

# 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, Act=Colorado Workers' Compensation Act; ALJ=administrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; ICAO=Industrial Claim Appeals Office; PTD=permanent total disability.

### Penalties

ICAO affirmed ALJ Broniak's order denying and dismissing claimant's petition to reopen and claim for penalties. The ALJ found that all of the evidence claimant presented to support his claim for penalties for respondent's alleged failure to timely provide medical treatment was known or

should have been known to claimant at least two years before claimant's request for penalties. The Act requires that all requests for penalties must be filed within one year after the requesting party first knew or reasonably should have known the facts giving rise to a possible penalty. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO Mar. 11, 2011)

### PTD

ICAO affirmed ALJ Azer's order denying and dismissing claimant's request for an award of PTD benefits. Claimant sustained an admitted injury to his left arm and hand. The ATP released him without restrictions. The DIME physician rated claimant's impairment at 13% of the upper extremity, which equaled 8% whole person impair-

ment. Claimant also had a number of non-work-related medical conditions. ICAO held that claimant must demonstrate that the industrial injury is a "significant causative factor" in his PTD. It is not sufficient that the injury created some disability that ultimately contributed to PTD. The ALJ must determine the residual impairment caused by the industrial injury and whether it was sufficient to result in PTD without regard to the effects of subsequent intervening events. *Lane v. Hospital Shared Services*, W.C. No. 4-309-217 (ICAO Mar. 25, 2011)

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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## In the Courts

### Court of Appeals Update Insurance—Bad Faith

In *Zolman v. Pinnacle Assurance*, announced March 3, 2011, the Colorado Court of Appeals affirmed the trial court's conclusion that, as a matter of law, the workers' compensation insurer's actions did not constitute bad faith. The Court of Appeals agreed with the trial court that plaintiff's claim for post-MMI care and a change of physician was at a minimum fairly debatable. The insurer had consid-

ered each of plaintiff's requests for change of physician prior to denying them based on her medical history, and it reasonably relied upon opinions of plaintiff's ATPs that she did not require further care or treatment and reasonably considered the ALJ's order denying claimant's previous request for a physician change and post-MMI care. Because the court found no genuine issue of material fact, the reasonableness of the insurer's actions could be decided as a matter of law.

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**Practice Pointer**

## Remember to Assert Offsets and Overpayments

By Joanne C. Crebassa

In 2010 the Colorado legislature passed amendments to section 8-42-103(1), C.R.S. regarding offsets that an insurer or employer may take against certain kinds of workers' compensation benefits. Some examples of benefits for which the insurer or employer may take an offset are Social Security Disability Insurance benefits (SSDI), benefits from employer-paid disability plans, and unemployment insurance benefits (UI). In addition, the legislature passed amendments to section 8-42-113.5(1)(b.5)(1), C.R.S. placing a one-year time limit for insurers and employers to assert their right to recover overpaid workers' compensation benefits resulting from awards of SSDI, UI, or retirement benefits. The basic rules for claiming offsets under section 8-42-103(1), C.R.S., for injuries after July 1, 2010, are as follows:

- Disability payments such as SSDI

may be offset against temporary disability benefits (TTD and TPD) and permanent total disability benefits (PTD) only and may not be offset against permanent partial disability (PPD);

- SSDI benefits are offset at 50% of the amount of the initial award;
- UI benefits may be offset 100% against TTD, TPD and PTD;
- The employer or insurer is entitled to an offset against PTD for 50% of Social Security retirement benefits or the amount of any employer-paid retirement benefits the claimant is eligible to receive;
- Upon request of the insurer or employer, the claimant must apply for all federal benefits to which the claimant may be entitled.

Subsections 8-42-113.5(1)(b.5)(I) and (II) were added to require employers and insurers to assert a claim to recover an overpayment within one year after the time the employer or insurer knew of the existence of the overpayment. Recently the Industrial Claim Appeals Office in *Maez v. Adelpia Communications Corp.*, W.C. No. 4-609-810 (Jan. 25, 2011) held that to "assert" an overpayment under section 8-42-113.5 the insurer must either file a new admission of liability or apply for a hearing within one year of the date the insurer knew that previously paid TTD, TPD or PTD had been overpaid due to a claimant's award of SSDI benefits while the claimant was receiving workers' compensation benefits.

If you have any questions about offsets or overpayments, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

## VICTORIES IN THE TRENCHES

### John M. Abraham

In *Coronel v. Walmart Stores, Inc.*, the prehearing ALJ denied claimant's motion to compel respondents to produce claimant's employment file. John argued successfully that claimant's request was in the nature of discovery and not covered by WCRP 5-4. Therefore, because no order permitting discovery was applicable and no application for hearing or petition to reopen was pending, claimant's motion should be denied.

### M. Frances McCracken

In *Cabral vs. Walmart Stores, Inc.*, the ALJ struck claimant's application for hearing, vacated the hearing, and precluded claimant from refile an application on the same issues until he complied with respondents' Rule 5-4 request for historical information about claimant's previous

medical providers and employers. The ALJ failure to provide the information had previously ordered claimant to provide the information no later than January 18. Fran persuaded the ALJ that claimant's prejudiced respondents' ability to investigate the claim and defend the issues raised in the application for hearing.



## Introduction to MSAs

If you would like to learn a little more about Medicare Set-aside Allocations (MSAs), check out the Ringler Radio episode, "A 101 on Medicare Set-Asides." The episode runs just over 20 minutes. Some of the issues discussed include when MSAs should be included in settlements,

how MSAs are funded, and the relationship between MSAs and Medicaid.

You can listen or download this and other episodes at <http://ringlerassociates.com/for-attorneys/ringler-radio/> or <http://legaltalknetwork.com/podcasts/ringler-radio/>.

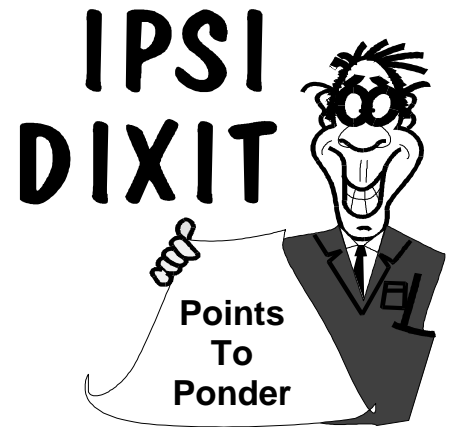


**IN THE COURTS**  
Continued from page 1

**Supreme Court Update**  
**Expert Witnesses**

In *Estate of Ford v. Eicher*, announced March 21, 2011, the Colorado Supreme Court held that scientific expert testimony is admissible if (1) the scientific principles at issue are reasonably reliable; (2) the witness is qualified to opine on such principles; (3) the testimony is useful to the jury; and (4) the probative value of the evidence outweighs any potential prejudice. Under the rules of evidence, “concerns about the degree of certainty to which the expert holds his opinion are sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof rather than exclusion” of the expert’s testimony. The court concluded that the expert testimony offered by defendants should have been admitted.

*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.*



- ◆ Before they invented drawing boards, what did they go back to?
- ◆ If all the world is a stage, where is the audience sitting?
- ◆ If one synchronized swimmer drowns, do the rest have to drown too?
- ◆ If you ate pasta and antipasto, would you still be hungry?
- ◆ If you try to fail, and succeed, which have you done?
- ◆ Why is the alphabet in that order? Is it because of that song?
- ◆ What happens when none of your bees wax?
- ◆ Why is there an expiration date on sour cream?

This month’s *ipsi dixit* was submitted by Jim Clifton. Send your suggestions for “Ipsi Dixit” to the editor at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com).



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**Pirates and the History of Workers’ Compensation**

This year marks the 100th anniversary of the workers’ compensation system in the United States, and *INSURANCE JOURNAL* has a great article on how state workers’ compensation systems have evolved and expanded. Did you know that:

- ◆ 18th century pirates had a system of compensation for injuries sustained by crew members?
- ◆ Otto von Bismark was the first to

introduce a compulsory workers’ accident insurance program in industrialized Europe?

- ◆ Early workers’ compensation statutes were struck down as unconstitutional?

Read *Happy 100th Birthday Workers’ Compensation: The Great Tradeoff!* at <http://www.insurancejournal.com/uncategorized/2011/03/23/191291.htm>

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