

DEFENSE TALKSM

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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

Apportionment okay despite natural aging factor

Duncan v. ICAO, 03CA1616 (July 1, 2004): In March 2002, claimant sustained an accidental injury to her right knee. The injury aggravated claimant's preexisting degenerative joint disease caused by the natural aging process in combination with a 1977 industrial injury she sustained while working for a previous employer. The Administrative Law Judge (ALJ) found that claimant's preexisting condition caused 75% of her disability and need for medical treatment, and the 2002 injury accounted for the remaining 25%. The ALJ ordered employer to pay 25% of the temporary dis-

ability and medical benefits for the claimant's right knee.

The court of appeals affirmed. The court held that the ALJ did not err by apportioning causation. Apportionment is proper where the claimant's condition is caused by successive industrial injuries and both injuries contribute to the disability and need for additional medical treatment. The fact that the natural aging process was a factor did not preclude apportionment because it combined with the 1977 injury to cause the preexisting degenerative joint disease. The court also rejected claimant's

argument that consideration of the aging process invites age discrimination.

The court further determined that it is not necessary that a prior employer be joined as a party before liability may be apportioned, even where, as here, the claimant was barred from reopening her 1977 claim. Finally, the court held that the full responsibility rule, which requires an employer to bear the full cost of disability benefits, is not applicable in this case because it only applies in permanent total disability cases.

Noneconomic damages awarded for injuries and pain

Peterson v. Tadolini, 03CA271 (July 1, 2004): In December 1998, defendant struck plaintiff with his car as she crossed a street. After trial, the jury found for plaintiff and determined that defendant was 55% at fault. The jury found that plaintiff suffered \$25,415 in economic damages and zero noneconomic damages. The court entered judgment for plaintiff for \$13,978.

The court of appeals affirmed on the issue of liability, rejecting defendant's argument

that the trial court erred by refusing plaintiff's tendered instruction on the comparative duties of drivers and pedestrians. It was not necessary, because the instructions taken as a whole conveyed the same message as the tendered instruction.

The court of appeals reversed, however, on the issue of whether the jury's finding of actual damages related to reasonable and necessary medical treatment, based on uncontroverted evidence, was inconsistent

with the jury's award of zero noneconomic damages where, as here, the record contained undisputed evidence of plaintiff's pain and suffering and loss of enjoyment of life. The court of appeals concluded that a new trial was required on the issue of damages when a plaintiff presents undisputed evidence of physical injuries and pain, and the jury awards actual, but not noneconomic, damages.

Developmentally disabled plaintiff comparatively negligent

McCall v. Meyers, 01CA2422 (June 17, 2004): Plaintiff suffered from developmental and physical disabilities. As he attempted to walk across an intersection, defendant's vehicle collided with him. Plaintiff sued defendant for negligence. Defendant asserted that plaintiff was comparatively negligent. The trial court entered

judgment for defendant.

The court of appeals affirmed the judgment, and held that the trial court properly instructed the jury on comparative negligence. C.R.S. § 42-4-808, which requires drivers to yield the right of way to disabled pedestrians, did not impliedly eliminate the defense of comparative negligence. The

comparative negligence statute, C.R.S. § 13-21-111 applies when the plaintiff's comparative negligence has been raised as a defense, there is evidence that both parties were negligent, and the negligence caused plaintiff's injuries.

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VICTORIES

Harvey Flewelling crushed the opposition on appeal in four cases. In *Cherrington v. Pinnacle Pizza and Clarendon Insurance Co.*, the Industrial Claim Appeals Office (ICAO) affirmed Judge Stuber's denial of medical benefits related to claimant's multiple sclerosis, including home attendant care. ICAO also set aside an assessment of penalties against respondents. In *Menor v. Jefferson County School District*, ICAO affirmed Judge Muramoto's denial of attorney Steven U. Mullens' motion for recusal, and claimant's claim for permanent total disability benefits. In *Marek v. Safeway, Inc.*, ICAO affirmed Judge Jones' denial of claimant's claim for penalties. In *Bosshardt v. SMJ Inc., and California Indemnity Insurance Company*, ICAO affirmed an order by Judge Martinez that denied a claim for temporary total disability benefits.

Cheryl Martin defeated a claim for unemployment benefits before Hearing Officer Newman in *Feyereisen v. Wal-Mart*. Opposing counsel was Bob Ring, Esq.

Richard Bovarnick successfully defended against a claim for medical benefits in *Wheeler v. Wal-Mart*. Judge Felter agreed that the evidence did not support the claim that claimant's need for health care treatment after August 31, 2003 was related to the August 1, 2003 industrial injury.

Note: Summaries and articles should not be relied upon as authoritative for a particular case. Consult your attorneys for advice on the application of all the law to the specific facts of your case or legal problem.

IPSI DIXIT



**I planted some bird seed. A bird came up. Now I don't know what to feed it.*

**I had amnesia once — or twice.*

**I went to San Francisco. I found someone's heart.*

**Protons have mass? I didn't even know they were Catholic.*

**All I ask is a chance to prove that money can't make me happy.*

**If the world was a logical place, men would ride horses sidesaddle.*

**They told me I was gullible — and I believed them.*

**I used to be indecisive. Now I'm not sure.*

**It's not an optical illusion. It just looks like one.*

**Is it my imagination, or do buffalo wings taste like chicken?*

**I'd give my right arm to be ambidextrous.*

**What if there were no hypothetical questions.*

**What was the greatest thing before sliced bread?*



LEGAL QUESTIONS?

The attorneys at Clifton, Hook & Bovarnick, P.C., are available to discuss your specific legal questions or provide general background on various legal topics. Please call us at (303) 988-7692, or fax us at (303) 988-7724, with your questions or to set up a seminar. Also, please visit our site on the world wide web at www.chbpc.com.

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