

DEFENSE TALK

SM

A PUBLICATION BY THE LAW FIRM OF

CLIFTON, MUELLER & BOVARNICK, P.C.

MARCH

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, ALJ=administrative law judge; DIME=Division-sponsored independent medical examination; ICAO=Industrial Claim Appeals Office; PTD=permanent total disability.

Compensability

ICAO affirmed ALJ Stuber's order finding the claim compensable. Claimant worked picking up loose trash at a landfill. While picking up trash he reached into a yucca plant to retrieve a five-dollar bill and scraped the back of his hand, which became infected and eventually required surgery. The ALJ determined that the act of picking up the five-dollar bill was an insignificant deviation from claimant's assigned duties that did not remove claimant from the employment relationship. Held: To prove a compensable injury, a claimant must only show that the injury arose out of a risk that was reasonably incidental to the

conditions and circumstances of the employment. It is not necessary to show that he was actually engaged in work duties at the time of the injury. *Laroc v. Labor Ready, Inc.*, W.C. No. 4-783-889 (ICAO Feb. 1, 2010)

ICAO affirmed ALJ Stuber's order denying and dismissing the claim for compensation. After smelling cat urine while at a customer's residence, claimant was diagnosed with vocal cord dysfunction syndrome (VCDS). The ALJ found that the case was a "mental-physical" case, because claimant did not sustain any physical injury. Therefore, claimant was required by § 8-41-301(2)(a), C.R.S., to prove that he suffered "a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances." He failed to do so. *Granados v. Comcast Corporation*, W.C. No. 4-724-768 (ICAO Feb. 19, 2010)

investigate the reasons for the disparity and attempt to resolve the disparity. *Capritta v. King Soopers*, W.C. No. 4-772-353 (ICAO Feb. 26, 2010)

PTD

ICAO affirmed ALJ Stuber's order finding claimant was entitled to PTD benefits and denying respondents' request for suspension of benefits for claimant's refusal to submit to additional surgical treatment. The ALJ found that the surgery was unlikely to enable the claimant to obtain and maintain employment, and concluded that his refusal to undergo the surgery was not a bar to his PTD claim. Held: It was not an abuse of discretion for the ALJ to refuse to suspend claimant's benefits when claimant's decision to refuse treatment had no impact on his entitlement to compensation and did not increase the liability of the insurer. *Aranda v. Evraz, Inc.*, W.C. No. 4-628-418 (ICAO Feb. 17, 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.

DIMES

ICAO affirmed ALJ Friend's order determining that respondent had overcome the DIME physician's opinion on permanent medical impairment. The DIME range of motion measurements differed significantly from the ATP's repeated findings of normal range of motion during the course of treatment. Respondent's expert testified that range of motion tests must demonstrate not only internal validity, but also external validity between examiners. If there are inconsistencies between findings by different examiners, the examiner must

INSIDE THIS ISSUE:

Practice Pointer	2
Victories in the Trenches	2
Legislative Watch	3
Ipsi Dixit	3
Tech Tips	3



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

Practice Pointer

Grover Medical Benefits

By Royce W. Mueller

An insurer may be responsible for medical benefits after a claimant reaches maximum medical improvement (MMI). These post-MMI medical benefits are known as “Grover medicals” or “Grover benefits,” or sometimes simply as “Grovers.” The name comes from the 1988 Colorado Supreme Court case called *Dawna Grover v. Industrial Commission of Colorado*, 759 P.2d 705 (Colo. 1988). In that case, the court held that an administrative law judge may order payment for future, post-MMI medical treatment if there is substantial evidence in the record that such treatment is reasonably necessary to relieve the claimant from the effects of the industrial injury, or to prevent deterioration of the claimant’s present condition.

Once the claimant establishes the probability of a need for post-MMI treatment, the claimant is entitled to a general award of future medical benefits. However, the respondents remain free to challenge whether

a particular course of treatment is reasonable and necessary. Note that the claimant need not be receiving treatment at the time of MMI in order to obtain a general award of Grover medical benefits.

When filing a final admission of liability, W.C.R.P. 5-5(A) requires the insurer to “specify and describe the insurer’s position on the provision of medical benefits after MMI, as may be reasonable and necessary within the meaning of the [Worker’s Compensation] Act. The admission shall make specific reference to the medical report by listing the physician’s name and the date of the report.”

If there is medical record support, consider admitting to specific, reasonable post-MMI treatment recommendations from the authorized treating physician, such as “respondents admit liability for 6 weeks of physical therapy and medication management for one year, per the attached report from Dr. Doolittle dated February 29,

2010.” Sometimes the open-ended admission (“we admit to reasonable and necessary post-MMI treatment”) is unavoidable, but it usually leads to ongoing disputes and litigation over reasonableness and necessity of a proposed course of treatment. We recommend that you consider denying liability for any Grover benefits versus admitting to vague, open-ended benefits.

If claimant wishes to challenge respondents’ denial of liability for Grover benefits, he must do so “at the time of hearing on the final award for permanent disability.” *Milco Const. v. Cowan*, 860 P.2d 539 (Colo. App. 1992). If claimant accepts the permanent disability award, he must timely object to the final admission and request a hearing if he wants to pursue Grover benefits. If he fails to do so, he may be held to have waived his right to seek those benefits in the future. *Hanna v. Print Expeditors*, 2003 WL 21283763 (Colo. App.)

VICTORIES IN THE TRENCHES

Holly M. Barrett

In *Stewart v. Allied Barton Security Services*, respondents filed a final admission of liability. Claimant objected and requested a Division IME but never scheduled the DIME. A prehearing ALJ granted Holly’s request to cancel the DIME. The case is now closed by the FAL, subject to a petition to reopen.

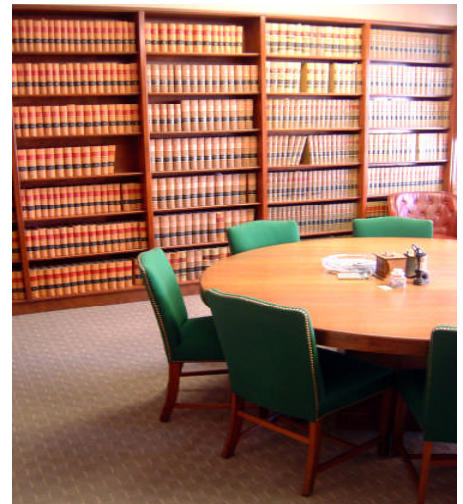
In *Montoya v. Waste Connections*, the DIME physician opined that Claimant was not at MMI. Holly filed an application for hearing to overcome the DIME opinion, had the DIME physician review video surveillance of claimant and took the DIME’s deposition. He testified that the video surveillance changed his opinion about MMI, agreed with ATP’s date of MMI, and agreed that Claimant had no permanent impairment and no need for any further medical care. Opposing counsel agreed to allow respondents to withdraw their appli-

cation for hearing and file an amended final admission consistent with the DIME physician’s deposition testimony that claimant is at MMI with no permanent impairment and no need for future medical benefits.

M. Frances McCracken

In *Barnett v. Wal-Mart Stores, Inc.*, ICAO set aside ALJ Stuber’s order denying respondents’ request to terminate TTD benefits and remanded for further findings on the question of whether claimant waived actual notice of the offer of modified employment. Fran presented evidence that an employer representative had attempted to hand the written offer to the claimant at a meeting, but claimant refused to accept it and insisted that it had to be sent to him by certified mail. Employer complied with claimant’s request and sent the written 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 modified job offer, but failed to show up. ICAO stated that these findings would support a factual determination that claimant waived actual receipt of the offer.





TECH TIPS



The federal government has many websites with information for consumers.

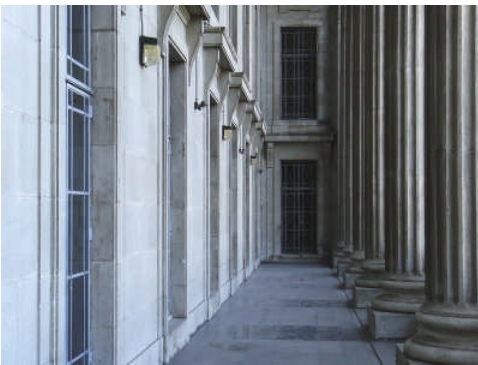
If you do not want to be bothered by telemarketing calls at home, register at www.donotcall.gov. Although charitable fundraisers are not required to use the do-not-call registry, many do check it.

For truly free credit reports, start at www.annualcreditreport.com. Other "free credit reports" sites frequently require a purchase or have other hidden charges.

To learn more about credit card offers, the new rules by which credit card companies must abide, or how long it will take to pay off your credit card balance, go to www.federalreserve.gov/creditcard.

You can find more consumer guides and other government information at www.usa.gov.

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



Legislative Watch

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

House bill 10-1269: would allow for the award of compensatory and punitive damages, attorney fees and costs in employment cases brought under state law. Compensatory damages would cover pecuniary losses other than wages, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses. Punitive damages could be awarded if plaintiff proved by a preponderance of the evidence that defendant engaged in a discriminatory or unfair employment practice with malice or reckless indifference to the rights of the plaintiff.

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.

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.

IPSI DIXIT



Drive Carefully

We have
Two Cemeteries
No Hospitals

No Trespassing

Violators Will Be Shot
Survivors Will Be Shot Again

Those Who Throw Objects at the Crocodiles

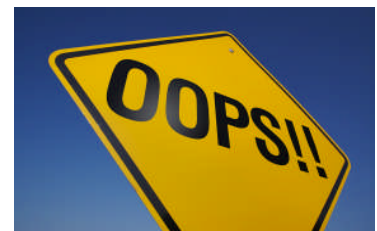
Will Be Asked to Retrieve Them

For a home-repair construction company:

Specializing in Property Damage
Since 1972

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

... more Signs!





CLIFTON, MUELLER & BOVARNICK, P.C.

789 SHERMAN STREET
SUITE 500
DENVER, COLORADO 80203