

DEFENSE TALKSM

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ATTORNEYS AT LAW

2004

CURRENT EVENTS, ARTICLES, AND SUMMARIES OF RECENT CASES AND LEGISLATION IN THE AREAS OF WORKERS' COMPENSATION, LIABILITY, INSURANCE, AND EMPLOYMENT LAW

Child support lien retroactive against PPD benefits

American Compensation Insurance Company v. McBride, 02CA2416 (May 20, 2004): Claimant sustained an industrial injury in 2000. In February 2000, employer began paying 55% of claimant's temporary total disability (TTD) benefits to the Colorado Family Support Registry pursuant to an administrative lien and attachment under C.R.S. § 8-42-124(6). On January 29, 2001, claimant's authorized treating physician placed him at maximum medical improvement (MMI). Employer requested a Division of Workers' Compensation independent medical examination (DIME) and continued to pay TTD benefits while the DIME was pending. After the DIME was complete, employer filed a final admission of liability for permanent partial disability (PPD) benefits based on the DIME report. Employer continued to reduce claimant's

benefits to pay the child support lien. At hearing, claimant argued that his PPD benefits were exempt from attachment because the version of § 8-42-124(6) in effect on the date of injury did not permit attachment of PPD benefits. Although the statute was amended on May 31, 2001 to permit attachment of PPD benefits, claimant argued that the amendment did not apply to his claim. The administrative law judge (ALJ) disagreed, and held that the amendment was procedural and could be immediately applied to pending claims. The Industrial Claim Appeals Office (ICAO) disagreed with the ALJ and held that the amendment to § 8-42-124(6) was substantive and could not be applied to claims for injuries occurring before its passage. ICAO's holding was supported by an interpretive bulletin issued by the Director

of the Division. The court of appeals reversed ICAO. Initially, the court held that employer had standing to appeal ICAO's order, despite the fact that the amount of benefits it paid was not affected, because employer was subject to additional liability if it did not properly deduct benefits pursuant to the lien. The court also agreed with employer that the amendment to § 8-42-124(6) was procedural in nature, did not violate the constitutional prohibition against retrospective legislation, and could be applied retroactively to claims for injuries that occurred before the effective date of the amendment. Finally, the court held that employer was entitled to a full credit against PPD benefits for the TTD benefits it paid while the DIME was pending.

Driver for independent contractor is not "employee"

FFE Transportation Services, Inc. v. ICAO, 03CA622 (May 20, 2004): Claimant was employed as a long distance truck driver pursuant to a written employment agreement with D. Grego Trucking. D. Grego had a conforming lease agreement with FFE, a contract carrier, and claimant was not a party to this agreement. D. Grego was uninsured for workers' compensation when claimant sustained two industrial injuries; however, D. Grego and claimant were insured under an "occupational accident policy" that paid workers' compensation-like benefits to claimant. Claimant was terminated without fault on May 2, 2000. Claimant sought temporary disability benefits from May 2, 2000

through March 15, 2001. The ALJ found that FFE conducted its trucking business by contracting out its work to independent contractors such as D. Grego, and that the lease agreement met the requirements of an independent contractor agreement under C.R.S. § 40-11.5-102. However, the ALJ determined that because claimant was not a party to the lease agreement, he was not working "under" a lease agreement within the meaning of C.R.S. § 8-40-301(5), which states that "employee" excludes any person who is working as a driver "under" a lease agreement pursuant to § 40-11.5-102 with a common carrier or a contract carrier. Thus, the ALJ held that claimant was

FFE's statutory employee. The court of appeals reversed. The court determined that the legislature intended to exclude drivers working for qualified independent contractors from the definition of "employee." The court concluded that "employee" also excludes a driver who is working for an independent contractor operating under a conforming lease with a contract carrier. There is no requirement of direct contractual privity between the driver and the contract carrier for such exclusion to apply. The court of appeals' ruling was based in part on *Newsom v. Frank M. Hall & Company*, 02CA1375 (February 26, 2004), and may be overruled in the near future.

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Employer not liable for employee's post-work accident

Raleigh v. Performance Plumbing and Heating, Inc., 02CA1076 (May 6, 2004): Performance's employee finished his work day and was driving home in his own truck when he collided with two cars stopped in a traffic lane. Plaintiff wife and her son were standing between the two cars when employee's truck hit the second car, forcing it into the first car. Plaintiffs sustained severe injuries, and brought claims against Performance for negligent hiring and vicarious liability based on employee's conduct.

The trial court granted Performance's motion for summary judgment, but in the first appeal, this order was reversed. At trial on remand, the jury found for plaintiffs and awarded damages on the negligent hiring claims, and to plaintiff husband on his claim for loss of consortium, but found for Performance on the vicarious liability claim. On that claim, plaintiffs filed a motion for judgment notwithstanding the ver-

dict (JNOV), which was denied. Performance's JNOV motion on the negligent hiring claim also was denied.

The court of appeals held that the trial court erred in denying Performance's JNOV motion on plaintiffs' negligent hiring claim. Sufficient evidence did exist for the trial court to determine that Performance had a duty to use reasonable care in hiring a safe driver who would not create an undue risk of harm to the public in performing his employment duties. There was also sufficient evidence for the jury to find that Performance breached its duty to the driving public in hiring employee. A review of his driving record would have revealed that his license had been suspended and he had multiple moving violations. However, the key issue was whether Performance's breach of the duty to check employee's driving record was the cause of plaintiffs' injuries, which depended on whether employee's conduct giving rise to

the injuries had a relationship to the employment.

The court of appeals found that the evidence showed that employee was driving home from work in his personal truck, which he used to travel to and from job sites during the workday. The jury specifically answered "no" to the question of whether employee was acting within the scope of his employment at the time of the collision. The jury necessarily found, therefore, that employee was not carrying out his employment responsibilities when the accident occurred.

The court of appeals concluded that no reasonable basis existed to support the jury verdict against Performance on plaintiffs' negligent hiring claim. The court of appeals also held that the trial court properly denied plaintiffs' motion for JNOV on the claim that Performance was vicariously liable based on principles of *respondeat superior*.

Pollution exclusion clauses reviewed

Cotter Corporation v. American Empire Surplus Lines Insurance Company, 02SC707 (May 17, 2004): In this case, the supreme court reviewed insurance companies' duties to defend and indemnify their insureds under various policy provisions. First, the court evaluated the application of qualified pollution exclusion clauses to wastes placed in unlined ponds. The court determined that the clauses do not necessarily exclude insurance coverage if the insured expected seepage. Instead, the court concluded that the relevant inquiry to determine if the clauses preclude coverage is whether the insured placed wastes in an unlined disposal area with the expectation

that contaminants would be fully contained through filtration. The court held that coverage existed in this case if the insured did not expect and intend contaminants to migrate either off its property or into the groundwater.

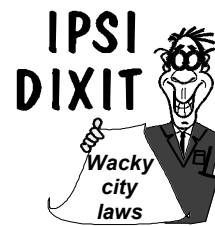
Next, the court examined the determination of an insurer's duty to defend once the underlying litigation has concluded. The court explained that when an insurer refuses to defend and the insured brings an action for defense costs after the resolution of the underlying action, the insurer must rely solely on the allegations contained in the underlying complaint to establish that no duty to defend existed.

Legislation seeks to reject Newsom

Senate Bill 04-249 is making its way through the Colorado General Assembly in an effort by some legislators to overturn the court of appeals' decision in **Newsom v. Frank M. Hall & Company**, 02CA1375 (February 26, 2004). In the **Newsom** case, the court held that an independent contractor may be an entity other than a natural person, and that a statutory employment relationship did not exist where a subcontractor is an independent

contractor as to the general contractor. Thus, under the court's decision, a general contractor is not immune from tort liability resulting from an injury to an uninsured independent subcontractor's employee, but may be immune from workers' compensation liability.

Senate Bill 04-249, which has not yet become law, would specifically overrule **Newsom** to state that an independent contractor must be a natural person.



**IPSI
DIXIT**

BOULDER:

**It is illegal to permit your llama to graze on city property.*

**Couches may not be placed on outside porches.*

DENVER:

**It is unlawful to lend your vacuum cleaner to your next door neighbor.*

**It is illegal to mistreat rats.*

ALAMOSA:

**Throwing missiles at cars is illegal.*

ASPEN:

**Catapults may not be fired at buildings.*

COLORADO SPRINGS:

**You may wear a holstered six-gun within city limits, except on Sundays, election days and holidays.*

CRIPPLE CREEK:

**It is illegal to bring your horse or pack mule above the ground floor of any building.*

PUEBLO:

**It is illegal to let a dandelion grow within city limits.*



VICTORIES IN THE

Harvey Flewelling won a full contest hearing in *Porras v. Cooper Industries and ACE, USA*. Judge Harr found that claimant failed to prove she sustained a compensable injury. James May, Esq., was claimant's attorney.

James Clifton applied persistence and forcefully-worded discovery demands to compel a third party to admit liability for a catastrophic injury (quadriplegia) to a 20-year old roofer in *Gonzales v. Lennar Family of Builders*. By pressuring the third party with a detailed factual investigation and an aggressive legal argument, Mr. Clifton avoided prolonged litigation and defense costs for his clients.

Cheryl Martin successfully moved for a dismissal of plaintiff's complaint that challenged the constitutionality of workers' compensation reopening rules before Pueblo District Court Judge David Cole in *Cruz-Cesario v. Don Carlos Mexican Foods and Centre Insurance Company*.

Richard Bovarnick defeated a claim with aggressive discovery tactics in *Son v. Labor Finders and ACE, USA*. Because claimant failed to respond to the discovery, Mr. Bovarnick successfully moved to strike claimant's application for hearing.



Death benefits are paid when an employee's death is caused by an industrial injury. The decedent's dependents are entitled to two-thirds of the decedent's average weekly wage, not to exceed the maximum temporary total disability benefit rate and not less than 25% of the maximum rate. Death benefits are reduced, but not below zero, by 50% of federal death benefits that are payable to the decedent's dependants.

There is a rebuttable presumption that the following persons are wholly dependent on the decedent: (a) widow or widower, unless voluntarily separated and living apart from the decedent at the time of the injury or death, or not dependent in whole or in part on the decedent for support; (b) minor children of the decedent under the age of 18; and (c) minor children of the decedent who are 18 or over, but under 21, if they are dependent on the decedent for support and, at the time of death, are 18 or older and engaged in full-time study. Dependency continues until they reach age 21 or cease full-time study at an accredited school, whichever is first.

Death benefits must be paid to one or more dependants of the decedent for the

Death benefits

By Cheryl A. Martin, Esq.

benefit of all the dependents. The Director apportions the benefits among the dependents in a just and equitable manner.

Death benefits continue for a widow or widower for life or until remarriage. If there are no other dependents at the time of remarriage, a 2-year lump sum benefit without discount, less lump sums previously paid, shall be paid to the widow or widower. Death benefits continue for dependent children until age 18, or age 21 with full-time education. Upon the death of any dependent, the benefit goes to the surviving dependents. In the case of a partial dependent, death benefits expire six years from the date of the decedent's death.

If there are no dependents, compensation is limited to expenses provided for medical, hospital and funeral expenses of the decedent, together with sums that have accrued to the decedent during his lifetime.

When the decedent dies as a proximate result of the injury, there must be paid a one-time lump sum within 30 days after death, not to exceed \$7,000 for reasonable funeral and burial expenses. This sum must be paid in addition to surgical and hospital expenses, and compensation paid to dependents.

Workers' comp rules being revised

The Colorado Division of Workers' Compensation is in the process of revising the Workers' Compensation Rules of Procedure. The Division recently announced that the first phase of the project--simplifying and streamlining the rules, and using a new format and numbering system--has been completed. Phase 2 of the project is an external review by those who handle workers' compensation claims or are otherwise affected by the proposed changes. This review period is taking place to allow further refinement of the proposals prior to a formal rules hearing. Formal rule making, which includes public comment and hearing, is anticipated in late summer or early fall of this year.

The proposed rule changes may be reviewed on the Division's website at www.coworkforce.com/DWC/RulesRevisionProject/RulesRevHome.asp.

www.coworkforce.com/DWC/RulesRevisionProject/RulesRevHome.asp. There is a form on the website that allows you to automatically submit your comments by email. You may also submit written comments via postal service to the Colorado Division of Workers' Compensation; Rules Revision Project; 1515 Arapahoe Street, Suite 590; Denver, CO 80202. Copies of the proposed rules are also available on disc if you call Timiann Flores at 303-318-8769 or Karen Hoppes at 303-318-8771. The Division will be reviewing comments through June 4, 2004.

Areas in which the rules are being significantly amended include compliance audits, petitions to close, petitions to reopen, medical utilization reviews, hearings and appeals.

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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.