

DEFENSE TALK

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ATTORNEYS AT LAW

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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; MMI=maximum medical improvement; TTD=temporary total disability.

Compensability

ICAO affirmed ALJ Henk's order denying and dismissing the claim for compensation. The ALJ had concluded that claimant failed to sustain his burden of proving that his injury arose out of or in the course and scope of his employment. Claimant had previously worked for the employer in Colorado and had travelled to Texas to apply for work for the employer on a Texas job. Claimant was injured in a one-car automobile accident while returning home to Colorado after he was laid off. ICAO held there was substantial evidence to support the ALJ's findings that claimant's travel to and from the job site in Texas were not contemplated by the em-

ployment contract. *Gutierrez-Salazar v. Jomax Construction Company*, W.C. No. 4-798-035 (ICAO Sept. 30, 2010)

TTD

ICAO set aside ALJ Felter's award of TTD benefits. The ALJ had awarded TTD benefits from the date claimant's private physician imposed restrictions of no work, almost a year after the ATP had placed claimant at MMI. The ALJ found that claimant's condition had worsened, but

reopening was not one of the issues at the hearing. ICAO held that an ALJ may not award TTD without requiring the claimant to obtain a DIME to challenge the determination of MMI. *Loofbourrow v. Harman-Bergstedt, Inc.*, W.C. No. 4-804-458 (ICAO Oct. 7, 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.

Workers' Compensation Educational Conference

On September 16 and 17 the Colorado Division of Workers' Compensation presented the First Annual Colorado Workers' Compensation Educational Conference in Denver. Here are some highlights of what the Division wants you to know:

The Director will issue penalties for failure to **respond to error letters and other inquiries from the Division.**

The Division is focusing its enforcement efforts, including penalties, on the following problem areas. Notes on avoiding penalties in these areas follow.

I. Late payment of lump sums:

A. within 10 business days of date of mailing of request by claimant:

i. if lump sum \$10,000 or less, issue payment taking applicable offsets;

ii. if lump sum more than \$10,000 and claimant represented by attorney, issue the payment and file the required benefit pay-

ment information, or file objection;

iii. if lump sum more than \$10,000 and claimant not represented by attorney, file required lump sum calculation information.

II. Late payment of providers.

III. Failure to use EDI.

IV. Termination of benefits:

A. release to regular employment must be signed by physician, not PA or NP;

B. don't terminate until 3 business days after claimant received offer of modified duty;

C. need document from physician that claimant failed to attend rescheduled appointment.

V. Final admissions:

A. attach medical reports including

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Mileage Reimbursement

By Royce W. Mueller

The Workers' Compensation Rules of Procedure provide in Rule 18-6(E) that:

The payer shall reimburse an injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments and reasonable mileage to obtain prescribed medications. The reimbursement rate shall be 52 cents per mile. The injured worker shall submit a statement to the payer showing the date(s) of travel and number of miles traveled, with receipts for any other reasonable and necessary travel expenses incurred.

Mileage is reimbursed at the rate that was in effect on the date the mileage was incurred, not the date of injury. The reimbursement rate changes most years.

Effective Date	Mileage Rate (per mile)
Prior to 07/01/99	20 cents
Effective 07/01/99	28 cents, 32 cents if 4-wheel drive required
Effective 01/01/04	30 cents
Effective 01/01/07	37 cents
Effective 01/01/08	40 cents
Effective 01/01/09	55 cents
Effective 01/01/10	52 cents

Tips for processing a mileage reimbursement request:

- Check the dates of claimed trips against medical records in your file to confirm claimant was actually

seen by an authorized medical provider on the dates for which mileage reimbursement is claimed. Use Mapquest (www.mapquest.com) or a similar program to verify the mileage that is claimed. You don't owe mileage for claimant to travel to see her attorney, attend legal proceedings, or obtain unauthorized treatment.

- Watch for "double billing." For example, claimant submits a reimbursement request for travelling 80 miles from her home in Fort Morgan to see an authorized physician in Denver on June 1, 2010. You reimburse appropriately. Later she submits a separate reimbursement request for travelling to Denver on June 1 to have a prescription filled. Chances are she filled the prescription when she made the trip to see the doctor. You have grounds to deny the second alleged trip on the basis that it was not "reasonable and necessary" for claimant to have made two 160 mile round trips to the same city on the same day. Remember that claimant has the burden to prove by a preponderance of the evidence that she is entitled to benefits.
- Courts have held that mileage expenses are recoverable as "incidental to medical treatment under the Workers' Compensation Act." As such, they should be treated as medical benefits themselves and paid or properly denied within 30 days. The willful delay of payment of compensable mileage reimbursement could subject you to a penalty of 8% of the amount of wrongfully withheld benefits. See C.R.S. § 8-43-401 (2).

If you have any questions about mileage reimbursement or other benefits claimed under the Workers' Compensation Act of Colorado, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In *Hamilton vs. Pointe Pest Control*, ALJ Harr denied and dismissed claimant's claim for workers' compensation benefits. Rich presented the expert testimony of a physician who had performed a physical medicine consult, referred the claimant for examinations by specialists, and opined that it was medically improbable claimant's complaints were caused by pesticide exposure at work. The ALJ found the testimony of respondent's expert to be persuasive and supported by the medical opinions

and examination findings of the other physicians who had examined claimant.

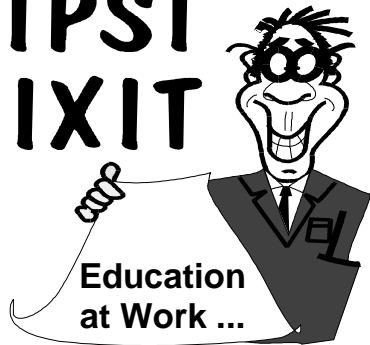
In *Frisch vs. School District 11*, ALJ Walsh denied and dismissed claimant's claim for workers' compensation benefits. Rich persuaded the ALJ that although claimant's knee injury occurred during work hours, it came about during normal activities that he experiences everyday whether at work or not. The ALJ concluded that there was no established causal link to claimant's work duties and that claimant had failed to establish that his injury arose out of his employment.

Holly M. Barrett

In *Flores vs. Labor Ready*, ALJ Stuber denied and dismissed the claim for additional medical benefits. Holly presented medical and psychological reports and testimony of a physician specializing in physical medicine and rehabilitation to persuade the ALJ that claimant had failed to prove that the claimed additional medical benefits were reasonably necessary to cure or relieve the effects of the work injury.

Please see VICTORIES on page 3

IPSI DIXIT



Education at Work ...

The following answers were given by 16-year-olds on last year's GED examination:

- Q. Name the four seasons
- A. Salt, pepper, mustard and vinegar
- Q. Explain one of the processes by which water can be made safe to drink
- A. Flirtation makes water safe to drink because it removes large pollutants

- like grit, sand, dead sheep and canoeists
- Q. How is dew formed
- A. The sun shines down on the leaves and makes them perspire
- Q. What causes the tides in the oceans
- A. The tides are a fight between the earth and the moon. All water tends to flow towards the moon, because there is no water on the moon, and nature abhors a vacuum. I forget where the sun joins the fight
- Q. What are steroids
- A. Things for keeping carpets still on the stairs
- Q. What happens to your body as you age
- A. When you get old, so do your bowels and you get intercontinental
- Q. Name a major disease associated with cigarettes

- A. Premature death
- Q. How can you delay milk turning sour
- A. Keep it in the cow
- Q. What is the fibula?
- A. A small lie
- Q. What does 'varicose' mean?
- A. Nearby
- Q. What is a terminal illness
- A. When you are sick at the airport.
- Q. Give an example of a fungus. What is a characteristic feature?
- A. Mushrooms. They always grow in damp places and they look like umbrellas

This month's *ipsi dixit* was contributed by Fran McCracken.

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

CONFERENCE

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- worksheets;
- B. list physician's name and date of report;
- C. state position on post-MMI medical benefits.
- VI. Apportionment:
 - A. attach previous award or settlement for work-related;

- B. attach documentation that previous condition identified, treated and independently disabling.
- VII. Final payment notices:
 - A. file on every claim with W.C. number on which benefits were paid;
 - B. amounts must match FAL.

Don't send copies of the brochure or survey to the Division when you send them to the claimant and claimant's attorney. Just note in your file as you would document any action.

PALJ Craig Eley's monthly brown bag seminars are open to anyone. Judge Eley discusses recent cases from ICAO and the courts and other changes to workers' compensation law and procedure. Each brown bag lasts about an hour. If you would like to be notified of the next brown bag, send an email to Craig.Eley@state.co.us and ask to be added to the email list. You can attend in person or by telephone, or you can ask judge Eley to email you the audio of the brown bag.

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.

VICTORIES IN THE TRENCHES

Continued from page 2

M. Fran McCracken

In *Barnett v. Wal-Mart Stores, Inc.*, ICAO affirmed ALJ Stuber's order granting 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 argued successfully that substantial evidence in the record supported the ALJ's conclusion that claimant had impliedly waived actual receipt of the modified job offer. Fran also persuaded ICAO that the ATP's release of claimant to work with restrictions satisfied the requirements of 8-42-105(3)(d)(I), and that the statute did not require the ATP to review and release claimant to a specific modified job.

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