

# DEFENSE TALK

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ATTORNEYS AT LAW

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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

## Court of Appeals Update

### Negligence — Duty of Care — Ice on a Public Sidewalk

In *Woods v. Delgar Ltd.*, decided July 23, 2009, the Colorado Court of Appeals affirmed the trial court's entry of summary judgment in favor of the defendant. The plaintiff had been injured when he fell on a patch of ice on a public sidewalk. He and his wife sued the owner of the adjacent building and the lessee that operated a restaurant in space it leased from the building owner. Plaintiffs alleged the ice was the result of snow falling on an awning and melting, resulting in water dripping onto the sidewalk and freezing.

Plaintiffs settled with the owner, and the lessee filed a motion for summary judgment. The trial court granted the lessee's motion for summary judgment, and the Court of Appeals affirmed. The Court concluded: "Absent evidence that lessee con-

trolled, constructed, or maintained the awning from which the water allegedly dripped, there can be no duty. Here there is no evidence that lessee controlled, constructed, or maintained the awning, or that the ice hazard on which Mr. Woods fell resulted from any other act of lessee."

The Court also held that the city ordinance that prohibited causing or permitting water to flow upon a sidewalk did not impose a duty on the lessee or render it negligent per se.

### General Liability Insurance Policy — Accident or Occurrence

In *Mountain States Mutual Casualty Company v. Hauser*, decided July 23, 2009, the Colorado Court of Appeals affirmed the trial court's entry of summary judgment in favor of the insurer. The case arose out of a sexual assault on a waitress by the insured restaurant's supervising manager. In a separate lawsuit, the waitress obtained a default judgment against the restaurant and sought to collect the damage award from the restaurant's general liability insurance policy.

The insurer had filed a declaratory judgment action against the insured restaurant, and the waitress intervened. The insurer sought a declaration that the waitress's lawsuit against the restaurant did not trigger coverage under the policy, that coverage was precluded by exclusions in the policy, and that the insurer had no duty to defend or indemnify the restaurant.

The Court held that the policy did not

cover the assault because it was not an occurrence, which was defined by the policy as "an accident." The Court declined to find that the assault was accidental from the point of view of the insured restaurant, despite the allegations of negligent hiring, negligent supervision, and negligent retention. The Court also held that coverage was barred by the "expected and intended injury" exclusion.

### Workers' Compensation — Petition to Reopen — Medical Benefit Defined

In *Jones v. Industrial Claim Appeals Office*, decided August 6, the Colorado Court of Appeals affirmed the ALJ and Industrial Claim Appeals Office denial of the claimant's 2006 petition to reopen as untimely. Jones had received her last medical benefit in 2003 and a division-sponsored independent medical evaluation (DIME) in 2004. She argued that the DIME was a medical benefit, which restarted the two-year limitations period for reopening her claim. The court held that a DIME is not a medical benefit because it is not intended to advance treatment or healing. Therefore the petition to reopen was untimely.

### Personal Injury — Dismissal for Failure to Prosecute — Reasonable Excuse for Delay

In *Oversole v. Mancini*, decided August 6, 2009, the Colorado Court of Appeals re-

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# 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, AH=application for hearing; ALJ=administrative law judge; ATP=authorized treating physician; DIME=Division-sponsored independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; IME=independent medical examination; MMI=maximum medical improvement; MUR=Medical Utilization Review; PPD=permanent partial disability; TTD=temporary total disability.

## Causation

ICAO affirmed ALJ Jones's order awarding temporary disability benefits and denying respondents' motion to withdraw their admission of liability. The ALJ determined that claimant had met his burden of proving his injury was caused by the admitted injury and not by an intervening incident. ICAO refused to consider respondents' argument that claimant had been released to regular duty shortly after he was laid off, because respondents had not raised the issue before the ALJ and the ALJ did not have the opportunity to make necessary factual determinations. **Clark v. Concrete Express, Inc.**, W.C. No. 4-749-423 (ICAO July 22, 2009)

ICAO affirmed ALJ Walsh's order denying and dismissing claimant's claim for benefits. The primary factual conflict on the issue of compensability involved medical opinions on causation. The ALJ resolved the conflict in favor of respondents, finding that claimant's subclavian vein clot was unrelated to his previous neurogenic symptoms, but more likely developed as a result of personal work he performed on his own truck. Held: claimant had the burden to prove his disability and need for medical treatment arose out of work he performed for the employer. The question of whether the claimant has proven a causal relationship between the employment and the alleged injury or disease is one of fact for determination by the ALJ. **Brassard v. San Juan Insulation & Drywall**, W.C. No. 4-766-331 (ICAO July 20, 2009)

## Closing the Claim

ICAO affirmed ALJ Cannici's order find-

ing the claim had closed by operation of law and denying claimant's request for penalties. Claimant alleged that the insurer violated the Act and Rules when it filed an FAL without ratings worksheets. However, the ATP had not completed any ratings worksheets. The insurer had attached the ATP's impairment evaluation report and the physical therapist's narrative report of range of motion testing, which were all the documents that existed regarding the claimant's medical impairment. Held: the insurer was not obligated to demand that the ATP prepare a worksheet to be attached to the FAL. **Aguilar v. Colorado Flatwork, Inc.**, W.C. No. 4-741-897 (ICAO Aug. 3, 2009)

## DIMES

ICAO affirmed ALJ Friend's supplemental order finding the claimant was at MMI from the effects of the compensable injury. Respondents overcame the DIME physician's opinion that the claimant was not at MMI by presenting medical evidence that showed a significant lack of objective evidence to support a determinable medical problem and significant evidence of over-reaction, pain magnification, symptom exaggeration and non-physiologic findings. Respondents also presented video surveillance of Claimant at a building supply store showing no signs of restrictions or limitations. "The ALJ found that no further treatment is expected to improve the claimant's work-related condition in part because no objective condition exists, and in part because the claimant restricts the types of treatment she will allow." **Siefken v. Home Depot**, W.C. No. 4-740-549 (ICAO Aug. 6, 2009)

ICAO affirmed ALJ Krumreich's order that found the respondents had overcome the opinion of the DIME physician. After hearing the testimony and reviewing the medical records, the ALJ found that claimant's testimony that he had complained of low back pain since immediately after the injury was not credible. In part because the DIME physician relied upon claimant's non-credible assertion, the ALJ found the DIME physician's opinion failed to provide any probable basis for relating the low back pain to the admitted injury. Held: the fact that the medical record did not show a complaint of low back pain until ten

months after the injury presented a plausible basis from which negative inferences may be drawn. Where the ALJ finds that the claimant lacks credibility but the DIME physician relied upon the claimant's report of injury, the ALJ retains the right to determine that the DIME physician's opinion was unpersuasive, which is part of the determination of whether the DIME physician's opinion has been overcome by clear and convincing evidence. **Rodriguez v. Kane Concrete**, W.C. No. 4-715-022 (ICAO July 31, 2009)

## Penalties

ICAO affirmed ALJ Walsh's order denying claimant's request for penalties for dictating medical care and finding that the respondents' endorsement of compensability was ripe for determination at the time the AH was filed. Held: the issue of "compensability" as an issue was ripe for hearing when respondents contested the causation and relatedness of the condition of certain body parts to the admitted injury. Claimant also failed to prove that a letter to the ATP, enclosing a report from respondents' expert and asking the ATP whether he agreed with the report, had the intent or effect of dictating medical care. **Gianzero v. Wal-Mart Stores, Inc.**, W.C. No. 4-669-749 (ICAO July 14, 2009)

## Responsibility for Termination of Employment

ICAO affirmed ALJ Walsh's order denying the claimant's claim for temporary disability benefits. Claimant sustained an admitted injury, but he did not initially miss any work because the employer immediately offered him light-duty work. However, after several weeks of light duty, claimant did not show up for work, even after the employer sent him a letter that failure to report for work within three days would be interpreted as a voluntary termination of employment. The ALJ found that the employer provided the claimant with light-duty work that conformed to his work restrictions; that the modified employment was flexible and allowed the employer to temper the claimant's activities so that they accommodated any change of restrictions; that the claimant failed to demonstrate that he suffered a disability that prevented him

# VICTORIES IN THE TRENCHES

## Richard A. Bovarnick

In *Hollingsworth v. Sava Senior Care, LLC and Ace American Insurance Co.*, the ALJ concluded that the claimant's injury was not caused by her job duties. Rich obtained all healthcare records, including records of a previous injury claimant had not reported to the ATP, and had them reviewed by an expert who opined that the incident described by claimant would not cause the injury claimed. The ALJ also inferred from the ATP's note "that he began to question Claimant's description of her symptoms compared to the physiologic findings."

In *Arroyo v. Wal-Mart Stores, Inc. and American Home Assurance*, the ALJ concluded that the claimant had failed to prove by a preponderance of the evidence that she sustained compensable injuries to her back on the dates alleged. Rich presented medical records and testimony of claimant's managers to impeach claimant's testimony.

## Holly M. Barrett

In *Schechter v. Labor Ready*, the ALJ denied and dismissed claimant's claim for post-MMI medical benefits. Holly showed that both authorized physicians had discharged claimant with no recommendation for additional treatment, and that at MMI claimant had no pain or swelling. Holly also proved that respondents had overpaid TTD benefits, and the ALJ permitted the insurer to take a credit for the overpayment against the disfigurement award.

## M. Frances McCracken

In *Boyd v. Wal-Mart Stores, Inc. and American Home Assurance*, the Industrial Claim Appeals Office affirmed ALJ Jones's order granting respondents' Petition to Modify, Terminate or Suspend Benefits. Fran presented the testimony of the store manager and assistant manager and introduced store records to convince the ALJ that claimant was not credible. The ICAO determined that there was substantial evidence to support the ALJ's finding that the claimant was responsible for the termination of his employment.

In *Colorado Insurance Guaranty Association v. Rykaart*, a Colorado District Court case in which the workers' compensation carrier sought to enforce its subrogation rights against the tortfeasor, the court denied Dollar Thrifty Automotive Group's (DTAG) motion for summary judgment. In May 1998, Cornelius Rykaart was driving a vehicle rented from DTAG when he crossed the center line and collided with a truck driven by Sherry Mosely. Ms. Mosely was in the course and scope of her employment at the time of the accident, and she collected workers' compensation benefits from Colorado Insurance Guaranty Association (CIGA) and its predecessor. Ms. Mosely was eventually found to be permanently and totally disabled. CIGA's predecessor filed suit against Rykaart, a resident of South Africa, but did not serve him or otherwise pursue the subrogation case while the workers' compensation case was pending. CIGA effected service on Rykaart in April 2007 and obtained a default judgment for more than \$420,000 against him in April 2008. DTAG moved for summary judgment on the subrogation claim, arguing that the delay between filing the complaint and service of process was unconscionable. Fran argued successfully that DTAG was notified about the accident the day after it occurred, was notified that the subrogation case had been filed in 2001, and had sufficient notice to preserve evidence regarding the case. Because DTAG had not shown it was prejudiced by the delay in service on Rykaart, the court denied its motion for summary judgment.

In *Martin v. Wal-Mart Stores, Inc.*, the ALJ denied and dismissed claimant's claim for additional TTD benefits. Fran established that the claim for additional TTD benefits was precluded, because claimant had been offered and accepted modified duty answering the phone, which was within her restrictions. Only when her supervisor told her to begin answering the phone did claimant object that answering the phone would cause her to suffer panic attacks. The ALJ found that claimant failed to prove the offer of modified employment was unreasonable, because claimant had

not informed the employer of her panic attacks when the position was offered to her and because she produced no medical evidence that she could not perform the modified duties.

In *Lawler v. Sam's Club, Inc. and American Home Assurance*, the ALJ denied and dismissed claimant's claim for additional therapy and medications. Fran proved that claimant's treatment during the period in question was focused on litigation stress and other personal issues rather than on chronic pain from the work injury.

In *Smith v. Wal-Mart*, the ALJ found that claimant had failed to overcome the DIME physician's determination of MMI. Claimant attempted to include her shoulder problems in her claim for bilateral carpal tunnel syndrome, which would have extended the period of temporary disability benefits and increased her PPD rating. Fran showed that claimant had not reported her shoulder pain as work-related and that the treating physicians did not believe the shoulder problems were related to the carpal tunnel syndrome.

## Erica A. Weber

In *Liggins v. Harsco Corporation and Ace American Insurance Co.*, the Industrial Claim Appeals Office affirmed ALJ Felter's order denying temporary disability benefits. Erica presented the testimony of the manager, supported by contemporaneous documentation, that the claimant was terminated for violation of company policy and insubordinate behavior. The ALJ found the manager's testimony more credible than the claimant's testimony. The ICAO concluded there was ample support in the record for the ALJ's determination that the claimant was responsible for the termination of his employment.



## Practice Pointer

## Audio Recording of Independent Medical Examinations

By James R. Clifton

In our April-May *Defense Talk* we mentioned the new statutory requirement that independent medical examinations (IME) requested by the employer or insurer (respondents) must be audio recorded. The statute applies to all workers' compensation claims filed on or after August 5, 2009. In last month's issue we briefly reviewed the new workers' compensation rules of procedure 8-8 through 8-13 that set forth the procedures to be followed by the parties and the physician conducting the IME.

The statute was pushed through the legislature by the claimants' bar for the purposes of decreasing or ending IMEs requested by respondents. Without IMEs respondents' ability to defend against non-meritorious claims would be severely hampered. The claimants' bar is banking on a decrease in the number of physicians who will conduct an IME. Initial information from some physicians who have usually agreed to conduct IMEs indicates that they will comply with the new procedures.

The problem that you may encounter when you request an IME from a physician who doesn't usually perform IMEs or only occasionally performs an IME is that the physician may be ignorant of the statute and the rules. When requesting an IME from such a physician, it is important that you communicate to the physician's assistant the fact that the IME must be audio recorded.

Assuming the physician agrees to audio record the IME, as a practical matter you

will need to acquaint the physician with the applicable rules to assure that you obtain an IME that can be used and admitted into evidence. Rule 8-8 states that prior to an IME the respondents shall ensure that the examining physician is provided written notice that describes the requirements for recording the examination. Set forth below is a suggested written notice that you may wish to use to comply with this rule.

### NOTICE CONCERNING PHYSICIAN'S OBLIGATIONS AND RIGHTS FOR AUDIO RECORDING OF AN INDEPENDENT MEDICAL EXAMINATION

1. You must obtain a signed form, "Information Regarding Independent Medical Examination," from the claimant, unless it is provided to you by the employer or insurer prior to the examination. You may not conduct the examination unless the claimant has signed the form.
2. Immediately prior to the examination, you must inform the claimant that the examination will be audio recorded.
3. You must make a digital audio recording of the examination.
4. You must provide to both parties a written medical report that is prepared as a result of the examination.
5. Regardless of which party makes the initial request for a copy of the recording, you must provide a copy only to the claimant within 15 days of the written request. The request must be in writing, include payment of \$20, and provide the address to which the copy should be sent.
6. Within fifteen days of receipt of a written request from the employer or insurer, notifying you that the claimant has made no allegation the recording contains confidential information that is irrelevant to the worker's compensation claim, and a \$20 payment, you must provide a copy of the recording to the requesting party.
7. If an ALJ issues an order finding that the recording does not contain confidential medical information, you must provide a copy to the employer or insurer within 15 days of receipt of the written request and a \$20, provided the employer or insurer requests the copy within 20 days after the order is issued.
8. Absent an order to the contrary, you may destroy the recording 12 months after the date the written report was issued.
9. You may require payment for a copy before providing it.
10. You may charge an additional \$30 for a recorded examination in addition to the fees allowed for special reports in the medical fee schedule.
11. You may charge \$20 for each copy of the recording that is provided.
12. You must not alter the recording.
13. You must retain the original recording for at least 12 months.
14. If you are responsible for a faulty or inaudible recording, you may be required to repeat the examination without additional payment.



### Helpful Websites

**Who Named It?** at [www.whonamedit.com](http://www.whonamedit.com) bills itself as "The world's most comprehensive dictionary of medical eponyms." It provides biographies of persons for whom medical phenomena are named. You can search or browse the database by a person's name or eponym (for example, Heimlich's manoeuvre). You can also browse lists by country or category. The site is a work in progress that eventually

will include more than 15,000 eponyms and more than 6,000 persons.

**Voice of America (VOA) Pronunciation Guide** at [names.voa.gov](http://names.voa.gov) provides pronunciations of names of people and places that have been mentioned in VOA news items. Pronunciations are written out phonetically, and audio files are linked for most entries.

**Wired's How-To Wiki** at [howto.wired.com](http://howto.wired.com) is a "library of projects,



## TECH TIPS

hacks, tricks and tips." You can search for articles or browse topics in Computers, DIY (do-it-yourself), Food & Drink, Gadgets, Green, Internet, Lifestyle, Photo, Survival, Video, and Work. Recent featured how-to articles include: "Start a Sustainable Garden," "Haggle on Craigslist," "Build a Fire," and "Create stunning time lapse videos using a simple digital camera."

Send your suggestions for "Tech Tips" to the editor at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com).

**ICAO Update**

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from performing the duties of modified employment he had accepted; that the claimant exercised a degree of control over his termination and his termination was for cause; and that claimant's wage loss was not attributable to the on-the-job injury. Held: where the claimant at the time of his claimed entitlement to TTD benefits was working modified employment, he must prove that he was unable to perform the modified employment in order to prove entitlement to TTD. Because the claimant had actually returned to work, it was not necessary for the employer to make a formal offer of modified employment that conformed to § 8-42-105(3)(d)(I) and Rule 6-1(A)(4) in order to terminate TTD.

**Candelaria v. Patterson Uti Drilling, Inc.**, W.C. No. 4-760-465 (ICAO July 20, 2009)

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.



**COURT OF APPEALS UPDATE**

*Continued from page 1*

versed the trial court's order dismissing plaintiff's claims for failure to prosecute and remanded the case to the trial court with directions to reinstate plaintiff's claims against Mancini. Plaintiff had filed suit for injuries she sustained in a motor vehicle accident. She had served two of the defendants, but was unable to serve Mancini because he was serving in the U.S. Marine Corps at an undisclosed location overseas. Despite plaintiff's explanation for her failure to serve Mancini, the trial court dismissed.

The Court of Appeals reversed holding that the trial court's dismissal under the circumstances was an abuse of discretion. The Court stated that the principal question on a motion to dismiss for failure to prosecute is whether there was a reasonable excuse for the delay. The Court concluded that plaintiff had demonstrated a reasonable excuse.

The Court also pointed out that if plaintiff had waited to file her complaint until Mancini's military service was completed, the statute of limitations would have been tolled under the Servicemembers Civil Relief Act (SCRA) for the duration of his service. Therefore, any prejudice to Mancini caused by plaintiff's delay in effecting service on him was no more than he would have experienced if plaintiff had waited to initiate the action until he had completed his service.

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



You have to wonder how some of these made it past the proofreader:

- Something Went Wrong in Jet Crash, Expert Says
- Police Begin Campaign to Run Down Jaywalkers
- Panda Mating Fails; Veterinarian Takes Over
- Miners Refuse to Work after Death
- Juvenile Court to Try Shooting Defendant
- Cold Wave Linked to Temperatures
- Kids Make Nutritious Snacks
- Typhoon Rips Through Cemetery; Hundreds Dead

Send your suggestions for "Ipsi Dixit" to the editor at [dmurley@cmb-pc.com](mailto:dmurley@cmb-pc.com).

**Grand Junction Office Moving**

Effective September 18, 2009 the Grand Junction office address will be:

2454 Patterson Road, Suite 200  
Grand Junction, Colorado 81505

The phone and fax numbers will not change, but we will be without phone service from September 18 until September 20.



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