

Case Law Update



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Case Law Update

Cabella v. Industrial Claim Appeals Office and United Parcel Services, and Liberty Mutual Group.
Colorado Court of Appeals No. 07CA2528 (November 13, 2008).

The Court of Appeals in the above-referenced claim provided further clarification on two regularly recurring issues. The first involved to what extent a claim is compensable in the absence of any kind of special hazard of employment. The second issue involved what happens after a treating physician declares that a condition is not work-related, and then refers the Claimant to his or her personal physician after the treating physician releases him or her.

In this case, Claimant sustained a knee injury. Specifically, it appears that Claimant felt a pop in her knee as she was sealing a cargo container that she had just loaded. Her knee then gave out without warning when she pivoted and began loading a second container. The employer argued that her knee giving out while she was standing or walking was not the result of any special hazard of

employment, but rather was an incident that was precipitated by a pre-existing knee problem. The ALJ had determined that there was a causative link between her knee popping and giving out, and her work activities. The Industrial Claim Appeals Office upheld that determination.

The Court of Appeals upheld the ALJ's determination. Although the Court of Appeals acknowledged that Claimant had testified that she believed that something was wrong with her knee as she was simply standing and signing papers prior to her knee popping, the Court of Appeals chose to uphold the ALJ's determination that Claimant's activities at the time that her knee popped and then gave out was a sufficient nexus to her work activities to make the claim compensable.

The treating physician, after determining that the claim was not compensable, referred Claimant to her personal physician for care. Claimant went to her personal physician and, from there, was referred to an orthopedic surgeon who provided treatment. At hearing, Claimant was requesting that

Respondents pay for the treatment that Claimant received from the orthopedic surgeon. The judge found that the treating physician's referral to the family physician was done on the mistaken belief that the treating physician thought the claim was not compensable. Consequently, the judge found that the treating physician's referral to the personal physician did not make the personal physician authorized, and the personal physician's subsequent referral to the orthopedic surgeon also was not authorized. The Industrial Claim Appeals Office upheld that determination.

The Court of Appeals reversed. The Court of Appeals concluded that the risk of a mistake by the authorized treating physician concluding an injury is not compensable lies with the employer. Therefore, under these circumstances, the Court of Appeals concluded that the personal physician is an authorized physician, and the subsequent referral to the orthopedic surgeon also made the orthopedic surgeon authorized.

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Consequently, in those regularly occurring instances when an authorized treating physician, after concluding that a particular condition is not work related, refers a claimant to a personal physician for treatment of that condition, the employer runs the risk that it may be responsible for treatment provided by that personal physician (as well as any subsequent referrals) if the condition is later determined to be work related. If, in certain claims, the respondents believe that the issue of whether the condition is work related may eventually be determined against that respondent, it may be cost effective to allow the authorized treating physician to continue to provide treatment for that condition. In doing so, the respondent avoids having a claimant's personal physician become an authorized treating physician.

Montoya v. Industrial Claim Appeals Office, District 60 Maintenance Center, and SCA Claims Management, No. 08CA0246 (Colorado Court of Appeals – November 13, 2008).

In this claim, the treating physician had provided Claimant with a 19% whole man rating to his low back. Respondents timely filed a Notice and Proposal to challenge the impairment rating given by the treating physician. During the pendency of the DIME, the treating physician issued a

new report amending the previous impairment rating and providing Claimant with an overall impairment rating of 14%. Respondents timely cancelled the DIME appointment, and filed a Final Admission of Liability admitting for the 14% whole man rating.

Claimant applied for hearing, seeking penalties and for an Order concluding that Respondents were bound to go forward with the DIME, and were not allowed to withdraw their request for a DIME and file a Final Admission of Liability. At hearing, the ALJ concluded that Respondents, by requesting a DIME, did not waive their right to be able to, thereafter, file a Final Admission of Liability based on another impairment rating given by the treating physician. The Industrial Claim Appeals Office upheld the ALJ's Order.

On appeal, Claimant continued to argue that, once Respondents requested a DIME, they were not allowed thereafter to withdraw their request for a DIME and file a Final Admission of Liability. However, it appears that Claimant was not able to cite any persuasive authority. The Court of Appeals stated that nothing in the pertinent statutes or rules restricted Respondents' right to cancel the DIME, or create a duty under the circumstances to complete

the DIME process.

Interestingly, Claimant apparently was arguing that in allowing Respondents to do what they did, it resulted in an unfair advantage to Respondents. The Court of Appeals rejected that argument, stating that Claimant had the right to request a DIME on his own if he chose to, and because the employer had stated that the amended impairment rating was unsolicited, Respondents had not exerted any undue influence on the treating physician to change the impairment rating.

This decision, in our opinion, does nothing more than confirm what we think is a standard practice with Respondents. If Respondents receive an impairment rating from a treating physician that they disagree with, the only option respondents have under the circumstances is to file a Notice and Proposal within thirty days from when the treating physician sent out the impairment rating. If Respondents do not request a Notice and Proposal, then Respondents are bound to the impairment rating. Respondents, then, have no choice but to request a Notice and Proposal. During the pendency of the DIME, if the treating physician amends the impairment rating, and, if

the amended impairment rating is acceptable, respondents should be allowed to file a Final Admission of Liability and cancel the DIME. The Court of Appeals, in *dicta*, seems to suggest that respondents, during the pendency of the DIME, may not be allowed to contact the treating physician to ask the treating physician to readdress his or her impairment rating. It is our opinion that Respondents should be allowed to contact the treating physician under the circumstances and ask for clarification of his impairment rating report. Indeed, there may be times where Respondents obtain medical records documenting a preexisting condition that would allow the treating physician to apportion an impairment rating. If this information were to come into Respondents possession during the pendency of a DIME, Respondents should be allowed to provide that additional information to the treating physician and request a consideration of a new impairment rating. So long as the contact with the treating physician does not rise to the level of dictating care, we believe that such contact with the treating physician is appropriate.

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