

DEFENSE TALK

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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

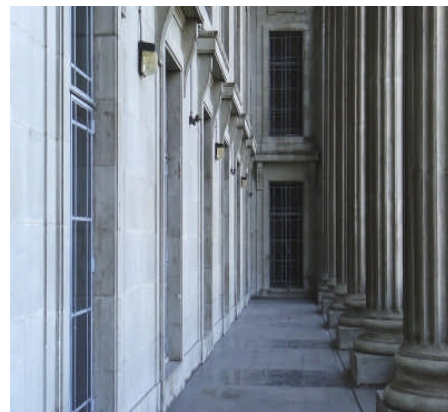
The case summarized here is only a selection of the cases decided by the Industrial Claim Appeals Office. In these summaries ALJ=administrative law judge; ICAO=Industrial Claim Appeals Office.

Compensability

ICAO affirmed ALJ Harr's order, which determined that the claimant suffered a compensable injury. The ALJ found that claimant experienced severe lower back pain when she stood up from her desk chair to go to the restroom and concluded that claimant's injury to her L4-5 disk arose out of her employment. ICAO upheld the ALJ's determination that claimant's injury was precipitated by the conditions of her employment, the act of standing up from her chair to tend to her personal com-

fort, and not by her pre-existing condition. ICAO rejected the employer's arguments that there was no special hazard of employment that caused or increased the degree of injury and that the act of standing up from a chair is a ubiquitous activity of daily life. *Geist v. Liberty Mutual Group*, W.C. No. 4-839-225 (ICAO Oct. 11, 2011)

The order summarized here is on file with the editor. If you would like a copy of the order, contact Diane Murley at dmurley@cmb-pc.com or 970-255-8852.



In the Courts

Court of Appeals Update

Workers' Compensation— Worsening of Condition— Selection of Authorized Treating Provider

In *Loofbourrow v. Industrial Claim Appeals Office*, announced October 13, 2011, the Colorado Court of Appeals held that a claimant who did not challenge a determination of maximum medical improvement (MMI) in an open case was entitled to temporary total disability (TTD) benefits when she experienced a worsening of her original injury. The court limited its holding to the unique circumstance of this case, in which the claimant had missed no time from work before being placed at MMI so

no final admission of liability (FAL) had been filed to close the claim. The court noted that the statutes do not preclude the assertion of a post-MMI worsening of condition in an open claim, particularly where the change of condition would have supported a petition to reopen had the claim been closed by an FAL. Because claimant's worsened condition resulted in an increase in her physical restrictions and caused her to suffer a wage loss not previously experienced, she was entitled to TTD benefits.

The court also affirmed the ALJ's determination that the right to select the authorized treating physician (ATP) had passed to claimant, even though the employer had properly designated an ATP at the time of

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Practice Pointer

Medical Marijuana and Termination for Cause

By Diane K. Murley

In two cases decided this summer, the Colorado Court of Appeals considered whether an employee who is terminated for failing the employer's drug test because of his use of medical marijuana may be denied unemployment compensation benefits. In one case the court affirmed the denial of benefits; in the other the court reversed the denial of benefits. These different results, by the same panel of the court, demonstrate the importance of following procedures when testing employees for drugs.

In *Beinor v. Industrial Claim Appeals Office*, announced August 18, 2011, the court held that an employee terminated for testing positive for marijuana in violation of an employer's express zero-tolerance drug policy may be denied unemployment benefits even if the employee's use of marijuana is "medical use" as defined by the Colorado Constitution. The court noted that, although the employee's registry identification card permitting him to possess and use marijuana for medical purposes may protect him from state criminal prosecution, marijuana is still an illegal substance under federal law. The court also noted that the physician certification on the medical marijuana registry application form is not a prescription for the use of marijuana. Finally, the court pointed to the following language in the medical marijuana amendment: "Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place." The employee did not dispute the accuracy of the reported test results or the qualifications of the laboratory performing the test.

A contrary result was reached in *Sosa v. Industrial Claim Appeals Office*, announced July 7, 2011. In *Sosa* the employee appealed the order denying his claim for unemployment benefits on the grounds that the employer had failed to prove the testing laboratory was licensed or certified as required by the statute. The court agreed and set aside the order disqualifying the employee from receiving unemployment benefits.

Although the court's decisions only apply

to the narrow issue of whether unemployment compensation benefits may be denied when an employee is terminated for failing the employer's drug test because of the use of medical marijuana, the cases are instructive on how the court would probably interpret sections of the Workers' Compensation Act dealing with responsibility for termination and use of controlled substances. In order to prove use of a controlled substance, it is important to follow the procedural requirements of the relevant statute.

Unemployment benefits can be denied if the presence in the worker's system, during working hours, of "not medically prescribed controlled substances" or a blood alcohol level at or above 0.04 percent is "evidenced by a drug or alcohol test administered pursuant to a statutory or regulatory requirement or a previously established, written drug or alcohol policy of the employer and conducted by a medical facility or laboratory licensed or certified to conduct such tests."

In workers' compensation cases, sections 8-42-103(1)(g) and 8-42-105(4), C.R.S., permit temporary disability benefits to be terminated if a claimant is responsible for termination of employment. Although these sections are not as detailed as the unemployment statutes, it is probable that an ALJ or court would similarly require proof that testing was done pursuant to an employer's previously established, written drug policy, of which the claimant was aware, and conducted by a medical facility or laboratory licensed or certified to conduct such tests.

Section 8-42-112.5, C.R.S., permits non-medical workers' compensation benefits to be reduced by fifty percent if the injury results from the presence in the claimant's system, during working hours, of not medically prescribed controlled substances or a blood alcohol level at or above 0.10 percent "as evidenced by a forensic drug or alcohol test conducted by a medical facility or laboratory licensed or certified to conduct such tests. 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." In addition to proof that the laboratory was licensed or certified, this workers' compensation provision requires proof that a duplicate sample was preserved for the employee.

Although the *Benoir* case is good news for employers, an employer seeking to reduce its liability for unemployment or workers' compensation benefits should establish a written drug policy, obtain employees' written acknowledgement of the policy, preserve a duplicate sample from any test, and use a licensed or certified facility for its drug testing.



Free Copies of Work Comp Act

The 2011 Colorado Workers' Compensation Act is available on the website of the Division of Workers' Compensation at www.colorado.gov/cdle/dwc. You can also find the Workers' Compensation Rules of Procedure, including the Medical Treatment Guidelines, and other official forms and publications on the website.

If you would like to receive a free hard copy of the Act, please contact anybody at Clifton, Mueller & Bovarnick.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In *Neiman vs. Miller Coors, LLC*, ALJ Cain denied and dismissed the claim for ongoing medical benefits after MMI. Rich presented the testimony of claimant's knee surgeon and a physician specializing in physical medicine and rehabilitation to persuade the ALJ that the recommended viscosupplementation and total knee replacement were not related to the industrial injury, but instead to the progression of claimant's underlying degenerative joint disease. The ALJ concluded that claimant had failed to present substantial evidence that he needs or will need medical treatment to cure and relieve the effects of the industrial injury or to prevent deterioration of any condition caused by the injury.

John M. Abraham

In *Struna vs. Wal-Mart Stores, Inc.*, ALJ Cannici granted John's motion to dismiss claimant's claim for further workers' compensation benefits when claimant failed to

appear at the hearing and failed to show good cause for her failure within 30 days as ordered.

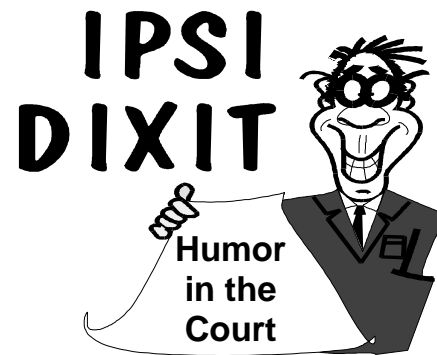
Holly M. Barrett

In *Hays vs. Walmart*, ALJ Walsh denied claimant's request for temporary total disability benefits after her employment was terminated. Holly presented the testimony of the store manager that claimant had been given the appropriate warnings pursuant to the written policy of the employer, and that the next step in the discipline process at the time claimant missed work on the weekend in question, that the schedule was posted, that it was claimant's responsibility to check the schedule, and that claimant exercised control in failing to check the schedule and in not calling in or coming into work as scheduled. He concluded that claimant was responsible for her termination, and therefore the resulting wage loss was not attributable to her on-the-job-injury.

M. Frances McCracken

In *Lewis vs. Wal-Mart Stores, Inc.*, ALJ Friend ruled that the insurer was not liable for the costs of recommended neck surgery. Fran submitted medical records and the deposition transcript of an orthopedic expert who had reviewed claimant's medical records and opined that claimant's work injury was a temporary aggravation of his pre-existing condition. At his deposition, the orthopedic expert reiterated and explained his opinion that the recommended surgery was not reasonably needed to cure and relieve claimant from the effects of his injury. The ALJ was persuaded that claimant had failed to prove that the recommended surgery was reasonably needed to cure and relieve claimant from the effects of the compensable injury.

In *Evans v. Wal Mart*, ICAO set aside and remanded ALJ Walsh's order on TTD and TPD benefits. Fran persuaded the panel that the ALJ's findings of fact were insufficient to permit appellate review on the offer of modified employment and its effect on temporary disability benefits. The ALJ had not addressed the ATP's release to return to modified duty or the employer's offer of a modified duty position.



The following exchanges between attorneys and witnesses are from actual court transcripts, published by court reporters in *Disorder in the American Courts*.

- Q: What was the first thing your husband said to you that morning?
 A: He said, "Where am I, Cathy?"
 Q: And why did that upset you?
 A: My name is Susan!
 Q: What gear were you in at the moment of the impact?
 A: Gucci sweats and Reeboks.
 Q: Have you lived in this town all your life?
 A: Not yet.
 Q: Doctor, before you performed the autopsy, did you check for a pulse?
 A: No.
 Q: Did you check for blood pressure?
 A: No.
 Q: Did you check for breathing?
 A: No.
 Q: So, then it is possible that the patient was alive when you began the autopsy?
 A: No.
 Q: How can you be so sure, Doctor?
 A: Because his brain was sitting on my desk in a jar.

This month's *ipsi dixit* was submitted by Judy Doebley. 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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IN THE COURTS

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the original injury. When claimant reported her worsening symptoms and informed the employer that her personal physician thought the symptoms might be work-related, neither the employer nor the adjuster referred the claimant back to the ATP, who had discharged claimant from care after placing her at MMI. Because the employer failed to tender medical care when claimant reported her worsened condition, the right to select the ATP passed to claimant.

Subrogation—Workers’ Compensation Benefits—Settlement of Noneconomic Damages

In *Chavez v. Kelley Trucking, Inc.*, announced October 13, 2011, the Colorado Court of Appeals held that the workers’ compensation insurer was not entitled to forfeiture or apportionment of the proceeds from the settlement of noneconomic damages claims between the injured employee and the third-party defendant. The insurer and claimant settled the workers’ compensation case, with the insurer explicitly retaining its subrogation rights. The claimant also settled with the defendant and executed a release of all claims for noneconomic damages. Claimant and defendant agreed that the settlement would not affect any claims assigned or subrogated to the workers’ compensation insurer. The in-

surer sought forfeiture or allocation of the settlement proceeds because the claimant did not seek written approval from the insurer before settling.

The court held that because the workers’ compensation insurer is not liable for noneconomic damages such as pain and suffering, it is not subrogated to the rights of the injured employee to recover such damages. Furthermore, the trial court determined that the settlement was a reasonable amount for claimant’s noneconomic damages and not intended to compromise the insurer’s subrogation interest. Therefore the insurer was not entitled to a share of the proceeds.



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