DEFENSE TALK SM

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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

Workers' Compensation — Penalties — Final Admission of Liability

In ***Paint Connection Plus v. Industrial Claim Appeals Office***, announced January 7, 2010, the Colorado Court of Appeals affirmed ICAO's final order upholding the ALJ's imposition of penalties for the filing of an invalid admission of liability. The respondent-insurer had filed a final admission of liability (FAL) based on the rating physician's report finding claimant at maximum medical improvement (MMI) for his admitted shoulder injury but not at MMI for a neck condition that respondents did not admit was compensable. The insurer attached a copy of the rating physician's report, which it had received without worksheets, to the FAL.

The Court of Appeals held that the FAL was invalid because it was inconsistent with the rating physician's opinion that claimant was not at MMI for his neck condition, which the physician attributed to the industrial injury. The Workers' Compensation Act contains no provision for partial MMI. Therefore, the Court held that the rating physician's report did not trigger the obligation to file an FAL, and respondents should have waited to file the FAL until claimant was at MMI for all conditions. Respondents could have employed other procedures for contesting the compensability of claimant's neck condition, e.g., setting the case for hearing, requesting a Division independent medical examination, or contesting claimant's request for treatment of his neck condition.

The Court also held that the FAL was invalid because the rating physician's worksheets were not attached. Although claimant conceded that respondents received the worksheets after the FAL was filed and immediately provided them to claimant, he did not concede that the worksheets did not exist when the FAL was filed. The worksheets were dated the same date as the rating physician's examination of claimant. [Editor's note: The Court's opinion impliedly imposes on respondents the responsibility to inquire of a rating physician whether worksheets were prepared and to obtain the worksheets if they exist.]

The Court upheld the ALJ's imposition of penalties under § 8-43-304(1), C.R.S. Because the Court held that the FAL did not comply with § 8-43-203(2)(b)(II), C.R.S., or Rules 5-5(A) and (E), W.C.R.P., it concluded that respondents' conduct violated the Workers' Compensation Act. The Court also concluded that the record contained substantial evidence to support the ALJ's factual finding that the conduct was not objectively reasonable.

Premises Liability Statute — Snow and Ice on Public Sidewalk

In ***Burbach v. Canwest Investments, LLC***, announced December 28, 2009, the Colorado Court of Appeals affirmed the trial court's entry of summary judgment in favor of the defendant. Plaintiff had sued under Colorado's premises liability statute, alleging she had been injured when she slipped and fell on snow and ice that had naturally accumulated on a public sidewalk adjacent to the defendant's property. The Court of Appeals concluded that the premises liability statute does not abrogate the common law "no duty" rule. It further concluded that defendant had not assumed a duty to pedestrians by complying with the snow removal ordinance from time to time.

Under Colorado common law, the owner of property has no duty to pedestrians to keep the adjacent public sidewalk clear of naturally accumulated snow and ice. City ordinances requiring snow removal do not create civil liability for property owners unless the ordinance expressly imposes such liability. Plaintiff conceded that defendant had no liability at common law but contended that the snow removal ordinance made defendant liable as a landowner un-

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More on Penalties: "Med Only" Admissions

By M. Frances McCracken

An often overlooked Rule of Procedure, and one on which claimants' attorneys are frequently relying to assert penalty claims, is Rule 5-5(B), W.C.R.P. Rule 5-5 deals with admissions of liability. Subsection (B) provides:

> An admission filed for medical benefits only, ***shall include*** remarks outlining the basis for denial of temporary and permanent disability benefits. (emphasis added)

Section 8-43-304(1), C.R.S. allows an Administrative Law Judge to impose penalties against any insurer who (1) violates any provision of the Act; (2) does any act prohibited by the Act; (3) fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director of the Division of Workers' Compensation or the Industrial Claim Appeals Panel; or (4) fails, neglects, or refuses to obey any lawful order of the director or the panel. The failure to comply with a procedural rule is a failure to "perform a duty lawfully enjoined" within the meaning of § 8-43-304 (1). Therefore, penalties can, and will, be imposed for the failure to include the basis for filing a medical-only admission in the "remarks" section of the admission.

The imposition of penalties under § 8-43-304(1) is a two-step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, the ALJ may impose penalties if he also finds that the insurer's actions were objectively unreasonable. Workers' compensation insurance adjusters are expected to know the rules relating to claims handling requirements. Therefore, ignorance of the law, mistake, or inadvertence will not avoid the imposition of a penalty. The amount of the penalty is discretionary, up to a maximum of $500 per day for each offense.

To avoid a potential penalty claim, pay careful attention to any "med only" admission and include a brief statement, *e.g.* "claimant responsible for termination" or "no lost time," explaining the basis for the admission. If you have any questions concerning Rule 5-5(B) or any of the Rules of Procedure, feel free to contact any of the attorneys at Clifton, Mueller & Bovarnick, P.C.

VICTORIES IN THE TRENCHES

Richard A. Bovarnick

In ***Vargas v. Tetra Technologies and Insurance Company of North America***, ICAO affirmed ALJ Friend's determination that the insurer was not liable for the costs of Dr. Yamamoto's care. Rich successfully argued that the employer's provision of the choice-of-physician letter to the claimant was valid even though the claimant was in a hospital's intermediate ICU at the time. Therefore, the right of selection did not pass to claimant, and Dr. Yamamoto was not authorized.

In ***Twolde v. ABM Industries, Inc. dba AMPCO System Parking and ACE American Insurance***, ALJ Harr granted the insurer's request to prospectively withdraw its admission of liability, and denied and dismissed claimant's claim for workers' compensation benefits. At hearing Rich presented the testimony of the treating physiatrist and submitted medical records to persuade the ALJ that it was medically improbable that claimant's job duties as an airport parking cashier caused, intensified, or aggravated her physical complaints. The ALJ also found that claimant's complaints were more probably the result of symptom magnification.

Holly M. Barrett

In ***Duryee v. Labor Ready-A&R Construction***, ALJ Stuber determined that claimant had failed to show by a preponderance of the evidence that she was the common law spouse of decedent or that she was a dependent of the decedent at the time of his death. Holly introduced the decedent's obituary, death certificate, claim for compensation, and other evidence showing that the decedent and claimant were not generally acknowledged as married.

M. Frances McCracken

In ***Fern v. Wal-Mart and American Home Assurance***, ALJ Stuber denied and dismissed the claimant's claim for an alleged occupational disease to her low back. Fran successfully argued that there was no evidence claimant's light-duty temporary work after neck surgery for a previous compensable work injury aggravated her preexisting degenerative lumbar disc disease to cause disability or the need for treatment of the low back.

In ***Meijer v. Gilbarco Veeder Root Services and Zurich Insurance Company***, Fran succeeded in having the worker's claim for compensation dismissed because claimant failed to comply with two orders compelling him to respond to interrogatories and requests for production of documents.

Diane K. Murley

In ***Stevenson v. Wal-Mart and American Home Assurance***, ALJ Mottram denied and dismissed claimant's petition to reopen. Diane introduced medical and employment records to show that claimant's testimony was not credible. The ALJ found that claimant failed to prove it was more probably true than not that the herniated disk in her low back, diagnosed almost a year after the admitted injury, was related to her work injury.

In ***Poulter v. Labor Ready and ACE American Insurance***, ALJ Mottram denied and dismissed claimant's claim for benefits. Diane presented the testimony of an

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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, ALJ=administrative law judge; ATP=authorized treating physician; C.R.S.=Colorado Revised Statutes; DIME=Division independent medical examination; FAL=final admission of liability; ICAO=Industrial Claim Appeals Office; MMI=maximum medical improvement; SSDI=Social Security Disability Insurance; TTD=temporary total disability; WCRP=Colorado Workers' Compensation Rules of Procedure.

Authorized Medical Treatment

ICAO affirmed ALJ Friend's order determining that the insurer was not liable for the costs of care claimant received from the physician he consulted without referral from a designated ATP. Claimant argued that respondents had provided him with the designated provider list prematurely, while he was still receiving emergency treatment, and therefore the right of selection had passed to him. Held: C.R.S. § 8-43-404(5) and WCRP 8-2 require the employer to provide a list of physicians to the injured employee upon notice of an injury. Neither the statute nor the rule prohibits delivering a designation letter to an injured employee while he is receiving emergency care. ***Vargas v. Tetra Technologies***, W.C. No. 4-771-845 (ICAO Dec. 18, 2009)

AWW

ICAO affirmed ALJ Walsh's order denying and dismissing the claim to have claimant's tips included in her AWW. Claimant testified and presented testimony of her mother and a coworker that she earned tips. She also submitted tax returns she had mailed to the IRS the day before the hearing. The ALJ found that claimant merely guessed at the amount of tips she may have received and that she only mailed the tax returns so they might be considered in calculation of her AWW. Held: Because the record supported the ALJ's finding that claimant was unable to establish she received tips in a specific amount, ICAO was bound by the ALJ's conclusion that claimant failed to provide an adequate evidentiary basis for the calculation of her actual tip income. ***Boyle v. Sonic Drive-In***, W.C. No. 4-717-518 (ICAO Dec. 29, 2009)

Burden of Proof

ICAO affirmed ALJ Cain's order allowing respondents to withdraw prospectively their admissions of liability and denying and dismissing the claim for compensation from the date of the ALJ's order. Claimant alleged a compensable occupational disease of his cervical spine. Respondents had filed an FAL based on the ATP's report that claimant had reached MMI and had no permanent impairment. The report also contained the physician's opinion that claimant's neck condition was a natural progression of his underlying rheumatoid arthritis and that his symptoms were probably not related to driving a school bus. Claimant objected to the FAL and requested a DIME. The DIME physician opined that claimant's conditions were work-related and assigned an 18 percent whole person impairment rating. Respondents sought to withdraw the FAL and place the burden of proof on the claimant to establish that he sustained a compensable injury or occupational disease. The ALJ determined that because claimant contested the FAL it never became final, and respondents were permitted to withdraw their FAL. Therefore, claimant had the burden of establishing by a preponderance of the evidence that he sustained an injury or occupational disease arising out of and in the course of his employment. Because the question of whether claimant proved a compensable injury is a threshold issue for the ALJ, the opinion of the DIME physician was not entitled to presumptive weight. ***Gareis v. Poudre School District R-1***, W.C. No. 4-714-186 (ICAO Dec. 14, 2009)

Compensability

ICAO affirmed ALJ Jones's order denying and dismissing the claim for workers' compensation benefits. Claimant claimed benefits for injuries he sustained in a car accident that occurred during a weekend trip to the front range to meet with his probation officer and see his family. Claimant had moved to the western slope to take a job with employer, but his family had stayed in Kersey, CO, on the front range. Claimant argued that he remained in travel status from the moment he left Kersey until the moment he returned and, therefore, the accident was compensable. The ALJ found: claimant's travel was after his normal work hours; the accident did not occur on employer's premises; claimant voluntarily moved to the western slope to be closer to his new job; employer did not pay for claimant's move, lodging, or meals; claimant's residence during the time he worked for employer was on the western slope; claimant was only paid for work while he was on the clock; claimant was not paid for travel from his western slope residence to western slope work sites. Claimant's travel was not contemplated by his employment, not assigned or directed by employer, not expressly or implicitly requested by employer, and did not confer a benefit on employer. Claimant was not authorized to use employer's gas account to purchase gas for his monthly visits to meet his probation officer and see his family. Held: These findings supported by the record and reasonable inferences constitute substantial evidence supporting the ALJ's fact-specific analysis that the accident was not compensable. ***Breidenbach v. Black Diamond, Inc.***, W.C. 4-761-479 (ICAO Dec. 30, 2009)

Coverage

ICAO affirmed ALJ Friend's order that claimant had waived coverage from insurer. Claimant was president and owner of employer. In order to reduce his premium for workers' compensation insurance, claimant signed a rejection of coverage. He never sent a written notice to the insurer revoking his election to reject coverage. Insurer noted the exclusion from coverage on the initial policy documents and in correspondence to the employer. When the employer ceased to have employees other than claimant, neither claimant nor his agent notified the insurer. Claimant did not send requested payroll records to insurer at renewal time. Held: Insurer was not estopped to deny coverage. ***Rodriguez v. CMR Siding, Inc.***, W.C. No. 4-776-684 (ICAO Dec. 10, 2009)

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ICAO Update

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DIMEs

ICAO affirmed ALJ Cannici's determination that respondents were not required to reinstate TTD benefits before hearing. TTD had been terminated by an FAL based on an ATP's conclusion that claimant had reached MMI. The DIME physician originally opined that claimant had not reached MMI, but respondents requested a hearing to contest the DIME report. After reviewing surveillance videos and a functional capacity evaluation, the DIME doctor changed his position and concluded that claimant had reached MMI. Held: Insurer was not "obligated after filing an FAL supported by the opinion of an ATP to reinstate TTD benefits upon receipt of the initial DIME opinion that the claimant was not at MMI before the matter could be heard before an ALJ upon the application filed by the insurer to overcome the opinion of the DIME physician." Question of whether the party challenging the DIME physician's determination of MMI has overcome the report by clear and convincing evidence is generally one of fact for determination by the ALJ. ***Price v. Staffing Solutions***, W.C. No. 4-707-792 (ICAO Dec. 8, 2009)

ICAO affirmed ALJ Walsh's order denying claimant's request to strike the FAL based upon the DIME physician's impairment rating. Respondents attached the DIME report's summary sheet and narrative but no range-of-motion worksheets, because the DIME physician had not completed any worksheets. Claimant did not object to the FAL. Held: The rating physician is not required to prepare ratings worksheets where the physician does not use worksheet calculations in rendering the impairment rating. ***Harrison v. Dunmire Property Management, Inc.***, W.C. No. 4-676-410 (ICAO Dec. 4, 2009)

Employee Status

ICAO affirmed ALJ Friend's order determining that claimant was an employee, not an independent contractor. Held: To prove that the claimant was an independent contractor, the employer needed to prove both that the claimant was customarily engaged in an independent trade, occupation, profession or business related to the service performed and that the claimant was free from control and direction in the performance of the service. ***Allen v. America's Best Carpet Cleaning Service***, W.C. No. 4-776-542 (ICAO Dec. 1, 2009)

Issue and Claim Preclusion

ICAO affirmed ALJ Cannici's order denying claimant's request for a Scheker wrist replacement. Claimant had previously sought a Scheker wrist replacement and a spinal cord stimulator at a 2008 hearing before ALJ Jones. ALJ Jones ordered respondents to pay for the spinal cord stimulator but denied claimant's request for the Scheker wrist replacement because it was not a reasonable and necessary medical benefit. Neither party appealed. Held: The doctrine of issue preclusion barred claimant from relitigating the issue of whether a Scheker wrist replacement was a reasonable and necessary medical procedure. ICAO noted that claimant had not filed a petition to reopen to support his argument that his condition had changed. ***McGee v. Pasterkamp Heating and Air Conditioning***, W.C. No. 4-505-189 (ICAO Dec. 3, 2009)

Offsets

ICAO affirmed ALJ Friend's order allowing respondents to offset workers' compensation benefits as a result of SSDI benefits awarded to the claimant. Past due SSDI benefits resulted in an overpayment of worker's compensation benefits. The ALJ found that one-half of the attorney fees and expenses incurred by claimant in connection with her Social Security claim must be deducted from the overpayment. ICAO rejected claimant's argument that respondents were not entitled to an offset because they "had failed to provide any assistance in obtaining" the SSDI benefits. ICAO also rejected claimant's argument that, because claimant had worked for the employer less than a month before her injury, the offset should be limited proportionally with the employer's contribution to Social Security taxes. ***Schramek v. Chico's FAS***, W.C. No. 4-601-867 (ICAO Dec. 3, 2009)

Reopening

ICAO affirmed ALJ Walsh's order denying and dismissing the claimant's petition to reopen. Claimant alleged he should be entitled to reopen his claim based on his mistaken belief at the time of the FAL that he would be able to continue working. The ALJ found that claimant's testimony regarding mistake was not persuasive and determined that claimant had failed to establish a mistake that warrants reopening. Held: The ALJ has wide discretion to determine whether a mistake has occurred, and, if so, whether it is the type of mistake that justifies reopening. ***Davis v. Rocky Mountain Materials & Asphalt, Inc.***, W.C. 4-647-601 (ICAO Dec. 30, 2009)

Responsibility for Termination of Employment

ICAO affirmed ALJ Stuber's order that denied TTD benefits because claimant voluntarily resigned her position and consequently was responsible for her termination. Claimant argued that she had been constructively discharged because of a hostile work environment. The ALJ determined that the manager's conduct was not so unreasonable, insulting, or offensive that a reasonable person would feel compelled to resign. Therefore, the ALJ found that claimant exercised volitional conduct in causing the employment termination. Held: The ALJ's findings of fact were supported by substantial evidence, and the ALJ applied the correct legal standard in determining whether claimant was at fault for her termination. ICAO was unpersuaded to disturb the ALJ's conclusions. ***Young v. Dillards Department Store***, W.C. 4-755-097 (ICAO Dec. 29, 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 or 970-255-8852.

VICTORIES IN THE TRENCHES

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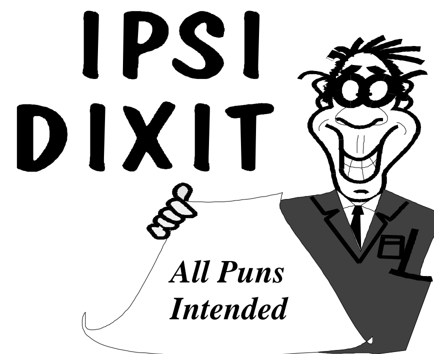
employer representative, settlement documents signed by claimant on another workers' compensation claim, and medical records from healthcare providers to whom claimant had given inconsistent histories of the cause of his symptoms. The ALJ found that claimant had failed to prove by a preponderance of the evidence that the incident at work resulted in an injury to claimant, specifically finding the testimony of the employer witness and the ATP more credible and persuasive than the testimony of the claimant.



The following puns were selected by Jim Clifton.

Two Eskimos sitting in a kayak were chilly, so they lit a fire in the craft. Not surprisingly it sank, proving once again that you can't have your kayak and heat it too.

A group of chess enthusiasts checked into a hotel and were standing in the lobby discussing their recent tournament victories.

After about an hour, the manager came out of the office, and asked them to disperse.

"But why," they asked, as they moved off.

"Because," he said. "I can't stand chessnuts boasting in an open foyer."

A woman has twins, and gives them up for adoption. One of them goes to a family in Egypt , and is named 'Ahmal.' The other goes to a family in Spain; they name him 'Juan.'

Years later, Juan sends a picture of himself to his birth mother. Upon receiving the picture, she tells her husband that she wishes she also had a picture of Ahmal.

Her husband responds, "They're twins! If you've seen Juan, you've seen Ahmal."

Mahatma Gandhi, as you know, walked barefoot most of the time, which produced an impressive set of calluses on his feet. He also ate very little, which made him rather frail and with his odd diet, he suffered from bad breath.

This made him (oh, man, this is so bad, it's good) ... a super-calloused fragile mystic hexed by halitosis.

Send your suggestions for "Ipsi Dixit" to the editor at dmurley@cmb-pc.com.

COURT OF APPEALS UPDATE

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der the premises liability statute.

The Court of Appeals noted that the legislature's intent in passing the premises liability statute was to narrow, not expand, landowner liability. Actions can be brought under the statute only against landowners for injuries *on their property*. Although the definition of landowner includes "a person legally responsible for the condition of real property," that definition does not mean someone who could be held legally liable in tort. It means "a person who is legally conducting an activity on the property or legally creating a condition on the property." The snow removal ordinance does not make public sidewalks property of adjacent property owners. Therefore, the premises liability statute does not apply to injuries on public sidewalks.

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.

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TECH TIPS

According to About.com, "an urban legend is an apocryphal, secondhand story, told as true and just plausible enough to be believed, about some horrific, embarrassing, ironic or exasperating series of events that supposedly happened to a real person."

Urban legends circulate quickly via email, twitter, or other online communications. Sometimes an urban legend is harmless, and you may not care if it is true. But if you want to verify a story you have been told, there are websites that check out the truth of urban legends, hoaxes, and rumors.

About.com's Urban Legends (http://urbanlegends.about.com/) provides Basics about urban legends, including frequently asked questions and quizzes; Current Hoaxes & Urban Legends; and Classics. You can also subscribe to David Emery's Urban Legends Blog or a newsletter.

Snopes.com offers urban legend reference pages that you can search or browse by topic. Other choices include Randomizer, Hot 25, and Odd News. Snopes also has an FAQ, glossary and newsletter.

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