

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; DIME=Division-sponsored independent medical examination; DWC=Division of Workers' Compensation; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; OAC=Office of Administrative Courts; ROM=range of motion.

DIMES

ICAO affirmed ALJ Walsh's order determining that claimant failed to overcome by clear and convincing evidence the DIME physician's opinion that claimant's left upper extremity conditions were not caused by her right upper extremity injury. Claimant argued that she should not have

been required to overcome the DIME physician's opinion on causation by more than a preponderance of the evidence. However, because employer admitted claimant suffered a work-related injury, the issue before the ALJ was the extent of the injury, not compensability. Therefore, ICAO held, the ALJ properly gave presumptive weight to the DIME physician's opinion that claimant's left-sided complaints were not related to the admitted injury. *Nielsen-Hernandez v. King Soopers*, W.C. No. 4-657-036 (ICAO Feb. 2, 2011)

ICAO affirmed ALJ Stuber's order determining that claimant had overcome by clear and convincing evidence the DIME physician's impairment rating. The DIME physician invalidated all lumbar ROM

measurements because the straight leg raising test invalidated the flexion ROM measurements. The DIME physician did not describe any other inconsistencies between ROM and clinical observations. The ALJ was persuaded by claimant's expert, who testified that it is part of the DWC's training that you can have invalid lumbar flexion and still have valid lumbar extension under the *AMA Guides*. *Flores v. Spacecon Specialty Contractors*, W.C. No. 4-803-707 (ICAO Feb. 8, 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.

In the Courts

Supreme Court Update

Setoff for Settlement of Subrogation Interest

In *Ferrellgas, Inc. v. Yeiser*, announced February 28, 2011, the Colorado Supreme Court held that defendant was entitled to a setoff of the full amount of a settled subrogation claim. The case involved a breach of contract claim that resulted in property damage to plaintiff's vacation home. Plaintiff's homeowner's insurer reimbursed her and her contractors for a total of \$212,000

and asserted a subrogation claim against defendant. The insurer settled its subrogation claim with defendant for \$172,000. The court held that the trial court should have set off against the verdict the full \$212,000, instead of just the \$172,000 settlement amount, and that the setoff should have been taken before pre-judgment interest was calculated. The court remanded to the trial court for recalculation of pre-judgment interest and costs after applying the correct setoff.

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Practice Pointer

Respond Promptly to Requests for Lump Sum Payment

By Diane K. Murley

If a claimant requests a lump sum payment of permanent disability or dependents' benefits, you must respond within 10 business days of the mailing of the request. Sometimes claimant's attorney will send a request for a lump sum payment at the same time as other documents, such as an objection to the final admission, an application for hearing, or a notice and proposal to select an independent medical examiner. Therefore, you should be on the lookout for requests for lump sums after you file a final admission of liability.

There are two types of requests for lump sums, and the procedure is slightly different for each. If claimant requests \$10,000, or the remainder of the award if less than \$10,000, it must be automatically paid, less the discount and any offsets, within 10 business days of the mailing of the request. If claimant requests more than \$10,000, he

must file a Request for Lump Sum Payment form with the Division of Workers' Compensation. Within 10 business days of the date of the mailing of the request, you must complete the Lump Sum Calculation and Proof of Payment form, submit the benefit payment calculations to the Division and claimant or claimant's attorney, and issue payment or object to payment of a lump sum.

Payment of a lump sum reduces future disability benefits but not future medical benefits. The Division has calculators for figuring out the lump sum that must be paid now and the reduced amount of future benefits on its website at <http://www.colorado.gov/CDLE/DWC>. Go to the Employers & Insurers page, then Benefit Calculator. Use the PPD Lump Sum calculator if the lump sum requested is the full award or the first \$10,000. Otherwise use

the PPD Lump Sum calculator for lump sums of permanent partial disability benefits or the PTD Lump Sum calculator for lump sums of permanent total disability benefits. There is also a printable "How to" guide on Methods of Calculating Lump Sums on the Employers & Insurers page.

Late filing of lump sum paperwork and late payment of lump sums is one of the issues the Director of the Division of Workers' Compensation is watching closely. If the lump sum calculation and proof of payment form is filed late or payment is issued late, the Director is likely to issue an order to show cause why penalties should not be assessed.

If you have any questions about calculating lump sums or completing the lump sum calculation and proof of payment form, 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*, ALJ Stuber ordered claimant to repay to insurer the overpayment of \$15,494.30. Jim presented the testimony of the adjuster and submitted documents from the DWC and OAC showing respondents' attempts to avoid the overpayment. Jim persuaded the ALJ that amendments to the Act in 1997 provided the ALJ with the power to order repayment of overpayments even if the overpayment was not caused by fraud of the claimant. The ALJ concluded that there would be an illogical result if the insurer were required to continue to pay benefits until an order to terminate was obtained if the insurer was not then entitled to recover the overpayment.

In *Bryner vs. Walmart*, Jim persuaded Lynn Fernandez, M.D. at her deposition to change her opinions in her DIME report that claimant needed additional work-up and might be a candidate for lumbar surgery. After reviewing reports from two board certified orthopedic surgeons that stated claimant was not a suitable candi-

date for lumbar surgery and reviewing video of claimant that contradicted her clinical presentation, Dr. Fernandez concluded claimant was at MMI and needed no additional work-up or surgery.

Richard A. Bovarnick

In *Husband vs. SSC Denver South Monaco Operating Company*, ALJ Krumreich permitted the insurer to withdraw its admissions of liability in their entirety and denied and dismissed with prejudice all claims for compensation and benefits except those previously paid. Rich submitted medical records at hearing and presented the testimony of claimant's supervisor and an expert in physical medicine and rehabilitation to persuade the ALJ that claimant had not sustained a compensable injury. The ALJ found the testimony of respondents' witnesses to be more persuasive than that of claimant and his witnesses.

In *Pulliam vs. Servisair USA, Inc.*, ALJ Jones found and concluded that respondents overcame the opinion of the DIME physician by clear and convincing evi-

dence with regard to MMI. Rich presented the testimony of an occupational medicine expert and submitted medical reports to establish that the DIME physician did not account for claimant's previous range of motion measurements and did not consider significant medical information of claimant's rotator cuff tear caused by the degenerative condition of his shoulder.

John M. Abraham

In *West vs. Walmart Stores, Inc.*, ALJ Friend found that claimant's condition was not work-related, permitted respondents to withdraw the final admission of liability, and denied and dismissed the claim for workers' compensation benefits. John submitted medical and employment records and presented the testimony of an authorized treating physician and claimant's primary care physician to persuade the ALJ that claimant's alleged condition was likely caused by her abnormal gait and lower extremity body mechanics, which had no direct correlation with claimant's job duties.



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.

IPSI DIXIT



Parapros-
dokian
Sentences

How is it one careless match can start a forest fire, but it takes a whole box to start a campfire?

Why does someone believe you when you say there are four billion stars, but check when you say the paint is wet?

Always borrow money from a pessimist. He won't expect it back.

Hospitality: making your guests feel like they're at home, even if you wish they were.

Some cause happiness wherever they go. Others whenever they go.

When tempted to fight fire with fire, remember that the Fire Department usually uses water.

Change is inevitable, except from a vending machine.

You're never too old to learn something stupid.

Evening news is where they begin with 'Good evening,' and then proceed to tell you why it isn't.

We never really grow up; we only learn how to act in public.

Nostalgia isn't what it used to be.

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

A paraprosdokian is a figure of speech in which the latter part of a sentence or phrase is surprising or unexpected in a way that causes the reader or listener to reframe or reinterpret the first part. It is frequently used for humorous or dramatic effect.

Dolphins are so smart that within a few weeks of captivity, they can train people to stand on the very edge of the pool and throw them fish.

Do not argue with an idiot. He will drag you down to his level and beat you with experience.

Light travels faster than sound. This is why some people appear bright until you hear them speak.

Knowledge is knowing a tomato is a fruit. Wisdom is not putting it in a fruit salad.

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IN THE COURTS

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Court of Appeals Update Underinsured Motorist Coverage

In *Levy v. American Family Mutual Insurance Company*, announced February 3, 2011, the Colorado Court of Appeals held that American Family was entitled to reduce the arbitration award for damages under the underinsured motorist coverage

by the amount it had previously paid pursuant to its medical payment coverage in order to avoid making duplicative payments. The court limited its holding to cases in which the insured is fully compensated and allowing the setoff prevents double recovery. The court indicated that the result would have been different if allowing the setoff resulted in impaired benefits under the policy.

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