

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

2004 legislation: Newsom overruled

By Chad A. Atkins, Esq.

SB 249: Perhaps no bill in the current session has generated more interest than Senate Bill 04-249, which amends C.R.S. § 13-50.5-102. In an unusual step, the legislature specifically overruled the holding of the Colorado Court of Appeals in *Newsom v. Frank M. Hall & Co.*, 02CA1375 (February 26, 2004), which held that an "independent contractor" could be an entity other than a "natural person." The *Newsom* court also speculated concerning the legislative intent of the applicable statutes. The legislature declared that in applying C.R.S. § 8-40-202, the term "individual" now clearly means a "natural person." Application of this change of law to the fact pattern presented in *Newsom* would have barred the injured worker from any action against the general contractor. Governor Owens signed SB 249 into law on May 21, 2004.

HB 1090: Amends C.R.S. §§ 8-43-409 and 8-47-203. The bill gives the Director of the Division of Workers' Compensation increased investigative powers to verify that employees are insured through their employers' workers compensation plans. HB 1090 further expands the definition of a "construction site" for purposes of allowing increased investigation. The remainder of the bill allows the Department of Revenue to access any of the inquiries made by the division for the express purpose of determining tax liabilities. Governor Owens signed the bill on April 23, 2004.

HB 1068: Amends C.R.S. § 8-41-203(4)(a)(I). The bill clarifies the obligation to report to the division and employee or surviving dependents, in writing and within ten days, the intention to recover in subrogation. The legislature added a new § (4)(a)(II) which imposes the same ten day reporting obligation on any party respons-

ible for paying workers' compensation benefits to the employee or surviving dependents and the division. The legislature added a new § (4)(e) which imposes a \$50 per day penalty on any party responsible for paying workers' compensation benefits to the employee or surviving dependents to give notice to the employee and the division who fails to give notice under § (4)(a)(II). The legislature also added § (4)(a)(III) which creates an exemption from reporting where the benefits are medical payments only. The amendments to § (4)(c)(I) and (II) clarify the 20-day filing and notice requirements. Governor Owens signed HB 1068 on March 3, 2004.

SB 116: Amends C.R.S. § 10-4-405. This bill establishes August 1 as the date for filings concerning insurance rates for workers' compensation, with the rates effective on January 1. Governor Owens signed the bill on April 8, 2004.

Bad faith emotional stress damages easier to prove

Goodson v. American Standard Insurance Company of Wisconsin, 02SC388 (May 3, 2004): The insured submitted outstanding medical bills in the amount of \$8,000 to the insurance company. For 18 months, the company delayed making payment which was due and owing under the policy. The insured sued and won a jury verdict for the tort of bad faith breach of the insurance contract. The jury's award included compensatory damages for emotional distress. The court of appeals reversed the award and required a new trial for failure of the trial court to instruct the jury that the insured must prove substantial property or

economic loss as a prerequisite to recovering damages for emotional distress.

The supreme court reversed the judgment of the court of appeals, and overruled that court's prior decision in *Farmers Group, Inc. v. Trimble*, 768 P.2d 1243 (Colo.App. 1988) ("*Trimble III*"). In doing so, the supreme court reasoned that an unreasonable denial of insurance benefits—a necessary element of every claim for bad faith breach of insurance contract—can cause anxiety, fear, stress, and uncertainty, even when the benefits are eventually paid. The supreme court stated: "Given that insureds purchase insurance policies to obtain finan-

cial security and peace of mind, emotional distress is a likely and foreseeable consequence of a bad faith denial of the benefits afforded under the contract."

In disapproving the *Trimble III* substantial loss rule, the supreme court held that there are sufficient protections in the law and the jury process to guard against speculative awards for emotional distress. For example, a statutory cap limits the amount of non-economic damages; trial courts can reduce damages awards that are excessive; and the insured has the burden of proving damages by a preponderance of the evidence.

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VICTORIES IN THE TRENCHES

Fran McCracken won summary judgment in *Scholfield v. Brian L. West and State Farm Fire & Casualty Co.* Judge Gartland rejected opposing counsel Robert Dawes, Esq.'s argument that claimant's permanent total disability (PTD) benefits commenced on the date of maximum medical improvement (MMI) rather than the date of the order awarding PTD benefits, and she also denied claimant's claim for penalties. Ms. McCracken also won on appeal in *Berry v. Continue Care Home Health, Inc.* ICAO affirmed Judge Martinez' order that denied claimant's request to hold the insolvent employer's owner personally liable.

Richard Bovarnick defeated a claim for medical benefits in *Weedman v. Wal-Mart Stores, Inc.* Crediting the opinion of defense expert Dr. Gerald Raines, Judge Harr held that Wal-Mart was not liable for surgery recommended by the authorized treating physician, in part because claimant omitted important aspects of her previous medical history. Mr. Bovarnick also successfully moved to strike claimant's petition to reopen before Judge Jones in *Roble v. Equilon* on the grounds that the petition was not supported by a current medical report.

James Clifton beat a claim for medical benefits and an increased average weekly wage before Judge Martinez in *Miller v. Wal-Mart Stores, Inc.* Mr. Clifton also won

a full contest hearing in *Searles v. Wal-Mart Stores, Inc.* Judge Martinez held that claimant, who was represented by Matthew Kaufman, Esq., failed to prove that his left knee injury for which he received surgery arose out of and in the course and scope of employment.

Cheryl Martin persuaded Judge Jones to deny a claim of compensability for a right tibial sesamoid injury in *Meyer v. Express Messenger Systems, Inc. and Bankers' Standard Insurance Co.* Judge Jones held that the new injury was not related to an admitted 1998 injury, and that the new claim was barred by the statute of limitations. Claimant was represented by Robert Turner, Esq.

Tiffany Scully overcame the DIME opinion of Dr. John Hughes in *Leonardi v. AT&T Broadband*. Under Ms. Scully's questioning at his deposition, Dr. Hughes reversed his opinion that claimant was not at psychiatric or physical MMI from the effects of the industrial injury.

Harvey Flewelling used wily defense tactics to persuade both claimants in *Quintana v. Red Wing Electric, Inc., and California Indemnity Insurance Co.* to withdraw their respective appeals. Claimants' attorneys were Mark Young, Esq., and Christopher Crabtree, Esq.

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**



***LAWYER:**
Are you
positive that
the prisoner is
the man who
stole your
car?

WITNESS: Well, I was until you
cross-examined me. Now I'm not
sure if I ever had a car!



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