider, as well as the amount paid by a third-party payer, even if such evidence is offered to prove the reasonable value of the healthcare services provided. However, under Colorado's collateral source statute, § 13-21-111.6, C.R.S., after the jury reaches a verdict the trial judge will consider evidence of amounts the plaintiff has received from other sources and enter judgment on the reduced amount.



The following bloopers allegedly appeared in church bulletins or announcements:

The Fasting & Prayer Conference includes meals.

Ladies, don't forget the rummage sale. It's a chance to get rid of those things not worth keeping around the house. Bring your husbands.

Remember in prayer the many who are sick of our community. Smile at someone who is hard to love. Say "Hell" to someone who doesn't care much about you.

Irving Benson and Jessie Carter were married on October 24 in the church. So ends a friendship that began in their school days.

Eight new choir robes are currently needed due to the addition of several new members and to the deterioration of some older ones.

Potluck supper Sunday at 5:00 PM — prayer and medication to follow.

The ladies of the church have cast off clothing of every kind. They may be seen in the basement on Friday afternoon.

Low Self Esteem Support Group will meet Thursday at 7 PM. Please use the back door.

The eighth-graders will be presenting Shakespeare's Hamlet in the church basement Friday at 7 PM. The congregation is invited to attend this tragedy.

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

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.

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