

Legislative Update

Article



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Legislative Update 2009

Four bills involving workers' compensation were introduced in the Senate in 2009. One bill involving Workers' Compensation was introduced into the house in 2009. These bills include Senate Bill 37, Senate Bill 70, Senate Bill 168, Senate Bill 243, and House Bill 1150. At this point, all of these bills have been signed into law by the governor.

SENATE BILL 37

Senate Bill 37 changes the way by which the Director determines and collects the tax on premiums for the purpose of funding both the Major

Medical Fund and the Subsequent Injury Fund. The general purpose of Senate Bill 37 is to eliminate premium taxes paid by employers into the Subsequent Injury Fund and the Major Medical Fund.

SENATE BILL 70

Senate Bill 70 first amends Section 8-42-105 to reflect that the first installment of temporary disability benefits must be paid no later than the date that liability for the claim is admitted. This new language replaces the previous language in which the first installment of compensation of temporary disability benefits needed to be paid no later

than the 20th day after the insurance carrier had written notice of knowledge of this claim, unless the claim is denied.

Senate Bill 70 also amends Section 8-42-111(5). That provision provided that for injuries occurring between July 1, 1991 and before July 1, 1994, permanent total disability benefits would cease when the employee reached the age of 65 years. Senate Bill 70 eliminated that provision.

Senate Bill 70 also amended Section 8-43-301(2), which is the Petition to Review provision. The amendment identifies the location of the filing of the Petition to

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Review Final Orders. Previously, the Petition to Review needed to be filed in the specific docket location. For example, if Grand Junction ALJ issued an Order, the Petition to Review needed to be filed in the Grand Junction docket. Senate Bill 70 provides that all Petitions to Review need to be filed at the Denver office of the Office of Administrative Courts. This certainly is helpful in eliminating the confusion of where a Petition to Review needs to be filed. As of now, all Petitions to Review should be filed in the Denver office of the Office of Administrative Courts.

SENATE BILL 168

Senate Bill 168 first

amends Section 8-42-107.2(3), which is the DIME provision. Senate Bill 168 states that the DIME physician cannot contact any of the authorized treating physicians, or any IME physician. It also provides that the DIME physician cannot request that Claimant undergo repeat testing when the testing results were valid and the DIME physician had resolved any disparity in testing results. This particular provision contemplates the situations where the DIME physician, despite obtaining a valid range of motion testing, still has concerns about the validity of the testing performed, given the discrepancies in previous testing. The DIME physician no longer has the

option of bringing the Claimant back for repeat testing. Basically, the DIME physician has to, at that point, decide whether to accept the range of motion measurements that he obtained, or conclude that the range of motion testing measurements that he obtained are not valid because of significant amount of disparity.

Senate Bill 168 amends Section 8-42-113.5(1), which is the overpayment statute. Senate Bill 168, in essence, creates a one-year statute of limitations from the date of the filing of the Final Admission of Liability to attempt to recoup any overpayment. This

provision does provide exceptions to the one-year statute of limitations in case of fraud.

Senate Bill 168 amends Section 8-43-201 by providing that any party seeking to modify an issue determined by a General or Final Admission, a Summary Order, or a Full Order, bears the burden of proof for any such modification. Obviously, if Claimant is going to challenge the amount of benefits admitted to in a General Admission of Liability or a Final Admission of Liability, he would continue to have the burden of proof. What Senate Bill 168 fundamentally changes is the

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burden that Respondents will have if Respondents attempt to challenge an issue that was resolved in an Admission of Liability or in an Order. The best example of how this is going to change the burden of proof involves maintenance care. Typically, Respondents will admit for Grover medical as part of most Final Admissions of Liability. What Senate Bill 168 purports to do is to shift the burden of proof to Respondents if Respondents challenge whether certain maintenance treatment is reasonable and necessary or related to the injury. Prior to the passage of Senate Bill 168, Claimant always continued to have

the burden of proving that any maintenance care that is being offered to him by the treating physician is reasonable and necessary and related to the injury. In essence, if Respondents are challenging maintenance care on the basis of reasonable and necessary and/or related to injury, Respondents now have the burden of proof.

Senate Bill 168 also amends Section 8-43-203(2)(b)(II). Section 8-43-203(2)(b)(II) provided that a Claimant was not required to file an Application for Hearing until after the DIME process had been completed. Senate Bill 168 changes that language to state that Claimant

is not required to file an Application for Hearing until the DIME process is terminated for any reason. Senate Bill 168 also provides that any issue for which a hearing or Application for Hearing is pending at the time that the Final Admission of Liability is filed, shall proceed to hearing without the need for the applicant to refile an Application for Hearing on the issue. This language, again, favoring the Claimant, addresses situations where Respondents have requested a DIME, proceeds to challenge the DIME by filing an Application for Hearing, and, during the pendency of the hearing,

determines to file a Final Admission of Liability to admit for the DIME rating. At that point, even though Claimant may have applied for hearing to challenge the DIME once the new Final Admission of Liability is filed, Claimant would be required to file a new Application for Hearing on issues ripe for adjudication. Senate Bill 168 now provides that all issues that are pending for hearing at the time that Respondents file a Final Admission of Liability can continue to hearing without Claimant having to reapply for hearing.

Senate Bill 168 also amends Section 8-43-404, which is a statutory provision providing for independent medical

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examinations. Senate Bill 168 mandates that when Claimant is required to attend an IME requested by Respondents, the IME physician must prepare a written report giving a description of the examination performed, the medical records that he reviewed, and all findings or conclusions of his examination. Frankly, this particular provision has been mandated for some time. In the past, if Respondents require Claimant to attend an IME, the IME physician must prepare a report. Indeed, Respondents have been hit for significant penalties based on situations where Respondent or counsel for Respondent had instructed the IME

physician not to issue a report.

Senate Bill 168 also amends Section 8-43-404 to indicate that, at this point, all IMEs must be recorded in their entirety and retained by the IME physician until requested by any party. The IME physician must notify Claimant that he will be taping the IME. Senate Bill 168 also states that, if requested, an exact copy of the recording shall be provided to the parties. Unfortunately, Senate Bill 168 does not state who has to pay for those recordings. Finally, Senate Bill 168 states that the parties have an independent right to record the IME.

SENATE BILL 243

Senate Bill 243 amends various provisions of the Worker's Compensation Act, in essence, to allow the combination of any mental impairment with any whole man impairment for purposes of determining whether an overall impairment rating is over the \$75,000 cap. Prior to Senate Bill 243, the mental impairment rating was not combined with any whole man impairment for purposes of determining whether the cap has been exceeded. In other words, if Claimant had a 23% whole man rating for a low back, and a 5% rating for a psych impairment, the \$75,000 cap would apply. From this point forward,

under that example, the \$75,000 cap would not apply. Senate Bill 243 also amends Section 8-42-101(3)(a)(I) to reflect that the fee schedule is still applicable for the payment of maintenance care.

Senate Bill 243 also amends Section 8-43-404 by adding Subsection (9)(a). Senate Bill 243 provides that healthcare services shall be deemed authorized when the claim is found to be compensable when:

- Compensability of the claim is initially denied,
- services of the authorized treating physician are not tendered at the time of the injury and
- the injured worker is treated at a public health facility (like Denver General).

Senate Bill 243

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goes on to state that a Claimant shall not be liable for payment for treatment by these providers if the treatment is reasonably needed and related to the injury. Frankly, it is established law that treatment provided by healthcare providers for a denied claim is authorized in circumstances when the employer does not direct the injured worker to an authorized treating physician. Indeed, an argument can be made that, because of this particular amendment, Respondents would not be liable for this kind of care in the future, unless such care has been provided by a public health facility.

HOUSE BILL 1150

House Bill 1150

amends Section 8-43-211 to allow the Office of Administrative Courts to send notices of hearings to parties via electronic mail. Consequently, when hearings have been set, the Notice of Hearings that typically were mailed out is now going to be e-mailed out.

CONCLUSIONS

As outlined above, the bills that have been passed into law have created significant statutory changes in numerous areas of the Workers' Compensation Act. If you have any questions about any of the new legislation this year, please contact this office.

Article

Income Eligibility for Indigent Claimant's seeking DIMEs

Effective August 1, 2009, the monthly income eligibility guidelines increase for indigent Claimant's seeking DIMEs. According to Rule 11-11(a), the eligibility yearly income ranges from as little as \$13,500 for an individual, up to \$46,263 for Claimant and a family size of eight.

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/>

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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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