



# Hot Topics in Colorado Workers' Compensation

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- ▶ Repetitive Motion Claims/Cumulative Trauma Claims

Science = Savings

- ▶ Marijuana use by workers' compensation claimants:

The grass is not always greener-positive tests reduce benefits

- ▶ Designating physicians and cost containment:

Want to save more? Designate four

# I. Repetitive Motion Claims: Rule 17

- ▶ WRCP 17 Exhibit (E) CCR 1101-3 (2014) and application of science to repetitive conditions/claims

Aggravated osteoarthritis of wrist

De Quervain's disease

Epicondylitis

Extensor Tendon Disorders

Flexor Tendon Disorders

Triangular Fibrocartilage Complex Tear (TFCC)

Trigger Finger

Carpal Tunnel Syndrome

Cubital Tunnel Syndrome

Guyon Canal (Tunnel) Syndrome

Posterior Interosseous Nerve Entrapment

Pronator Syndrome

Radial Tunnel

# What does Rule 17 Exhibit E require?

- ▶ Application of the Causation Algorithm
- ▶ Determine Diagnosis
- ▶ Clearly Define Job Duties  
Do not rely solely on the workers' description
- ▶ Apply risk factor tables from Rule 17 to determine if criteria is met

# How does application of Rule 17 reduce costs?

- ▶ High costs of repetitive claims
- ▶ Medical, time loss, impairment
- ▶ Cumulative Trauma conditions lead to more severe and costly conditions (e.g. CRPS)
- ▶ Cumulative Trauma demographic and permanent total

# Application of Rule 17 by Colorado Administrative Law Judges (ALJ's)

- ▶ ALJ's are rejecting the conventional wisdom that all jobs with some repetitive motion cause carpal tunnel and other similar conditions:

**Ex. 1** 50 year old female warehouse worker, multiple carpal tunnel surgeries. Claim originally accepted, then reversed compensability determination.

- ▶ “The conclusions by the treating physician, as well as the summary conclusions by other physicians in this claim, are reflective of **accepted medical lore** and have ignored the revisions in more recent medical literature.”

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- ▶ Ex 2: Male, 56 year old IT Development Engineer. Alleges bilateral cumulative trauma from extended typing and mousing. Diagnosed with osteoarthritis and Triangular Fibrocartilage Tear (TFCC)

Claim denied by ALJ:

“Applying the osteoarthritis diagnosis and TFCC diagnosis to Rule 17, there is no quality evidence available linking the diagnosis to risk (work) activities.”

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- ▶ **Ex: 3** 56 year old radiology technician for large health care provider. Alleges positioning of persons in machine for years led to ulnar nerve, cubital tunnel syndrome.

ALJ denied claim:

- ▶ “IME is found to be credible and persuasive because he utilized Rule 17 . . . And performed a causation analysis. The treating physician’s conclusions are less credible because he did not discuss the application of Rule 17 and did not discuss the primary and secondary risk factors provided for in the Rule”

# What should the standard protocol be to maximize savings under Rule 17?

- ▶ Provide a detailed job description if available to claims representative
- ▶ Claims representative should deny claim and ask authorized treating physician (ATP) to perform a Rule 17 analysis. If opinion inadequate, obtain IME
- ▶ No claim should be accepted for cumulative trauma without an affirmative Rule 17 analysis and opinion
- ▶ Be prepared for a more detailed Job Site Analysis (JSA)
  - ▶ Conducted on site
  - ▶ Representative of employer attend to ensure accuracy, potential testimony

## II. Marijuana and Colorado: Basics

- ▶ In 2000, Colorado adopted a constitutional amendment authorizing medical marijuana, Amendment 20 (Colorado Constitution Art. 18 §14). In 2012, Amendment 64 (Colorado Constitution Art. 18, § 16) was approved by voters and legalized marijuana for recreational use.
- ▶ Medical marijuana is *not prescribed* by physicians in Colorado. Physicians issue “recommendations” for use, then patient submits application to Colorado Department of Public Health
- ▶ Colorado law does not require insurers to pay for medical marijuana Amendment 20 (Colorado Constitution Art 18, §14 (10)(a)).
- ▶ Nothing requires an employer to accommodate the medical use of marijuana in any work place. Amendment 20 (Colorado Constitution Art. 18,§14(10)(b)).



- ▶ Conflicting Federal Law
- ▶ **Controlled Substances Act:** Marijuana is a Schedule 1 drug.
- ▶ 2013 Memorandum: U.S. DOJ has indicated that it will not aggressively enforce the CSA in states that have legalized marijuana.



# Colorado Courts: State or Federal?

- ▶ ***Coats v. Dish Network, LLC*, –350 P.3d 849 (Colo. 2015)—Wrongful termination claim**

The employee, a quadriplegic, was licensed by Colorado to use medical marijuana. Was terminated after testing positive for marijuana which was a violation of the employer's drug policy.

The employee filed a wrongful termination lawsuit alleging that his termination violated the Lawful Activities Statute (Section 24-34-402.5). The statute prohibits an employer from discharging an employee for engaging in lawful activity off the premises of the employer during nonworking hours

The Supreme Court held that state-licensed medical marijuana use was not lawful activity for purposes of the Lawful Activities Statute because, at the time of the plaintiff's termination, all marijuana use was prohibited by federal law. Accordingly, claimant's termination was not in contravention of the Lawful Activities Statute.



► ***Beinor v. ICAO, 262 P. 3d 970 (Colo. App. 2011) – Unemployment Claim***

Claimant filed a claim for unemployment benefits after being fired for violating zero tolerance policy of employer.

Denied unemployment compensation for having “not medically prescribed controlled substances” in his system during working hours.

A physician does not prescribe marijuana, but may only provide written documentation that the patient has a debilitating medical condition and may benefit from the medical use of marijuana. Further, as marijuana is a schedule I drug under the DEA, it cannot be prescribed. See 21 C.F.R. §812(c) (1999).

Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place.” Colo. Const.art.XVIII§ 14(10)(b).



# Impact on workers' compensation: Termination for Cause

- ▶ Termination for cause is a defense to temporary indemnity benefits. See §8-42-105(4) CRS (2014):
- ▶ “In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job-injury.”
- ▶ Claimant tests positive after a work injury

▶ ***Bolerjack v. Water Edge Pond Service, W.C. 4-905-434 (July 29, 2014)***

Claimant was employed as a “Pond Specialist”

Claims injury on job and reports it two weeks later, sent for drug test.

Tests positive for Marijuana

Employer had policy on substance abuse: “being under the influence of illegal drugs, alcohol, or substances of abuse on Company property is prohibited” and “working or reporting to work, conducting Company business or being on Company property while under the influence of an illegal drug or alcohol or in an impaired condition.”

Claimant fired, denied temporary disability and Industrial Claims Appeals Office affirmed as claimant responsible for termination.

# Impact on Workers' Compensation: Reduction of benefits

- ▶ Colorado Workers' Compensation Act imposes 50% penalty for lost wages/impairment benefits if an employee is injured as a consequence of being impaired by marijuana. §8-42-112.5 (CRS 2014).
- ▶ A duplicate sample must be preserved and made available to the worker for purposes of a second test at the workers' expense

# What should employer implement to maximize cost containment?

- ▶ Employer has a “zero-tolerance” policy, in writing
- ▶ Mandatory drug testing for ALL workers' compensation injuries
- ▶ Claimant tests positive after a work injury; follow standard termination process, documented appropriately

# Colorado's Revised Physician Designation Rule

- ▶ WRCP 8-2, 7 CCR 1101-3, §8-43-404 (5)(a)(I)(A)-(C) CRS (2015)
- ▶ Effective April 1, 2015



# Designation Specifics

- ▶ Employer or Insurer shall designate at least four physicians or four corporate medical providers
- ▶ Any combination of physicians and/or corporate medical providers so long as at one physician or corporate provider is at a distinct location without common ownership
- ▶ If not at least two physicians or corporate medical providers at distinct locations without common ownership within thirty (30) miles of employer's place of business, can use providers at same location or with common ownership

- ▶ Available physicians or corporate medical providers within 30 Miles willing to treat determine how many to be designated:

AVAILABLE PROVIDERS WITHIN 30 MILES:	REQUIRED NUMBER OF DESIGNATED PROVIDERS TO BE LISTED:
THREE OR LESS	ONE
AT LEAST FOUR BUT LESS THAN NINE	TWO
NINE OR MORE	FOUR

# What happens if the employer fails to designate?

- ▶ Claimant gets to designate his/her own medical provider
- ▶ Single largest cost control measure in Colorado Workers' Compensation
- ▶ ATP controls case until MMI
- ▶ Sets restrictions for return to work
- ▶ Determines referrals
- ▶ No jurisdiction to challenge this for a period of 24 months