

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

Legislative Update

Brochure required to be sent to claimants

HB 10-1038 became law May 26, effective immediately. The law requires employers and insurers to provide to claimants, at the same time as the initial notice of contest or admission, a brochure describing the claims process and informing claimants of their rights. The required brochure is available on the website of the Division of Workers' Compensation (www.colorado.gov/CDLE/DWC) or by contacting any attorney at Clifton, Mueller & Bovarnick.

Surveys required to be sent to claimants

SB 10-013 requires insurers to survey claimants or, if deceased, decedent's dependents, regarding claimant's satisfaction

with the insurer. The director will develop the form and manner of the survey. Insurers must send surveys to claimant upon closure of a claim and annually report the survey results to the Division. The director will post the results on the Division's website. Employer and insurer may not retaliate against claimant or dependents for completing a survey. This law is effective July 1, 2010.

Penalties

SB 10-012 doubles the potential penalty under 8-43-304(1) to \$1,000 per day for each offense, to be apportioned between the aggrieved party and the Workers' Compensation Cash Fund by the director or ALJ. It also changes the mental state required from "willfully" to "knowingly" for penalties under 8-43-401 for delaying payment of medical benefits or stopping payment. No penalty is due if the insurer or self-insured employer proves the delay was the result of excusable neglect. It remains to be seen whether the substitution of "knowingly" for "willfully" in the statute will change claimant's burden of proof. The two terms are usually used interchangeably in Colorado law. Penalties for delay in payment of medical benefits are to be apportioned between the aggrieved party, the medical services provider, and the Workers' Compensation Cash Fund. This law becomes effective on August 11, 2010, unless a referendum petition is filed against all or part of it.

Conflicts of interest

SB 10-011 imposes a number of require-

ments intended to reduce conflicts of interest:

1. If requested, DIME physicians are required to disclose summarized information about business, financial, employment, or advisory relationships with the insurer, self-insured employer, or claimant. Parties will not be required to make their strikes from the DIME panel until they have had a reasonable opportunity to review the summary disclosure. The director will adopt rules to implement this requirement. This section applies to requests for IMEs made on or after July 1, 2010.
2. Financial incentives based on number of days to MMI, rate of claims approved or denied, number of medical procedures or appointments, or "any other criteria designed or intended to encourage a violation" of the Colorado Workers' Compensation Act are prohibited. Besides penalties under the Act, payment of incentives may subject insurer or self-insured employer to penalties and fines for an unfair act or practice in the business of insurance.
3. Treating physicians may not communicate with employer or insurer unless claimant is present for the communication or "the treating physician makes an accurate written record of the communication, containing all relevant and material information that was communicated, and provides the

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Practice Pointer

A Guide Through the Division IME Process

By John M. Abraham

Colorado Revised Statutes section 8-42-107.2 and Workers' Compensation Rules of Procedure Rule 11 govern the selection of the Division IME physician. The selection of a Division IME physician can be a rather addling process. It is laden with deadlines and forms that must be filed with the Division, the claimant, and, if applicable, opposing counsel, prior to the ultimate confirmation of the physician and the appointment date. This practice pointer will help to simplify the Division IME process in six simple steps.

Step 1: The first step in requesting a Division IME is the filing of a Notice and Proposal to Select an Independent Medical Examiner. The Colorado courts have deemed the filing of the Notice and Proposal to be **mandatory**, and it is a jurisdictional prerequisite for either side requesting a Division IME. If the insurer requests a Division IME, the Notice and Proposal must be filed within 30 days from the date the authorized treating physician's determination of maximum medical improvement is mailed or delivered to the insurer. If the claimant requests a Division IME in response to a Final Admission of Liability, the claimant must file a Notice and Proposal **and** an objection to the Final Admission of Liability within 30 days of the date of the Admission. C.R.S. 8-43-203(2)(b) (II). Always double-check that the claimant has filed **both** forms. Claimant's failure

to file both forms has been deemed a failure to properly request a Division IME.

Step 2: After the requesting party has filed the Notice and Proposal, the parties are required to negotiate the selection of the Division IME physician. The insurer does not have to agree to any of the physicians proposed by the claimant. Often the parties simply agree to disagree. When the parties cannot agree to a physician, the **insurer** is required to file a "Notice of Failed Independent Medical Examination Negotiations" within 30 days of the date of the filing of the Notice and Proposal.

Step 3: Once the insurer has filed the Notice of Failed IME Negotiations, the requesting party is responsible for filing the "Application for a Division Independent Medical Exam." Generally, the Application for a Division IME should be filed within 30 days of the date of the filing of the Notice of Failed IME Negotiations. However, the Colorado courts have ruled that the filing of the Application for a Division IME beyond the deadline does not bar a party from seeking a Division IME.

Step 4: Once an Application for a Division IME has been filed, the Division IME Unit will issue a "panel" of three physicians from which the parties select based upon a series of strikes. The party requesting the Division IME always has the first strike. The first strike must be made within

seven business days from the date the panel was issued. The second strike is due within **five** business days of the first strike. Strategy is important at this step in selecting the "best" Division IME physician. If the insurer is unsure of which physician is best suited to perform the evaluation, contact any of the attorneys at Clifton, Mueller & Bovarnick.

Step 5: The next step in the Division IME process is the setting of the appointment. The appointment has to be set by the requesting party within **five** business days from the date of the Division IME confirmation sheet sent to the parties by the Division. Failure to set this appointment within the five business days allows the non-requesting party to request cancellation of the Division IME.

Step 6: Lastly, the Division IME packet must be mailed to the physician no later than 14 days before the date of the examination. The insurer is responsible for mailing the Division IME packet, which must be arranged in a specific format.

Some of these deadlines may change to accommodate the new DIME disclosure requirements. (See "Legislative Update" in this issue.) If you have any questions regarding the Division IME process or its deadlines, please contact the attorneys at Clifton, Mueller, & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In *Stark v. Wal-Mart Stores, Inc.*, Rich persuaded PALJ De Marino that claimant's actions in scheduling a DIME amounted to doctor shopping. After the parties made their strikes from the three-doctor IME physician panel, claimant's attorney alleged that the remaining doctor was unable to schedule the DIME within the 35- to 50-day window. Instead of contacting Rich to agree to scheduling the DIME outside the window, claimant's attorney asked the DIME unit to designate a new three-doctor

panel. The PALJ ordered the DIME to be set with the original DIME doctor.

John M. Abraham

In *Coronel vs. Wal-Mart Stores, Inc.*, PALJ Eley granted John's motions to strike claimant's notices and proposals to select DIME physicians for both of claimant's injuries. In one case claimant missed her scheduled DIME appointment and failed to reschedule for more than four months. John persuaded the PALJ that claimant had waived her right to the DIME

through her inaction. In the other case claimant failed to schedule a DIME appointment after the parties agreed upon a physician. John successfully argued that under Rule 11 claimant had five business days from the date of the agreement to schedule an appointment, and that cancellation of the DIME was appropriate pursuant to Rule 11-3.

Holly M. Barrett

In *Moaz v. Conoco Phillips Co.*, the Indus-

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VICTORIES IN THE TRENCHES

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trial Claim Appeals Office affirmed ALJ Cain's order denying and dismissing claimant's claim for benefits. ICAO held that the ALJ's findings of fact were supported by substantial evidence in the record, including testimony by claimant's co-worker and supervisor, video recordings depicting claimant working for another convenience store with no evidence of pain or other symptoms, and the opinions of respondents' IME physician.

In *Mendez vs. Labor Finders*, ALJ Caninci denied and dismissed claimant's claim for workers' compensation benefits. Holly presented testimony of two employer witnesses and employer and medical records to persuade the ALJ that claimant failed to prove she sustained a compensable workers' compensation injury. The employer witnesses and records established that claimant did not work on the date she claimed to have been injured and that she had not reported her alleged injury for more than seven months. The ALJ also found that the nurse practitioner at the authorized clinic credibly concluded that claimant's knee problem was the result of a degenerative miniscal tear.

In *Chadwick vs. Wal-Mart Stores, Inc.*, ALJ Walsh denied and dismissed claimant's claim for workers' compensation benefits. Holly presented employer and medical records showing that claimant had not reported his alleged injury for almost three months, and the ALJ found that Dr. Dickson and Dr. Jones credibly testified that Claimant's condition was not work-related.

In *Steele vs. Wal-Mart Stores, Inc.*, PALJ Eley granted Holly's motion to strike claimant's objection to final admission of liability (FAL) and notice and proposal to

select independent medical examiner and denied claimant's motion to reconsider. Holly successfully argued that the objection and notice, which were filed one day late, should be stricken despite claimant's allegations that the admission was defective and that he did not receive it. Claimant is jurisdictionally barred from obtaining a DIME, and the determinations of the ATP are binding on all parties and the division.

M. Frances McCracken

In *Barnett v. Wal-Mart Stores, Inc.*, on remand from ICAO, ALJ Stuber granted respondents' request to terminate claimant's TTD benefits as of the date he could have returned to work under an offer of modified employment. Fran had presented evidence that employer representatives attempted to hand the written offer to claimant, but he refused to receive it directly from employer and told employer to mail the offer by certified mail. Employer sent the offer by certified mail, which claimant failed to collect despite three post office notifications. Claimant twice agreed by telephone to go to employer's office to sign the offer, but he did not show up. The ALJ found that claimant had impliedly waived actual receipt of the written offer of modified duty.

In *Gallegos vs. Wal-Mart Stores, Inc.*, PALJ De Marino granted respondents' motion to strike claimant's petition to reopen, closing the claim not subject to reopening. The case has a long, complex procedural history, including claimant's application for hearing seeking penalties against the DIME unit, which ALJ Walsh struck for lack of jurisdiction. Claimant's notice and proposal and application for a DIME were then stricken, and claimant's attorney failed to timely file an application

for hearing appealing the order striking the DIME. Fran successfully argued that the time for filing a petition to reopen had expired, and that the petition to reopen was really an attempt to appeal ALJ Walsh's order striking the application for hearing.

Diane K. Murley

In *Stevenson v. Wal Mart*, the Industrial Claim Appeals Office affirmed ALJ Mottram's order denying claimant's petition to reopen. ICAO held that the ALJ's findings were supported by substantial evidence and that his inferences were reasonable from the factual record. The ALJ relied upon medical records and the factual circumstances surrounding claimant's complaints of increased symptoms, and rejected parts of claimant's testimony as not credible because conflicting medical evidence rebutted her testimony. ICAO therefore upheld the ALJ's determination that claimant failed to carry her burden of showing that any worsening of her condition was caused by her compensable injury.

In *Travis vs. Shaw, Stone & Webster Construction*, Diane prevailed on two motions. When claimant failed to provide employment information and authorizations and was not available for an IME, she filed a motion to compel. ALJ Walsh entered an order requiring claimant to provide the requested information and authorizations within 10 days and to make himself available for an IME. When claimant did not comply within 10 days, Diane filed a motion to strike the application for hearing and cancel the hearing. ALJ Stuber cancelled the hearing and ordered that claimant may not refile his application until he has provided the requested information and made himself available for an IME.

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; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; ICAO=Industrial

Claim Appeals Office; MMI=maximum medical improvement.

DIMES

ICAO affirmed ALJ Stuber's order denying claimant's request for authorization of right shoulder surgery. Claimant argued

that the ALJ erred in requiring her to overcome the opinion of the DIME physician, that her right shoulder pain was not causally related to the industrial accident, by clear and convincing evidence. ICAO held

Please see ICAO on page 4

Court of Appeals Update

On May 13, 2010, the Colorado Court of Appeals decided two appeals in the same workers' compensation case.

Workers' Compensation— Medical Utilization Review (MUR)

In *Franz v. Industrial Claim Appeals Office*, 09CA0298, claimant appealed the final order of the Industrial Claim Appeals Office upholding the MUR order directing a change in claimant's treating physician. The Court of Appeals affirmed the ICAO, holding that the MUR process did not violate claimant's rights to due process and that no disqualifying conflict of interest existed. The court held that claimant does not have a property right to receive treatment from a particular provider, and he has no due process right to a hearing before a change of provider may be ordered. The court also held that the only disqualifying conflict of interest for an MUR panel member is a direct or substantial financial interest between the MUR physician and the ATP. The broader definition of conflicts in the rules governing DIMEs does not apply to an MUR because of the differ-

ence between the two processes.

Workers' Compensation— Attorney Fees

In *Franz v. Industrial Claim Appeals Office*, 09CA1433, claimant appealed the final order of the Industrial Claim Appeals Office affirming the ALJ's denial of attorney fees. Within seven days of the director's MUR order of a change in claimant's physician, respondents took steps to select a new ATP for claimant. Because claimant would not cooperate in the process, respondents were unsuccessful. After exhausting all administrative processes for selecting a new ATP, they filed an application for hearing on selection of a new ATP. The ALJ determined that the issue of selecting a different ATP was ripe for adjudication, but concluded that it would be "an extremely unwise action" for him to select a new ATP at that time. However, because the issue was ripe for adjudication, he denied claimant's request for attorney fees. The court held that the issue of selection of a new ATP was ripe for adjudication at the time the application for hearing was filed. In reaching its decision, the court pointed

out that the MUR statute anticipates that the parties may simultaneously follow two separate courses for resolving disputes over ATPs, and pointed out the need to identify an ATP to take over treatment if respondents prevailed on appeal.

ICAO Update Continued from page 3

that when the issue is the relatedness of particular components of a claimant's overall impairment, the opinions of the DIME physician carry presumptive effect. The issue before the ALJ was not whether claimant had sustained a compensable injury, which claimant would only have had to prove by a preponderance of the evidence. The issue was whether respondents were liable for the shoulder surgery and whether claimant was at MMI. Therefore the issue of the cause of claimant's right shoulder surgery was properly before the DIME physician, and her opinions on causation became binding unless overcome by clear and convincing evidence. *Gianzero v. Wal-Mart Stores, Inc.*, W.C. No. 4-669-749 (ICAO May 5, 2010)

Penalties

ICAO affirmed ALJ Cain's order requiring the insurer to pay penalties. When an ATP recommended an EMG to rule out radiculopathy, the adjuster stated she wanted the EMG done through a "gatekeeper" organization that the insurer used for purposes of authorizing medical providers to administer diagnostic tests. ICAO held that the delay in performance of the EMG was attributable to the adjuster's refusal to allow the prescribing doctor, an ATP, to perform the EMG. Therefore, the ALJ's award of penalties for dictating the type or duration of treatment was supported by relevant legal principles and substantial evidence. *Casillas v. Bemis Construction, Inc.*, W.C. No. 4-777-652 (ICAO May 24, 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.

Supreme Court Update

Workers' Compensation— Average Weekly Wage

In *Benchmark/Elite, Inc. v. Simpson*, announced June 1, 2010, the Colorado Supreme Court overruled section III.C of its previous decision in *Avalanche Industries*, which held that "time of injury" for purposes of determining AWW under the default provision could mean time of accident or time of disablement. However, the court upheld its holding that the discretionary exception allows an ALJ to compute an employee's AWW based on compensation received at a subsequent employer if appropriate.

The Colorado legislature amended the AWW statute this year to clarify that "time of injury" means date of injury. See "Legislative Update" in this issue.

Workers' Compensation— Lump Sum Payments

In *Specialty Restaurants Corp. v. Nelson*, announced May 10, 2010, the Colorado Supreme Court held that a claimant who is receiving benefits for permanent total disability is entitled to a lump sum payment up to the aggregate amount of the statutory maximum in effect at the time of the request for a lump sum. Claimant had previously received a lump sum in the amount of the statutory maximum available at the time of her 1990 injury. She later requested an additional lump sum up to the aggregate allowed by the 2007 amendments. The court held that the 2007 amendment to the statute on lump sum payments was procedural, and therefore applied regardless of claimant's date of injury.



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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**IPSI
DIXIT**



Fran McCracken submitted this month's *Ipsi Dixit*.

Dispatcher: 9-1-1. What is your emergency?

Caller: I heard what sounded like gunshots coming from the brown house on the corner.

Dispatcher: Do you have an address?

Caller: No, I have on a blouse and slacks, why?

Dispatcher: 9-1-1. What is your emergency?

Caller: Someone broke into my house and took a bite out of my ham and cheese sandwich.

Dispatcher: Excuse me?

Caller: I made a ham and cheese sandwich and left it on the kitchen table and when I came back from the bathroom, someone had taken a bite out of it.

Dispatcher: Was anything else taken?

Caller: No, but this has happened to me before and I'm sick and tired of it!

Dispatcher: 9-1-1. What is the nature of your emergency?

Caller: I'm trying to reach nine eleven but my phone doesn't have an eleven on it.

Dispatcher: This is nine eleven.

Caller: I thought you just said it was nine-one-one.

Dispatcher: Yes, ma'am nine-one-one and nine-eleven are the same thing.

Caller: Honey, I may be old, but I'm not stupid.

Dispatcher: 9-1-1. What's the nature of your emergency?

Caller: My wife is pregnant and her contractions are only two minutes apart.

Dispatcher: Is this her first child?

Caller: No, you idiot! This is her husband!

And the winner is.....

Dispatcher: 9-1-1.

Caller: Yeah, I'm having trouble breathing. I'm all out of breath. Darn.... I think I'm going to pass out.

Dispatcher: Sir, where are you calling from?

Caller: I'm at a pay phone. North and Foster.

Dispatcher: Sir, an ambulance is on the way. Are you an asthmatic?

Caller: No.

Dispatcher: What were you doing before you started having trouble breathing?

Caller: Running from the police.

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



Legislative Update

Continued from page 1

injured worker access to the writing in the same manner as medical records disclosures as required by director rules.” Under this provision, adjusters may still call a treating physician, as long as they remind the physician to make an accurate written record of the call and provide the claimant with access to the record.

4. No insurance or ancillary contract such as an annuity may establish a reversionary interest in the insurer for indemnity benefits.

This law is effective immediately, except for the DIME disclosures in section 1.

Other changes

SB 10-187 made a number of changes to the Colorado Workers’ Compensation Act:

1. Medicaid and any other indigent healthcare program are not to be included in calculation of AWW.
2. If any party applies for hearing on whether claimant is entitled to medical maintenance benefits recommended by an ATP, and claimant is successful,

“costs” can be awarded to claimant. If liability for the benefits is admitted at least 21 days before hearing, no costs can be awarded. Costs could include charges by the ATP for a report, deposition or hearing testimony. Costs do not include attorney fees.

3. Calculation of AWW under the default provision is clarified: “at the time of injury” means the date of injury. This section modifies part of the Supreme Court’s opinion in the *Avalanche* case. Director’s discretion to fairly determine AWW is not altered. (See also “Supreme Court Update” in this issue.)
4. An offset for SSDI benefits may no longer be taken against PPD benefits. The offset may still be taken against TTD, TPD and PTD. The rationale for this change is that PPD compensates for impairment not disability.
5. Claimant’s refusal to accept an offer of modified employment does not constitute responsibility for termination if the offer would require claimant to

travel greater than 50 miles one way more than claimant’s pre-injury commute. An ALJ may also determine that claimant’s rejection of modified employment was reasonable concerning the totality of claimant’s circumstances, including “consequences of the industrial injury,” “financial hardship,” or “any other reason” that makes acceptance of the offer “impracticable.” If any of these exceptions to “responsibility for termination” applies, payment of TTD must continue.

6. Adds 6 weeks’ compensation for loss of a tooth to scheduled PPD.
7. Director shall adjust indemnity caps for injuries sustained on or after January 1, 2012, by percentage of adjustment made to the state AWW.
8. Claimant can receive lump sum PPD while pursuing permanent total disability benefits.

This law is effective July 1, 2010, except for the COLA in section 7.

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