

# 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; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; MMI=maximum medical improvement; OAC=Office of Administrative Courts; PPD=permanent partial disability.

### Authorized Medical Treatment

ICAO affirmed ALJ Henk's order that determined claimant's personal physician and his referrals were authorized. The ALJ found that respondents failed to designate a medical provider in the first instance, and therefore the right to select a provider

passed to claimant. Held: respondents are required to provide claimant with a list of at least two physicians "in the first instance," from which claimant may select the physician to attend her. If the services of a physician are not tendered at the time of injury, claimant has the right to select a physician or chiropractor. Whether there was an emergency situation and whether claimant was referred to a medical provider are questions of fact for determination by the ALJ. *Talley v. North Suburban Medical Center*, W.C. No. 4-746-176 (ICAO Apr. 6, 2010)

### DIMEs

ICAO affirmed ALJ Friend's order requiring respondents to pay PPD based on a 27% impairment of the whole person, a rating given by the ATP and claimant's IME. The DIME physician assigned a rating of 21% of the whole person. The ALJ found that claimant had overcome the rating of the DIME physician by clear and convincing evidence, because the DIME did not include a rating for a neurological disorder. ICAO held that once claimant overcame the DIME rating, the correct impairment rating was a question of fact for resolution based on a preponderance of the evidence. ICAO affirmed the ALJ's determination of PPD because it was supported by substantial evidence. *Coyle v. Allegis Group/Aerotek Temp Services*, W.C. No. 4-701-632 (ICAO Apr. 27, 2010)

### Issue and Claim Preclusion

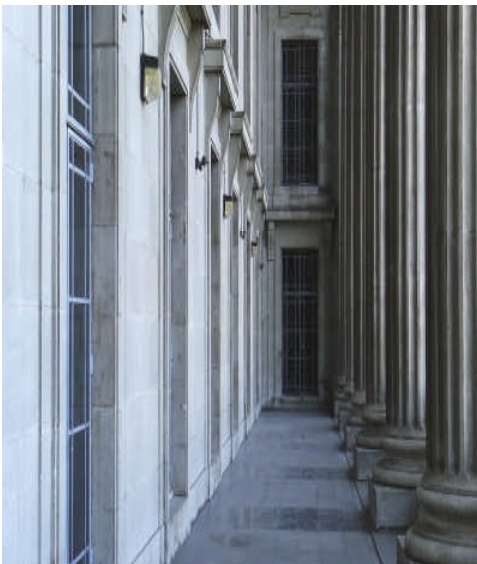
ICAO affirmed ALJ Mottram's order that denied claimant's claim for ongoing Botox

injections. In a previous hearing ALJ Martinez had ordered respondents to pay for Botox injections to treat claimant's injury. ICAO held that ALJ Mottram was not bound by the previous order for two reasons: at the time of the previous hearing claimant did not have to overcome the opinion of the DIME physician that Botox injections should be discontinued; and the issue at the previous hearing was medical treatment to cure and relieve the effects of the injury, whereas the issue before ALJ Mottram was post-MMI maintenance medical benefits. *Braun v. Vista Mesa*, W.C. No. 4-637-254 (ICAO Apr. 15, 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](mailto:dmurley@cmb-pc.com) or 970-255-8852.

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**Practice Pointer**

## ALJs Are Ruling in Favor of Respondents and Denying Cumulative Trauma Disorder Claims

By Richard A. Bovarnick

The medical treatment guidelines for cumulative trauma disorders are contained in rule 17, exhibit 5 of the Colorado Workers' Compensation Rules of Procedure. Carpal tunnel syndrome, a cumulative trauma disorder frequently alleged, has its own guidelines, rule 17, exhibit 2. The guidelines discuss the necessary conditions in order for a cumulative trauma or carpal tunnel claim to be proven.

Rule 17, exhibit 5, section D.4 examines risk factors to be considered in determining whether a job is likely to cause a cumulative trauma disorder. The risk factors include: "repetition, force, vibration, pinching and gripping, and cold environment." The guideline states: "In general, jobs that require less than 50% of maximum voluntary contractile strength for the individual are not considered 'high force.'" The guidelines are based on current epidemiologic knowledge. The cumulative trauma disorder guidelines were last revised April 26, 2007.

Rule 17, exhibit 2, on carpal tunnel syndrome, was last revised September 29,

2005. Under identification of occupational risk factors, section D.2.b states: "Job title alone is not sufficient information. The clinician is responsible for documenting specific information regarding repetition, force and other risk factors ... A job site evaluation may be required." Under past medical history and review of symptoms, section D.2.d states: "A study of CTS patients showed a 33% prevalence of related disease. Risk factors for CTS include: female gender; obesity; Native American, Hispanic, or Black heritage, and certain medical conditions..." Medical conditions that are considered risk factors include pregnancy; arthropathies including connective tissue disorders, rheumatoid arthritis, and osteoarthritis; hypothyroidism; and diabetes mellitus.

In the cases of *Batres vs. ABM*, *Parker vs. Time Warner*, and *Ambaye vs. Standard Parking*, ALJs Broniak, Walsh, and Harr, respectively, denied and dismissed carpal tunnel and cumulative trauma claims based upon a two prong defense: (1) detailed job analysis performed by a certified ergonomist or a vocational expert and (2) testi-

mony of a level II accredited occupational medicine specialist that the actual job duties the claimant performed did not rise to the requisite level of repetition, force, etc., medically necessary to either cause the underlying condition or aggravate, accelerate or exacerbate to some substantial degree the underlying condition. The ergonomist was able to add the NIOSH standards into the equation and testify that pursuant to the NIOSH standards the actual job duties could not, cause or aggravate, accelerate or exacerbate to some substantial degree the underlying condition. For more details of these three cases, please see "Victories in the Trenches" in the December 2009 and April 2010 issues of *Defense Talk*. You can find previous issues of *Defense Talk* at <http://www.cmb-pc.com/news.htm>.

If you have a claim in which the claimant alleges carpal tunnel or cumulative trauma, please consider the above in analyzing compensability. Any of the attorneys at Clifton, Mueller and Bovarnick, P.C. are more than happy to review the facts with you and provide our legal opinion.

# VICTORIES IN THE TRENCHES

### Richard A. Bovarnick

In *Turner v. Four Corners Health Care*, ALJ Jones denied and dismissed claimant's claim for medical benefits for treatment of knee symptoms that developed more than three years after claimant's injury and more than two years after she reached MMI. Rich presented the testimony of an expert in physical medicine and rehabilitation, who reviewed the medical records and listened to the testimony of claimant and the ATP. The expert testified that claimant's symptoms that began in August 2009 were in a different area of the knee than her post-injury knee problems. The ALJ found respondent's expert's opinions to be more credible than those of the ATP.

In *Velasquez v. ABM Industries*, ALJ Cannici denied and dismissed claimant's

claim for workers' compensation benefits. Rich presented employer witnesses, medical records, and other evidence of claimant's significantly delayed reporting to persuade the ALJ that claimant had not established that he suffered a hernia while working for the employer.

### Royce W. Mueller

In *Lefebre v. The Shaw Group*, ALJ Stuber denied and dismissed claimant's claim for PPD benefits in a respiratory/inhalation injury case. Royce presented medical records and the testimony of a pulmonologist to overcome by clear and convincing evidence the DIME physician's impairment rating of 18% whole person. The ALJ found respondents' expert persuasive that claimant had normal lung function tests

and no medical impairment, and that the DIME physician's use of Table 9 on page 126 of the *AMA Guides to Evaluation of Permanent Impairment, Third Edition Revised* was erroneous.

### Holly M. Barrett

In *Martinez v. Wal-Mart Stores, Inc.*, claimant alleged bilateral carpal tunnel syndrome. Holly obtained an IME. The IME physician opined that claimant's CTS was not work-related but the result of longstanding hypothyroidism. Claimant withdrew her claim and vacated the hearing.

### Diane K. Murley

In *Green v. The Shaw Group*, the Director of the Division of Workers' Compensation

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## VICTORIES IN THE TRENCHES

*Continued from page 2*

vacated his order to show cause after Diane demonstrated that all amounts ordered by the ALJ had been paid and explained that additional information was needed to determine if the additional bills submitted by claimant were for treatment of the injury. Claimant was instructed to submit bills along with medical reports to the adjuster and to allow respondent a reasonable opportunity to receive, review and take action on the bills.

In *Custer v. Halliburton Energy Services*, ALJ Mottram denied and dismissed claimant's claim for maintenance medical treatment. Diane presented medical records to

prove that no provider had recommended treatment that would constitute maintenance medical treatment.

### Erica A. Weber

In *Orozco v. SavaSeniorCare*, the Director of the Division of Workers' Compensation vacated his order to show cause, despite claimant's attorney's argument that penalties should be assessed. Erica provided a statement from the employer that claimant had physically returned to work on the date shown in the admissions of liability. The Director stated that a hearing was necessary on claimant's contention that she returned to work later.



## Medicare and AWW

If you have a claim in which average weekly wage includes the amount it would have cost claimant to continue health care coverage under COBRA, you may be able to have AWW decreased once claimant becomes eligible for Medicare. The premium cost for Medicare can be found on the notice of award of SSDI benefits.

**Remember:** in order to recover an overpayment for benefits paid under a final admission of liability, you must request to recover the overpayment within one year after the time the insurer or self-insured employer knew of the existence of the overpayment.

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*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.*



- I got a pre-declined credit card in the mail.
- I ordered a burger at McDonalds and the kid behind the counter asked "Can you afford fries with that?"
- If the bank returns your check marked "Insufficient Funds" you call them and ask if they meant you or them.
- Hot Wheels and Matchbox stocks are trading higher than GM.
- Motel Six won't leave the light on anymore.
- Exxon-Mobil laid off 25 Congressmen.

Send your suggestions for "Ipsi Dixit" to the editor at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com).

## Update

Last month's practice pointer advised that if an 18-month DIME physician concludes the claimant is at MMI, the insurer can file a Final Admission of Liability if the DIME physician's rating is acceptable. Although the law is still unsettled on this point, the better approach is to return the claimant to the ATP for an impairment rating and to follow the usual procedures for contesting the impairment rating.



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