

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



Worksheets Required?

By M. Frances McCracken

It has been a common belief that receipt of the authorized treating physician's (ATP's) report of maximum medical improvement and impairment alone is not sufficient to trigger running of the 30-day period for filing a Final Admission of Liability (FAL) or a Notice and Proposal to Select a DIME. Rather, it was believed, the physician's range of motion worksheets must also be received before respondents' responsibilities under § 8-42-107.2(2)(b), C.R.S. and Rule 5-5(E), W.C.R.P., to either file an admission of liability consistent with the physician's opinions or request a DIME by filing a Notice and Proposal to Select a DIME within 30 days were triggered.

In the recent case of *Connie Servantes v. Exempla, Inc.*, W.C. No. 4-779-285, the Industrial Claim Appeals Office (ICAO) affirmed an Order of Administrative Law Judge Margot Jones striking the respondent's Notice and Proposal as untimely. In *Servantes*, the respondent received the ATP's impairment report on January 5, 2009, but this report did not contain the range of motion worksheets. On February

6, 2009, the respondent received the range of motion worksheets. The respondent's notice and proposal was filed March 6, 2009, 28 days after receipt of the worksheets, 58 days after receipt of the ATP's narrative report. ALJ Jones found that the ATP's narrative report received by the respondent on January 5, 2009 was a "disputed finding or determination" within the meaning of § 8-42-107.2(2)(a)(I)(B), C.R.S., after which the respondent had 30 days to file a Notice and Proposal to Select a DIME. ALJ Jones found the respondent had not timely filed the March 6, 2009 Notice and Proposal and therefore struck the pleading.

The respondent appealed, arguing that because the Notice and Proposal was filed within 30 days of receiving the range of motion worksheets, it complied with the statute's timing requirements. The respondent cited to a number of ICAO decisions holding that a Final Admission is deficient if it fails to attach the AMA Guide's worksheets, thereby relieving the claimant of any duty to object to it. ICAO rejected the respondent's arguments, holding that the rationale for the holdings in the prior line of cases was that the "claimant must be notified of the exact basis of the admitted or denied liability so that the claimant can make an informed decision whether to accept or contest the FAL." In *Servantes*, ICAO agreed that because the ATP outlined the claimant's range of motion in his narrative, the respondent had all of the necessary factual predicates for determin-

ing whether to accept the opinion of the ATP and file an FAL or contest the opinion by requesting a DIME. (Does this seem like a double standard to anyone else?) ICAO also noted that there was no evidence the respondent took any steps to obtain the range of motion worksheets after the ATP's narrative report was received on January 5, 2009, and if the respondent had questions about the referenced range of motion worksheets, it could have timely obtained the worksheets. Additionally, ICAO found that if the respondent was confused about the ATP's impairment report without the worksheets, it had the option of requesting a hearing on the issue of its liability.

The lesson to be taken from *Servantes*:

Do not assume that range of motion worksheets are required prior to commencement of the 30-day period for filing a Notice and Proposal to Select a DIME or possibly an FAL. If you receive an impairment rating report that provides the factual predicates necessary to file an FAL based on the report, *i.e.*, it outlines the claimant's range of motion deficits, and worksheets would not likely add any useful information, and if grounds exist to contest the ATP's opinion, you must be proactive. Either take immediate steps to obtain the rating worksheets or move forward with the Notice and Proposal to Select the DIME.

If you have any questions about filing an admission of liability or requesting a DIME, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

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VICTORIES IN THE TRENCHES

James R. Clifton

In *Gonzales vs. Louisiana Pacific Corporation*, ALJ Friend held that after an award of reasonable medical care and treatment post-MMI respondent retained the right to contest any future medical bills on the grounds that the expense was not reasonably needed to relieve claimant from the effects of the compensable injury. The ALJ also held that claimant had failed to prove respondent's refusal to pay for certain prescriptions after the ATP said they were for a non-compensable condition violated a previous order, even when the ATP reversed herself and said they were prescribed for the compensable injury, and that respondent had a rational argument for its denial of the prescriptions. Jim presented correspondence with the ATP and the adjuster's testimony to show respondent acted reasonably in contesting the prescriptions.

Richard A. Bovarnick

In *Hays vs. SAVA Senior Care*, ALJ Stuber denied and dismissed claimant's claim

for TTD benefits after September 21, 2009. Rich argued persuasively that claimant's entitlement to TTD benefits terminated as of the date the ATP released her to return to regular duty work without any restrictions, despite the DIME physician's opinion that she was not at MMI and the FCE's statement of permanent restrictions.

In *Robberson vs. Freeman Decorating*, ALJ Harr found that most of claimant's claimed period of disability was unrelated to her injury. Claimant sought TTD for a 14-month period. Based upon the credible testimony of respondents' expert, the ALJ found that 10 months of the claimed disability were not due to the effects of the admitted industrial back injury but were due to claimant's preexisting low back condition. Rich also persuaded the ALJ that, except for four weeks, the amount of claimant's unemployment benefits exceeded the TTD benefit rate and respondents were entitled to an offset.

In *Pakiser vs. Wal-Mart Stores, Inc.*, ALJ Cannici determined that respondents had presented clear and convincing evidence to overcome the DIME physician's 2% impairment rating for claimant's lumbar spine range of motion deficits. Rich presented video surveillance, medical records and expert testimony to prove that claimant's range of motion testing was not reliable and the DIME physician's range of motion impairment rating was incorrect.

In *Pickens vs. ABM Industries, Inc.*, ALJ Jones denied claimant's motion to strike

respondents' application for hearing. Rich argued persuasively that respondents' application for hearing, filed within 30 days of the Division's notice of completion of the DIME, was timely filed.

In *Haynes vs. ITT Corporation*, the Director was persuaded that claimant failed to prove that respondents actually received claimant's application for lump sum prior to it being provided by the Division.

M. Frances McCracken

In *Gallegos vs. Wal-Mart Stores, Inc.*, ALJ Felter found that claimant's petition to review was not well-grounded in fact nor warranted by existing law or a good faith argument for an extension, modification, or reversal of existing law. Fran argued persuasively that claimant's petition to review was interlocutory and the Industrial Claim Appeals Office lacked jurisdiction to review it. The ALJ ordered that a hearing be set on the issue of attorney fees.

Diane K. Murley

In *Foster vs. Shaw, Stone & Webster*, the Director of the Division of Workers' Compensation ordered that respondents had shown good and sufficient cause why penalties should not be assessed. Diane argued successfully that because of confusion arising from the unusual situation in which there were two files for the same alleged injury the final payment notice was filed on time but used the wrong claim ID.



Court of Appeals Update

Workers' Compensation— Disfigurement Benefits

In *Leffler vs. Industrial Claim Appeals Office*, announced Aug. 19, 2010, respondents appealed the Industrial Claim Appeals Office's award of additional com-

ensation for disfigurement from claimant's partial loss of two fingers. The court affirmed, holding that the stump of a partially amputated finger is a disfigurement within the meaning of the statute providing for an additional award for "stumps due to loss or partial loss of limbs."

IPSI DIXIT



A woman brought a very limp duck into a veterinary surgeon. As she laid her pet on the table, the vet pulled out his stethoscope and listened to the bird's chest.

After a moment or two, the vet shook his head and sadly said, "I'm sorry, your duck,

Cuddles, has passed away."

The distressed woman wailed, "Are you sure?" "Yes, I am sure. Your duck is dead," replied the vet.

"How can you be so sure?" she protested. "I mean you haven't done any testing on him or anything. He might just be in a coma or something."

The vet rolled his eyes, turned around and left the room. He returned a few minutes later with a black Labrador Retriever. As the duck's owner looked on in amazement, the dog stood on his hind legs, put his front paws on the examination table and sniffed the duck from top to bottom. He then looked up at the vet with sad eyes and shook his head.

The vet patted the dog on the head and took it out of the room. A few minutes later he returned with a cat. The cat jumped

on the table and also delicately sniffed the bird from head to foot. The cat sat back on its haunches, shook its head, meowed softly and strolled out of the room.

The vet looked at the woman and said, "I'm sorry, but as I said, this is most definitely, 100% certifiably, a dead duck."

The vet turned to his computer terminal, hit a few keys and produced a bill, which he handed to the woman. The duck's owner, still in shock, took the bill. "\$150!" she cried, "\$150 just to tell me my duck is dead!"

The vet shrugged, "I'm sorry. If you had just taken my word for it, the bill would have been \$20, but with the Lab Report and the Cat Scan, it's now \$150."

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

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.

DIMES

ICAO affirmed ALJ Cain's order that determined that respondents overcame the DIME physician's 15 percent impairment rating and that claimant failed to overcome the lack of a rating for her shoulder and low back. In finding that respondents had overcome the DIME rating, the ALJ relied on expert testimony that under the *AMA Guides* a rating physician may not rate an impairment when the physician cannot explain the causal relationship between the impairment and the industrial injury, and that the medical evidence did not support an inference of a causal relationship between the industrial injury and the impairment found by the DIME physician. *Mavian v. Aurora Public Schools*, W.C. No. 4-758-499 (ICAO Aug. 13, 2010)

ICAO affirmed ALJ Stuber's order that determined that claimant failed to over-

come the DIME. ICAO agreed that whether the DIME physician complied with the *AMA Guides* is a factor that may be considered by the ALJ in determining whether the report is overcome. However, ICAO held that even if there was a deviation from the *AMA Guides*, it was up to the ALJ to determine whether the deviation rendered it "highly probable" that the DIME report was incorrect. *Hardgrave v. Triumph Auto Glass*, W.C. No. 4-757-065 (ICAO Aug. 13, 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.



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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.



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