

# 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 ALJ=administrative law judge; ATP=authorized treating physician; AWW=average weekly wage; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; WCRP=Colorado Workers' Compensation Rules of Procedure.

### AWW

ICAO affirmed ALJ Friend's order including in computation of AWW wages earned at concurrent employments. The ALJ's determination of claimant's AWW was based on claimant's actual earnings from her sporadic employments with other em-

ployers. ICAO held that the ALJ may, in order to achieve fairness, include wages from concurrent employments. Because the ALJ's determination was supported by substantial evidence and did not constitute an abuse of discretion, ICAO affirmed. *Smith v. J-T Initiatives, Inc.*, W.C. No. 4-815-801 (ICAO Mar. 28, 2011)

### DIMEs

ICAO affirmed ALJ Cannici's order awarding claimant a 19% whole person impairment rating. The ATP rated claimant's impairment at 19%. The DIME physician rated it at 17% but attributed all but 1% to a previous non-industrial motor vehicle accident and a previous industrial injury. The ALJ determined that claimant's pre-existing injuries to her lumbar spine did not involve the same body part as the sacroiliac joint, which the ATP opined was the pain generator from claimant's recent injury. The ALJ therefore concluded that the DIME physician had misapplied the *AMA Guides* by apportioning part of claimant's impairment to her previous injuries. *King v. Starbucks*, W.C. No. 4-802-142 (ICAO Mar. 28, 2011)

### Penalties

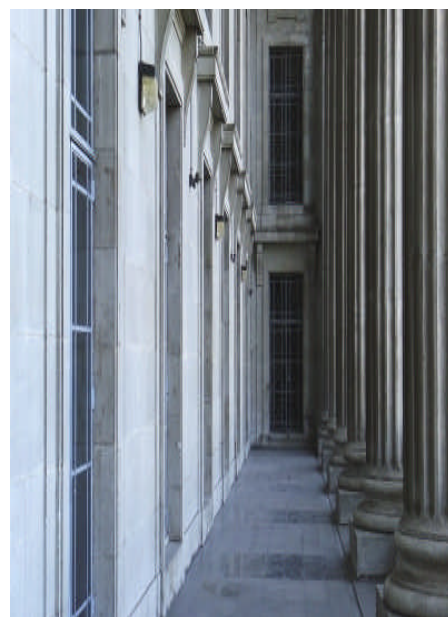
ICAO set aside ALJ Walsh's order and remanded for entry of a new order. The ALJ had imposed penalties on respondents for filing an FAL predicated upon a medical report that claimant alleged did not place him at MMI for all his work-related conditions. At the time the FAL was filed, claimant was complaining of other condi-

tions, but the ATP did not form an opinion about the cause of the other conditions until three months later. ICAO remanded the case for determination of whether the FAL complied with WCRP Rule 5-5(A) at the time it was filed, and if not, whether the insurer's conduct was objectively reasonable given the timing of the ATP's opinion regarding causality. *Johnson v. Champ, LLC*, W.C. No. 4-815-801 (ICAO Apr. 12, 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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## Practice Pointer

## Bad Faith?

By M. Frances McCracken

On March 3, 2011, the Court of Appeals released its opinion in the case cited as *Zolman v. Pinnacol Assurance*, 2011 WL 7274744. Although *Zolman* involves a claim for bad faith breach of contract, the bad faith allegations arose out of an underlying worker's compensation claim. In *Zolman*, the claimant brought an action against her employer's workers' compensation insurer, alleging bad faith after the insurer denied requests for post-MMI medical care and a change of physician.

The background of *Zolman* is as follows. The claimant, Charlotte Zolman, sustained a work-related injury to her low back on December 3, 2004. After receiving extensive medical treatment, the ATP placed the claimant at MMI on August 18, 2005, assigning 12 percent whole person impairment, with no recommendations for medical treatment post-MMI. The insurer filed a Final Admission consistent with the ATP's opinions. The claimant was dissatisfied and requested a Division IME. The DIME agreed with the determined MMI date, but assigned the claimant 16 percent permanent impairment of the whole person. The DIME did not recommend any post-MMI medical care. The insurer subsequently amended its FAL to reflect the DIME's findings.

The claimant sought to overcome the opinions of the DIME, and alleged permanent total disability. An ALJ conducted an extensive evidentiary hearing. The ALJ received exhibits and post-hearing depositions from multiple physicians, including the claimant's ATP, IMEs, and the DIME, as well as testimony from the claimant's employers, vocational rehabilitation experts, and the claimant herself. Thereafter, the ALJ issued a lengthy written order denying claimant's claim for permanent total disability, denying her request for change of physician, but ordering the insurer to pay for "reasonable and necessary post MMI maintenance medical treatment", including treatment recommended by the claimant's IME.

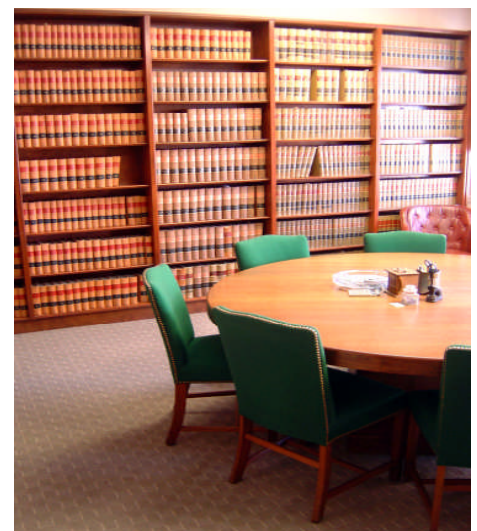
After the ALJ's Order, the claimant continued with multiple visits to the ATP and ongoing treatment. The ATP ordered a CT scan of the claimant's lumbar spine. After reviewing the scan, the ATP concluded that the claimant's work-related injury was stable, but the claimant had "multilevel degenerative disc disease which was independent of her work injury." Therefore, the degenerative disc disease was no longer "a work-related component to [the claimant's] back pain." The ATP concluded that medication and further follow-up would not be needed. The claimant then submitted a written request for a change of physician to Dr. Yamamoto. This request was based on the claimant's allegation that she was entitled to post-MMI maintenance medical care, but the ATP was refusing to provide her with any further care for her back pain. The insurer denied the request for change of physician, denied requests for further medical treatment, and later denied requests for reimbursement submitted by Dr. Yamamoto. The claimant then filed a complaint in district court alleging that the insurer breached its duty of good faith and fair dealing by unreasonably denying and delaying authorization for her medical care.

The insurer filed a Motion for Summary Judgment arguing its actions in handling the claimant's workers' compensation claim were at least "fairly debatable" because it relied on the medical opinions of four physicians, the ALJ's order, and Colorado law. The District Court, granted the insurer summary judgment. Claimant appealed. On appeal, the Court of Appeals held, as relevant to this article, (1) claimant's request for steroid injections was fairly debatable, and thus, insurer did not act unreasonably in declining the request; and (2) claimant's request for change of physician was fairly debatable, and thus, the insurer did not act unreasonably in declining the request. In reaching its holding, the court acknowledged that, in assessing a bad faith breach of an insurance contract in

first-party context, the reasonableness of an insurer's conduct is measured objectively based on industry standards, and it is reasonable for an insurer to challenge claims that are "fairly debatable." An insurer will be found to have acted in bad faith in first-party context only if it has intentionally denied, failed to process, or failed to pay a claim without a reasonable basis; even if an insurer possesses a mistaken belief that a claim is not compensable, it may be within the scope of permissible challenge. The court recognized that this standard "reflects a reasonable balance between the right of an insurance carrier to reject a non-compensable claim submitted by its insured and the obligation of such carrier to investigate and ultimately approve a valid claim."

One lesson to be taken from *Zolman* is that medical benefits, including medical benefits after an award of post-MMI medical benefits, are always subject to the insurer's right to contest relatedness, reasonableness, or necessity of any requested medical treatment. It is reasonable to challenge claims which are "fairly debatable".

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



# VICTORIES IN THE TRENCHES

**James R. Clifton**

In *Kukus vs. Integrated Health Services*, the Director of the Division of Workers' Compensation granted respondents' request for utilization review and ordered a change of provider. Jim filed compiled medical records and other documents to persuade the Director's appointed utilization review panel that the provider's care was not reasonably necessary to cure and relieve claimant of the effects of the on-the-job injury; the provider's care was not reasonably appropriate according to professional standards; the provider's plan of care and treatment did not follow the medical treatment guidelines; and the deviations

from the guidelines were not reasonable and necessary.

In *Lebus vs. Walmart Stores, Inc.*, ALJ Mottram denied the claim for payment of the ER bills for claimant's treatment 3-4 days after her functional capacity evaluation (FCE). Jim submitted medical records and presented the testimony of an internal medicine specialist who had reviewed the medical records. The ALJ found and concluded that claimant was admitted to the ER for treatment of non-cardiac chest pains; her symptoms were not causally related to her exertion during the FCE; and she had failed to prove that the treatment she received in the ER was reasonable and

necessary emergency medical treatment designed to cure and relieve the claimant from the effects of her industrial injury.

**Richard A. Bovarnick**

In *Muncy vs. SavaSeniorCare*, ALJ Walsh ruled against claimant on two alleged injuries. On the first, admitted injury, the ALJ concluded that the DIME physician's opinion claimant was not at MMI was clearly in error, that respondents had established that claimant was at MMI and that the treatment recommended by the DIME physician and claimant's IME physician was

*Please see VICTORIES on page 4*

*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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## IPSI DIXIT



We take English for granted, but if we explore its paradoxes, we find that quicksand can work slowly, boxing rings are square, and a guinea pig is neither from guinea nor is it a pig.

And why is it that writers write but fingers don't fing, grocers don't groce and hammers don't ham?

In what other language do people recite at a play and play at a recital?

We ship by truck but send cargo by ship.

We have noses that run and feet that smell.

We park in a driveway and drive on a parkway.

And how can a slim chance and a fat chance be the same, while a wise man and a wise guy are opposites?

Let's face it — English is a crazy language.

There is no egg in eggplant nor ham in hamburger; neither apple nor pine in pineapple.

Doesn't it seem crazy that you can make amends but not one amend.

If you have a bunch of odds and ends and get rid of all but one of them, what do you call it?

If teachers taught, why didn't preachers praught?

If a vegetarian eats vegetables, what does a humanitarian eat?

You have to marvel at the unique lunacy of a language in which your house can burn up as it burns down, in which you fill a form in by filling it out, and in which an alarm goes off by going on.

And in closing, if Father is Pop, how come Mother's not Mop?

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).

# VICTORIES IN THE TRENCHES

Continued from page 3

not reasonable or necessary, and that claimant had failed to establish she was entitled to temporary disability benefits. On the second, contested claim, the ALJ concluded that claimant had failed to prove she suffered an injury arising out of and in the course of her employment. Rich presented the testimony of the ATP and submitted a records review by a physician specializing in physical medicine and rehabilitation to persuade the ALJ.

## Holly M. Barrett

In *McIntyre vs. KI, LLC*, ALJ Walsh denied and dismissed claimant's attempt to overcome the DIME, request for shoulder surgery, and claim for conversion of the scheduled impairment rating to a whole person impairment rating. The ALJ also granted respondents' request for attorney fees because claimant's attorney had endorsed issues that were not ripe for hearing. Holly submitted medical records and surveillance video to persuade the ALJ that claimant had failed to establish that he was not at MMI, that he was entitled to a higher or additional impairment rating, or that he had any functional impairment beyond his arm at the shoulder.

In *Anderson vs. Walmart Stores, Inc.*, ALJ Harr denied and dismissed claimant's request for penalties. Holly presented testi-

mony of the adjuster and employer witnesses to persuade the ALJ that respondents reasonably considered claimant's injury to be not work-related because it occurred when she was clocked out and while she was in the parking lot, that they timely reported the alleged injury and denied liability once claimant filed a claim for compensation, and insurer had no duty to provide medical benefits until it admitted liability for the injury or was ordered to provide benefits.

## M. Frances McCracken

In *Johnson vs. Walmart Stores, Inc.*, ALJ Walsh denied and dismissed claimant's claim for benefits under the Workers' Compensation Act. Fran presented the report and testimony of respondents' IME physician who noted that claimant attributed her symptoms to her previous workers' compensation injury and opined that claimant did not sustain an injury in the course of her employment with the employer on the alleged date of injury. The ALJ was persuaded that claimant had failed to prove she sustained an injury or an aggravation of a pre-existing condition arising out of and in the course of her employment.

In *Gallegos vs. Labor Ready, Inc.*, ALJ Walsh denied and dismissed claimant's

claim for TTD and TPD benefits. Fran presented medical evidence that claimant had been released to return to work with restrictions, and that his work restrictions after his injury had not changed from his permanent physical restrictions from a previous injury. She also presented evidence that the employer had made a transitional duty job offer to claimant in writing, which he declined after meeting with the branch manager, to persuade the ALJ that claimant was precluded from receiving TTD or TPD benefits.

In *Iseminger vs. Walmart Stores, Inc.*, ALJ Cain concluded that claimant's compensation should be reduced by 50 percent for willful failure to obey a reasonable safety rule. Claimant was injured because she lifted a heavy television with a customer rather than a co-employee. Fran presented the testimony of the training coordinator and the personnel manager about the employer's safety program and the safety rule requiring "team lifts" for bulky or heavy items to persuade the ALJ that claimant was sufficiently aware of the rule that her conduct in violating it was willful. The ALJ specifically found that claimant's testimony that she believed the rule allowed team lifts to be performed with customers and regularly had customers assist her was not credible.

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