

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

In the Courts

Supreme Court Update Personal Injury—Auto Accident

In *Kendrick v. Pippin*, announced May 9, 2011, the Colorado Supreme Court held that the trial court should not have given a jury instruction on the doctrine of sudden emergency under the facts of the case and remanded for a new trial. The Supreme Court also held that the trial court properly refused to give a jury instruction on the doctrine of *res ipsa loquitur*.

The doctrine of sudden emergency recognizes that "a person confronted with sudden or unexpected circumstances calling for immediate action is not expected to exercise the judgment of one acting under normal conditions." Because the defendant testified that she anticipated the roads would be slick and icy on the morning of the accident, the Supreme Court held that she failed to present competent evidence that she was confronted with sudden or unexpected road conditions resulting in an

emergency not of her own making. Therefore, she was not entitled to a jury instruction on the doctrine of sudden emergency.

The doctrine of *res ipsa loquitur* (literally "the thing speaks for itself") is a rule of evidence that creates a rebuttable presumption that the defendant was negligent if the evidence introduced by the plaintiff establishes that three elements are more probable than not. The Supreme Court held that the plaintiff had failed to establish the first element, that the event is of the kind that ordinarily does not occur in the absence of negligence. Therefore, it upheld the trial court's refusal to give a jury instruction on *res ipsa loquitur*.

Personal Injury—Exemplary Damages

In *Qwest Services Corporation v. Blood*, announced May 23, 2011, the Colorado Supreme Court upheld the jury's award of \$18 million in exemplary damages in addition to compensatory damages for \$9.9 million in economic losses, \$1 million in economic losses, \$10 million for physical impairment and disfigurement, and \$750,000 for loss of consortium. The court held that Colorado's exemplary damages statute, which permits a jury to consider harm or potential harm to nonparties only for the purpose of assessing whether a defendant's conduct is willful and wanton, was not unconstitutional on its face or as applied by the trial court. The court also held, on de novo review, that the evidence was sufficient to demonstrate that Qwest's conduct was willful and wanton beyond a reasonable doubt and was sufficiently rep-

rehensible to justify the amount of the exemplary damages award.

Court of Appeals Update Workers' Compensation— Stay of DIME Process

In *Munoz v. Industrial Claim Appeals Office*, announced May 12, 2011, the Colorado Court of Appeals held that the DIME process was automatically stayed when the claimant filed an application for hearing on the propriety of the DIME panel selection and physician specialties after the Division issued a physician panel that did not include an orthopedic surgeon specializing in upper extremities as requested by claimant. The Court of Appeals also held that the claimant could not knowingly waive his right to a DIME when the DIME

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Legislative Watch

This year the General Assembly only passed one new workers' compensation law. See Holly's practice pointer on page 2 of this issue for information on the changes to the law on post-MMI medical benefits, discovery, prepayment of expenses for attending IMEs and vocational evaluations, and applications for lump sums.

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Practice Pointer

New Legislative Changes

By Holly M. Barrett

Senate Bill 11-199 was signed by Governor Hickenlooper on May 23, 2011. Below is a summary of the changes to the Workers' Compensation Act, which are effective immediately and apply to all claims.

§8-42-107(8)(f) – Required admission for medical maintenance treatment:

Paragraph (f) has been added to §8-42-107 (8), which governs medical impairment benefits for scheduled and nonscheduled injuries. Paragraph (f) essentially says that in all claims in which an authorized treating physician (ATP) recommends medical benefits after maximum medical improvement (MMI) and there is no contrary medical opinion in the record, the final admission of liability **shall** admit liability for “related reasonable and necessary medical benefits by an authorized treating physician.”

Remember also that §8-42-101(5) became effective July 1, 2010. That statute provides that an ALJ **shall** award the claimant all reasonable costs associated with pursuing a medical maintenance admission when the authorized treating physician recom-

mends medical maintenance care and that care is either ordered by an ALJ or is admitted fewer than 20 days before a hearing on that issue.

§8-43-207(1)(e) – Discovery:

The clause requiring the parties to agree to engage in discovery has been removed from §8-43-207(1)(e). The parties no longer need to obtain permission to engage in discovery when each party is represented by an attorney. If a party is proceeding *pro se* (without an attorney), permission still needs to be obtained before engaging in discovery.

§8-43-404(1)(b) – Prepayment of expenses for attending IMEs and vocational evaluations:

Two paragraphs have been added to §8-43-404 governing independent medical examinations (IME) and vocational evaluations. Paragraph (b)(I) essentially provides that, if an injured worker requests an advance for attending an IME or a vocational evaluation, at least 3 business days before the IME or vocational evaluation the employer or insurer **shall** pay to the injured

worker the estimated expenses of attending the examination. The advance includes estimated transportation, mileage, food, and hotel costs. Failure to provide claimant with the estimated expenses is grounds for the claimant to refuse to attend the IME.

Paragraph (b)(II) provides that if the employer pays the estimated expenses and the claimant does not attend the IME, the employer may recover the estimated expenses paid from future indemnity benefits.

§8-43-406(1) – Lump sum payments:

SB 11-199 changes the effective date of last year's amendment allowing a claimant to request a lump sum of PPD benefits without waiving the right to pursue PTD benefits. The provision is now applicable to all claims regardless of the date of injury.

If you have any questions regarding these changes to the Workers' Compensation Act or the application of these changes to a specific case, please contact any of the attorneys at Clifton, Mueller, & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Newman-Finch vs. Walmart*, ALJ Mottram denied and dismissed claimant's claim for benefits. Jim submitted medical records, presented the testimony of employer witnesses, and cross-examined claimant and the ATP to persuade the ALJ that claimant had failed to demonstrate it was more probable than not that she suffered a compensable injury arising out of and in the course of her employment. The ALJ specifically found that claimant's testimony and the inherent inconsistencies with the medical records were too great to overcome in this case.

In *Dunn vs. Shaw, Stone & Webster Construction, Inc.*, PALJ McBride granted respondents' motions to strike the DIME report of Dr. Rook and order the DIME unit to issue a new IME Physician Panel. Jim argued persuasively that the multiple

deviations from Rule 11 of the WCRP by claimant's attorney Steven Mullens had the effect of depriving respondents of a fair and impartial DIME report, and that it was necessary to strike the DIME report and begin the process again with a new DIME panel.

In *Shelton vs. Halliburton Energy Services, Inc.*, PALJ Purdie denied claimant's motion to compel respondents to advance travel costs for the Grand Junction claimant to attend a DIME in Denver. Jim persuaded the PALJ that neither the statute nor the rule requires respondents to advance travel costs for an indigent claimant who requests a DIME. He argued successfully that travel expense related to a DIME is a function of the litigation process and not properly characterized as medical treatment, which respondents are required to pay.

Richard A. Bovarnick

In *Gunn vs. MillerCoors, LLC*, ALJ Friend denied claimant's requests for medical treatment and TTD benefits related to a low back injury he alleged he sustained at the same time as his compensable hamstring injury or during physical therapy for the compensable injury. Rich presented the expert testimony of two ATPs and cross-examined claimant and his expert to persuade the ALJ that claimant did not injure his low back, aggravate his low back condition, or accelerate the need for treatment to his low back in the accident.

John M. Abraham

In *Houston vs. Harsco Corporation/Heckett Multiserve*, ALJ Krumreich denied claimant's claims for thrice-weekly

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VICTORIES IN THE TRENCHES

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massage therapy for his skin-graft scars and for medications for cardiac arrhythmia and hypertension. John submitted medical records, presented testimony of an expert in physical medicine and rehabilitation, and cross-examined claimant's witnesses to persuade the ALJ that claimant had failed to prove that continued massage therapy and medications for cardiac arrhythmia and hypertension were reasonable and necessary to cure and relieve him from the effects of his injury.

Holly M. Barrett

In *McIntyre vs. KI, LLC*, ALJ Walsh previously granted respondents' request for attorney fees because claimant's attorney had endorsed issues that were not ripe for hearing. Holly submitted an affidavit of attorney fees incurred in preparing for hearing on the issues that were not ripe. The ALJ found that the itemized attorney fees were reasonable and ordered claimant to pay those attorney fees.

M. Frances McCracken

In *Claims Management Inc. vs. Conley*, the Director of the Division of Workers' Compensation granted respondents' request for utilization review and ordered a change of provider. Fran compiled medical records and other documents to persuade the Director's appointed utilization review panel that a change of provider was appropriate. One of the three panel members suggested that the provider under review undergo early re-accreditation as a refresher course and another suggested a "Level II oriented case review which might result in learning points from this case that could be applied to future cases" followed by Level II oriented monitoring of performance over a period of time following the training.

Diane K. Murley

In *Blackman vs. Walmart Stores, Inc.*, ALJ Cannici denied and dismissed claimant's request for workers' compensation benefits. Diane presented the testimony of an assistant manager and submitted employer and medical records and reports to document claimant's inconsistent descriptions of her alleged injury and her physicians' inability to establish a diagnosis to account for her continuing complaints of significant pain. The ALJ was persuaded that claimant had failed to prove that she suffered a compensable injury during the course and scope of her employment.

IN THE COURTS

Continued from page 1

process was stayed. The Court remanded for the ALJ's reconsideration of the DIME issue raised in the application for hearing.

Personal Injury—Offer of Settlement

In *Strunk v. Goldberg*, announced May 26, 2011, the Colorado Court of Appeals held that defendant's settlement offer, which included subrogation interests in and liens on the claim before the court, did not implicate nonmonetary conditions and was a valid offer of settlement under section 13-17-202, C.R.S. The trial court therefore properly awarded post-offer costs to defendant.



While on a road trip, an elderly couple stopped at a roadside restaurant for lunch. After finishing their meal, they left the restaurant, and resumed their trip.

When leaving, the woman unknowingly left her glasses on the table, and she didn't miss them until they had been driving for about forty minutes.

By then, to add to the aggravation, they had to travel quite a distance before they could find a place to turn around in order to return to the restaurant to retrieve her glasses.

All the way back, the husband became the classic grouchy old man. He fussed and complained, and scolded his wife relentlessly during the entire return drive. The more he chided her, the more agitated he became. He just wouldn't let up for a single minute.

To her relief, they finally arrived at the restaurant. As the woman got out of the car and hurried inside to retrieve her glasses, the old geezer yelled to her:

While you're in there, you might as well get my hat and the credit card.

This month's *ipsi dixit* was submitted by an anonymous reader. Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.

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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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; IME=independent medical examination; MMI=maximum medical improvement; PPD=permanent partial disability.

Apportionment

ICAO affirmed ALJ Henk's order that determined claimant sustained no permanent impairment from her compensable injury. A DIME physician's apportionment must be overcome by clear and convincing evidence or it is binding. Respondents successfully overcame the DIME physician's impairment rating, but claimant was the only party with an incentive to overcome the DIME report on apportionment. ICAO held that the ALJ did not err in concluding that apportionment was not overcome by clear and convincing evidence. *Medina-Weber v. Denver Public Schools*, W.C. No. 4-782-625 (ICAO May 9, 2011)

Post-MMI Medical Benefits

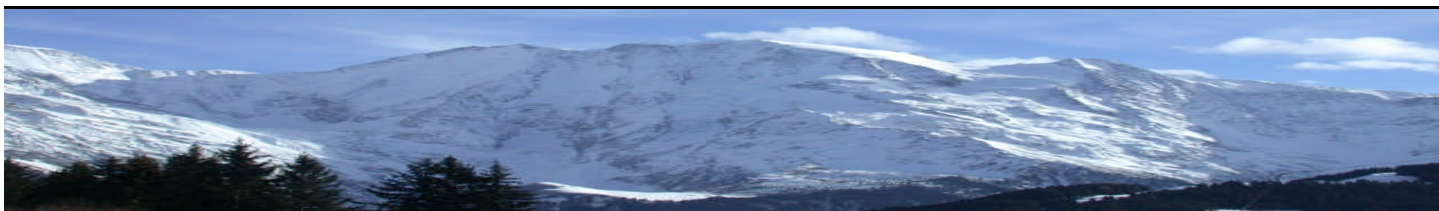
ICAO affirmed ALJ Stuber's order that denied claimant's claim for post-MMI medical benefits. Claimant had been treated by a chiropractor on his own and without referral from an ATP. At claimant's request the chiropractor issued a note that claimant would benefit from a motorized wheelchair. A year and a half after claimant was placed at MMI, he was diagnosed with a deep venous thrombosis and bilateral pulmonary emboli. Respondents' IME physician testified that these conditions were not related to claimant's work injury but resulted from his self-imposed use of a wheelchair. ICAO upheld the ALJ's determination that respondents had established by clear and convincing evidence that the anticoagulant therapy was not reasonably necessary to cure and relieve the effects of the work injury. *Balfour v. Oakwood Homes LLC*, W.C. No. 4-718-516 (ICAO May 19, 2011)

Relatedness of Conditions

ICAO affirmed ALJ Jones's order that awarded PPD benefits based on the ATP's impairment rating of 29% of the whole

person, which included ratings of claimant's lumbar and cervical spine as well as his upper extremity. In 2008 ALJ Walsh had determined that claimant sustained a compensable injury and several times in his order mentioned the injury to claimant's wrist and hand. ICAO dismissed claimant's appeal of ALJ Walsh's order, inferring that the ALJ contemplated that any disputes over the relatedness of future medical treatment for other conditions would be adjudicated when those disputes arose. In affirming ALJ Jones, ICAO held that ALJ Walsh's order could not rule that claimant's injury was limited to his wrist and hand and thereby foreclose future disputes about the relatedness of other conditions. Therefore, when the ATP issued his impairment rating, respondents had the responsibility to either admit to the ATP's rating or request a DIME. *Garrett v. McNelly Construction Company*, W.C. No. 4-734-158 (ICAO May 17, 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 or 970-255-8852.



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