

**SPECIAL INTEREST  
ARTICLES**

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Case Law Update



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Employment Law  
Update

Payment of Mental  
Impairment Awards

Firm Profile



Dworkin  
Chambers  
Williams  
York  
Benson &  
Evans, PC

## EMERGENCY RULE HEARINGS

As discussed in the June newsletter, three changes to the Workers' Compensation Act for injuries occurring after July 1, 2008, were recently enacted by Senate Bill 08-241. The areas of the Act effected by this bill included Claimants' rights to prosthetic devices, fee scheduling of all services rendered regarding a claim whether regarding treatment or not (i.e. IMEs), and apportionment of medical treatment and impairment ratings.

After allowing time to evaluate application of the changes, the Colorado Division of Workers' Compensation identified a need to change the Workers' Compensation Rules of Procedure to facilitate the changes to the Act.

Because of implementation problems, the Division has already implemented emergency changes to Rule 12-3 and Rule 5-5. The changes are not yet permanent and are subject to formal adoption. (See text of Rule 12-3 and subsection J of 5-5 on Page 2).

The Hearing for adoption of these rules has been scheduled for August 11, 2008, and if accepted, the changes will become a final addition to the Workers' Compensation Rules of Procedure.

Later editions of this newsletter will provide you with the final outcome of these proceedings.

## Rule 12-3

**W.C.R.P. Rule 12-3:** Rule 12-3 has been changed to read:

FOR CLAIMS WITH A DATE OF INJURY ON OR AFTER JULY 1, 2008, THE LEVEL II ACCREDITED PHYSICIAN MAY PROVIDE AN OPINION ON APPORTIONMENT FOR ANY PRE-EXISTING [CONDITION] WHERE MEDICAL RECORDS OR OTHER OBJECTIVE EVIDENCE SUBSTANTIATE A PRE-EXISTING IMPAIRMENT. ANY SUCH APPORTIONMENT SHALL BE MADE BY SUBTRACTING FROM THE INJURED WORKER'S IMPAIRMENT THE PRE-EXISTING IMPAIRMENT AS IT EXISTED AT THE TIME OF THE SUBSEQUENT INJURY OR OCCUPATIONAL DISEASE. THE PHYSICIAN SHALL EXPLAIN IN THEIR WRITTEN REPORT THE BASIS OF ANY APPORTIONMENT. IF THERE IS INSUFFICIENT INFORMATION TO MEASURE THE CHANGE ACCURATELY, THE PHYSICIAN SHALL NOT APPORTION. THE PHYSICIAN MAY BE ASKED TO PROVIDE AN OPINION AS TO WHETHER THE PREVIOUS MEDICAL IMPAIRMENT WAS IDENTIFIED, TREATED AND INDEPENDENTLY DISABLING AT THE TIME OF THE WORK-RELATED INJURY THAT IS BEING RATED.

- (1) THE EFFECT OF THE PHYSICIAN'S APPORTIONMENT DETERMINATION IS LIMITED TO THE PROVISIONS IN C.R.S. 8-42-104. WHEN FILING AN ADMISSION AN INSURER MAY APPORTION ONLY IF DOCUMENTATION IS PROVIDED REFLECTING COMPLIANCE WITH 8-42-104.
- (2) THE LEVEL II ACCREDITED PHYSICIAN MAY PROVIDE AN OPINION ON THE APPORTIONMENT OF MEDICAL AND TEMPORARY DISABILITY BENEFITS. THE CLAIMANT'S RECEIPT OF MEDICAL AND TEMPORARY DISABILITY BENEFITS MAY NOT BE REDUCED BASED UPON ANY SUCH OPINION.

## Rule 5-5

### **W.C.R.P Rule 5-5**

A new section to Rule 5-5 has been added under subsection (J). The Rule has been changed to state:

THIS SECTION (J) APPLIES TO CLAIMS WITH A DATE OF INJURY ON OR AFTER JULY 1, 2008. A CARRIER MAY NOT REDUCE A CLAIMANT'S TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY, OR MEDICAL BENEFITS BECAUSE OF A PRIOR INJURY, WHETHER WORK RELATED OR NON WORK RELATED.

IF PERMANENT IMPAIRMENT RATING IS REDUCED ON AN ADMISSION PURSUANT TO SECTION 8-42-104, A COPY OF THE PREVIOUS AWARD OR OTHER DOCUMENTATION SUPPORTING THE APPORTIONMENT MUST BE ATTACHED TO THE ADMISSION.

## **Shelton v. Eckstine Electric Company, W.C. 4-724-391:**

Respondent sought review of an Order denying the compensability of his claim. He sustained an injury when he bent down to inspect an outlet box when his knee “popped.” It was undisputed that Claimant suffered from a pre-existing knee condition. The ALJ found that Claimant aggravated his underlying condition when he bent down to inspect the outlet. However, the ALJ found that because there was no special hazard of the workplace that caused the injury, Claimant had not suffered a compensable claim. On review, the ICAP held that because the ALJ found that the work act of bending down to inspect the outlet was the precipitating cause of the injury, he did not need to assess whether there was a “special hazard” of the workplace that contributed to the work injury. The ICAP held that the special hazard doctrine is only evaluated where the pre-existing condition is the precipitating cause of the injury, not a work function. The claim was found compensable.

## **Pommerening v. Advantage Pawn, Inc., W.C. No. 4-698-275:**

Claimant suffered an injury when he ran out of the workplace to stop a customer who had attempted to pawn an item which Claimant happened to know was stolen. Respondents asserted that Claimant had willfully violated a safety rule contained in the Employee Handbook which stated that “employees were never to incite a dangerous situation, never put oneself or fellow employees at risk, never attempt to confront, subdue, or apprehend a person in the act of a crime and never attempt to confiscate property suspected of being stolen.” The ICAP upheld the ALJ’s findings that the safety rule was sufficiently definite to warrant compliance therewith and reduced the Claimant’s benefits by 50% in accordance with statute.

## **Perez v. Radio Shack Corporation, W.C. No. 4-731-877:**

Claimant was scheduled to be off work on the date of the injury, but came in for his annual review as scheduled. When he arrived at the workplace, the supervisor asked him to go play golf and that they would discuss his review while they golfed. During the golf trip it began to rain and the manager wanted to speed up play so he asked the Claimant to ride in the back of golf cart. While riding on the back, Claimant fell off sustaining a head injury. After evaluating the “totality of the circumstances,” the ALJ found that Claimant had sustained a compensable injury because although the golf outing was recreational in nature, Claimant’s participation was not voluntary, and was at the discretion of his supervisor for business-related activities. The ICAO upheld the ALJ’s findings.

**Jackson v. Curtis Maddox, W.C. No. 4-719-337:**

After reviewing the totality of the circumstances the ALJ determined that the Claimant was an Independent Contractor. Whether a Claimant is an employee or an independent contractor is a question of fact for the ALJ and centers on whether the individual is: paid a salary or hourly rate instead of a fixed contract rate; paid in his individual name rather than a trade or business name; whether the Respondent provides no more than minimal training to the claimant; whether Respondent dictates the time of performance; whether Respondent establishes a quality standard for the claimant's work; whether Respondent combines its business with the business of the claimant; whether Respondent requires the claimant to work exclusively for one person or company and whether Respondent cannot terminate the claimant for any reason. Here the ALJ found that the Claimant was an employee of the Respondent after making the following factual findings: The claimant was paid approximately \$500 to \$600 in cash each week. The claimant was not free from direction and control in the performance of his duties. The respondent visited the work site daily, instructed the claimant and other workers about the activities to be performed, and reviewed the work that had been completed, and the claimant was not customarily engaged in an independent business related to plumbing services. Accordingly, the ALJ found that Claimant had suffered a compensable injury when he was assaulted as part of his job duties.

**Harris v. Golden Peaks Nursing, W.C. No. 4-680-878:**

When a claimant's pre-existing, non work-related, condition is aggravated or accelerated by a work-related injury which subsequently requires treatment, the injury is considered to be compensable. The ALJ, however, is responsible for determining whether this need for treatment is caused by an on the job aggravation to the pre-existing condition, or rather if the need for treatment is simply due to the degenerative nature of the pre-existing condition.

<b>Don't Forget!</b>		
<ul style="list-style-type: none"><li>✓ The State AWW has increased to \$863.93 as of July 1, 2008.</li><li>✓ The Maximum Compensation Rate has increased to \$863.93 as of July 1, 2008.</li></ul>	<ul style="list-style-type: none"><li>✓ The maximum allowable award for disfigurement benefits increased as of July 1, 2008. As of July 1, 2008, the maximum amount which can be awarded to a Claimant is now \$4,174.00 and up to \$8,384.00 for extensive facial scars or facial burn scars; extensive body scars or burn scars; or stumps due to loss or partial loss of limbs.</li></ul>	<ul style="list-style-type: none"><li>✓ Please NEVER hesitate to contact us with any questions!</li></ul>

On May 7, 2008, Colorado Governor Bill Ritter signed legislation that modifies the Colorado Antidiscrimination Act to prohibit discrimination against employees for failing to maintain the confidentiality of their wages/salaries. The legislation (Senate Bill 122) becomes effective August 6, 2008.

Under the law, it is a discriminatory or unfair employment practice for an employer to “discharge, discipline, discriminate against, coerce, intimidate, threaten, or interfere with any employee or other person because the employee inquired about, disclosed, compared or otherwise discussed the employee’s wages; to require as a condition of employment nondisclosure by an employee of his or her wages; or to require an employee to sign a waiver or other document that purports to deny an employee the right to disclose his or her wage information.”

If you currently have an employee handbook that prohibits employees from discussing their salary information with co-workers this provision should be removed.

## CLARIFICATION OF DIVISION’S POSITION WITH RESPECT TO PAYING OUT MENTAL IMPAIRMENT AWARDS:

Our firm has recently come across an issue where we have received several different answers from the Division of Workers’ Compensation. The issue is whether mental impairment awards are subject to the statutory caps set forth in C.R.S. § 8-42-107.5. The following is the Division’s official position with respect to the above issue:

In the case of Dillard v. ICAP, 134 P.3d (Colo. 2006), the Colorado Supreme Court held that C.R.S. §8-42-107(7)(b)(III) precludes combining a mental impairment rating with a physical impairment rating for the purposes of obtaining the benefit of the higher cap set forth in 8-42-107.5.

Claims of mental impairment are defined in C.R.S. §8-41-301(2)(a), the section titled “conditions of recovery” and limits the Claimant to 12 weeks of mental impairment benefits, not less than \$150,000 and not more than 50% of the state AWW. It does not take into account if impairment for “mental” is 1% or 50%, all receive similar benefits.

C.R.S. § 8-42-107(7)(b)(III) provides that mental or emotional stress shall be compensated pursuant to 8-41-301(2) and shall not be combined with a scheduled or nonscheduled injury. C.R.S. §8-42-107.5 limits the payment of temporary and permanent partial disability benefits to a Claimant whose impairment rating is 25% or less, and increases the amount of benefits awardable to a Claimant whose impairment is greater than 25%.

Thus, the Division is essentially saying that if Claimant cannot combine the mental impairment to receive the next level of the applicable statutory cap, a carrier cannot take credit for the 12 weeks of benefits to limit payment of PPD benefits in the application of the lower cap.

## ABOUT OUR ORGANIZATION

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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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