

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

Medical Treatment Guidelines

ICAO affirmed ALJ Friend's order requiring respondents to pay for back surgery recommended by three physicians but opposed by two other physicians. Respondents argued that the ALJ was required to articulate compelling reasons for deviation from the Medical Treatment Guidelines. The only express reference to the Guidelines in the ALJ's order was the statement that he had considered them. ICAO held that the ALJ is not required to award or

deny medical benefits based on the Guidelines and concluded there was substantial evidence to support the ALJ's order. *Nunn v. United Airlines*, W.C. No. 4-785-790 (ICAO Sept. 9, 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.



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In the Courts

Court of Appeals Update

Workers' Compensation—Post-MMI Medical Benefits

In *Hire Quest, LLC v. Industrial Claim Appeals Office*, announced September 15, 2011, the Colorado Court of Appeals affirmed an award of medical benefits after maximum medical improvement (MMI). In 2009, an ALJ had entered an order awarding permanent partial disability benefits. The ALJ's order also stated, "Issues not expressly decided herein are reserved to

the parties for future determination." Claimant later applied for hearing on the issue of ongoing medical benefits after MMI. Respondents argued that the issue of post-MMI medical benefits was closed because claimant had not requested them at the time permanent disability was determined. The court recognized the general rule that post-MMI medical benefits must be requested at the time permanent disability is heard, but held that the ALJ had reserved the issue for future determination, even though neither party had raised the issue at hearing.

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Practice Pointer

Unexplained Falls and Initial Investigations

By John M. Abraham

An important question for adjusters and claim managers to consider when initially investigating a claim is whether an injury caused by an unexplained fall is compensable. This area of workers' compensation has been a fairly hot topic in recent months, with the Industrial Claims Appeals Office and the Court of Appeals releasing several decisions. The courts have recently diluted the definition of an "unexplained fall" and have made it easier for a claimant to establish compensability. However, these recent decisions should not discourage an adjuster from investigating every aspect of a claim at its onset and gathering as many facts as possible to defend against the claim.

An injured employee has the burden of establishing a compensable injury by proving that the injury arose out of and in the course of employment. The courts have held that an unexplained fall does not arise out of the employment. Therefore, the adjuster should not assume that an injury that occurred at the place of employment necessarily arose out of that employment. The

claimant must establish a direct causal relationship between the employment duties and the injury sustained.

How easy is it for a claimant to prove that the cause of an injury was some condition of their employment? Easier than you may think. Recent cases have shown that almost any "explanation" of the cause of a claimant's injury is sufficient to establish compensability. For example, a claimant's injury was found compensable by an ALJ when a coworker discovered the claimant lying on the floor at the back of a truck trailer bleeding from his head. Although the claimant had retrograde amnesia resulting from the fall and could not remember any details of how the injury occurred, the ALJ found that the claimant must have sustained some injury resulting from his employment. The ALJ theorized that the claimant either tripped and fell at the door of the trailer, or fell while climbing up the ladder at the back of the truck trailer, or fell while moving from the ladder to the back of the trailer door. Ultimately, the issue of whether the claimant has estab-

lished a cause of the injury is one of fact for the ALJ.

The key to prevailing at hearing on claims involving an unexplained fall is to gather a detailed history of what happened to the claimant just before and just after the alleged injury. Often, the claimant changes the initial story of how the injury may have happened to help bolster support for an "explanation." Preserving the claimant's initial description of the alleged cause of the injury is crucial. This can be achieved through recorded statements, written documentation, witness statements, hospital records, and other evidence. If the claimant's story changes, the initial evidence that was gathered can be used to impeach the claimant's testimony and help persuade the ALJ that claimant has failed to prove causation.

There are several different facts and legal issues that can hinder or solidify the defense to a case involving an unexplained fall. For assistance at the onset of a claim, contact any of the attorneys at Clifton, Mueller, & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

James R. Clifton

In *Jenkins vs. Samedan Oil Corporation dba Nobel Energy, Inc.*, ALJ Henk denied and dismissed claimant's claim. Jim presented medical records and testimony of employer witnesses to persuade the ALJ that claimant had failed to prove by a preponderance of the evidence that he sustained a compensable injury or occupational disease. The ALJ found that claimant's testimony about the onset of his symptoms was not consistent with the medical evidence, and, therefore, claimant's testimony was not persuasive.

Richard A. Bovarnick

In *Seely vs. ABF Freight System*, a federal jury awarded plaintiff \$336,000 on her request for \$1.2 million in economic and non-economic damages for alleged injuries

to her shoulder and cervical spine, facetogenic pain, occipital neuralgia, TMJ, TOS, visual midline shift syndrome, pain and suffering, loss of earning capacity, physical impairment, and disfigurement. Defendants had admitted liability for the rear-end collision by the semi tractor-trailer and made an offer of settlement of \$397,500. During the 8-day trial, Rich cross-examined plaintiff's 15 witnesses and presented the testimony of the treating spine surgeon, a neurologist, and a vocational expert.

Holly M. Barrett

In *McGuire vs. Family Dollar Stores, Inc.*, ALJ Broniak denied claimant's request to increase his average weekly wage by the cost of continuing health and dental insurance for his entire family. Holly presented evidence that coverage for claimant's dependents had been terminated be-

cause claimant had failed to respond to a "dependent audit notice," which he hadn't received because of his failure to update his address with the employer. The ALJ was persuaded that at the time the employer stopped paying for claimant's insurance, which was the triggering event for an increase in AWW, the dependents were no longer covered by the group plan. Therefore, claimant was not entitled to an increase in AWW for the cost of coverage for his dependents.

In *Reader vs. NANA Regional Corporation, Inc.*, ALJ Stuber denied and dismissed claimant's claim for payment of medical treatment by an unauthorized provider. Holly presented evidence that claimant had been offered a choice of physicians but had declined treatment, and that claim-

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VICTORIES IN THE TRENCHES

Continued from page 2

ant had never asked for treatment from one of the authorized providers before seeking treatment from his personal physician. The ALJ was persuaded that claimant's treatment by his personal physician and providers to whom his personal physician referred him was unauthorized.

M. Frances McCracken

In *Coffman vs. Wal-Mart Stores, Inc.*, ALJ Jones concluded that claimant had failed to sustain his burden of proving that he suffered a work-related injury. Fran presented medical and employer records, a surveillance video of the time and place claimant alleged he was injured, claimant's recorded statement, and testimony of employer witnesses, the adjuster, and the IME physician. The ALJ found that claimant's testimony and his witness's testimony were neither credible nor persuasive, and that his multiple reports of injury were inconsistent and lacked credibility.

**CLIFTON,
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DIXIT**



1. In the memo field of all your checks, write "for marijuana."
2. Order a diet water whenever you go out to eat, with a serious face.
3. Specify that your drive-through order is "to go."
4. Sing along at the opera.
5. Five days in advance, tell your friends you can't attend their party because you have a headache.
6. When leaving the zoo, start running towards the parking lot, yelling "run for your lives! They're loose!"
7. Tell your children over dinner, "Due to the economy, we are going to have to let one of you go."

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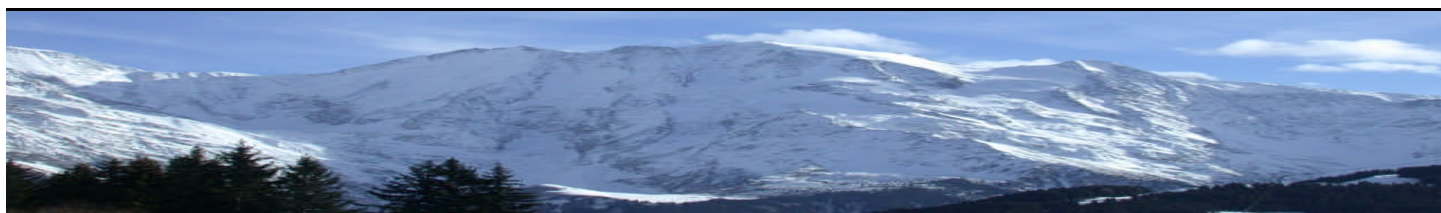
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Note: Summaries and articles should not be relied upon as authority for a particular case. Consult any of the attorneys at Clifton, Mueller & Bovarnick, P.C. for advice on the application of all the law to the specific facts of your case or legal problem.

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.



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