

All About Claims

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All About Claims is a newsletter published by the Colorado Division of Workers' Compensation designed to provide information to claims handlers. Please send comments or suggestions for future topics to JoAnne Ibarra at 303.318.8790 or by e-mail to JoAnne.Ibarra@state.co.us.

Statute Requiring IMEs Ruled Unconstitutional As Applied to Indigent Claimants

In a decision dated November 5, 2001, Denver District Court Judge John McMullen issued a declaratory judgment finding specific sections of Colorado's workers' compensation statute and rule to be unconstitutional. The order addressed issues of equal protection and due process rights relating to indigent claimants and the requirement that a Division Independent Medical Evaluation (DIME) precede prosecution of a claim at hearing. *Smith v. Whiteside, et al*, 00CV9120

The class action lawsuit, which was decided on behalf of Marvin Smith and other similarly situated individuals, involved the case of a 30-year old truck driver who suffered injuries to his lower back and right hip in November of 1991. Senate Bill 218 had become law in July of that year and the injury followed on the heels of one of the largest pieces of workers' compensation legislative reform in decades. Pivotal to the case was the requirement that any party disputing findings of maximum medical improvement (MMI) or whole person impairment, first obtain an independent medical opinion prior to setting the matter for hearing. The basic cost of the evaluation was set at \$450.00, and was required to be prepaid by the requesting party. If challenged, the IME opinion could only be overcome by clear and convincing evidence. The underlying purpose was to reduce litigation and discourage the expense and delay of "dueling doctors" in the hearing room.

In his decision, District Court Judge John McMullen found specific sections of Colorado's statute and rule unconstitutional and "the risk of erroneous deprivation of benefits [to be] substantial." The court determined that there was no apparent reason why procedural safeguards could not be implemented to give the indigent claimant some "meaningful opportunity to be heard...without undue administrative or fiscal burden."

The Division and the Industrial Claim Appeals Panel appealed this ruling to the Colorado Supreme Court. In the meantime, the Division adopted emergency amendments to its rule instituting a system whereby injured workers who are determined financially indigent, and who wish to contest a finding of MMI or medical impairment, may obtain a DIME. The purpose was to address the constitutional issues and to ensure that the process not impede access to administrative or judicial remedies for the class. The rule essentially allows the insurer to advance the cost of the DIME at the front end and to recover costs as an offset against permanent indemnity benefits, once the case is final. Public hearings have been held and the rule was effective on April 1, 2002.

To obtain a copy of the rule, you can log onto our website at www.coworkforce.com/DWC/, and click on *Rules of Procedure, Workers' Compensation Rules*. Then click on Rule XIV and scroll down to (P).

The Pinnacol Foundation - A Scholarship Program

Pinnacol Assurance, the largest provider of workers' compensation insurance in Colorado, has established a foundation to provide financial assistance to children of Colorado workers whose parents(s) were killed or permanently and totally disabled in a compensable work-related accident.

Recognizing that education is the key to Colorado's future, Pinnacol Assurance hopes to further serve the employers and employees of Colorado by providing scholarship opportunities for these children.

For information on this program, visit the website of Pinnacol Assurance at: <http://pinnacol.com/foundation>

Rules, Rules and a Few More Rules

When circumstances dictate, rules follow. Here is the gist of recent rule making activity at the Division:

Rule VIII, *Workers' Compensation Hearings, Effective April 1, 2002*

The purpose of these amendments was to eliminate, wherever possible, potential delays occasioned by the co-location of the prehearing and merit ALJs and to provide the workers' compensation community with specific information on the new filing requirements under Section M, Place of Filing. Subsequent amendments were proposed to increase efficiencies and impact nearly all parts of Rule VIII. These changes are to provide greater definition, predictability, and flexibility in the hearings process.

Here are some of the highlights:

Scheduling of Hearings

- Listing what constitutes good cause for obtaining an extension of time to commence or continue a hearing, including those circumstances which do not constitute good cause, absent additional grounds.

Motions

- Requirement that an attempt be made to confer with the opposing party on a motion where appropriate, and inclusion of a statement as to the status of that motion--i.e, whether the motion is contested, uncontested or stipulated;
- Delegation of ministerial authority to a motions clerk to grant motions that are unopposed or stipulated; and
- Standards for filing motions by facsimile.

Discovery

- Increased clarity on the use of discovery tools as they pertain to interrogatories and depositions;
- Establishment of a "willful" standard for failure to comply with an order to compel discovery (acknowledging that "willful" is triggered by failure to perform, following issuance of a lawful order);
- Parity of in-person testimony with telephone, deposition or report testimony; and
- Use of a privilege log.

Transcripts of Hearing

Addition of a new section that allows for increased flexibility in the creation of a hearing record.

Disfigurement Award

- Addition of a section that expressly defines the practice that has been in place to review claims for disfigurement awards and to provide a method for reconsideration of an award that was predicated on photographic review.

Rule XIV, *Medical Cost Containment, Effective April 1, 2002*

Section P, *Indigent Claimant*, is specific to the Division IME (DIME) process and was adopted as an emergency rule following a decision by District Court Judge John McMullen finding specific sections of Colorado's statute and rule to violate equal protection and due process rights of indigent claimants by denying access to the sole remedy for contesting maximum medical improvement and whole person impairment (See *Statute Requiring IMEs Ruled Unconstitutional As Applied to Indigent Claimants, page 1, of this issue.*)

The purpose of this section is to establish a process (application, parameters, time frames, criteria, etc.) for determining whether a claimant is indigent and, to ensure access to remedies afforded through Division Independent Medical Evaluation. In cases where a claimant is determined indigent, the rule provides for the insurer or employer to advance the cost of the DIME. Reimbursement may only be taken as an offset against permanent impairment once an admission or order has become final.

Rule XIX, *Permanent Impairment Rating Guidelines, Effective May 1, 2002*

A change to the mental impairment worksheet was adopted and is effective on May 1, 2002 for dates of service on or after May 1, 2002. The new form is longer than the current form *WC-M3-Psych*, although the elements for evaluation are only minimally changed. The new worksheet includes a formula for calculating the impairment rating which, coupled with enhanced instructions and the addition of an Appendix, should improve consistency in the assignment of mental impairment ratings. Included in the worksheet, is a space for the clinician to specify a diagnosis based on the DSM-IV (the manual of psychiatric diagnoses). If such diagnosis is not included, the worksheet may be deemed incomplete. The reference for the new mental impairment worksheet is **Rev. 03/02 WC-M3-Psych**, and the previous version of the form should not be used after May 1, 2002.

For more information or to review the rules on-line, go to www.coworkforce.com/DWC/ and click on Rules of Procedure: Workers' Compensation Rules.

A Few More Changes to Let You Know About...

Due to recent events, we face change that comes more as a result of necessity than design. Last summer, the *All About Claims* newsletter carried an article about the need to adapt service to the prevailing workforce (*Keeping up with the Division...Adapting Service Delivery in a Changing Workforce*, Volume 16, June 2001). We noted that the Department of Labor and Employment was second highest in the number of retirement-eligible employees among state departments. Add to this, across-the-board state budget cuts and the recently enacted freeze on hiring of state employees and contract workers.

Last fall, the retirement of Carolyn Boyd, former workers' compensation attorney and Assistant to the Director, left a significant impact on in-house resources. Retirement announcements by Jacquelin Calvert, Deputy Director, Barbara Carter, Manager of Special Funds, and Kathy Banning, Communications Manager, gave notice of the on-going loss of historical memory in a system that has undergone dramatic change with efforts to make it more balanced, responsive, and equitable.

The Deputy Director role, which has historically provided direct oversight of personnel and budgetary matters, has been abolished and the duties reallocated between Robert Summers, who has extensive experience in personnel and budget administration with the state, and Paul Tauriello, who is experienced in risk management and state budgetary practices. JoAnne Allen Ibarra, who has over 20 years claims experience

and is Editor of the All About Claims newsletter, will head up the Communications Unit.

In addition, two positions were recently filled prior to announcement of the hiring freeze. Attorney David Schutzenhofer has filled the position vacated by Carolyn Boyd. Mr. Schutzenhofer's history includes employment at the Division in the mid-nineties when he served as the Division's Rules Coordinator and representation of the Subsequent Injury Fund as an Assistant Attorney General. Most recently, Mr. Schutzenhofer was a Hearings Referee with Unemployment Insurance Claims. In his new role, he will provide training to division staff, and assist the Director with formulation of the Division's legal policy. Robert Klingler, former Subrogations Officer and attorney for Pinnacol Assurance, is the new Manager of the Special Funds Unit. In addition to his law degree, Mr. Klingler holds an MBA and a degree in economics.

Though change is often equated with loss, we continue efforts to deliver the best of public service to the Colorado community. On the practical side, change often results in process evaluation and increased efficiency. We are confident of a positive outcome. Our commitment to the Colorado workers' compensation system remains intact and we look forward to finding better ways to respond and provide service to a small but strong workers' compensation community.

Western Association of Workers' Compensation Boards 30th Annual Convention

The Colorado Division of Workers' Compensation, in association with the WAWCB is hosting the 30th Annual WAWCB Convention at the Adams Mark Hotel in Denver, Colorado May 12 – 15, 2002. The WAWCB is a non-profit corporation consisting of eighteen Western Workers' Compensation agencies organized for the purpose of promoting education and information exchange on Workers' Compensation in the West. Nationally and regionally noted specialists and experts will be speaking about issues affecting workers' compensation. Social activities will include a tour of the

Coors Brewing Company, a visit to Buffalo Bill's Grave and Museum and dinner, music, and dancing at the historical Chief Hosa Lodge. For more information on this convention, please visit the Division's website at www.coworkforce.com/DWC/ and click on [Training and Events](#). Early-bird registration has been extended until April 15, 2002 and 17 General Continuing Legal Education credits are available for attorneys. The Division is looking for organizations or individuals who would like to sponsor a break, breakfast, dinner, reception, or portion thereof, during the convention. Exhibitor booths will

be available throughout the convention. If you are interested in being an exhibitor or sponsor please contact Kathy Banning at kathy.banning@state.co.us or by telephone at 303.318.8637 at the Division of Workers' Compensation.

COLORADO STATE WEBSITE
<http://www.state.co.us>

**WORKERS' COMPENSATION
HOME PAGE**
www.coworkforce.com/DWC/

INSURANCE COVERAGE REPORTING REQUIREMENTS

In response to recent inquiries received by the Division, the following information is intended to provide guidance on requirements for notifying the Division of insurance coverage and cancellations.

Rule III (A)

In 1994, House Bill 94-1271 was adopted into law. This bill mandated the development of an employer crosscheck system to determine whether employers who paid unemployment insurance tax also maintained workers' compensation insurance coverage for their employees. One purpose of the system was to determine how many employers in Colorado did not have workers' compensation insurance.

Informational systems within the Department of Labor and Employment were coordinated in order to establish the crosscheck system. These included data from the Division of Workers' Compensation, the Labor Market Information Office, and Unemployment Insurance Tax. The Division entered into a contract with the National Council on Compensation Insurance ("NCCI") to coordinate this policy data. The Division then adopted Rule III (A), of the *Rules of Procedure*, concerning the reporting of insurance coverage *after* the cancellation of coverage. Rule III (A) designates NCCI as the Division's agent to receive, process, and make available to the Division, the required notices regarding coverage and the cancellation of

coverage. Of real significance was the ability to transmit and receive policy information electronically.

NCCI provides the required information to the Division via electronic transmission. The result is that the Division's Coverage Enforcement Unit obtains information in a more timely manner and with increased accuracy. Prior to automation of the system, the Unit relied on hard copy correspondence to demonstrate compliance with coverage requirements. Typically, each employer sent one letter per year per policy to establish that coverage was in effect, and perhaps an additional letter if the policy was cancelled. This equated to approximately 300,000 letters per year. Processing and storing this correspondence was both burdensome and inefficient. Furthermore, there was no system to independently verify that coverage was in place, and because of the difficulty of retrieving information, an investigation would only take place if a complaint were received.

The automated system in place through NCCI allows the Division to receive information on a broader range of actions. Currently, the Division receives an average of 100,000 transactions per month, without the necessity of manually recording and maintaining each of these transactions. This information has allowed the Coverage Enforcement Unit to more effectively perform its mandated functions so that the number of employers in Colorado without workers' compensation insurance has declined each year.

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