

Special Interest Articles

2008 Legislative Changes



Case Law Update



FMLA Discussion

Don't Forget!



Reference Links

*Anderson v.
Brinkhoff* Discussion

Firm Profile



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York
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2008 Legislative Changes

Three main changes to the Workers' Compensation Act have been proposed as part of the 2008 legislative session and the enactment of Senate Bill 08-241. The bill was signed into law by Governor Bill Ritter on June 2, 2008. The following will provide you with a quick overview of the changes made to the Workers' Compensation Act. The Bill will be effective as of July 1, 2008, and apply to all injuries occurring thereafter.

Prosthetic Devices

The Bill allows Employees to receive as many prosthetic devices as are reasonable required to improve the Claimant's condition. The Bill also allows Claimant's to petition the Division for replacements with good cause shown. Previously, Claimant's had to prove an anatomical change to request a replacement.

Fee Schedule

The Bill clarifies that the Medical Fee Schedule found in Workers' Compensation Rule 18 applies to "all parties" and makes it unlawful or void for "any party" to charge in

excess of the fee schedule. Accordingly, Respondents' IME's and experts will be bound by the fee schedule.

Apportionment

A substantial reworking of the ability of Respondents to apportion liability was enacted. The following is a quick overview of the changes, but please feel free to contact us with any specific questions.

1. Temporary & Medical Benefits: May NOT be reduced with regard to a previous injury.

2. Permanent Total Disability Benefits: May NOT be reduced when the disability is the result of a work related injury COMBINED with a congenital disease.

** Please Note that this section specifies that the reductions permitted pursuant to Anderson v. Brinkhoff still apply. There is a discussion of Anderson v. Brinkhoff later in this newsletter.

3. Permanent Partial Disability Benefits:

Awards may be reduced in the following situations:

a. Where Claimant suffered more than one permanent impairment award or settlement to the SAME BODY PART.

b. Where Claimant suffered a prior NON-WORK related injury with PERMANENT impairment, which has been identified, treated, and at the time of the subsequent injury, is independently disabling. (Statutory change made from case law resulting from the work of this firm – Martinez v. ICAO, 176 P.3d 826 (Colo. Ct. Appeals)).

** Please note, the Bill specifies that Respondents may still seek contribution or reimbursement from previous employers or insurers where permitted by law. Still, Respondents may not take an up front apportionment unless permitted by this amendment.

Case Law Update

Mileage Reimbursement

Safeway Inc. v. ICAO:
No. 07CA0071 (Colo. Ct. App. April 17, 2008)

Claimant suffered a work related injury in May 2003. She drove herself to medical appointments and made no claim for mileage reimbursement until nearly three years after the injury, when she sought reimbursement for 5,464 miles driven between January 2004 and November 2006. Employer reimbursed Claimant for travel completed within 120 days of her request which totaled 970 miles. The other miles were denied based on W.C.R.P. Rule 16-11, which stated, "providers shall submit their bills for services rendered within one hundred twenty days of the date of service." The Ct. of Appeals upheld the ICAO's opinion that the Claimant was not a "provider" for purposes of the application of the Rule and ordered the Employer to reimburse Claimant for the mileage traveled.

Suspension of TTD for missed rescheduled medical appointment

Sigala v. Atencio's Market
No. 07SC73 (Colo. May 12, 2008).

The Supreme Court held that an Employer is responsible for reimbursement of suspended TTD benefits when the Claimant attends a rescheduled medical appointment after the benefits have been properly "suspended" under C.R.S. section 8-42-105(2)(c). The decision turned on an interpretation of "suspension" as being temporary and subject to reinstatement. The Firm previously emailed a detailed discussion of the holding in this case. If you did not receive this and

would like a copy, please contact any of the Workers' Compensation attorneys.

Subrogation

Gibson v. ICAO: No. 07CA0701 (Colo. Ct. App. May 8, 2008)

Confirmation that Employee must obtain Employer's consent before entering into a settlement of a third party claim under C.R.S. section 8-41-203(2) or the Employee forfeits her rights to receive future compensation benefits. Also, Employer must "make a good faith appraisal of the suit and any proposed settlement, and shall act accordingly."

Average Weekly Wage (AWW)

Berg v. Labor Ready, W.C. No. 4-726-042 (ICAP April, 10, 2008).

The ALJ used Claimant's wages at a prior employer to calculate her AWW because the Claimant had not worked for her current employer long enough to enable earnings to be fairly computed. Again the ICAO confirmed that an injured workers' AWW is based upon her remuneration at the time of injury. However, ALJs are granted broad discretion in determining "whether the circumstances of a particular case require employment of an alternative method of computing compensation benefits to arrive at a fair calculation of the employee's AWW."

Compensability – Personal Comfort Doctrine

Rodriguez v. Exempla Healthcare, Inc. W.C. 4-705-673 (ICAO April 10, 2008).

Claimant was injured while walking to a nearby coffee shop to buy a snack on her PAID break. The ICAO found that Claimant had satisfied both elements of compensability and that the claim was compensable. Specifically, the ICAO found that Claimant satisfied that the injury occurred in the course of her employment as it happened within the time of her employment and that she had satisfied the arising out of employment element as she was merely tending to personal comfort. Under the personal comfort doctrine, actions such as eating, sleeping, resting, etc. have been held as being part of employment.

Due Process

Bodensieck v. ICAO No. 07CA1022 (Colo. Ct. App. March 20, 2008).

Claimant alleged two industrial injuries, one to her right hand in 2004, and the other to her back in 2005. Claimant had two hearings and according to the presiding ALJ, failed to prove that either injury was compensable. Claimant argued on appeal that she had been denied due process because the second ALJ had not been present at the hearings but determined her testimony was not credible based solely on a review of the digital recording of the hearing. The Court of Appeals held that Claimant's due process rights were not violated by the ALJ's credibility determination based solely on a review of the digital recording.

The following is a brief outline of the common issues that employers must deal with when handling employee's who have both worker's compensation and FMLA claims. If you have any questions, please don't hesitate to give me a call.

I. FAMILY MEDICAL LEAVE ACT

FMLA requires employers with 50 or more employees to provide up to 12 weeks of unpaid, job-protected, leave during a 12 month period in order to allow an employee to

1. Care for a new child (natural or adopted);
2. Care for a sick parent, spouse or child, or;
3. Care for employee's own serious health condition.]

A. Notice

Employer's must post a notice in a conspicuous place (usually the break-room) that explains all pertinent provisions of the Act and how an employee may file a claim for violation of the FMLA with the Department of Labor. Employee's, in turn, are also required, if possible, to provide notice to their employer's of their need for leave under the FMLA.

B. Common Questions and Issues Regarding the FMLA

1. Employer can use different methods to calculate the 12 month period (calendar year, fiscal year, rolling 12 months) for purposes of determining leave use.
 2. Employers should establish a policy that employees must submit a written notice to employer to request FMLA leave.
 3. Act requires 30 days' notice to obtain leave or shorter notice where it is not reasonable to expect that employee could give advance notice.
 4. If FMLA leave is required for medical reasons for employee, spouse, child, etc. – Employer should require medical certificate prior to leave, if possible.
 5. You may require periodic reports on medical condition and notice of employee's intent to return to work and date of return.
 6. Employer's should establish a uniform policy requiring a return to work certification from employee's health care provider.
 7. Submit job descriptions and list of essential functions of position in question to health care provider prior to return to work so that employer is assured that employer is fit for duty.
 8. Identify whether second or third medical opinion will be sought -- second or third opinion is the employer's expense; if first and second opinions disagree, third opinion can be obtained.
 9. Employer can require that employee take paid leave/vacation concurrently with FMLA leave, as long as this is stated in employer's written policy regarding FMLA leave.
 10. Medical insurance/health care benefits must be maintained if employee is active. This includes requirement that employer must pay its portion of insurance premiums; however, employees are still required to pay their portion of health insurance premiums, as long as this was required prior to their leave.
 11. Life insurance/disability/and other benefits. Employees must be reinstated to their position with all existing benefits at the conclusion of the leave period without any qualifying periods.
 12. Compensation increase where across the board to all employees (not based on productivity or performance) must also be given to FMLA employee. If raise is performance/productivity based, employer can delay increase for the period of the leave -- if so stated in written notice policy.
- C. Exemption:** Highly compensated employees (defined as top 10% of the wage earners of employer) may not be entitled to FMLA leave if the imposition of the leave would cause "substantial and grievous economic injury to operations."

II. INTERPLAY BETWEEN FMLA AND WORKER'S COMPENSATION

A. If an employee is injured on the job their leave may also be covered by the FMLA if it constitutes a "serious health condition that makes the employee unable to perform the functions of the employee's job." **29 C.F.R. Section 825.112(a)(4)**. "Serious health condition" under FMLA and "injury" under workers' compensation statute, while not synonymous, are from a practical standpoint the same, due to the broad definition of "serious health condition" set forth in the Department of Labor regulations. **29 C.F.R. Section 825.114**. Prolonged medical care is not enough to qualify an injured worker for FMLA leave, the worker must also prove the he/she is unable to perform the essential functions of the job with or without accommodation. As a result of above information it is best for employer to advise employees in their FMLA policy statement that, although FMLA leave is unpaid, employees may be eligible for workers' compensation and they should refer to the employer's workers' compensation policy.

B. FMLA Leave and Workers' Compensation Leave: FMLA leave may run concurrently with a workers' compensation absence as long as the employer provides proper notice to the employee that FMLA leave has begun. **29 C.F.R. Section 825.207(d)(2)**.

1. Light Duty Jobs: The ADA does not require an employer to create a "light duty" position for an injured worker; however, a new "light duty" job may be a requested accommodation from a disabled employee.

2. Reasonable Accommodation for Light Duty: If an employee is put in a different "light duty" job after returning from a work injury, the employer still may be required to accommodate the employee in the new position.

3. Return to Work program: ADA does not make distinction between workers' compensation disabilities and other individuals with disabilities. Therefore, if company has return to work program for employees who have filed a workers' compensation claim, they must include non-workers' compensation employees in the program or risk an ADA claim. **Matos v. Phoenix**, 1993 LEXIS 9 (Ariz. Ct. App. 1993). Employer cannot require that an employee who is home with workers' compensation claim to participate in return to work program if that employee has elected to take his FMLA leave. **29 C.F.R. Section 825.702(d)(2)**; see also **29 C.F.R. Section 825.220(d)**. Employee may lose his/her temporary disability benefits if he/she refuses to report for modified/"light" duty. **C.R.S. Section 8-42-105(3)(d)**; **7 C.C.R. 1103-3 Section IX (C)(1)(d)**. Employee who rejects return to work program may lose his/her workers' compensation benefits; however, he/she remains entitled to his/her FMLA leave and can wait to return to work until it is exhausted.

C. Injured Employee's Return to Regular Job

1. Part-Time Status: Employee's return to regular job on a part time basis may constitute reasonable accommodation under ADA. If the employer does allow an employee to work part-time at their regular job, as a reasonable accommodation, it cannot reverse its decision and attempt to place the employee in an alternative position against the employee's will for the duration of the FMLA leave period. **29 C.F.R. Section 825.702(c)(3)**. Once an employee returns to his/her regular job on a part-time basis they are only entitled to those benefits ordinarily provided to part-time employees. **29 C.F.R. Section 825.702(b)**.

2. How Long Does an Employer Have to Keep Job Open for Injured Worker.

a. Workers' Compensation/FMLA Leave: Colorado's workers' compensation law does not require an employer to keep a worker's job open for any period of time. The FMLA protects a worker's job for up to twelve weeks in a leave year. If an employee does not take twelve consecutive weeks of leave under the FMLA, he/she may take the remaining leave before the end of the year. **29 C.F.R. Section 825.200 and 825.203**.

D. Settlement of ADA, FMLA and Workers' Compensation claims: ADA waivers may be ineffective in workers' compensation settlement agreements, especially if employee does not have counsel. Employers cannot induce employees to waive their rights under the FMLA; however, they can release their FMLA rights for consideration. The FMLA allows an employee to work a reduced schedule until the equivalent of twelve weeks of leave are exhausted, with health benefits maintained during this period. **29 C.F.R. Section 825.702(c)(1)**.

RESOURCES

DCWYB&E:

<http://www.dnvrllaw.com>

Colorado Division of Labor:

www.coworkforce.com

Office of Administrative Courts:

<http://www.colorado.gov/dpa/oac/>

Colorado Legislature:

www.leg.state.co.us/

Benefits Calculator:

<http://www.coworkforce.com/benefits/>

Centers for Medicare and Medicaid Services:

<http://www.cms.hhs.gov/>

Anderson v. Brinkhoff:

- i) Applies to occupational diseases only; does not apply to traumatic injuries or mental impairment.
- ii) Basic Rule I: If Claimant is equally exposed to the hazards outside of work, the claim is not compensable.
- iii) Basic Rule II: If the claim is compensable, the insurer pays only to the extent of the industrial contribution to the disability.
- iv) Get investigation of outside activities and conditions early.

DON'T FORGET!

- ✓ The mileage reimbursement rate is currently \$0.40 cents per mile.
- ✓ The State AWW will increase as of July 1, 2008. Later issues of this newsletter will supply you with the increased amount.

- ✓ To list all overpayments made on Admissions of Liability and explain the basis for the overpayment(s). Once recouped, amend the Admission if appropriate.
- ✓ Final Payment Notices should be filed within 60 days of the Final Admission.

- ✓ Thorough investigations at the scene and time of the accident/injury greatly helps defense efforts down the line.
- ✓ Please NEVER hesitate to contact us with any questions!

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The members of DCWYB&E have been practicing in the areas of Workers' Compensation Defense, Subrogation, Insurance Defense, Employment Law, and Commercial Litigation for over 18 years.

The firm currently employs 11 attorneys, 5 paralegals, and 1 office administrator. The firm is essentially a litigation boutique specializing in all types of insurance litigation, employment and securities work. In its early years, the Firm concentrated solely on Workers' Compensation defense. Three of the six Shareholders continue to concentrate in the Workers' Compensation arena. However, four of the Shareholders specialize in all areas of insurance, employment, and commercial litigation.

The attorneys and Shareholders in the Firm have significant trial, hearing and arbitration experience. And, although we are zealous advocates, we pride ourselves on evaluating matters with an eye toward economics and of course the well being of the insured and the effect a matter will have on the reputation and foundation of the company remains a primary focus.

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