

Offsets,  
Overpayments &  
Credits



Professionals in  
Workers'  
Compensation  
(PWC)



Subrogation article  
by Steven G. York,  
Esq.

Case Law Update

Don't Forget!



Reference Links

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Evans, PC

## Offsets, Overpayments & Credits

David J. Dworkin, Esq. of our offices will be presenting at the upcoming Spring Workers' Compensation Update presented by the Colorado Bar Association, discussing effective recovery strategies for Offsets, Overpayments & Credits. The following will provide a quick overview of these topics.

### I. OFFSETS PURSUANT TO 8-42-103

- A. SOCIAL SECURITY DISABILITY – 50% offset of TTD, TPD, PPD, PTD, for benefits awarded an individual and their dependants. Social Security Disability offset terminates at age 65 unless claimant was over age 45 on date of loss. (c)(I)
- B. SOCIAL SECURITY RETIREMENT – 50% offset of PTD if employee at least 45 on date of loss. (c)(II)
- C. SOCIAL SECURITY DEATH BENEFIT – 50% offset against DEATH BENEFITS payable to dependents. (c)(II)
- D. EMPLOYER PAID RETIREMENT - percentage of employer paid retirement benefits offset PTD if employee at least 45 on date of loss. EXCEPTION: No offset allowed if retirement account created and funded pursuant to a collective bargaining agreement. (c)(II, II.5)
- E. EMPLOYER FINANCED PENSION OR DISABILITY PLAN – proportional percent of employer contribution to the plan offsets TTD, TPD, PPD, and PTD but only if terms of pension or disability plan do not preclude offsets. EXCEPTION: statutory fire and police pension plans shall not reduce below 100% of the state average weekly wage applicable to the year the disability benefits are paid. (d).
- F. WORKERS COMPENSATION BENEFITS FROM ANOTHER STATE OR FEDERAL GOVERNMENT – dollar for dollar offset against TTD, TPD, PPD, PTD. (e)
- G. UNEMPLOYMENT COMPENSATION – dollar for dollar offset against TTD, TPD, PTD unless unemployment benefit amount already reduced by temporary total disability benefit amount or if unemployment requested because work comp denied. (f).

## Offsets, Overpayments & Credits

### II. OVERPAYMENTS:

**Defined:** An overpayment is money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under the Workers' Compensation Act. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received workers' compensation disability or death benefits. C.R.S. §8-40-201(15.5).

Recovery of certain overpayments:

- a) Specific procedures exist for recovery of overpayments that result from Claimant's receipt of payment, award, or entitlement to benefits under the Federal Old-Age, Survivors, and Disability Insurance Act, an employer-paid retirement benefit plan, or any other plan, program, or source for which the original disability benefits or death benefit is required to be reduced pursuant to the Workers' Compensation Act and the offset is not already reflected in the workers' compensation disability or death benefit amount. C.R.S. §8-42-113.5. (ICAO held this section applies to wages received from a subsequent employer. Scruggs v. UPS, W.C. No. 4-490-474 (1/27/04)).

A claimant must report in writing receipt of payment, award, or entitlement to benefits under the Federal Old-Age, Survivors, and Disability Insurance Act, an employer-paid retirement benefit plan, or any other plan, program, or source for which the original disability benefits or death benefit is required to be reduced pursuant to the Workers' Compensation Act. C.R.S. §8-42-113.5.

Respondents must specifically reference claimant's obligations to report in the written admission or notice of contest. C.R.S. §8-43-203(1).

If claimant gives written notice within twenty days after learning of such payment, award, or entitlement, respondents may recover any overpayment in installments at the same rates, or a lower rate than, the rate at which the overpayments were made. Recovery shall reduce the disability benefits or death benefits after all other applicable reductions have been made. C.R.S. §8-42-113.5.

If claimant fails to give timely notice, respondents are authorized to cease all disability or death benefit payments immediately until the overpayments have been recovered in full. C.R.S. §8-42-113.5.

If recovery of overpayments against ongoing benefits is not practicable, the respondent may seek an order for repayment. C.R.S. §8-42-113.5

The Director and Administrative Law Judges are empowered to determine overpayment issues. C.R.S. §8-43-207(1)(q).

Respondents may convert an order for repayment of an overpayment into a judgment in the district court and then try to collect on the judgment. Respondents must (1) file a certified copy of any final order of the Director or an Administrative Law Judge ordering repayment of overpayments with the clerk of the district court of any county in Colorado at any time after all appellate rights have run; (2) at the same time file a certificate to the effect that the time for appeal or review has passed or been exhausted; (3) the clerk of the district court records the order and the certificate in the judgment book and makes an entry in the judgment docket following which execution on the judgment may issue as in other cases. C.R.S. §8-43-306

Reopen for Overpayment: A case may be reopened at any time within six years after the date of injury on the ground of overpayment. Upon a prima facie showing that the claimant received overpayments, the award shall be reopened solely as to the overpayments and repayment shall be ordered. C.R.S. §8-43-303.

An insurance carrier cannot waive their right to Social Security offset and may take the offset at any time without the need to reopen first. Johnson v. ICAO, 761 P.2d 1140 (Colo. 1988).

- b) Incarceration: An individual who is ineligible for worker's compensation benefits due to incarceration shall repay to the respondent any amounts received while not eligible. C.R.S. §8-42-113(1.5)(b).

### III. CREDITS

Permanent disability benefits awarded by admission are retroactive to the date of maximum medical improvement. An insurer shall receive credit against permanent disability benefits for any temporary disability benefits paid beyond the date of maximum medical improvement. WCRP 5-6(C, D).

Respondents may credit permanent partial disability benefits paid after commencement of permanent total disability against permanent total disability payments. Moran v. HealthOne/Spaulding Rehabilitation Hospital, 4-424-488 (January 26, 2005).

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## ■ PROFESSIONALS IN WORKERS' COMPENSATION (PWC)

We are proud to announce that our firm is now a sponsor of the Professionals in Workers' Compensation. Look for our logo on the PWC website at [www.PWCColorado.com](http://www.PWCColorado.com).

This year we are a Gold Sponsor of the PWC Awards Banquet, so look for our logo on cocktail napkins and more!

PWC is an organization that provides both educational opportunities as well as networking opportunities for all types of professionals involved with Workers' Compensation. We are thrilled to support this innovative, non-biased Organization. PWC holds rotating monthly happy hours and "Lunch and Learn" seminars.

Erika L. Alverson, Esq., with our firm served as Secretary of the PWC in 2008 and has accepted the position again for 2009. Please feel free to contact her should you wish to join the Organization, or if you need information on one of PWC's upcoming events!

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## ■ SUBROGATION ARTICLE

Steven G. York, Esq. recently published an article in the Winter 2009 Edition of NASP's Subrogator magazine. The article was entitled "My Insured was injured on the job, and it wasn't his fault! Effective Subrogation Strategies for the Worker's Compensation Insurer." Please visit our website for a copy of this informative article! [www.dnvrllaw.com](http://www.dnvrllaw.com).

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## CASE LAW UPDATE

### **Bianghi v. Walmart, W.C. No. 4-749-717 (Jan. 16, 2009)**

Where the treating physician concluded that the claimant's carpal tunnel syndrome arose from a combination of diabetes, obesity, and repetitive forceful grasping at work, it was a reasonable inference for the ALJ to conclude that the repetitive forceful grasping that occurred on the job caused, intensified or aggravated the claimant's carpal tunnel syndrome to some reasonable degree.

### **Nilsen v. Legacy Trucking, W.C. No. 4-711-855 (Dec. 23, 2008)**

Whether the decedent and spouse were living together at the time of death, not only at the time of the injury, is relevant to a claim for dependent's benefits.

### **Avalanche Industries v. Clark – NOT PUBLISHED**

While calculation of a claimant's average weekly wage is generally tied to the time of injury, the statute affords an ALJ the discretion to determine a claimant's average weekly wage, including the claimant's cost for COBRA insurance, based not only on the claimant's wage at the time of the original accident, but that which existed at a time years later when the claimant became unable to work.

## Don't Forget!

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| <ul style="list-style-type: none"><li>✓ The Division has promulgated form settlement agreements. Please see the Division's website for a copy of the form Agreement.</li></ul> | <ul style="list-style-type: none"><li>✓ Mandatory Insurer Reporting (MIR) Compliance with CMS becomes effective July 1, 2009 for all cases involving Medicare beneficiaries. Please give us a call from more information.</li></ul> | <ul style="list-style-type: none"><li>✓ Mileage was increased on January 1, 2009 to \$0.55 per mile.</li><li>✓ Please NEVER hesitate to contact our office with any questions.</li></ul> |
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## RESOURCES

DCWYB&E:

<http://www.dnvrllaw.com>

Colorado Division of Labor:

[www.coworkforce.com](http://www.coworkforce.com)

Office of Administrative Courts:

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

Colorado Legislature:

[www.leg.state.co.us/](http://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 attorneys 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.

## CONTACT US!

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