

DEFENSE TALK

SM

A PUBLICATION BY THE LAW FIRM OF

CLIFTON, MUELLER & BOVARNICK, P.C.

FEBRUARY

ATTORNEYS AT LAW

2011

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; C.R.S.=Colorado Revised Statutes; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office.

DIMES

ICAO affirmed ALJ Walsh's order denying claimant's request for additional benefits on the ground that claimant had failed to overcome the DIME physician's opinion that claimant's low back pain was not related to his injury. Held: "Because the determination of causation is an inherent part of the diagnostic process, the DIME physician's finding that a condition is or is not related to the industrial injury must be

overcome by clear and convincing evidence." *Hodges v. ATR Collision, Inc.*, W.C. No. 4-751-557 (ICAO Jan. 19, 2011)

Employee Status

ICAO affirmed ALJ Felter's order that determined claimant was an independent contractor and therefore denied his claim for workers' compensation benefits. ICAO held that because the ALJ found that claimant was an independent contractor as defined by the Act and claimant was not working as a driver under a lease agreement, employer was not required to offer workers' compensation insurance to claimant per § 8-40-301(6), C.R.S. ICAO also affirmed the ALJ's finding that claimant had contracted to make a single delivery, and therefore the employer was exempted from statutory employer status. *Luevano v. Transworks, LLC*, W.C. No. 4-814-671 (ICAO Jan. 5, 2011)

Medical Treatment Guidelines

ICAO affirmed ALJ Stuber's order denying claimant's request for authorization of a cervical spine epidural steroid injection (ESI). The ALJ found that the rationale offered by the ATP for the injections was contrary to the approved use set forth in the Medical Treatment Guidelines and that neither of claimant's physicians had offered a justification for the deviation. The ALJ concluded that claimant had failed to prove by a preponderance of the evidence that a cervical ESI was reasonably necessary to cure or relieve the effects of the

admitted injury. ICAO held that it is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary and that the ALJ had correctly applied the "preponderance of the evidence" standard of proof. *Logiudice v. Siemens Westinghouse*, W.C. No. 4-665-873 (ICAO Jan. 25, 2011)

Overpayments

ICAO affirmed ALJ Stuber's order denying respondents' claim for an overpayment on the ground that it was time-barred. Section 8-42-113.5(1)(b.5)(I), C.R.S. provides that after the filing of an FAL, "any attempt to recover an overpayment shall be asserted within one year after the time the requestor knew of the existence of the overpayment." ICAO affirmed the ALJ's determination that the statute requires the requesting party to file an amended FAL or seek an order to recover the overpayment within one year of the FAL, and that respondents' informal efforts to reach an agreement with claimant's attorney were not sufficient to toll the statute of limitations. *Maez v. Adelphia Communications Corp.*, W.C. No. 4-609-810 (ICAO Jan. 25, 2011)

Penalties

ICAO affirmed ALJ Jones's order denying respondents' request for a 50-percent penalty for intoxication. Section 8-42-112.5, C.R.S. allows respondents to take a 50-

INSIDE THIS ISSUE:

Practice Pointer—Section 8-42-112.5, C.R.S. and the Use of Medical Marijuana in Colorado 2

Victories in the Trenches 2

Ipsi Dixit 3

Please see ICAO on page 3

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


Practice Pointer

Section 8-42-112.5, C.R.S. and the Use of Medical Marijuana in Colorado

By John M. Abraham

A growing issue in Colorado is the presence of controlled substances in a claimant's system at the time an injury occurs. In Colorado, section 8-42-112.5, C.R.S. allows an employer or insurer to take a 50% reduction of a claimant's nonmedical benefits where "an injury results from the presence in the worker's system, during working hours, of not medically prescribed controlled substances, or of a blood alcohol level at or above 0.10 percent, or at or above an applicable lower level as set forth by federal statute or regulation, as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests." The statute further requires that "a duplicate sample from any test conducted shall be preserved and made available to the worker for purposes of a second test to be conducted at the worker's expense." If the test detects illicit substances or alcohol at or above 0.10 percent, "it shall be presumed that the employee was intoxicated and that the injury was due to such intoxication. This presumption may be overcome by clear and convincing evidence."

The employer or insurer can automatically take the 50% reduction when filing the first admission of liability. There is no requirement that a hearing be first conducted. However, before taking the reduction, the employer or insurer must make sure the requirements of section 8-42-112.5 have been met. Often meeting the requirements

can be problematic.

One problem is timing. When an injury occurs and there is a suspicion that the injured worker was under the influence, a drug or alcohol test must be conducted. It is important to test as quickly as possible after the worker was injured, because some substances can linger in the human body for days or weeks making it difficult to prove at a hearing that the injured worker was on the controlled substance at the time of the injury. Recently the Industrial Claim Appeals Office upheld an ALJ's ruling reinstating the claimant's full temporary disability benefits because there was a lack of evidence demonstrating that the claimant's injury resulted from the presence of marijuana in his system. The ALJ determined that because the drug test had been conducted three days after the injury occurred, there was insufficient evidence that the claimant had ingested marijuana on the day of his injury.

Another problem deals with preserving a second sample. Preservation must be done by the testing facility. Fortunately, most facilities in Colorado preserve the sample for up to six months or even a year and make it available to the injured worker upon request. Without the preservation of the second sample, a claimant can argue that his or her due process rights have been violated and successfully block the reduction in benefits.

Recently, Colorado has joined an ever-

growing group of states that have legalized marijuana for medicinal purposes. As a result, section 8-42-112.5 has been amended to include the phrase, "not medically prescribed substances." One controversial issue that has caused heated legislative debate has been the ease with which an individual can obtain access to medically prescribed marijuana for many common ailments. Easy access has allowed some workers to be prescribed marijuana to be taken daily, which may lead them to be under the influence while on the job. So long as the injured worker can prove that he or she had a valid medical prescription for the marijuana during working hours, the reduction in benefits is defeated.

To summarize, when reducing an injured worker's benefits pursuant to section 8-42-112.5: 1) conduct a drug test as soon as possible; 2) always preserve a second sample; 3) if an illicit substance or alcohol at or above 0.10 percent is detected upon testing, reduce the disability benefits when filing the first admission of liability; and 4) make the injured worker prove at hearing he or she was allowed to have the controlled substance in the first place. In addition, the key to prevailing at hearing is to preserve as much tangible evidence as possible.

If you have any questions about using drug or alcohol tests to reduce nonmedical benefits, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Haney vs. Shaw, Stone & Webster*, Jim persuaded Yusuke Wakeshima, M.D. at his deposition to change his opinions stated in his DIME report that claimant wasn't at MMI and needed testing for chronic regional pain syndrome. After reviewing additional medical evidence from the treating physician, Dr. Wakeshima agreed that claimant was at MMI and had a lower impairment rating than was assigned by Dr. Sharma.

Richard A. Bovarnick

In *Crill vs. Remedy Staffing*, ALJ Walsh denied and dismissed claimant's request for TTD benefits and for surgery recommended by an ATP. Rich presented the testimony of employer witnesses and submitted employer records to prove that claimant was responsible for his termination. The ALJ concluded that claimant's misrepresentation on his application for employment that he had a valid driver's license was knowingly made by claimant

or with a reckless disregard for the truth of the statement. Rich also presented testimony of respondents' IME physician, an expert in the field of orthopaedic surgery and the diagnosis and treatment of ankle problems, to persuade the ALJ that the treatment recommended by the ATP was not reasonable and necessary. The ALJ concluded that the opinion of respondents' IME physician was more credible than that of the ATP.

Please see VICTORIES on page 4

ICAO Update

Continued from page 1

percent reduction in nonmedical benefits where the industrial injury results from the presence in the worker's system, during working hours, of not medically prescribed controlled substances. The ALJ found that the drug test three days after the admitted injury did not establish that claimant had ingested marijuana on the day of the injury. **D v. Southeast Auto Detail & Wash, LLC**, W.C. No. 4-814-833 (ICAO Jan. 18, 2011)

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.

Unexplained Fall

ICAO affirmed ALJ Harr's order that determined the claimant suffered a compensable injury. Claimant was discovered lying on the concrete floor, bleeding from his head, near a trailer in which he had been working. He suffered a traumatic brain injury, which caused retrograde amnesia. Claimant was unable to recall the circumstances or cause of his accidental fall, but he presented testimony of a physician who said that there was no medically probable evidence showing the claimant's fall was idiopathic or precipitated by a preexisting condition. The ALJ inferred

from the circumstantial evidence that claimant's fall was more likely due to an accidental fall while performing work-related functions than precipitated by a pre-existing condition or the result of an idiopathic fall. ICAO held that substantial evidence supported the ALJ's determination. **Landes v. Morgan Corporation**, W.C. No. 4-795-135 (ICAO Dec. 27, 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.

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

Joanne C. Crebassa
M. Frances McCracken
Royce W. Mueller
Diane K. Murley

© 2011 Clifton, Mueller & Bovarnick, P.C.
All rights reserved. Printed in USA.

**IPSI
DIXIT**



Golf appeals to the idiot in us and the child. Just how childlike golf players become is proven by their frequent inability to count past five. ~John Updike

If profanity had any influence on the flight of the ball, the game of golf would be played far better than it is. ~Horace G. Hutchinson

They say golf is like life, but don't believe them. Golf is more complicated than that. ~Gardner Dickinson

If a lot of people gripped a knife and fork as poorly as they do a golf club, they'd starve to death. ~Sam Snead

Golf is a day spent in a round of strenuous idleness. ~William Wordsworth

If you are going to throw a club, it is im-

portant to throw it ahead of you, down the fairway, so you don't have to waste energy going back to pick it up. ~Tommy Bolt

Man blames fate for all other accidents, but feels personally responsible when he makes a hole-in-one. ~Bishop Sheen

I don't say my golf game is bad, but if I grew tomatoes, they'd come up sliced. ~Arnold Palmer

I'm hitting the woods just great, but having a terrible time getting out of them! ~Buddy Hackett

The only time my prayers are never answered is playing golf. ~Billy Graham

If you think it's hard to meet new people, try picking up the wrong golf ball. ~Jack Lemmon

It's good sportsmanship to not pick up lost golf balls while they are still rolling. ~Mark Twain

May thy ball lie in green pastures, and not in still waters or small round sandy regions. ~Ben Hogan

If I hit it right, it's a slice. If I hit it left, it's a hook. If I hit it straight, it's a miracle. ~All Us Hackers

Golf is a game invented by the same people who think music comes out of a bagpipe. ~Lee Trevino

This month's *ipsi dixit* was forwarded by Jim Clifton. Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.

VICTORIES IN THE TRENCHES

Continued from page 2

In *Randon vs. Air Serv Corporation*, ALJ Cain denied the claim for workers' compensation benefits. Claimant worked for a vendor at the airport. She alleged she was injured when the shuttle bus she was taking from where she parked to the terminal was struck by a truck. Rich presented the testimony of claimant's supervisor that the parking lot where claimant parked was not an "inducement of employment" between the claimant and the employer. Based on this evidence, Rich argued successfully that claimant's injury did not arise out of her employment.

Holly M. Barrett

In *Contreras vs. Conoco Phillips Co.*, ALJ Cain denied claimant's petition to reopen. Holly submitted the report of a physical medicine specialist and persuaded the ALJ that the claim should not be reopened because claimant had failed to show that her condition worsened after being placed at MMI or that she would be entitled to any additional benefits.

In *Stephens vs. Walmart Stores, Inc.*, PALJ Eley granted Holly's motion to dis-

miss for failure to comply with an order. The PALJ had previously ordered claimant to schedule a recommended surgery and to provide respondents with an employment release. Holly persuaded the PALJ that the claim should be dismissed with prejudice for her willful failure to abide by the previous order.

In *Williams v. Waste Connections, Inc.*, the Director vacated his previous order to show cause why penalties should not be assessed for improper termination of TTD benefits. Holly responded to the order to show cause and persuaded the Director that the amended general admissions of liability had been filed in attempts to correct the original GAL and to comply with error letters from the Division, that claimant had been paid more benefits than he was entitled to receive, and that no harm had come to the claimant from the erroneous GALs.

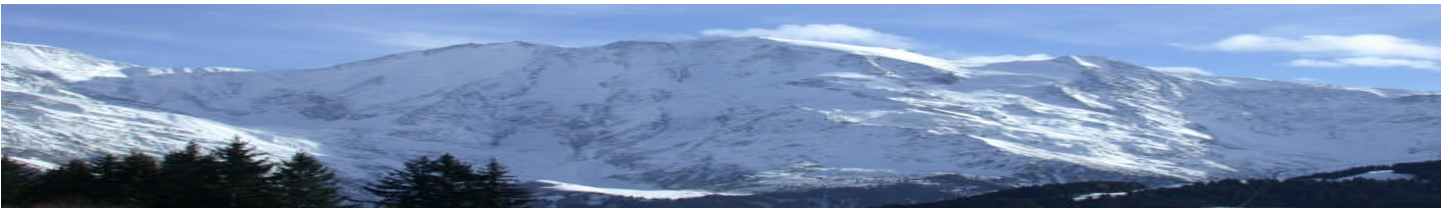
M. Frances McCracken

In *Johnson vs. Walmart Stores, Inc.*, the Division allowed claimant's attorney to withdraw his application for hearing and vacate the hearing. Fran had filed a motion

to strike the application because claimant had failed to timely file an application for hearing to contest the final admission, was barred by the doctrines of law of the case and *res judicata* from repeatedly raising the same issues for determination in the same claim, and endorsed for hearing issues that were not ripe.

John M. Abraham

In *Ocker vs. ICM Equipment Company*, ALJ Harr denied and dismissed claimant's request for an award of medical benefits to cover Botox and Myobloc injections. John submitted reports of a specialist in physical medicine and rehabilitation, who had performed an independent records review, and a specialist in occupational medicine, who had performed an IME, to establish that passive palliative treatment modalities, such as Botox injections, had failed to provide claimant any functional improvement. The ALJ credited their medical opinions as persuasive in finding that claimant failed to show it more probably true than not that Botox and Myobloc injections are reasonable and necessary to cure and relieve the effects of his condition from the injury.



CLIFTON, MUELLER & BOVARNICK, P.C.

789 SHERMAN STREET
SUITE 500
DENVER, COLORADO 80203