

# DEFENSE TALK

SM

A PUBLICATION BY THE LAW FIRM OF

CLIFTON, MUELLER & BOVARNICK, P.C.

JANUARY

ATTORNEYS AT LAW

2012

CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, AND INSURANCE 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; DIME=Division-sponsored independent medical examination; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; PPD=permanent partial disability.

### Post-MMI Medical Benefits

ICAO affirmed ALJ Mottram's order that denied claimant's request for maintenance medical benefits. The ATP had placed claimant at MMI without any permanent impairment for her admitted injury; he did not recommend maintenance medical benefits after MMI. The DIME physician assigned a 14% whole person rating and recommended maintenance medical bene-

fits. Respondents admitted for the impairment rating but did not admit for maintenance medical benefits. ICAO held that, in order to receive maintenance medical benefits, a claimant must prove that future medical treatment is or will be reasonably necessary to relieve the claimant from the effects of the injury or to prevent deterioration of the claimant's condition. The fact that the ATP had prescribed medication after MMI did not compel the conclusion that the treatment was related to the industrial injury rather than the degenerative condition. *Maddalone vs. Wal-Mart Stores, Inc.*, W.C. No. 4-823-588 (ICAO Dec. 5, 2011).

### PPD

ICAO affirmed ALJ Allegretti's order that awarded claimant a 7% whole person rating for her shoulder injury. The ALJ determined that claimant suffered a functional impairment not listed on the schedule of

disabilities, based on the claimant's testimony that she experienced pain proximal to the glenohumeral joint and had made changes to her activities of daily living and how she performed her job. ICAO rejected respondents' argument that the ALJ erred in concluding claimant had any functional impairment, because she had not been given any permanent restrictions from a doctor. ICAO held that functional impairment need not take any particular form. It is appropriate for an ALJ to consider the impact the injury has had on the claimant's capacity to meet personal, social and occupational demands, in addition to medical restrictions. *Martinez vs. Pueblo County Sheriff's Office*, W.C. No. 4-806-129 (ICAO Dec. 7, 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.

### INSIDE THIS ISSUE:

Practice Pointer—Deadline for Filing Application for Hearing to Challenge a DIME 2

Victories in the Trenches 2

Ipsi Dixit 3

## In the Courts

### Court of Appeals Update Sections 10-3-1115 and 10-3-1116, C.R.S. and Bad Faith Claims

In *Kisselman v. American Family Mutual Insurance Company*, announced December 8, 2011, the Colorado Court of Appeals held that sections 10-3-1115 and 10-3-

1116, which the Colorado General Assembly enacted in 2008, created a new private right of action in addition to and different from an action alleging breach of the common law duty of good faith and fair dealing. Section 10-3-1115(1)(a) provides: "A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or

Please see COURTS on page 3

VISIT US ON THE WEB: [WWW.CMB-PC.COM](http://WWW.CMB-PC.COM)


**Practice Pointer**

## **Deadline for Filing Application for Hearing to Challenge a DIME**

### **(Use Caution When Relying upon Interpretive Bulletins)**

By Holly M. Barrett

An Interpretive Bulletin is the interpretation of a statute by the Director of the Division of Workers' Compensation. It does not have the force and effect of a rule. Its purpose is to provide a greater level of consistency and predictability as to how the Colorado workers' compensation system is intended to operate. It is intended to clarify and simplify processes, create efficiencies, and reduce litigation.

Here is an example of why caution should be used when relying upon Interpretive Bulletins:

Pursuant to § 8-42-107.2(4), C.R.S., the insurer or self-insured employer must file an admission of liability or request a hearing to overcome the DIME within 30 days after the date of the mailing of the DIME physician's report.

The Director issued an Interpretive Bulletin on June 13, 2001 to clarify the time frame for filing an application for hearing or admission of liability following a DIME. The Interpretive Bulletin provides that the Division reviews all DIME reports

and issues a Notice of Completion letter if the report contains all the required components. The Interpretive Bulletin further provides that the time frame for responding to the DIME results does not begin to run until the Division notifies the parties that the DIME report is complete and that the parties may rely upon the Notice of Completion's certificate of mailing to ascertain the commencement of the 30-day time frame.

In a recent decision, ALJ Stuber struck the respondents' application for hearing, finding that it was not filed within 30 days of the date of mailing of the DIME report even though it was filed within 30 days of the certificate of mailing of the Notice of Completion. The respondents appealed the ALJ's order, but, because the order did not grant or deny benefits, the Industrial Claim Appeals Panel did not have jurisdiction to review the order.

In granting the claimant's motion to strike the respondents' application for hearing, ALJ Stuber found that the statute requiring

the insurer to either file its admission of liability or request a hearing within 30 days after the date of the mailing of the DIME report was not ambiguous and, because interpretive bulletins issued by the Director are not controlling and do not have the force and effect of a rule, ALJ Stuber did not give any weight to the Interpretive Bulletin.

It is important to review all DIME reports immediately upon receipt. To ensure that you are able to challenge a DIME report, you need to calendar the filing of an application for hearing **within 30 days of the date of the mailing of the DIME report**. If the file has not been referred to counsel yet, it is even more important to review the reports immediately to allow for the transmission of the file to counsel for the timely filing of the application for hearing.

As always, if you have any questions about time deadlines, please do not hesitate to contact any of the attorneys at Clifton, Mueller, & Bovarnick, P.C.

# VICTORIES IN THE TRENCHES

### **Richard A. Bovarnick**

In *Flores vs. Halliburton*, ALJ Jones granted respondents' motion for summary judgment. Rich persuaded the ALJ that claimant's claim was barred by the statute of limitations because claimant did not timely file a worker's claim for compensation with the state, and employer was not required to report the injury because claimant did not miss more than three days of work and employer had no knowledge that claimant claimed a permanent physical impairment.

### **Royce W. Mueller and Diane K. Murley**

In *Martinez v. Shaw, Stone & Webster Construction Services*, ICAO affirmed ALJ Stuber's order that denied the claim for PPD benefits and for medical benefits

after MMI. The ALJ found that claimant failed to prove by clear and convincing evidence that the DIME physician's causation determination was incorrect. Diane argued successfully that the ALJ's findings of fact and conclusions were supported by substantial evidence in the record, including the testimony of respondents' expert witnesses. Royce tried the case and Diane wrote the brief in opposition to claimant's petition to review.

### **John M. Abraham**

In *Herrera vs. Sam's Club*, ALJ Harr denied and dismissed claimant's request for ongoing psychotherapy and for other treatment and medications beyond six months. John submitted the report of the DIME physician and the testimony of the psychiatrist who conducted an independent psychiatric evaluation to persuade the ALJ that claimant had failed to prove that the denied

treatment was reasonably necessary to maintain her condition at MMI. The ALJ found claimant's testimony regarding her ongoing complaints of pain unreliable.

### **Holly M. Barrett**

In *Waller vs. Waste Connections, Inc.*, ALJ Walsh denied and dismissed claimant's claim for additional medical benefits of a total knee replacement and related treatment. Holly presented testimony of a physical medicine and rehabilitation expert, who had performed a records review. The ALJ found the expert's testimony that there was no pathology to correct by means of a total knee replacement and that replacement was contrary to the medical treatment guidelines credible and persuasive. Holly also presented surveillance video and other evidence that claimant's activities were not as restricted as he claimed.

Please see **VICTORIES** on page 3

**VICTORIES IN THE TRENCHES**

*Continued from page 2*

**M. Frances McCracken**

In *Gamble vs. Wal-Mart Stores, Inc.*, ALJ Krumreich denied and dismissed claimant's request for medical benefits for a C4-5 cervical decompression and fusion surgery. Fran submitted a video of claimant's injury, medical records and reports, and expert testimony of two physicians and a psychologist to persuade the ALJ that claimant had failed to prove that the requested surgery was causally related to the

admitted injury or that it was reasonably necessary. The ALJ found the opinions of the two psychologists that claimant was not a good surgical candidate to be credible and persuasive. He was also persuaded by the opinions of respondents' IME and records-review physicians that the recommended surgery was not reasonable and necessary, that there was a likelihood it would make claimant worse post-surgery, and that it was not related to the September 14, 2010 incident.

**IN THE COURTS**

*Continued from page 1*

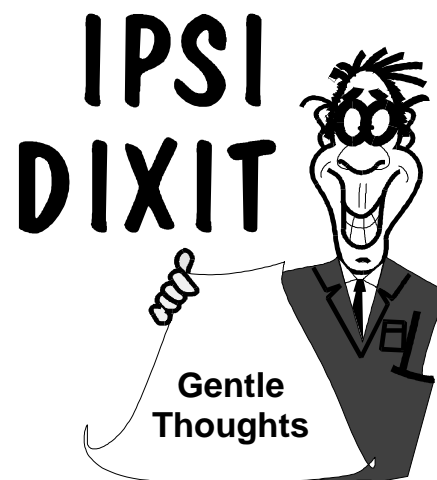
on behalf of any first-party claimant." Section 10-3-1115(2) provides that "an insurer's delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action." The Court of Appeals concluded that, unlike a claim for bad faith, these sections do not require

that a plaintiff prove an insurer acted with knowledge or recklessness that its denial or delay was unreasonable.

Editor's note: Sections 10-3-1115 and 10-3-1116 do not apply to workers' compensation claims at this time.

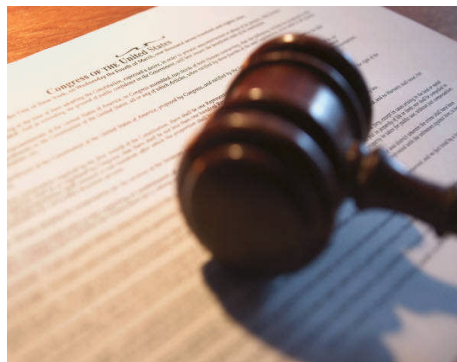
**Supreme Court Update  
Exemplary Damages**

In *Vickery v. Evans*, announced December 12, 2011, the Colorado Supreme Court held that "the amount of actual damages awarded," which limits the amount of exemplary damages that may be awarded, includes prejudgment interest added to the jury's assessment of compensatory damages. Since 1986, section 13-21-102(1)(a), C.R.S., has limited exemplary damages in Colorado civil actions. The Supreme Court held that the statute's limitation of exemplary damages to "the amount of actual damages awarded" refers not to the jury's assessment of compensatory damages but to the compensatory damages awarded by the trial court against the defendant, which necessarily includes statutorily mandated prejudgment interest.



- The easiest way to find something lost around the house is to buy a replacement.
- He who hesitates is probably right.
- Did you ever notice: The Roman numeral for 40 is XL.
- If you can smile when things go wrong, you have someone in mind to blame.
- The sole purpose of a child's middle name is so he can tell when he's really in trouble.
- Some people try to turn back their odometers. Not me, I want people to know why I look this way. I've traveled a long way and some of the roads weren't paved.
- When you are dissatisfied and would like to go back to your youth, think of algebra.

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).



*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.*

**DEFENSE TALK SM**

FOUNDED 1991

is published monthly by the law firm of

Clifton, Mueller & Bovarnick, P.C.  
Attorneys at Law  
Suite 500  
789 Sherman Street  
Denver, CO 80203  
Telephone (303) 988-7692  
Facsimile (303) 988-7724

Grand Junction Office  
Suite 200  
2454 Patterson Road  
Grand Junction, CO 81505  
Telephone (970) 255-8852  
Facsimile (970) 255-8905

John M. Abraham                      M. Frances McCracken  
Holly M. Barrett                    Royce W. Mueller  
Richard A. Bovarnick                Diane K. Murley  
James R. Clifton



*Everyone at Clifton, Mueller & Bovarnick, P.C.,  
wishes you a happy and prosperous 2012!*

---

CLIFTON, MUELLER & BOVARNICK, P.C.

---

789 SHERMAN STREET  
SUITE 500  
DENVER, COLORADO 80203