

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

Court of Appeals Update

Premises Liability

In *Wycoff v. Grace Community Church of the Assemblies of God* and *Wycoff v. Seventh Day Adventist Association of Colorado*, announced December 9, 2010, the Colorado Court of Appeals considered application of the Premises Liability Act (Act) to an accident in which plaintiff was seriously injured during an overnight event sponsored by Grace Community Church of the Assemblies of God (Grace) on a ranch owned by Seventh Day Adventist Association of Colorado (SDA).

The Act requires a landowner to exercise reasonable care to protect an invitee from dangers of which the landowner knew or should have known. The distinction between an "invitee" and a "licensee" turns on whether the person's presence on the land was affirmatively invited or merely permitted. The court reviewed the facts and concluded Grace affirmatively encouraged the presence of plaintiff and other youth

attendees at the event and took affirmative steps to facilitate their attendance and participation. Therefore plaintiff was an invitee of Grace. The court also held that plaintiff was an invitee of SDA under the Act because she was on SDA's ranch "to transact business in which [she and SDA were] mutually interested," even though she had no direct dealings with SDA. Grace had collected registration fees from participants, which it paid to SDA to secure access to the ranch. The court rejected arguments that plaintiff was merely a so-

cial guest.

The court also held that both Grace and SDA were landowners under the Act. The court held that the Act's definition of landowner, which includes one "who is legally conducting an activity on the property," clearly encompassed Grace. SDA remained liable as a landowner under the Act during Grace's event, because Grace was not entitled to possession of the ranch to the exclusion of SDA. SDA staff remained on the ranch and reserved the right to regulate activities conducted on the ranch.

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; ICAO=Industrial Claim Appeals Office.

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 physi-

cian who said that there was no medically probable evidence showing the claimant's fall was idiopathic or precipitated by a pre-existing condition. The ALJ inferred from the circumstantial evidence that claimant's injury 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.

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Practice Pointer

New Treatment Guidelines for Cumulative Trauma Conditions

By Richard A. Bovarnick

The Colorado Division of Workers' Compensation has issued revised treatment guidelines for Cumulative Trauma Conditions (CTC), effective October 30, 2010. The guidelines, contained in rule 17, exhibit 5 of the Colorado Workers' Compensation Rules of Procedure, cover cumulative trauma disorders, covered by the previous exhibit 5, and carpal tunnel syndrome, formerly covered by exhibit 2. To save you the time required to review the new guidelines, we set forth below highlights of the changes.

Under Medical Causation Assessment for Cumulative Trauma Conditions, starting on page 13 of the revised exhibit 5, the guidelines instruct the clinician how to determine if it is medically probable that the need for treatment is due to a work-related exposure or injury. Step 1 of the causation assessment requires a specific diagnosis and reminds the clinician that "cumulative trauma, repetitive strain and repetitive motion are not diagnoses." Examples of actual medical diagnoses include specific tendonopathies, strains, sprains, and mononeuropathies. Sections F and G cover specific musculoskeletal and peripheral nerve disorders.

The Division provides a six-step process that the clinician is supposed to follow to evaluate causation in CTC cases, with subsections on Foundations for Evidence of Occupational Relationships and Using Risk Factors to Determine Causation. See exhibit pages 14–18. Pages 19–20 provide an algorithmic diagram of the steps for causation assessment.

Pages 21–22 provide definitions for various categories of risks as primary and secondary risk factors. For example, computer work is noted not to be a primary risk factor if the claimant works up to 7 hours per day at an ergonomically correct workstation. However, more than four hours of mouse work can be a primary risk factor if it is physiologically related to the diagnosis.

The Diagnosis-Based Risk Factors table on pages 23–30 provides information on the strength of evidence for and against specific risk factors for common cumulative trauma diagnoses. For example, the entry for carpal tunnel syndrome notes good evidence that a combination of force, repetition, and vibration is a risk factor; some evidence that wrist bending or awkward

posture for 4 hours is a risk factor; and good evidence that repetition alone for less than or equal to 6 hours is NOT RELATED. Oddly, the table only covers finger, wrist and elbow diagnoses and does not address shoulder conditions, even though there are claims of alleged CTC of the shoulder.

If you have a claim of cumulative trauma, repetitive strain or repetitive motion, we recommend you obtain an accurate and detailed job analysis of the claimant's actual job duties, which you may need to have determined by an onsite job assessment, and provide that analysis along with reference to the new CTC guidelines to the ATP for a causation opinion. While the analysis is taking place we recommend that you file a notice of contest pending investigation. Once you receive the ATP's report you can then decide to have an IME, stand on the notice of contest, or file a general admission.

If you have any questions about the treatment guidelines or defending claims for cumulative trauma conditions, please contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Westwood vs. Walmart Stores, Inc.*, the Director of the Division of Workers' Compensation dismissed his order to show cause why penalties should not be assessed for late payment of a lump sum. Jim provided the adjuster's affidavit stating that she had not received a copy of the request for lump sum payment from claimant's attorney, that after she received the request from respondents' counsel she was delayed in completing the form because of circumstances beyond her control, and that the delayed payment did not result from indifference or disregard of respondents' obligations.

Richard A. Bovarnick

In *Montoya vs. Sava Senior Care*, ALJ Walsh denied and dismissed claimant's

claim for benefits under the Workers' Compensation Act. Rich presented the testimony of an employer representative, which the ALJ found to be credible and persuasive, and submitted employer and medical records to persuade the ALJ that claimant's testimony about her alleged injury was not credible and that claimant had failed to establish by a preponderance of the evidence that she sustained a compensable injury.

In *Simpson vs. ABM Industries, Inc.*, ALJ Friend found that respondents had overcome the DIME physician's rating by clear and convincing evidence. Rich presented medical reports from respondents' expert and other rating physicians, all of whom stated that claimant did not sustain a ratable impairment to his lumbar spine as a result of his work injury. The ALJ deter-

mined that the DIME physician's rating was likely incorrect and accepted the lower permanent impairment rating of the other physicians. The lower rating also resulted in application of a lower indemnity cap.

In *Reyes vs. SSC Englewood*, ALJ Krumreich found that respondents had overcome by clear and convincing evidence the DIME physician's opinions that claimant had sustained a radial tunnel syndrome and a Wartenberg syndrome and needed surgery for those conditions. Therefore the ALJ denied and dismissed claimant's claim for medical treatment of those conditions. Rich presented testimony of two ATPs and an IME, including two hand surgeons, to persuade the ALJ that the DIME physician's diagnoses were incorrect. The ALJ

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found the opinions of respondents' experts on these two diagnoses to be more persuasive than the DIME physician's opinions.

Holly M. Barrett

In *Gonzales vs. Interstate Brands Corp.*, ALJ Krumreich denied and dismissed claimant's claims for penalties. The insurer's payment records showed that, except for one minor computational error, claimant had been paid combined temporary disability and permanent impairment benefits of \$75,000, the indemnity cap applicable to claimant's injury. Holly persuaded the ALJ that the insurer did not willfully withhold PPD benefits and that the insurer had an objectively reasonable

basis for not making any further TTD payments to claimant.

Joanne C. Crebassa

In *Lewis v. Badger Drilling Company*, ALJ Felter determined that claimant failed to overcome by clear and convincing evidence the DIME opinion on MMI and failed to establish conversion of the scheduled rating of his left shoulder to a whole

person impairment rating. Joanne presented reports of other experts to the DIME physician at his deposition, resulting in the DIME physician changing his earlier opinions on MMI and impairment. At hearing Joanne cross-examined claimant about his subsequent employment as a drilling roughneck and his failure to disclose a prior personal injury claim for cervical injury.

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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The following announcements were reportedly made by pilots and flight attendants of WestJet, a Canadian airline whose employees try to make their announcements a bit more entertaining.

On a WestJet flight (There is no assigned seating, you just sit where you want) passengers were apparently having a hard time choosing, when a flight attendant announced, "People, people we're not picking out furniture here. Find a seat and get in it!"

"There may be 50 ways to leave your lover, but there are only 4 ways out of this airplane."

As the plane landed and was coming to a stop at the Vancouver Airport, a lone voice came over the loudspeaker: "Whoa, big fella. Whoa!"

"Welcome aboard WestJet flight 245 to Calgary. To operate your seat belt, insert the metal tab into the buckle, and pull tight. It works just like every other seat belt; and, if you don't know how to operate one, you probably shouldn't be out in public unsupervised."

"In the event of a sudden loss of cabin

pressure, masks will descend from the ceiling. Stop screaming, grab the mask, and pull it over your face. If you have a small child traveling with you, secure your mask before assisting with theirs. If you are traveling with more than one small child, pick your favourite."

"Weather at our destination is 50 degrees with some broken clouds, but we'll try to have them fixed before we arrive."

"Your seat cushions can be used for flotation; and in the event of an emergency water landing, please paddle to shore and take them with our compliments."

"As you exit the plane, make sure to gather all of your belongings. Anything left behind will be distributed evenly among the flight attendants. Please do not leave children or spouses."

An airline pilot wrote that on this particular flight he had hammered his ship into the runway really hard. The airline had a policy which required the first officer to stand at the door while the passengers exited, smile, and give them a "Thanks for flying our airline." He said that, in light of his bad landing, he had a hard time looking the passengers in the eye, thinking that someone would have a smart comment.

Finally everyone had gotten off except for a little old lady walking with a cane. She said, "Sir, do you mind if I ask you a question?"

"Why, no, Ma'am," said the pilot. "What is it?"

The little old lady said, "Did we land, or were we shot down?"

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



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