

## Interpretive Bulletins

### Director's Interpretations of Issues Impacting the Colorado Workers' Compensation System

In an effort to provide guidance on the practical applications of the Colorado Workers' Compensation Act, we are publishing Director's interpretations of statutes and other factors affecting the system, in the form of *Interpretive Bulletins*. The purpose is to provide greater levels of consistency and predictability as to how the Colorado system is intended to operate. While the opinions do not have the force and effect of rule, they are offered as navigational tools to clarify and simplify processes, create efficiencies, and to reduce litigation.

If you have questions regarding this information or issues you would like to see addressed in future bulletins, please direct your inquiries to Bob Summers, Director of the Division of Workers' Compensation, at 633 17<sup>th</sup> St., 4th Floor, Denver, CO 80202, FAX 303-318-8632 or email at bob.summers@state.co.us

#### **FOLLOW UP DIVISION INDEPENDENT MEDICAL EXAMINATIONS**

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As a result of the Colorado Court of Appeals reaching differing conclusions in two opinions, *Stefanski* and *Williams*, the Division has received inquiries and requests for guidance on the issue of follow-up Division Independent Medical Exams (DIMES). Pending final judicial resolution of this issue, the Division provides the following guidance.

This discussion involves a fact pattern where the doctor performing a DIME concludes that the claimant is not at maximum medical improvement (MMI), and the procedure that should be followed thereafter. It may be helpful to examine the history of this issue. In the past the Division's view had been that, unless the DIME doctor's opinion was overcome at hearing, the resolution of MMI remained with the DIME doctor. In other words, the claimant should receive the necessary additional care or treatment recommended by the DIME, but then would return to the DIME doctor for a follow-up examination and determination of MMI. It follows that an opinion in the interim by an authorized treating doctor that the claimant reached MMI might substantiate the need for the follow-up DIME, but would not have binding effect nor provide the basis for the filing of a Final Admission.

As a practical matter, this interpretation would typically result in the insurer being the requesting party for the follow-up DIME. This view appears consistent with a limitation of having only one DIME in an open claim. See §8-43-203(2)(b)(II), ". . .if an independent medical examination has not already been conducted."

The Industrial Claim Appeals Office (ICAO) reached a different conclusion in *Perales v. Napier Enterprises, Inc.* In that case the ICAO concluded that when the DIME doctor finds that the claimant is not at MMI and the claimant's care is returned to an authorized treating doctor, the parties are essentially returned to the same legal position they were in prior to the DIME. That is, when an authorized treating doctor subsequently determines MMI the insurer may either request a DIME or file a Final Admission. If a Final Admission is filed the claimant must either accept the Final Admission or request a DIME. In response to the ICAO decision, and to provide consistent guidance in the system, the Director adopted the ICAO's position in *Perales* and on February 24, 2005 issued Interpretive Bulletin No. 11. This Interpretive Bulletin attempted to clarify that if the insurer or claimant requested a DIME after the second determination of MMI by an authorized treating doctor, that exam constituted a follow-up DIME.

Subsequently the Court of Appeals issued a decision in *Stefanski v. ICAO*, \_\_\_ P.3d \_\_\_, (Colo. App.) (Sept. 8, 2005); cert. granted February 13, 2006. The Court concluded that when a DIME doctor determines the claimant is not at MMI, and an authorized treating doctor places claimant at MMI for the second time, the insurer is obligated to return the claimant to the DIME doctor for a follow-up examination. The Court held that the insurer could not file a Final Admission in an attempt to close the claim and shift the burden to claimant to initiate and bear the cost of another DIME. The Director then rescinded Interpretive Bulletin No. 11 on September 15, 2005 in view of the Court's decision in *Stefanski*.

Next, on January 12, 2006, a separate Division of the Court of Appeals issued an opinion in *Williams v. ICAO*, \_\_\_ P.3d \_\_\_ (Colo. App.). The Court held that the 30-day time limit in §8-42-107.2(2)(b) applies to both an initial request for a DIME and a request for a follow-up DIME. The Court determined that an insurer could file a Final Admission after an authorized treating doctor finds MMI for a second time, and the claimant must then timely request a DIME to contest the Final Admission. The Court recognized that its decision conflicted with the *Stefanski* opinion.

There does not appear to be any way to reconcile or harmonize *Stefanski* and *Williams*. Nor is it clear which interpretation will ultimately prevail. As a result it is precarious to provide guidance in an area that is so uncertain. On the other hand,

cases continue to go through the system and this issue continues to arise. Some type of guidance is needed to fulfill the statutory mandate of providing quick and efficient delivery of benefits at a reasonable cost to employers, without the necessity of litigation.

Accordingly, the Division believes that when this factual scenario arises the parties should attempt to reach agreement on how to proceed. This way the parties go forward with a mutual understanding of the procedures and timelines that will be followed. If agreement cannot be reached there is the possibility that whatever actions are taken will be found to be incorrect and final resolution of the claim becomes uncertain.

If the parties are unable to reach agreement, the Division believes that the better course of action is to return the claimant to the DIME doctor for a follow-up examination and not file a Final Admission based on an authorized treating doctor's second determination of MMI. This belief is grounded in both legal and practical considerations. One consideration is that if a Final Admission is filed and the decision in *Stefanski* is upheld, it could be determined that the Final Admission is not valid and did not close the claim.

Additionally, in both *Stefanski* and *Williams* the Court discussed the application of the language in §8-42-107.2(6): ". . . for which a division IME has not been requested, pursuant to section 8-42-107". As noted earlier, the Division has interpreted language in §8-43-203(2)(b)(II) as holding that only one DIME may be conducted in an open claim. The Division's interpretation has been that when a DIME doctor finds that the claimant is not at MMI the DIME remains open, and is not concluded until the DIME doctor makes a determination of MMI after a follow-up visit. Under this interpretation the DIME is not used to dispute the second finding of MMI by an authorized treating doctor because that finding does not justify the filing of a Final Admission. The claimant previously requested the DIME and in a sense prevailed, and unless a different result obtains as a result of a hearing, must be returned for a follow-up exam to conclude the DIME process. Efficient resolution of claims, of course, requires there be no undue delay in concluding the DIME.

Application of an alternative interpretation raises the possibility of a claimant being "whipsawed" back and forth between the DIME and authorized treating doctor. It can also result in the claimant having to pay for the DIME each time he/she goes back. As noted by the Court in *Williams*, this could result in undue financial burden on the claimant's due process right to be heard. At a minimum, if the claimant is required to request and pay for one or more follow-up DIMEs, the procedures for requesting and determining indigent status must be available each time.