

All About Claims

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From the Director's Desk...Emergency Rules and Rule Hearings

As is often the case following the close of the legislative session each year, the Division must evaluate the impact of any changes to the workers' compensation statute to ensure that implementation will sync with what the General Assembly had in mind. Where needed to ensure consistent application and avoid litigation, administrative rules are drafted for public hearing and discussion. At times, emergency rules may be necessary to implement the law pending the opportunity for full hearing and adoption of permanent rules. Such is the case with Senate Bill 241 which is applicable to dates of injury on or after July 1, 2008. Two emergency rules were adopted to ensure compliance with the statute on the date it went into effect, and are identical to the rules that have been proposed and noticed for public hearing on August 1. The proposed amendments are to Rule 12-3 (Apportionment of Permanent Impairment Rating), and 5-5 (Admissions of Liability) of the *Workers' Compensation Rules of Procedure, 7 CCR 1101-3*. In addition, amendments to Rule 16 (Utilization Standards) and Rule 18 (Medical Fee Schedule) have also been proposed and are scheduled for hearing on August 11. You are encouraged to review the proposed rules and participate in the process.

In quick summary, Senate Bill 241

- Removes limitations to the number of external prosthetic devices including glasses, hearing aids, braces and dentures, reasonably required to replace or improve the function of the affected body part. The claimant may request replacement on the basis of an anatomical change or for *other good cause shown*.
- Disallows reduction of temporary total, temporary partial or medical benefits to an injured worker based on a previous injury.
- Allows for the reduction of a permanent medical impairment award where there has been a previous work-related injury to the same body part which resulted in an award or settlement under the Workers' Compensation Act of Colorado (or a similar act from another state.) The medical impairment rating for the injury may be reduced by the previous *impairment rating* to the same body part as established by the award or settlement.

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- Allows for the reduction of a permanent medical impairment award based on a *non-work related medical impairment* to the same body part, only where the previous non-work-related injury has been identified, treated, and at the time of the work-place injury, was independently disabling. If all these factors apply, the non-work related medical impairment percentage existing at the time of the work injury may be subtracted from the medical impairment rating for the work-related injury.

- Disallows apportionment of permanent total disability benefits when the disability is the result of work-related injury or work-related injury combined with genetic, congenital or similar conditions. Permanent total disability benefits *may be* apportioned in cases where an occupational disease results from contributing factors both within and outside the workplace as set out in Anderson v. Brinkhoff, 859 P.2d 819, (Colo.1993).

- Does not restrict employers or insurers from seeking reimbursement or contribution by other employers or insurers for benefits paid to or for an injured worker, as long as the claimant's benefits are not reduced or affected by such contribution or reimbursement.

For your convenience, the text of proposed Rules 5-5(J) and 12-3 are provided below:

Rule 5 Claims Adjusting Requirements

RULE 5-5 ADMISSIONS OF LIABILITY

(J) 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 A 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.

Rule 12 Permanent Impairment Rating Guidelines

12-3 APPORTIONMENT

(A) Pursuant to §8-42-104(2), C.R.S., FOR CLAIMS WITH A DATE OF INJURY PRIOR TO JULY 1, 2008, a Level II accredited physician ("THE PHYSICIAN") shall apportion ~~the~~ ANY pre-existing medical impairment, WHETHER WORK- RELATED OR NON-WORK-RELATED, from a work-related injury or occupational disease using the AMA Guides, 3rd Edition, Revised, where medical records or other objective evidence substantiate a pre-existing impairment TO THE SAME BODY PART. 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 ~~Level II accredited~~ physician shall not apportion.

(B) FOR CLAIMS WITH A DATE OF INJURY ON OR AFTER JULY 1, 2008, THE LEVEL II ACCREDITED PHYSICIAN ("THE PHYSICIAN") MAY PROVIDE AN OPINION ON APPORTIONMENT FOR ANY PRE-EXISTING GUIDES, 3rd EDITION, REVISED 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 §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.

For more information on these and other rule changes, please visit our website at <http://www.coworkforce.com/dwc/>

In Memoriam

Doug Phillips

September 4, 1943 – July 15, 2008

The Colorado Division of Workers' Compensation acknowledges the recent passing of Doug Phillips. Mr. Phillips began his law practice in 1973 representing the interests of injured workers for more than three decades. Along with wife and fellow practitioner Sue Phillips, he authored the treatise: "Colorado Workers' Compensation Practice and Procedure," which is a standard reference manual on workers' compensation practice in Colorado utilized by attorneys and adjusters alike. With the passing of Mr. Phillips, we acknowledge the loss of an exemplary practitioner and recognize his individual and collective contributions to the Colorado Workers' Compensation system.

Prehearing Conference—What Is It and How Does It Differ From a Regular Hearing?



Prehearing Conference Unit: Back row: left to right, Chief Judge Tom DeMarino; Judge Thomas McBride; Judge Ron Jaynes; Administrative Assistant Valerie Bellamy; Judge Craig Eley. Front row: left to right, Office Manager Judy Nichols; Judge Sharon Fitzgerald; Judge Sue Purdie; Administrative Assistant Cecilia Busby.

An Administrative Hearing is a formal legal proceeding where an administrative law judge from the Office of Administrative Courts renders a decision on the disputes that have been set for resolution by one or both of the parties. The judge reviews the evidence, hears testimony and issues a decision in the form of an order. Ultimately, once a party places an issue for resolution in this forum, it sets into motion a process whereby the administrative law judge determines credibility, resolves factual disputes, applies the law and decides the outcome of the case.

Conversely, a Prehearing Conference at the Division of Workers' Compensation is designed to figuratively "clean house" for both sides in workers' compensation litigation. The frame for prehearings was created by the Colorado legislature in enacting C.R.S. 8-43-207.5, entitled "Prehearing Conferences." The Prehearing Administrative Law Judges (PALJs) are told by this section of the Workers' Compensation Act why they exist and what they are empowered to do. The public, including pro se litigants, and the attorneys for both sides of every case are told what they can do in Prehearing Conferences.

"Housecleaning" is a term that means getting the facts necessary to present a claim and defend against a claim. The rules of procedure formulated by the government agency and case law opinions from the Industrial Claim Appeals Office and the Supreme Court, define the boundaries of what facts may be discovered within the rules that apply.

We Prehearing Administrative Law Judges at the DOWC Prehearing and Settlement Conference Unit will assist the parties in shaping the case-in-chief for the claimant and the case-in-chief for the respondents by simplifying the issues that they will present at hearing, identifying who witnesses are and what they are expected to say and ruling on what documents may be discovered by each side and used as evidence at hearing. If the party applying for hearing fails to follow the Act or the rules or PALJ orders, the PALJ may order sanctions and limit the evidence that may be presented at hearing.

The term “Discovery” encompasses interrogatories, requests for documents, depositions, independent medical examination of the claimant. All forms of discovery may be used by both sides of a case, except that independent medical examinations apply only to a request made of the claimant by an employer or insurer.

A hearing is not a condition before these forms of discovery may be used by both sides. Discovery can begin at the very beginning of a case, for example when an admission or notice of contest of liability is filed by an employer or insurer or when a workers’ compensation claim is filed by a claimant.

In addition to Prehearing Conferences, PALJs conduct Settlement Conferences, which may be requested by either side. But both sides have to agree to hold a Settlement Conference, because it is optional and entirely voluntary for both sides.

The parties on both sides use all the discovery mentioned above to learn the facts and then apply them to the law that applies to each issue in a case before going into a Settlement Conference. Settlements can be made of one or more issues in a case or they can be “full and final”, which means all issues are settled and the case is then closed. Sometimes the competency of a claimant arises as an issue in a case, where the claimant is a minor or has suffered the loss of mental abilities to manage his affairs. In those situations, the parties need a prehearing conference with a PALJ to determine competency of the claimant before any settlement can be approved.

PALJs are empowered to conduct arbitrations between the parties. Both sides must agree to arbitration and they can choose an ALJ to be the arbitrator. When arbitration is conducted by a PALJ, an award by the PALJ is binding on both sides and cannot be reviewed by an appeal. While not often done, arbitrations are conducted from time to time.

PALJs must approve settlements reached by both sides – they are academic or theoretical, and neither side is bound by any settlement terms until approved by a PALJ. A perfect illustration of this is a settlement made with an unrepresented or pro se claimant. It cannot be legally effective until a PALJ approves it. As a matter of fact, the PALJs conduct pro se settlement approvals (or disapprovals) on every day of the week. That is a departure from tort actions in civil suits, where approval from the Court is not a condition of the legality of a settlement. In workers’ compensation cases, no settlement is legal without approval by the Director or a PALJ.

In sum, each PALJ in the DOWC Prehearing and Settlement Conference Unit is busy conducting 400 to 500 prehearings and 300 to 400 settlement conferences each year.

The judges, for their part, are unique in their perspective and approach. Their independence is preserved and they operate under the auspices of the prehearing conference statute; their orders being orders of the Director and binding on the parties. The Division boasts some of the most experienced workers’ compensation attorneys in the state, including Ron Jaynes, Sue Purdie, Craig Eley, Sharon Fitzgerald, Tom McBride and Chief Judge Tom DeMarino, who is spotlighted in this issue. Prehearing conference staff who, together with the judges, keep the docket running smoothly and efficiently, are Judy Nichols, Cecilia Busby and Valerie Bellamy.

COLORADO STATE WEBSITE
<http://www.colorado.gov/>
WORKERS’ COMPENSATION WEBSITE
www.coworkforce.com/DWC/

An Interview With...Tom DeMarino, Chief Judge, Prehearing and Settlement Conferences

For those who have spent some time in the Colorado workers' compensation system, Thomas DeMarino is an icon. The Chief Judge of the Division's Prehearing Conference Unit has spent 33 years as a workers' compensation practitioner and nine years as an Administrative Law Judge ("ALJ"); authored Colorado Workers' Compensation Law and Practice (with Administrative Law Judges Ron Jaynes and Tom McBride); and wrote the treatise on permanent disability (Primer on Permanent Disability in Colorado Workers' Compensation Law.) Tom took a few moments to share his thoughts on an abiding passion for public service and the ingredients of a well-lived life:



1. You joined the military right after law school and became an army ranger. What led you to join the military and can you tell us about that time in your life?

I listened to the tales of people coming back from WWII coming over to visit my dad on weekends where they would drink beer into the night, and I listened to all the stories and wanted to be in the Army. In 1951, a student came into Greensburg High School, who was living with his aunt because his dad was fighting in the Korean War. His dad had been a West Point graduate and gone to airborne and ranger schools, and this fellow student became my closest friend. We played football together, and we debated forensically together. He told me all about the stories of airborne and ranger schools that his dad went through. I decided then I wanted to be a ranger—an airborne ranger—and I never lost that goal. I went into the Army in 1963. From May 1963 to May 1965 I was a first lieutenant; I went through infantry officers' basic course, ranger school and airborne school and then to Korea for 13 months of hazardous duty. They tried to put me in judge advocate general corps (JAG) when I arrived in Korea, because I had been a lawyer and practiced law in Philadelphia for almost a year following law school. I said: *'Don't you dare do that—because I've waited my whole life to be an infantry officer. That's all I want to do. I want a command'*— and they said OK. They assigned me to an infantry command as a rifle company commander in the 7th Army, 2nd Battalion, 31st Infantry at Camp Keiser near the DMZ (De-Militarized Zone.) It was in northeast Korea, the furthest north installation in Korea

that the Army had—and I loved it. In January 1965, I left Korea and went to Fort Carson in Colorado Springs for the last 5 months of my two-year tour. And then I went to Denver and I looked for a job. I didn't know anybody, so I went to the Supreme Court law library and found the Martindale-Hubbell volumes. They are an encyclopedia of all the lawyers in the United States, and they ranked the lawyers A, B, and C. Since I didn't know anybody in Colorado, I made a list of 20 A-rated lawyers and law firms in Denver. I took my resume to each of those firms, all in one week. I just walked into those firms and said: *'I'm ready for my interview'* and stayed there until they gave me an interview. They all gave me an interview. I interviewed great people—three of whom were later Chief Justices of the Colorado Supreme Court. The job I wanted most was with Margaret Bates. She had been a founder of what is now the law firm of Hall and Evans and then was Yegge, Hall, Bates & Schulenberg. She left that firm and was in solo practice in 1965, when I interviewed her. She offered me a job in that first week of interviewing. I started work with her in 1965 and *life was perfect.*

2. What influenced you to become an attorney in the first place?

The Perry Mason television show in the early 1950's. And then in my freshman year in high school, I started oratory competition. National Forensic League (NFL) was hugely popular in our high school, and a lot of the athletes did it. I started debating and oratory competitions in my freshman year.

In 1954, my junior year, I won the Pennsylvania championship in oratory. NFL oratory, debating and student congress became huge in my life. I went to the national tournament in 1955 in student congress at San Jose State University in California and won outstanding speaker award in that tournament. I decided, as a result of these competitions, that I wanted to be a trial lawyer just like Perry Mason. I only wanted trial law—I didn't want anything else in the law.

3. *What aspects of this work do you find most fascinating?*

The answer—quickly and easily—is public service. That's the most fascinating part of this work—that you can actually do things that help the public and have a wonderful time.

4. *Can you name a person(s) who has had a great impact on your life?*

Margaret Bates Ellison—she won the Colorado Bar Association Award of Merit. She was an outstanding lawyer in Colorado and had a huge impact on my life. She taught me to be a trial lawyer.

5. *What influenced you to leave the private sector and become a public servant?*

At 61 years old, I had been a trial lawyer and tried cases for 33 years. The time was right to be a judge and a public servant. A position was open in the Division of Workers' Compensation, and I applied and got it. I started on January 4, 1999, and on November 1, 1999, I was appointed Chief Judge. I've been Chief Judge since then, and I love it all.

6. *What has surprised you most about this work?*

The surprise I get is how much I thoroughly love it. I thought maybe my interest in the law could have dulled after so many years in it. But the opposite has happened. It's actually increased, and my pleasure with the law has increased and my degree of dedication's increased. So I didn't expect all of those good things.

7. *Is there a particular workers' compensation decision that resonates with you and why?*

Yes, *Travelers v. Savio*, 706 P.2d 1258 (Colo.1985). It's a Supreme Court case that I lost. And it resonates with

me because I advised Travelers to settle the case. And they allowed me to retain a leading attorney in workers' compensation law in Colorado to give them an opinion on whether we could lose that case. And that attorney said yes—he thought we definitely would lose that case. And Travelers decided that they would “roll the dice” nonetheless. And so I lost the case. But it's the landmark decision in Colorado on bad faith. It created a tort of bad faith against an insurance company for acting unreasonably and acting with knowledge or disregard for the fact that no reasonable basis existed for denying a claim. And in this case, they promised vocational rehabilitation to Mr. Savio, who was a plumber, and enroll him, in a school to teach him to become a construction estimator. And he got a position with a national company on that basis. At the time of enrollment, the school refused to allow him to enter because the arrangements had not been concluded and the fee had not been paid by the insurance company. The national company hired someone else and Mr. Savio lost his opportunity. He sued for bad faith and won. I tried to convince the Supreme Court that they didn't need to give him a tort action of bad faith because the Workers' Compensation Act had \$100-a-day penalties for such conduct. Justice Kirshbaum looked at me and said: ‘Where does the money get paid if he gets a penalty?’ and I said: ‘It goes to the state treasury.’ And he said: ‘Well, how does that help Mr. Savio?’ and I said: ‘Well, because, he's a citizen of the state.’ Well, since there was no award of penalty available to Mr. Savio, the Supreme Court created relief for him. That's how the tort of bad faith was created by the Colorado Supreme Court. And now, we have \$500-a-day penalties, 75% of which goes to the claimant when a situation like this arises. Both actions for relief are now available to a claimant at the same time. So, I've created a decision that will resonate with me for the rest of my life. But actually, it was a good result for Mr. Savio.

8. *If you could do it all over again, what would you do?*

In my life, I wouldn't do anything differently. I'd do everything exactly the same.

9. What are some of the accomplishments, either personal or public, of which you are most proud?

I would say my volunteer work with the Denver and Colorado Bar Associations, because I believe that all lawyers should give back time to their profession in helping to improve it. In that work, I became the vice-president and then the president of the Denver Bar Association, and I'm really proud of founding an event they have every year called the Barrister's Benefit Ball. It raises (in one night) over \$100,000 that helps to fund administrative costs each year of Metro Volunteer Lawyers; they donate their legal services free to people who are destitute and in urgent need legal services—now valued at more than \$1,000,000 a year. Other accomplishments that I have loved in my life are in athletics; playing football in college and then lacrosse and rugby. I was on the Denver Lacrosse Club for 10 years and one of the founders of the Denver Barbarians rugby football club. I played in their first game in October 1967, against the University of Colorado Law School rugby football club. The Denver Barbarians are thriving and a good rugby club now. I joined the Colorado Mountain Club in 1965 and love climbing: both winter and summer climbing; ski climbing; night climbing; and all kinds of wall climbing—I just love climbing and skiing—I skied for 30 years out here and I've loved that. So those are just things that I really, really, love. My physical limitations have stopped those things, but not before 30 years of pure fun.

10. What are some of the trends you're seeing in workers' compensation?

Excellent lawyering compared to the 1960's when I began. The good lawyering has increased by leaps and bounds, and I believe that some of the best lawyers I have ever seen are now in workers' compensation law. I believe that the quality of lawyers now is the highest that I have ever seen. And they are favorably compared to the very, very best lawyers in all areas of law. A lot of that has to do with money. I was admitted to the Bar on October 1, 1965 at 9:00 a.m. and I had my first trial in workers' compensation at 1:00 pm October 1, 1965. I got the case assigned to me that prior June, when I was hired by Margaret Bates, and she said: 'Get ready for it, because if you pass the Bar and are licensed that day, then you can try the case that afternoon. If you don't pass the Bar, then you're not going to be in my firm and I'll do the case myself.' So I went over to

University of Colorado Medical School library and researched the medical aspects of hernias including strangulation of hernias and was able to cross-examine everyone, including the doctors, and came out with a good result. I really, really loved that experience. But at that time, if a person in 1965 got an award of permanent total disability and got medical benefits, they would get a meager \$49 a week and inadequate medical benefits of \$5,000 or 6 months, whichever came first after the accident. That all changed, because now we have larger amounts of money and medical benefits for injured workers. As a result, workers' compensation law has attracted excellent lawyers into litigation.

11. In your opinion, what is the future for workers' compensation in this state?

In one word, it's a *strong* future—I don't think it'll ever be a weak future. I think that the way we see the stage set for workers' compensation benefits to workers in this state, they will improve—they'll get stronger. And I believe the future is excellent.

12. Considering the challenges of your work, how do you find balance?

I find it with my wife and family. She has 4 living children and 11 grandchildren. And I have 2 children, 2 stepchildren and 7 grandchildren. And our combined families are all the balance that I need. Also, I find balance by following these Desiderata for life and lawsuits:

Examination. 'An unexamined life is not worth living' —Socrates

Planning. 'An unplanned life is not worth examining. —Aristotle

Begin. 'Whatever you can do or dream you can, begin! Boldness has genius power and magic in it.' —Goethe

Equipoise. 'Failure is never fatal; success is never permanent.'" —Anonymous

There was a wonderful University of Chicago philosophy professor, Mortimer Adler, who is deceased now. In the 1980's he wrote *Aristotle for Everybody: Difficult Thought Made Easy*. And in the middle of the book he described a challenge—striking a balance between two kinds of goods—limited and unlimited goods.

Limited goods are the kind where too much is always bad for you. Unlimited goods are the kind where too much is always good for you. The kind of goods where too much is always bad for you are accumulation of property, wealth, money, food and libation. Goods where too much is always good for you are accumulation of love, beauty, knowledge — so, the key is to strike a balance between acquiring goods that are always good for you and enough goods to sustain yourself. It's a balance everybody has to find. He also wrote a book entitled *How to Speak So People Listen*. And there was one line from that book that I've taken as a challenge, which is:

'Speak so that you're clear, but never plain; elevated, but never obscure.' That embraces a lifelong joy I've had in reading the dictionary, and I've now read the *Little Oxford Dictionary* 35 times.

13. As a man who has had some measure of success in both the private and public sectors, what advice would you give a person who is seeking career satisfaction?

My advice would be: *follow your dream.*