



# **WORKERS' COMPENSATION UPDATE**

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## **NEWS**

### **DO YOU NEED A GREAT UTAH WORKERS' COMPENSATION DEFENSE LAWYER?**

Please consider referring your Utah WC defense or subrogation claim to Ritsema & Lyon. Just contact either of the attorneys below to refer a Utah file or to request additional information.

Nancy Hummel: 303-297-7289, [hummeln@ritsema-lyon.com](mailto:hummeln@ritsema-lyon.com)

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### **STILL CONFUSED (OR SCARED) ABOUT THE UPCOMING SCHIP SECTION 111 MANDATORY REPORTING REQUIREMENTS?**

MSP Solutions, a division of Ritsema & Lyon, is here to help. Samantha Fite and Delores (Dee) Dafoe are available to help you register as a Responsible Reporting Entity (RRE) and guide you through the maze of reporting requirements. MSP Solutions can take the fear and uncertainty out of this process. Please contact them at: 303- 675-4406 or toll free at 1-866-677-6717.

### **SAVE THE DATE!**

The 16<sup>th</sup> Annual Ritsema & Lyon Workers' Compensation Seminar will be held August 14, 2009.

The National Workers' Compensation Defense Network will be holding a National Workers' Compensation Seminar on June 17-18, 2009, in Overland Park, Kansas. For more information, visit <http://www.nwcdn.com/AllMainPages/natSeminars.shtml>.

### **TALES FROM THE TRENCHES**

John Steninger successfully defended against a claim for complex regional pain syndrome (CPRS). The court, crediting the testimony of Dr. Pitzer, found that stellate ganglion blocks are no longer effective to diagnose or treat CPRS, and

that claimant had failed to prove by a preponderance of the evidence that she required treatment for CPRS.

Jennifer Caswell also successfully argued to the Nebraska trial court that an employee was not entitled to compensation for an alleged low back and neck injury. In dismissing the employee's claim with prejudice, the Court found that the Claimant's testimony when compared to the inconsistencies in the medical evidence was simply not sufficient for her to sustain her burden of proof.

## **LEGISLATIVE UPDATE**

The major workers' compensation legislation passed this session is summarized below. For additional information, please read Fred Ritsema's Blog at <http://www.ritsema-lyon.com>.

**SB 09-037** – This bill reduces the tax paid by employer and carriers to fund the Subsequent Injury Fund and Major Medical Insurance Fund to an amount necessary to continue SIF and MMF operation for the next fiscal year. The bill also imposes a surcharge until the balance of both funds is sufficient to future claim payments and administrative costs. Once that threshold is met, the surcharge will reduce to zero.

**SB 09-070** – This is the Director's bill, and will be effective August 5, 2009. Under the bill, the first installment of compensation is to be paid no later than the date the carrier admits liability on a claim. If liability is denied, and claimant requests an expedited hearing, the application must be filed within 45 days after the notice of contest is mailed. The Director must set the hearing within 40 days after the date of the application.

This bill also includes a provision requiring petitions to review to be filed with the agency that issued the order – the Division if the order was issued by the Director, or the Office of Administrative Courts in Denver if issued by an ALJ. It also prohibits an ALJ from issuing a decision on a matter currently pending before the Director.

**SB 09-168** – This bill was part of the claimants bar's package, and is effective August 5, 2009. It will apply to pending claims as of that date. Included are provisions prohibiting a DIME physician from contacting an ATP or IME physician, or requiring a claimant to undergo repeat testing where the initial results were valid. Issues unrelated to the DIME may proceed to hearing without the need for a new application for hearing after a DIME has been completed.

Another provision prohibits carriers from asserting an overpayment more than one year after the overpayment became known in claims where an FAL has been filed, except in cases of fraud. This bill also places the burden of proof on the party seeking to modify an issue determined by an admission of liability or order. Finally, the bill requires all defense IMEs to be recorded in audio, and a written report describing the examination performed, records reviewed, and all findings and conclusions of the examiner. A copy of this report shall be furnished to the claimant at the same time it is furnished to the respondents.

**SB 09-243** – This bill, effective July 1, 2009, is also part of the claimant bar's package of legislation. It allows use of a mental impairment rating for the sole purpose of exceeding the benefits cap. It

also imposes the fee schedule on all medical and expert witness services after any final admission, final order, or full or partial settlement. Finally, this bill makes public health facilities within 150 miles of the claimant's residence authorized providers in denied claims where care is not offered by the employer or insurer.

**SB 09-281** - This legislation relates to Pinnacol Assurance, and will mandate a performance audit of Pinnacol by the state auditor, to be paid out of Pinnacol's general operating funds. The state auditor has authority to conduct performance audits as it deems appropriate. The bill also establishes a legislative study committee to study issues relating to Pinnacol, including the continued operation of Pinnacol as a state entity and the implications of selling Pinnacol to a third-party buyer.

**HB 09-1260** – This bill gives numerous rights to domestic partners who file a "Designated Beneficiary Agreement" with the Clerk and Recorder of their county of residence. Included is the right to receive dependency benefits under the Workers' Compensation Act. This bill also amends § 8-41-501(1) by creating a presumption of dependency for designated beneficiaries.

## **ADJUSTER TIP**

Workers' Compensation Rule of Procedure 5-11(B) requires the carrier to file a Notice of Final Payment in every claim in which benefits were paid. The Notice must be filed after all compensation issues have been resolved, regardless of method. Even in cases that have been settled outside of litigation, a carrier must file a Notice of Final Payment within 60 days of the date the settlement was approved by the Division.

## **MEDICARE SET-ASIDE TIP**

The Center for Medicaid and Medicare Services (CMS) has issued a revised timetable for Section 111 reporting deadlines. All non-GHPs now have until September 30, 2009 to register as Responsible Reporting Entities (RRE). The test submission period for claim input files by non-GHPs will run from January 1, 2010 through December 31, 2010. Finally, all RREs must submit their first live production file no later than their assigned submission window during the April-June calendar quarter of 2010.

RREs who have completed registration and are in testing status will be able to use the Query function as of July 1, 2009 to determine Medicare beneficiaries. CMS has also changed the threshold for reporting a total payment obligation to claimant (TPOC). RREs will no longer be required to report any TPOC amounts with dates prior to January 1, 2010.

## **COURT OF APPEALS OPINIONS**

## **OVERPAYMENTS**

The Act provides for three categories of overpayments: (1) money received that exceeds the amount that should have been paid; (2) money received that a claimant was not entitled to receive; and (3)

money received that results in duplicative benefits because of offsets that reduce disability or death benefits payable under the Act. Here, the ALJ correctly concluded that claimant received money he was not entitled to receive.

**Simpson v. ICAO**, No. 07CA1581, slip op. (Colo. Ct. App. April 16, 2009).

## **DIME – CONFLICT**

W.C.R.P. 11-2(H) provides that an apparent conflict of interest exists: (1) when the DIME physician or someone from his office has treated the claimant; and (2) when the DIME physician and a physician who previously treated the claimant have a direct or substantial financial interest. A “direct or substantial financial interest” exists when the DIME physician and treating physician have a “business ownership interest, a creditor interest in an insolvent business, employment or prospective employment for which negotiations have begun, ownership interest in real or personal property, debtor interest or being an officer or director in a business.” Another division of the COA has held that this rule applies only to relationships between physicians, not physician/carrier. This panel disagreed, holding that W.C.R.P. 11-2(H) does not restrict the appearance of a conflict only to those scenarios where the DIME physician has a relationship with the treating physician. The matter is remanded for the ALJ to consider the extent of the DIME physician’s financial relationship with respondent-carrier to determine whether this relationship creates the appearance of a conflict of interest.

**Ruff v. ICAO**, No. 08CA0767, slip op. (Colo. Ct. App. May 14, 2009).

## **JURISDICTION**

The Colorado Constitution provides that the district court retains original jurisdiction in civil cases. However, the General Assembly has the right to define the term “civil case” and has determined that workers’ compensation cases are not civil cases that must be heard in a judicial court. Additionally, because (1) the grant of jurisdiction to ALJs did not require them to exercise inherently judicial functions, (2) the Act creates a “public rights” case that is particularly suited to administrative oversight, and (3) the judicial branch retains appellate review, the Act poses no threat to the separation of powers and is constitutional. Finally, while § 8-43-309 provides that actions brought in the Court of Appeals shall be heard within thirty days, this provision is directive, not mandatory.

**Aviado v. ICAO**, No. 08CA0923, slip op. (Colo. Ct. App. April 16, 2009).

## **STATUTE OF LIMITATIONS**

Section 8-43-303(1) provides that an ALJ may, within six years after the date of injury, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition. In addition, within two years after the date the last temporary or permanent disability benefits or dependent benefits excluding medical benefits become due or payable, an ALJ may review and reopen any award on the grounds of fraud, an overpayment, an error, a mistake, or a change in condition. An individual who is otherwise entitled to workers' compensation benefits shall neither receive nor be entitled to such benefits for any week following conviction during which such individual is confined in a jail, prison, or any

Department of Corrections facility. § 8-42-113(1). When a person is released from confinement, he must be restored to the same position with respect to entitlement to benefits as he would otherwise have enjoyed at the point in time of

his release from confinement. § 8-42-113(2). The legislative intent of this statute was not to toll the statute of limitations while a claimant is in custody. Accordingly, the statute does not allow the claimant, after being confined for years in the Department of Corrections, to recover the time under which he had to file his petition to reopen.

**Landeros v. ICAO**, No. 08CA0618, slip op. (Colo. Ct. App. April 16, 2009).

## **ICAO OPINIONS**

### **COMPENSABILITY**

CRE 602 provides that: "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself." The personal-knowledge requirement under CRE 602 may be inferred from sources other than the

witness and from the total circumstances surrounding the matter that is the subject of the witness's testimony. Thus, as long as there is evidence before an ALJ such that she could reasonably find that the witness had personal knowledge of the event to which the witness is about to testify, the witness should be permitted to testify. Here, the testimony of the claims adjuster could reasonably be viewed as based on his direct personal knowledge regarding whether a claim or lawsuit had been pursued against his client. Further, the testimony of the risk analyst can be viewed as establishing that after her investigation of the claim she would have personal information about whether any Jefferson County snowplows were in the area and whether any had been reported as being involved in an accident. Accordingly, the ALJ did not abuse her discretion in permitting the testimony.

**Harrison v. Weight Watchers International**, W.C. No. 4-739-048 (ICAO April 2, 2009) (Jones).

### **COMPENSABILITY – UNEXPLAINED FALL**

An injury rises out of employment if it is sufficiently related to the conditions and circumstances under which the employer generally performs her job functions such that the activity may reasonably be characterized as an incident of the employment, even if the activity is not a strict obligation of the employment and does not confer a specific benefit on the employer. It is sufficient that the conduct originated in the work-related duties or responsibilities so as to be considered part of the service to the employer. However, there is no presumption that a fall is compensable and a truly unexplained fall at the workplace is not compensable. Here, the record contains substantial evidence supporting the ALJ's determination that claimant's fall was truly unexplained and therefore not compensable.

**Aguilar v. Checks Unlimited**, W.C. No. 4-761-110 (ICAO April 30, 2009) (Walsh).

## **DIME**

The claims adjuster did not disclose to the pro se claimant that the physician who performed the DIME was one of three physicians proposed by the claims adjuster, and was a medical advisor for the carrier. The claims adjuster's failure to do so was not an error. First, a physician who is a contracting medical provider or physician advisor with an insurance company is not prohibited from performing a DIME in a case involving that insurance company. Second, respondents are not obligated to provide claimant with the curriculum vitae of a proposed DIME physician. Third, respondents are not required to disclose information that would show potential bias on the part of

any proposed physician. Fourth, claimant's pro se status does not require a different result, as a pro se claimant is presumed to know applicable statutes and is required to act accordingly.

**Logan v. Durango Mountain Resort**, W.C. No. 4-679-289 (ICAO April 3, 2009) (Martinez).

### **MENTAL IMPAIRMENT**

The Act permits benefits for a permanent mental impairment. A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. "Mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. Mental impairment does not arise out of and in the course of employment when it results from a disciplinary action, work evaluation, job transfer, or similar action taken in good faith by the employer." The ALJ found that numerous factors led to claimant's depression, including her job transfer and other personal matters. Respondents' expert testified that claimant's personal relationships were the "main thing" causing claimant's depression. Additionally, the record contains substantial evidence supporting the ALJ's determination that claimant did not sustain a psychologically traumatic event that was outside of a similarly situated worker's experience. Claimant's assertion that the plain application of the mental impairment statute to the circumstances of public servants such as police officers, paramedics, and mental health counselors necessarily compels the denial of benefits to such individuals. However, the mental impairment statute is not constrained in its application, as claimant argues.

**Turner v. Larimer Center for Mental Health**, W.C. No. 4-679-849 (ICAO April 29, 2009) (Cannici).

### **PENALTIES**

Rule 18-6 is entitled "Division Established Codes and Values." Subsection (A) of the rule during the relevant time period read as follows: (A) Conferences held at the request of a party: Telephonic or face-to-face conferences shall be related to the injured worker's treatment. All parties shall receive actual notification from the requesting party in advance and within 24 hours of scheduling. [Rule 18-6(A) now refers to a "face-to-face or telephonic meeting with the treating physician, with the employer, claim representatives, or an attorney, and with or without the injured worker."] Here, at the time of the representative's meeting with the ATP, the Rule clearly required the employer to provide actual notice to all parties, including the claimant, in advance of the conference with the claimant's treating physician. Accordingly, the ALJ erred by dismissing the penalty as a matter of law.

**Eller v. Boulder Valley School District**, W.C. No. 4-694-053 (ICAO April 10, 2009) (Krumreich).

## **PETITION TO REOPEN**

Except in rare circumstances, it is unlikely that issues raised by successive petitions to reopen based on a worsened condition and filed over a year apart from one another can be said to be "identical." The mere passage of time itself changes the issues raised by the successive petitions, since each fact finder must focus on the claimant's allegedly worsened condition at a different point in time. Thus, issue preclusion will rarely be applicable in the context of reopening. In any event, claimant's initial

petition to reopen was based on the worsening of his vascular necrosis. The subsequent petition to reopen alleged a general worsening of condition. Accordingly, the issues were not identical and the ALJ erred by failing to conduct a hearing.

***Hanson v. Northwest Pipe Company***, W.C. No. 4-559-615 (ICAO April 2, 2009) (Krumreich).

## **STATUTE OF LIMITATIONS**

Equity will toll a statute of limitations if a party fails to disclose information that he is legally required to reveal and the other party is prejudiced thereby. Here, the benefits history section of the FAL misrepresented the payment history. On its face, the FAL indicated that payment of PPD would run through May 17, 2006, and therefore the two-year time period of § 8-43-303(2)(a) for filing a petition to reopen would run through May 17, 2008. Because the ALJ's order did not address the issue of whether the two-year statute of limitations on a petition to reopen should have been equitably tolled, the matter must be remanded for additional findings.

***Barfoot v. Xcel Energy***, W.C. No. 4-540-676 (ICAO April 16, 2009) (Harr).

## **TEMPORARY DISABILITY BENEFITS**

A worsening of condition after MMI may entitle a claimant to additional temporary disability benefits if the worsened condition caused a "greater impact" on the claimant's temporary work capacity than existed at the time of MMI. This does not require the claimant to establish "an actual wage loss" where, for example, the claimant was not working immediately before the worsened condition. In order to establish additional temporary disability benefits, claimant must show the

worsened condition resulted in increased physical restrictions "over those which existed on the original date of MMI," and that the increased restrictions caused a "greater impact" on the claimant's temporary "work capability" than existed at the time of MMI. Thus, the critical issue is not whether the worsened condition actually resulted in additional temporary wage loss but whether the worsened condition has had a greater impact on the claimant's temporary "work capacity." Here, the record contains substantial evidence demonstrating that claimant's worsening of condition resulted in increased disability.

***Root v. Great American Insurance Company***, W.C. No. 4-534-254 (ICAO April 15, 2009).

## **UTAH LAW UPDATE**

### **OFFSETS**

The Utah Supreme Court held the statute allowing for a partial offset of PTD benefits by Social Security retirement benefits was unconstitutional. The Supreme Court did not address whether the ruling was retroactive, and the Labor Commission has requested the Supreme Court address whether that issue. A

decision is expected in the near future. The Labor Commission has indicated that employers/insurers should stop taking this offset effective April 24, 2009.

***Merrill v. Labor Commission, et al***, (2009 UT 26, April 29, 2009).