COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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May Case Law Update

Presented by Judge David Gallivan and Judge Craig Eley

This update covers ICAO and COA decisions issued between April 12, 2018 to May 4, 2018

Decisions

The Case Law Update is offered as an educational and informational program. The discussions and commentary should not considered a policy statement by the Division of Workers' Compensation or an indication of how the presenters would rule on any future pending cases.

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-973-614-05

IN THE MATTER OF THE CLAIM OF:

CECIA GARCIA AUSTIN,

Claimant,

v.

FINAL ORDER

WELLS FARGO,

Employer,

and

OLD REPUBLIC INSURANCE COMPANY,

Insurer,
Respondents.

The parties seek review of orders of Administrative Law Judge Cayce (ALJ) dated May 11, 2017, and October 12, 2017, that found the claimant sustained a compensable mental impairment injury and determined the authorized treating physician (ATP). We set aside the October 12 Order due to a lack of jurisdiction and reverse the May 11 order's denial of the claimant's request to designate an ATP. We otherwise affirm the May 11 Order.

The claimant worked for the employer as a personal banker. On November 18, 2014, while performing that portion of her shift requiring her to greet customers, she encountered a man determined to rob the bank. This individual handed the claimant a note demanding $10,000. The claimant took the note to the back of the facility and advised the branch manager. The man was provided the money, after which he left the bank without incident. He was found and arrested several weeks later.

The claimant became distraught over the incident. The claimant reported to her manager on November 19 she was experiencing panic and anxiety attacks. The employer referred the claimant to Karen Hauser, a Licensed Clinical Social Worker (LCSW), pursuant to the employer's employee assistance program. Ms. Hauser confirmed the claimant's experience with the robbery led to symptoms including paranoia, extreme fear, and difficulty sleeping. The claimant was three months pregnant at the time. The claimant's personal medical provider recommended the claimant stay off work for three

weeks and obtain further counseling for her anxiety. The claimant was scheduled to return to work on January 13, 2015. However, on January 12, the claimant was involved in an auto accident. During a medical evaluation following the accident, it was discovered her baby had died in utero two weeks previously. Ms. Hauser continued to see the claimant until April 21, primarily about grief following the end of her pregnancy.

Following an evaluation by psychologist Lupe Ledezma, Ph.D., it was recommended the claimant be transferred to another bank branch to lessen her anxiety and to avoid reminders of the robbery. The claimant worked for the employer at another branch between May 15, 2015, and July 8, 2016.

The claimant described to Ms. Ledezma the circumstances surrounding the November 18 bank robbery. The claimant reported the robber grabbed her and told her he had a gun. She noted the robber said he knew who she was and gave her a note requesting $10,000. The claimant feared the robber had knowledge of, and access to, her husband and her daughter. After struggling to read the note, the claimant spoke with another bank teller and her manager. The claimant described how she was able to collect the necessary cash and slid it to the robber through the teller window. The claimant said the robber began yelling loudly before she was able to provide him the money. Ms. Ledezma diagnosed the claimant with post traumatic stress disorder (PTSD). The claimant displayed symptoms of anxiety, depression and cognitive difficulties. The claimant blamed herself for possibly allowing her anxiety over the robbery to affect her pregnancy. The claimant arranged for an evaluation by Dr. Caroline Gellrick on May 28, 2016. Dr. Gellrick agreed with the diagnosis of Ms. Ledezma. The doctor recommended the claimant undergo treatment with psychologist Dr. Walter Torres, Ph.D.

The claimant was evaluated and treated with Dr. Torres for 13 sessions. At the respondents' request, the claimant was also evaluated by Dr. Stephen Moe, M.D., a psychiatrist. Both testified at the March 7, 2017, hearing in the case. Dr. Torres diagnosed the claimant as suffering from PTSD. He reported several instances of psychological trauma in the claimant's past. However, Dr. Torres found the bank robbery caused the claimant to suffer her current set of symptoms. He noted their onset coincided with the date of the robbery. He did not believe her January car accident nor the loss of her unborn child were intervening circumstances causing her mental disability. Dr. Moe testified the claimant reported a dramatically exaggerated response to the robbery. The video surveillance depiction of the robbery authenticated very few of the event's details recollected by the claimant. The claimant was noted by Dr. Moe to have displayed similar outsized reactions to unfortunate events in the recent past. The

claimant had a history of several traumatic events in her childhood, which the doctor believed was the more likely source of the claimant's mental condition.

On approximately January 26, 2015, the claimant completed and filed a Workers' Claim for Benefits form with the Division. The claimant's attorney sent a letter to the respondent insurance carrier on February 17, 2015, using an address located electronically on-line. The attorney sent a second copy of the letter on March 16 to the carrier's third party administrator. The letters advised that the claimant had not been provided a list of four physicians from whom she could treat when she reported her injury on November 19, 2014. Accordingly, the letter asserted the claimant had inherited the right to select her treating physician. The claimant designated Dr. Gellrick to treat her. The letter also stated that if a list of physicians had been provided, the claimant was now requesting a change of physician to Dr. Gellrick. The respondents replied through counsel on March 19, 2015, denying the request to change physicians. The respondent employer sent the claimant a letter on March 17 containing a list of four medical clinics from which she could choose to obtain treatment.

The claimant filed an application for a hearing endorsing as issues compensability, medical benefits, authorized physician and temporary disability benefits. At the outset of the March 7, 2017, hearing, the parties agreed the only issues to be presented would be limited to compensability, the identity of the authorized treating physician (ATP) and the liability of the respondents for treatment provided and recommended by the treating physician. The claimant asserted Dr. Gellrick should be recognized as the ATP because the right to select the ATP had passed to the claimant when the employer did not initially provide a list of authorized medical clinics.

Following the hearing, the ALJ authored Findings of Fact, Conclusions of Law, and Order on May 11, 2017. The ALJ did acknowledge some embellishment by the claimant of the details surrounding the November 18, 2014, robbery. Nonetheless, the ALJ found credible the claimant's testimony that the robbery generated her symptoms of PTSD. The ALJ agreed with the diagnosis of Dr. Torres that these symptoms included depression, panic attacks, an eating disorder and poor cognitive functioning. The ALJ ruled the claimant had satisfied the criteria for a mental impairment set forth in § 8-41-301(2)(a) C.R.S. The claimant was deemed to have experienced an accidental injury, not involving physical injury that consisted of a recognized permanent impairment occurring through the course and scope of employment. In addition, the ALJ concluded the claimant had also satisfied the statutes' stipulation that there must be a psychologically traumatic event verified by the opinion of a licensed psychologist or physician, that the traumatic event was outside the claimant's usual experience and the event would evoke

significant distress in a similarly situated worker. The ALJ surmised the claimant's preceding experiences of psychological trauma, the untimely termination of her pregnancy nor her subsequent auto accident served as intervening injuries to preclude the compensability of her disability stemming from the November 18 bank robbery. The claimant's injury was adjudged a compensable claim.

Concerning the designation of the ATP, the ALJ found the claimant had initially agreed to treat with Ms. Hauser upon referral from the employer. The ALJ ruled this represented a selection by the claimant of an ATP. The ALJ determined the claimant's subsequent request to change physicians to Dr. Gellrick was ineffective pursuant to § 8-43-404(5)(a)(VI)(A). The ALJ noted the request to change physicians was not included on the form designated by that section and designed by the Director for that purpose. Accordingly, Ms. Hauser was denominated the ATP by the ALJ. The claimant's request to authorize Dr. Gellrick was denied.

Both parties appealed the May 11, 2017, order. The respondents contend the ALJ was in error to have found the claimant's injury was compensable. The claimant asserts the ALJ was mistaken when she required the Director's form be used to request a change of physician for the reason that requirement was not a part of the statute in 2015 when the request was made. *See, Berthold v. Industrial Claim Appeals Office,* 410 P.3d 810 (Colo. App. 2017). The claimant also objected that Ms. Hauser did not qualify as a candidate to be an ATP because she was not a licensed physician. A briefing schedule was sent by the Office of Administrative Courts on June 22 and 23, 2017. Pursuant to motion, the final responsive brief was directed to be filed on August 24, 2017.

On October 12, 2017, the ALJ submitted a Supplemental Order. The Supplemental Order arrived at the same conclusions and order as were set forth in the May 11 Order, with the exception that the ALJ revised her order designating Ms. Hauser as the ATP. Instead, the October 12 Order concluded Dr. Gellrick had become the ATP because the respondents had not timely provided the claimant a choice from four medical providers in the first instance pursuant to § 8-43-404(5)(a)(I)(A). The order also observed the claimant requested a change of physician as provided in § 8-43-404(5)(a)(VI)(A) which did not draw a timely objection from the respondents. Only the respondents appealed the October 12 order.

I.

We initially observe that § 8-43-301(4) provides "After the briefs are filed or the time for filing has run, the director or administrative law judge shall have thirty days to

enter a supplemental order ….” The final brief was due, and was filed, on August 24. Accordingly, in this matter the ALJ had until September 23, 2017, to submit her supplemental order. The supplemental order however, is dated October 12. Pursuant to the decision in *Hillebrand v. Worf*, 780 P.2d 24 (Colo. App. 1989), the ALJ lost jurisdiction to issue a supplemental order after September 23, and the October 12 order is void. We will then review the parties’ appeal of the original Order of May 11, 2017.

II.

The ALJ’s denial of a claimant’s request for a change of physician is subject to appellate review pursuant to § 8-43-301(2).

> Unlike an order that grants a request for change of physician without specific medical benefits, the panel has previously held that an order that denies a request for a change of physician to a specific doctor is equivalent to the denial of a specific benefit and, therefore, is final and reviewable.” *Benton v. Lowe Enterprises*, W.C. No. 4-903-810-04 (September 14, 2015).

The ALJ’s May 11 Order involves the denial of the claimant’s request to change physicians and is therefore subject to review as a final order. In *BCW Enterprises v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997), the Court explained “… it remains that an interlocutory order becomes reviewable when appealed incident to or in conjunction with an otherwise final order. *See American Express v. Industrial Commission*, [, 712 P.2d 1132 (Colo. App. 1985)]….” Accordingly, the respondents’ cross petition to review the ALJ’s conclusions pertinent to compensability is also appropriate for our review in conjunction with the order denying a change of physician.

III.

The ALJ found the claimant notified the employer of her work related psychological injury on November 19, 2014, the day following the bank robbery. The employer, in fact, referred the claimant at that point to Karen Hauser, LCSW, for counseling made necessary by the claimant’s involvement in the robbery. The ALJ determined the respondents did not simultaneously provide the claimant a list of at least four designated medical providers from which to choose an ATP as required by § 8-43-404(5)(a)(I)(A). The respondents do not contend they submitted such a list until March 17, 2015. The ALJ noted Workers’ Compensation 8-2(A)(1) specifies the list must be

given to the claimant within seven days following the date the employer received notice. The sanction applicable to a failure to timely provide the list involves passing to the claimant the authority to select a physician or chiropractor of the claimant's choosing to become the ATP; § 8-43-404(5)(a)(I)(A), and W.C. Rule 8-2(E).

In the ALJ's order of May 11, it was determined the employer was notified of the injury on November 19 and the claimant attained the ability to select an ATP when the employer did not provide the designated provider list by November 26. While the employer's provider list may designate a 'corporate medical provider,' the claimant must select a 'physician' or 'chiropractor.' The May 11 order was therefore in error when it concluded the claimant had exercised her authority to select an authorized treating physician by choosing Ms. Hauser, who is a Licensed Clinical Social Worker, and not a physician. The record indicates the claimant was seen by only two physicians, Dr. Moe and Dr. Gellrick, between the date of her injury and the date of the hearing. The claimant saw Dr. Moe at the behest of the respondents and the appointment was not for the purpose of treatment. The hearing record, therefore, substantiates no choice the claimant may have made to select an ATP other than that represented by her request to choose Dr. Gellrick. We therefore conclude the ALJ committed error in denying the claimant's request that Dr. Gellrick be designated as her ATP.

IV.

On appeal, the respondents contend the claimant was not successful in demonstrating the presence of the conditions specified by § 8-41-301(2)(a). They assert principally that the evidence showed the robbery incident was not of such a character that it would "evoke significant symptoms of distress in a worker in similar circumstances" and that the actual reasons for the claimant's symptoms lie in her subsequent auto accident and loss of her pregnancy.

The respondents submitted the surveillance video from the bank's security camera recording the robbery on November 18, 2014. As noted by Dr. Moe in his testimony and by the ALJ in her order, the events in the video do not correspond to the claimant's recollected history or to her testimony. The video shows the robber walk up to the claimant and hand her a written note. The claimant quickly reads the note, turns and walks away from the robber. The robber waits in the lobby and then places his arm around the shoulder of another waiting customer. The customer removes the robber's arm and both continue waiting. The robber's hands are exposed. He is not holding anything and his hoodie sweatshirt does not indicate any item in its pockets. The video shows the claimant remains in the back of the bank, is attended to by other employees

and has no further contact with the robber. The robber collects his money and walks out the front door. The others in the lobby appear unaware a robbery is even occurring. Dr. Moe expressed his opinion that normally a person involved in the events would experience an immediate rush of adrenaline. However, he observed the normal person would soon reflect on the incident as being a narrow escape that resulted in no potential damaging consequences. He believed the claimant's embellishment of the details of the event and her prolonged investment in a feeling of potential danger was a very unusual response. The robbery, he concluded, was not an event sufficient to 'evoke significant symptoms of distress in a worker in similar circumstances.'

Dr. Moe also reviewed the claimant's history as presented to him and to Dr. Torres by the claimant. This included a nearly fatal carjacking attempt when the claimant was 15 in her native Guatemala, a sexual assault by an older brother, the murder of a twin brother, a previous bank robbery and a previous miscarriage. Dr. Moe observed this personal background of the claimant significantly contributed to the claimant's overly dramatic response to the robbery. The respondents point to the fact that the claimant planned to return to work on January 12, 2015. She did not, they contend, because on January 11 the claimant was involved in a car accident and discovered she had lost her unborn child two weeks previously. It was only subsequent to these events that the claimant sought additional counseling and delayed returning to work for several months. The respondents argue these intervening events are the actual cause of the claimant's' symptoms of depression.

The ALJ relied on the reports of Dr. Ledezma and Dr. Gellrick as well as the testimony and reports of Dr. Torres. Dr. Torres indicated the events comprised by the bank robbery led to the claimant's diagnosis of PTSD. He acknowledged the claimant had suffered several previous experiences that could have also led to her condition. However, Dr. Torres noted the claimant did not develop her symptoms until after the bank robbery. He therefore, resolved the claimant's prior tragedies were not significant in relation to her PTSD. Dr. Torres commented on the claimant's exaggerated response to the actual circumstances of the robbery incident by explaining how the shock of the robbery many times causes individuals to disassociate actual events from perceived fears and link one to the other. That, he believes, is how the claimant came to fear for her family, suspected a gun was involved and suspected the robber knew how to find her. The ALJ found this testimony and report credible. The ALJ was persuaded the claimant had sustained a permanent mental disability both arising out of her employment and outside of the claimant's usual experience. The ALJ credited the opinions of Dr. Torres, Dr. Gellrick and Dr. Ledezma to conclude the robbery consisted of a psychologically traumatic event.

Section 8-41-301(2)(a) sets forth several threshold requirements applicable to a claim for mental impairment. These include:

- A recognized, permanent disability (however, § 8-41-301(2)(d) allows for an impairment that renders the claimant temporarily disabled).
- Arises from an accidental injury involving no physical injury.
- Involves a psychologically traumatic event.
- Is outside of the claimant's usual experience.
- The event would evoke significant symptoms of distress in a worker in similar circumstances.
- The event does not arise from a good faith disciplinary action.
- The mental impairment must have arisen primarily from the claimant's occupation.[1]

If the claimant's stress is more related to personal factors than to her employment, it is not "primarily" caused by the employment within the meaning of § 8-43-301(2)(a), and the claim must be denied. Resolution of this issue is one of fact for the ALJ. *General Cable Co. v. Industrial Claim Appeals Office,* 878 P.2d 118 (Colo. App. 1994); *Young v. Industrial Claim Appeals Office*, 860 P.2d 591 (Colo. App. 1993). Because the issue is factual in nature, we must uphold the ALJ's resolution if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2002. This standard of review requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999).

While the ALJ does not refer specifically to the stipulation in the Act that the impairment must arise primarily from work, she did make findings in that regard. The ALJ referenced the opinions of Dr. Ledezma, Dr. Gellrick and of Dr. Torres. Dr. Ledezma listed the complaints of the claimant to include anxiety, depression, and cognitive deficits. These were all attributed to the robbery event. Her report reviewed the preceding and subsequent traumas inflicted on the claimant. However, Dr. Ledezma pointed out the claimant was quite functional at the time of the robbery. She then noted the claimant was diagnosed with PTSD, requested and received psychological counseling and displayed her psychological symptoms following the robbery but prior to the date of her January, 2015 auto accident and loss of her pregnancy. Dr. Gellrick also specifically states her diagnosis of PTSD, depression, anxiety and panic attacks are 'resultant' from

[1] While the amendments to § 8-41-301(2) and (3) made by House Bill 17-1229 rearranged paragraph (2) by adding paragraph (3) and adding provisions for a claim of PTSD 'within' the claimant's usual experience under certain conditions, the changes made take effect and only apply to injuries occurring subsequent to July 1, 2018.

the November 2014 robbery. This medical evidence represents substantial evidence to support the ALJ's conclusion the claimant's mental impairment arose from the robbery event at work and was not due to prior traumas. This evidence also supports the ALJ's finding that subsequent events did not constitute intervening events, which severed the effects of the robbery from the claimant's condition.

The respondents assert the claimant did not satisfy the statute's requirement the inciting event must qualify as an objectively distressing circumstance. In *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004), the Supreme Court interpreted§ 8-41-301(2)(a) and ruled that the questions of whether an alleged psychologically traumatic event is "generally outside a worker's usual experience," and whether the event would evoke "significant symptoms of distress in a worker in similar circumstances," are questions of fact for determination by the ALJ. Further, a claimant need not present expert psychological "testimony" to establish these elements, but may rely on lay evidence.

Because these issues are factual in nature, we must uphold the ALJ's findings if supported by substantial evidence in the record. Substantial evidence is that quantum of probative evidence, which would support a reasonable belief in the existence of a fact without regard to conflicting evidence or inferences. *Monfort v. Rangel*, 867 P.2d 122 (Colo. App. 1993). This standard of review requires us to view the evidence in the light most favorable to the prevailing party, and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. If the record equally supports two possible inferences, it is for the ALJ to determine which inference to draw. *Wilson v. Industrial Claim Appeals Offic*e, 81 P.3d 1117, 1119 (Colo. App. 2003). The reports and testimony referenced by the ALJ constitute substantial evidence in support of the ALJ's findings.

The ALJ considered the requirement the claimant must demonstrate the details of the November 18 robbery were an event that would evoke significant symptoms of distress in a worker in similar circumstances. The ALJ relied on the observation of Dr. Moe that the claimant stated the robber claimed to have a gun and implicitly threatened to harm her if she did not comply with his demands. He wrote "such an experience would be acutely distressing to all but the rare individual" and "acute fear is quite expectable." The ALJ noted Dr. Moe then made the point that other workers would not suffer any 'enduring' emotional distress due to the benign elements involved in this particular robbery. The ALJ took exception with this conclusion and reasoned the statute is not so

restrictive that it insists the "significant symptoms of distress" be of a necessarily enduring quality. The ALJ referenced the comment on this clause by the Court of Appeals in *City of Loveland v. Industrial Claim Appeals Office*, 141 P.3d 943, 953 (Colo. App. 2006):

> The statute discourages such claims by requiring a claimant to prove the employee experienced a psychologically traumatic event which, viewed objectively, was severe enough in nature to evoke significant symptoms of distress in a worker in similar circumstances. *See Davison II, supra*, 84 P.3d at 1028 n.5. The General Assembly focused on the objective nature of the psychological event and its potential to evoke a significant reaction in similarly situated employees.
>
> Thus, a compensable psychologically traumatic event under § 8-41-301(2)(a) must cause a significant, but not necessarily identical, reaction in similarly situated employees. Individual reactions of employees experiencing the same psychologically traumatic event will vary dramatically depending upon the physical and psychological makeup and resilience of the individuals affected. … But such claimants need not show the psychologically traumatic event would cause identical significant symptoms of distress in similarly situated workers.

Applied to this case, the ALJ reasoned it was unnecessary to require the reaction expected from other similarly situated workers to be prolonged. The ALJ therefore concluded: "Thus, fear, while limited in time period, can constitute a significant symptom of distress." Dr. Moe noted such "acute fear" to be a normally expected reaction to an episode of a bank robbery. Accordingly, the ALJ's finding is founded on substantial evidence in the record and we find no compelling reason to signify error in her determination.

Accordingly, we find no compelling reason to conclude the ALJ has committed error in her finding the claimant has sustained a compensable mental impairment injury and we affirm her findings and order concerning that issue.

IT IS THEREFORE ORDERED that the ALJ's order issued October 12, 2017, is set aside as issued outside the ALJ's jurisdiction, the ALJ's order of May 11, 2017, is reversed and modified to authorize the designation of Dr. Gellrick as an authorized treating physician, and the remaining findings and directions in the May 11, 2017, order are affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Brandee DeFalco-Galvin

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

4/20/18 by TT .

THE LAW OFFICES OF FURUTANI & MERKEL, Attn: JOSEPH A MERKEL ESQ, 1732 RACE STREET, DENVER, CO, 80206 (For Claimant)
POLLART MILLER LLC, Attn: BRAD J MILLER ESQ, C/O: JACQUI D CONDON ESQ, 5700 S QUEBEC STREET SUITE 200, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-015-855-01

IN THE MATTER OF THE CLAIM OF:

BRET HUGHES,

Claimant,

v.

FINAL ORDER

MV TRANSPORTATION, INC.,

Employer,

and

INDEMNITY INS. CO. OF NORTH AMERICA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Mottram (ALJ) dated September 8, 2017, that ordered the respondents liable for a proposed cervical foraminotomy surgery. We affirm the order of the ALJ.

The claimant sustained an injury to his cervical spine and his left shoulder on October 22, 2015. On that day, the claimant was working for the employer as a bus driver. He was manually engaging a faulty wheelchair ramp on his assigned bus when he felt a twinge near his left shoulder. The claimant noted immediate pain and restriction in his arm and shoulder. Shortly thereafter, the claimant initiated treatment with Dr. Stagg. Dr. Stagg began conservative treatment and recommended lift and carry restrictions of two pounds on the left. Dr. Stagg suspected either a rotator cuff injury or a cervical spine disorder. He referred the claimant to Dr. Copeland for a shoulder diagnosis.

Dr. Copeland reviewed a shoulder X-ray and MRI. These revealed a small rotator cuff tear. However, an EMG study and an MRI of the cervical spine suggested to Dr. Copeland the claimant's primary difficulty lay with his spine. Dr. Stagg initiated a referral to a neurosurgeon. The claimant saw Dr. Witwer, a neurosurgeon, on April 25, 2016. Dr. Witwer read the cervical MRI as revealing significant narrowing at the C4-5 and C5-6 levels. The doctor suggested treatment options including physical therapy, epidural steroid injections, and a foraminotomy surgical procedure. The claimant elected to pursue conservative treatment. Evaluations by two additional specialists generated

additional diagnosis involving radiculopathy generated by cervical spine intrusion on the nerves. The claimant received an epidural injection from Dr. Witwer on August 22, 2016. The claimant reported some pain relief from the injection. Both Dr. Witwer and Dr. Stagg sought to maintain the claimant on physical therapy. When the claimant indicated some improvement in his activities, Dr. Stagg obtained a functional capacity exam and suggested permanent restrictions. The doctor placed the claimant at maximum medical improvement (MMI) on December 1, 2016, and assigned a 17% whole person permanent impairment rating. The respondents filed a Final Admission of Liability (FAL) on December 30 adopting this rating and allowing for maintenance medical benefits subsequent to MMI. The claimant did not dispute the FAL nor did he seek to commence the selection of a Division sponsored Independent Medical Evaluation (DIME) to question MMI or permanent impairment.

The claimant received a second epidural steroid injection from Dr. Witwer on December 27. When the claimant followed up with Dr. Witwer on February 9, 2017, the doctor observed some improvement in symptoms but continued aching and nerve type pain in the left shoulder. He recommended the claimant undergo the previously suggested cervical foraminotomy surgery. This surgery was designed to relieve pressure on the claimant's nerve roots at the C5 and C6 level.

The respondents denied authorization for the surgery. The respondents inquired of Dr. Witwer his reasons for recommending the surgery. On June 18, Dr. Witwer replied that he believed the procedure would relieve the pressure on the claimant's cervical nerve and thereby "improve his radicular pain." The respondents objected to the surgery on the basis that the claim closed through the December 30 FAL for any further medical treatment other than maintenance care. The respondents asserted the surgery, instead, was designed to cure the claimant of his disabling condition. The claimant filed an application for a hearing endorsing solely the issue of medical benefits as represented by Dr. Witwer's suggested foraminotomy surgery. The claimant did not seek to reopen his claim.

The claimant testified at the August 24, 2017, hearing that he had experienced little improvement in his symptoms dating from the time of his work injury. The claimant indicated Dr. Witwer explained to him there was a good possibility the surgery would result in relief and improvement. The claimant expressed his hopes for the surgery in terms of allowing him to return to work that is more regular.

Following the hearing, the ALJ determined the surgical procedure recommended by Dr. Witwer qualified as medical maintenance treatment. The ALJ noted Dr. Stagg had

followed the claimant through at least three appointments subsequent to the request for surgery. In each report following an examination, Dr. Stagg had expressed his agreement with the recommendation. In addition, the ALJ observed that the accompanying reports from Dr. Stagg always included the doctor's hand written note the claimant remained at MMI, and that the MMI date was always asserted to be December 1, 2016. From this notation by Dr. Stagg, the ALJ concluded the doctor had resolved the proposed surgery represented a medical maintenance type procedure as opposed to treatment designed to significantly improve the claimant's condition. The ALJ found this determination by Dr. Stagg to be persuasive. The ALJ deemed the surgery to be a therapy within the respondents' admission for maintenance medical care. Accordingly, the claimant would not be required to establish grounds to reopen his claim. The ALJ found the foraminotomy surgery to be reasonable, necessary and related to the compensable injury. He therefore ordered the surgery authorized and directed the respondents to assume liability for its expense.

On appeal, the respondents assert that because the surgery was designed to significantly improve the claimant's condition, it does not qualify as maintenance medical treatment. As a result, the respondents contend that until the claimant demonstrates sufficient grounds to reopen his claim pursuant to § 8-43-303, C.R.S., the claim is closed and they are not responsible for the cost of the surgery. The claimant responds that as long as the treatment is medically beneficial, it qualifies as a medical maintenance benefit. The claimant asserts it is not material that the treatment may also serve to improve the claimant's condition. We disagree with both positions but affirm the ALJ.

Section 8-42-107(8)(f), C.R.S. specifies that in any claim in which an authorized treating physician recommends medical treatment following MMI, and the record features no contrary medical opinion, the employer shall admit liability "for reasonable and necessary medical benefits." Section 8-43-203(3)(b)(IX), C.R.S. describes this right as notice that continued medical care will be provided if "necessary to maintain maximum medical improvement." More specifically, § 8-40-201 (11.5), C.R.S., defining maximum medical improvement, indicates the obligation to provide treatment to "cure" or improve the claimant's condition terminates when the claimant reaches MMI. This is true because MMI is defined as the point in time when the claimant's condition is "stable and no further treatment is reasonably expected to improve the condition." That section further provides that some medical treatment indeed may remain as a continuing benefit subsequent to MMI. However, this further treatment is exclusive of treatment that will "significantly improve the condition." Ordinary medical benefits terminate at MMI, but the claimant is entitled to medical benefits after MMI where there is substantial evidence

in the record to support a determination that future medical treatment will be reasonable and necessary to relieve the effects of an industrial injury or to prevent further deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

The fact that the post MMI treatment in question involves surgery does not necessarily require that the treatment be considered as aimed at significant improvement of the claimant's condition. *Chism v. Walmart*, W.C. No. 4-809-103-3 (January 9, 2017) and (July 10, 2017). As the Panel stated in *Hayward v. Unisys Corp.*, W.C. No. 4-230-686 (July 2, 2002), *aff'd*, Colo. App. No. 02CA1446 (Jan. 9, 2003)(NSOP), "surgery is not as a matter of law 'curative' treatment." We instead explained that medical treatment "which does not tend to cure or improve the claimant's condition may nevertheless be ordered under *Grover* upon the presentation of substantial evidence that such treatment 'will be reasonably necessary to relieve a claimant from the effects of the injury or to prevent further deterioration of his or her condition' after MMI." *Id*. (knee surgery may be curative or may be a form of *Grover*-style maintenance treatment designed to alleviate deterioration of the claimant's condition); *see also Grover v. Industrial Commission, supra*. Whether medical treatment is provided to cure or merely to relieve the claimant's condition does not depend on the type of treatment, but rather the reason for the treatment. We noted the following statement from *Milco* was pertinent in this regard:

> We hold, therefore, that, if the evidence in a particular case establishes that, but for a particular course of medical treatment, a claimant's condition can reasonably be expected to deteriorate, so that he will suffer a greater disability than he has sustained thus far, such medical treatment, *irrespective of its nature*, must be looked upon as treatment designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition. (emphasis added)

Id. at 542.

The question of whether the claimant carried his burden of proof regarding post-MMI medical treatment is one of fact for resolution by the ALJ. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, we may not disturb the ALJ's resolution of that question if it is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. "Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v.*

Gussert, 914 P.2d at 414. In applying the substantial evidence test on review, we may not substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of the evidence, nor may we generally disturb his credibility determinations. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). Further, it is for the ALJ to assess the weight and credibility of the medical evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

The assumption by the ALJ that Dr. Stagg resolved the proposed surgery in this matter was of a maintenance character rather than treatment intended to cure or improve the claimant's condition, is a reasonable conclusion to reach. The respondents' contention the singular activity of checking a box on a medical form by Dr. Stagg cannot be designated as substantial evidence is not availing. In each of the three reports involved, Dr. Stagg not only checked the box corresponding to 'MMI,' but he also hand wrote in the date he assigned to MMI. Section 8-40-201(11.5) requires two findings be made by the authorized physician to substantiate MMI. First, the claimant's condition must be 'stable.' Second, no further treatment may reasonably be expected to improve the condition. Dr. Stagg concluded the claimant was stable as of December 1 and his subsequent examination reports contain no notations signifying any particular change in the claimant's medical condition. The second finding operates largely apart from the claimant's symptoms. The finding that a newly recommended treatment, or a newly developed medical procedure, has become available to treat the claimant's condition could lead the physician to withdraw his opinion of MMI regardless of whether the claimant is deteriorating. This would follow because there is now further treatment reasonably expected to achieve improvement for the claimant. However, Dr. Stagg did not believe the recommendation for a foraminotomy surgery could be characterized as a new treatment now capable of demonstrating significant improvement for the claimant. If so, he would have modified his assessment of MMI. A foraminotomy surgery had been referenced by Dr. Witwer as a possible treatment as early as April 25, 2016. The recognition by the ALJ that neither an unstable condition nor a newly fabricated treatment was present is supported by Dr. Stagg's consistent application of the MMI standard in his medical reports. This constitutes substantial evidence justifying the ALJ's conclusion the proposed surgery is compensable as a maintenance medical benefit. Section 8-43-301(8), C.R.S.

We further add that throughout their brief in support, the respondents cite to evidence, such as the opinions of Dr. Witwer, which would support a contrary conclusion. That opinion asserted the surgery "would improve his radicular pain." However, we may not substitute our judgment for that of the ALJ concerning the weight and credibility of the evidence. *Rockwell International v. Turnbull, supra*. Further, the

respondents' argument notwithstanding, the ALJ is not required to credit the testimony of a witness, even if it is unrebutted. *Levy v. Everson Plumbing, Co., Inc.*, 171 Colo. 468, 468 P.2d 34 (1970); *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993). It necessarily follows, therefore, that the ALJ did not abuse his discretion in ordering the respondents liable for the recommended foraminotomy surgery as a maintenance medical benefit.

IT IS THEREFORE ORDERED that the ALJ's order issued September 8, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

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2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

4/12/18 by TT .

WITHERS SEIDMAN RICE MUELLER GOODBODY PC, Attn: SEAN E P GOODBODY ESQ, 101 SOUTH THIRD STREET SUITE 265, GRAND JUNCTION, CO, 81501 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: JAMES B BUCK ESQ, 1401 SEVENTEENTH ST STE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-030-198-02

IN THE MATTER OF THE CLAIM OF:

KENNETH FERGUSON,

Claimant,

v.

FINAL ORDER

LANE ELECTRIC, INC.,

Employer,

and

FARMERS INSURANCE EXCHANGE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Goldman (ALJ) dated September 11, 2017, that granted the respondents' request to suspend the claimant's temporary total disability benefits as of the date of the order. We affirm the ALJ's order.

This matter went to hearing on the respondents' request to terminate temporary disability benefits on the basis that the claimant was responsible for his termination, and on the respondents' request to suspend temporary benefits because the claimant refused to undergo shoulder surgery. The ALJ denied the respondents' request to terminate benefits finding that the claimant was not responsible for his termination. The ALJ granted the respondents' request to suspend temporary disability benefits based on the claimant's failure to undergo shoulder surgery. Although the claimant filed a petition to review on September 29, 2017, the petition was subsequently withdrawn. The only issue on appeal is the respondents' contention that the ALJ erred in ordering the suspension of benefits as of the date of the order, rather than the date the claimant cancelled the scheduled surgery.

The claimant was employed as an electrician. The claimant sustained an admitted injury on October 27, 2016, when he was on a ladder and was shocked by a light switch causing him to fall from the ladder and injure his right shoulder. The respondents filed a

general admission of liability on November 11, 2016, and began paying temporary total disability benefits to the claimant.

Shoulder surgery was recommended and scheduled for February 17, 2017. The claimant cancelled this surgery without giving a reason. The surgery was rescheduled for April 17, 2017, but was again cancelled without reason. The surgery was rescheduled for May 4. 2017. The claimant cancelled this surgery stating that he needed a travel companion because he lived in Arizona at the time and was required to travel to Colorado for the surgery. The ALJ did not find the claimant's reason persuasive.

The respondents filed an application for hearing on April 28, 2017, seeking to terminate temporary total disability benefits on April 28, 2017. The hearing took place on August 17, 2017. The ALJ found that the recommended shoulder surgery was reasonable and necessary to get the claimant to maximum medical improvement. The ALJ determined that the claimant engaged in an injurious practice by cancelling the shoulder surgery on three separate occasions. The ALJ found for the respondents and ordered the suspension of benefits starting from the day of the order, September 11, 2017. The ALJ further ordered the respondents to reinstate the claimant's temporary disability benefits as of the date the claimant undergoes the shoulder surgery. The respondents now appeal contending that the ALJ erred in only allowing the suspension of benefits from the date of the order. We perceive no reversible error and, therefore, affirm the ALJ's order.

Section 8-43-404(3), C.R.S. allows an ALJ to suspend temporary disability benefits when the claimant:

> . . . persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote recovery…

Under this statute, the respondents must prove that the recommended surgery is reasonable and necessary to assist the claimant in reaching MMI. Section 8-40-201(11.5), C.R.S.; *Gonzales v. Industrial Claim Appeals Office*, 905 P.2d 16 (Colo. App. 1995). Whether the claimant has unreasonably refused to submit to surgery that is reasonably necessary to improve the industrial injury is a question of fact for resolution by the ALJ. *See Padillo v. F.H. Linneman Construction Co*., 29 Colo. App. 137, 479 P.2d 990 (1971). Consequently, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Under the substantial evidence standard we must defer to the ALJ's credibility determinations and his assessment of the sufficiency and probative value of the evidence. *Rockwell International v. Turnbull*, 802

P.2d 1182 (Colo. App. 1990). Furthermore, where the evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to determine the inferences to be drawn from the record. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, there is no dispute that the ALJ's findings of fact are amply supported by the record. Furthermore, the ALJ's findings support his determination that the claimant willfully delayed surgery, and that determination supports the suspension of benefits. *See Padillo v. F.H. Linneman Construction Co., supra.*

Section 8-43-203(2)(d), C.R.S., provides that, "if any liability is admitted, payments shall continue according to admitted liability." It is true that improvident admissions may be withdrawn, but any relief from an improvident admission may be prospective only. *See HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990)(*superseded by statute on other grounds*.). Thus, whenever an admission is contested by either party, the matter placed in issue is subject to determination by the ALJ and the admission is binding as to admitted liability until the date of the ALJ's order granting prospective relief. *See Pacesetter Corporation v. Collett*, 33 P.3d 1230 (Colo. App. 2001) (superseded by statute on other grounds).

The respondents here admitted and paid for ongoing temporary disability benefits by a general admission of liability dated November 11, 2016. The admission was binding until the date of the ALJ's order granting the prospective relief. We, therefore, have no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated September 11, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

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1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

5/4/18 by TT .

ELEY LAW FIRM, Attn: SCOTT ELEY ESQ, C/O: CLIFFORD E ELEY ESQ, 2000 S COLORADO BLVD NO 2-740, DENVER, CO, 80222 (For Claimant)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, 1801 BROADWAY SUITE 1300, DENVER, CO, 80202-3878 (For Respondents)
LAW OFFICE OF ROBERT B HUNTER, Attn: JOE M ESPINOSA ESQ, PO BOX 258829, OKLAHOMA CITY, OK, 73125-8829 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-039-943-01

IN THE MATTER OF THE CLAIM OF:

JOHN IM,

Claimant,

v.

FINAL ORDER

BUILDER SERVICES GROUP INC.,
d/b/a ALLIED INSULATION,

Employer,

and

ACE AMERICAN INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Spencer (ALJ) dated November 7, 2017, that denied their request to reduce the claimant's indemnity benefits by fifty percent for the alleged willful violation of a safety rule. We affirm.

This matter went to hearing on whether the respondents proved entitlement to a fifty percent reduction in the claimant's indemnity benefits for the willful violation of a safety rule. After the hearing, the ALJ found that the claimant worked for the respondent employer for approximately 11 years as an insulation installer. Occasionally, the claimant had to wear stilts to complete insulation jobs.

The employer has an established policy that employees are not to wear stilts on uneven surfaces, including stairs. The employer conducts frequent safety meetings to review and emphasize various safety issues, and in January 2017, the claimant attended a safety meeting regarding the use of stilts. The claimant acknowledged awareness of the employee's policy prohibiting the use of stilts on stairs. The claimant agreed with the policy because he knew using stilts on stairs is dangerous. During the hearing, the claimant testified that he always removed his stilts before ascending or descending stairs.

The claimant suffered an admitted injury on February 3, 2017, after falling down a flight of stairs while wearing stilts. The staircase consisted of approximately six to seven

stairs down to a landing, a 90-degree turn to the left, and another six or seven steps down to the first floor. The claimant suffered multiple injuries, including a significant head injury with a subarachnoid and subdural hematoma. The claimant has no reliable recollection of the accident.

After the accident, the Colorado Springs Fire Department (CSFD) arrived on scene and found the claimant standing and talking. The CSFD records indicate "Co-workers stated the pt stumbled on staircase wearing stilts and fell approximately 8-10 feet while installing insulation in interior of new home construction." Additionally, a note from the responding EMTs provides "CSFD stated the patient was wearing drywall stilts and standing on a landing when he fell."

Approximately one hour after the incident, the employer's warehouse supervisor, Jon Goff, arrived on the scene to investigate. Mr. Goff took several photographs depicting the staircase from different angles and several individual stair treads. One photograph shows black scuff marks, which Mr. Goff believed were caused by the rubber padding on the bottom of the stilts. However, Mr. Goff also acknowledged that numerous workers wearing boots had used that staircase during the construction project. Another photograph shows a wing bolt from the claimant's stilts on the first step up from the first floor.

While the respondents admitted liability for the claimant's accident and commenced payment of temporary total disability (TTD) benefits effective February 4, 2017, they nevertheless reduced the claimant's TTD benefits by fifty percent pursuant to §8-42-112(1)(b), C.R.S. based on their determination that the claimant's injury resulted from a safety rule violation.

During the hearing, the respondents attempted to introduce into evidence Exhibits P and R. Exhibit P was an "Accident/Incident Investigation Report" prepared by the claimant's field manager, Jeff Sherrod, on February 3, 2017. Attached to the report were handwritten statements of two co-workers, Kevin Molina and Israel Gonzales, and a typewritten report from Bill Christie. Exhibit R contained email conversations among the employer's risk management personnel and the claims adjuster recounting their investigation and determinations on whether the claimant violated the safety rule. The claimant objected to the exhibits on the basis of hearsay. Conversely, the respondents contended Exhibits P and R were admissible under §8-43-210, C.R.S. as "records of the employer" or, alternatively, admissible as records of regularly conducted activity under the hearsay exception contained in CRE 803(6). The respondents made an offer of proof as to what both Exhibits would show. The ALJ disagreed with the respondents, holding

that the documents were not records of the employer as contemplated by §8-43-210, C.R.S. He instead ruled that the Exhibits were inadmissible hearsay. The ALJ further ruled that CRE 803(6) did not provide an independent basis to admit the Exhibits.

Subsequently, in his order, the ALJ denied the respondents' request to reconsider his ruling excluding Exhibits P and R. Relying on the holdings in *Ackerman v. Hilton's Mechanical Men, Inc*., 914 P.2d 524 (Colo. App. 1996) and *Braden v. Integrated Health Services*, W.C. No. 4-406-349 (Dec. 21, 1999), the ALJ again determined that the Exhibits were inadmissible hearsay and not records of the employer as contemplated by §8-43-210, C.R.S. The ALJ also ruled that the records were not admissible under the hearsay exception contained in CRE 803(6).

The ALJ ultimately found that the respondents proved the existence of a safety rule prohibiting employees from wearing stilts on stairs. However, he determined that the respondents failed to prove the claimant's injury resulted from the willful violation of the safety rule. The ALJ reasoned that there was insufficient credible evidence establishing the claimant was on the stairs when he fell. The ALJ explained that there were no direct witnesses to the fall, the claimant did not remember the incident, and he could not ascertain whether the co-workers' statements were based on first-hand observation or mere assumptions and supposition. The ALJ further explained that the circumstantial evidence- scuff marks on the stair treads, the wing bolt, and the 90-degree turn in the staircase- also did not prove the claimant's injury more likely than not resulted from the violation of a safety rule. The ALJ denied and dismissed the respondents' request to reduce the claimant's indemnity benefits by fifty percent.

The respondents have appealed the ALJ's order again arguing that Exhibits P and R were admissible under §8-43-210, C.R.S. as "records of the employer" or admissible under the hearsay exception contained in CRE 803(6) for records kept in the course of a regularly conducted business activity. The respondents also contend substantial evidence does not support the ALJ's finding that they failed to prove the claimant's injury resulted from the willful violation of the safety rule.

I.

A. Section 8-43-210, C.R.S.

Section 8-43-210, C.R.S. provides "records of the employer are admissible as evidence and can be filed in the record as evidence without formal identification if relevant to any issue in the case." Section 8-43-210, C.R.S. is an exception to the general rule that hearsay is inadmissible. *See Chambers v. CF & I Steel Corp*., 757 P.2d 1171

(Colo. App. 1988)(rules of evidence generally apply in workers' compensation proceedings); CRE 801. However, the exception is limited to the types of documentary evidence explicitly enumerated in §8-43-210, C.R.S.

As noted by the ALJ, the Panel's previous decision in *Braden* is instructive here. In *Braden*, the ALJ found that the claimant experienced an immediate onset of neck pain on December 20, 1998, while moving a resident from a bed to a wheelchair. On December 23, 1998, the claimant filed a written injury report listing the date of injury as December 17, 1998. However, the ALJ credited the claimant's testimony that she subsequently realized the actual injury occurred on December 20, 1998.

On appeal, the respondents argued the ALJ erred in excluding several written witness statements from co-workers which indicated the claimant insisted that the injury occurred on December 17, 1998, and that the claimant complained of neck pain prior to December 20, 1998. The respondents argued that the handwritten statements were self-authenticated "records of the employer" and thus admissible under §8-43-210, C.R.S. The Panel rejected the respondents' argument. The Panel held that in the absence of formal identification, §8-43-210, C.R.S. does not allow employers to introduce written "reports" of witnesses as a substitute for testimony under the guise of "employer records." The Panel therefore agreed with the ALJ that the disputed statements were not "records of the employer." Instead, it held the statements were akin to "reports" generated as a result of the employer's investigation of the claim for workers' compensation benefits.

Here, we agree with the ALJ that Exhibits P and R do not amount to "records of the employer" as contemplated by §8-43-210, C.R.S. Initially, we are not persuaded by the respondents' argument that the statements in Exhibit P do not concern the employer's investigation because they were taken on the date of the claimant's injury and, therefore, were not done in anticipation of litigation. Exhibit P is entitled "Accident/Investigation Report," identifies all immediate and root causes of the accident, identifies witnesses of the accident, and contains attached witness statements of how the claimant fell. The Report also states that it is to be sent to WorkersCompensation@TopBuild.com and to your Regional Safety Manger's email address. Additionally, Exhibit R contains the employer's emails regarding the results of its investigation and its decision to terminate the claimant as a result of its conclusion that he violated the safety policy. Thus, similar to *Braden*, we agree with the ALJ's implicit determination that the disputed Exhibits instead are akin to "reports" generated as a result of the employer's investigation of a claim for workers' compensation benefits. Accordingly, we will not disturb the ALJ's order on this ground.

B. CRE 803(6)

Section 8-43-210 C.R.S. provides that the rules of evidence of the district courts shall apply in all hearings under the Colorado Workers' Compensation Act. CRE 801 defines "hearsay" evidence as a statement made outside the hearing of the court and offered for the truth of the matter asserted. The admission of hearsay evidence is precluded by the CRE 802, unless the evidence falls under one of the exceptions listed in CRE 803. Records kept in the course of a regularly conducted business activity, are an exception to the hearsay rule. CRE 803(6). There are five requirements for a hearsay document to be admissible under CRE 803(6): (1) the document must have been made at or near the time of the matters recorded in it; (2) the document must have been prepared by, or from information transmitted by, a person with knowledge of the matters recorded; (3) the person or persons who prepared the document must have done so as part of a 'regularly conducted business activity;' (4) it must have been the regular practice of that business activity to make such documents; and (5) the document must have been retained and kept in the course of that, or some other, regularly conducted business activity. *Schmutz v. Bolles*, 800 P.2d 1307 (Colo. 1990). The business record exception applies to computer records and insurance investigation reports. *Downing v. Overhead Door Corp*., 707 P.2d 1027 (Colo. App. 1985)(insurance adjuster's investigation report which was based, in part, on a conversation with the manager of an overhead door distributor, was admissible under CRE 803(6) in product liability claim against overhead door manufacturer).

Here, we disagree with the respondents that Exhibits P and R were alternatively admissible under the hearsay exception contained in CRE 803(6). While the Colorado Court of Appeals previously has held that an insurance adjuster's investigation report was admissible under the hearsay exception contained in CRE 803(6) for documents prepared as a result of regularly conducted business activity, we are not persuaded Exhibits P and R can be classified as such here. *See Downing v. Overhead Door Corp., supra.* Again, as the ALJ implicitly determined, these Exhibits instead are akin to "reports" generated as a result of the employer's investigation of a claim for workers' compensation benefits, and do not carry the guarantees of reliability that form the underlying basis for the business records exception. *See People v. Stribel,* 199 Colo. 377, 380, 609 P.2d 113, 115 (1980); *compare People v. Flores-Lozano,* 410 P.3d 684, 685 (Colo. App. 2016)(spreadsheet was not a document prepared for litigation; if spreadsheet had been prepared exclusively for litigation, it likely would have been inadmissible). Consequently, we will not disturb the ALJ's order on this ground.

II.

To the extent the respondents argue the ALJ's order is not supported by substantial evidence, we disagree.

Section 8-42-112(1)(b), C.R.S. provides that "[w]here injury results from the employee's willful failure to obey any reasonable rule adopted by the employer for the safety of the employee" the compensation provided under the Act shall be reduced fifty percent. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *See Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). The respondents bear the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof is one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Thus, we are required to uphold the ALJ's order if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). In applying this standard, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Here, substantial evidence supports the ALJ's determination that the respondents failed to satisfy their burden of proving the claimant willfully violated the respondent employer's safety rule. The ALJ credited the claimant's testimony that he always removed his stilts before ascending or descending stairs. During the hearing, the claimant testified that in his 12 or 13 year history of installing insulation, he never has walked up or down stairs on stilts, and that any time he has to go up and down stairs, he took off the stilts. The claimant explained that he takes the stilts off numerous times during a day of work. Tr. at 40-41. The ALJ further found there was insufficient credible evidence to establish the claimant was on the stairs when he fell. The ALJ explained that there were no direct witnesses to the claimant's fall, and he could not ascertain if the witness statements regarding the claimant being on the staircase were based on first-hand observation or mere assumptions and supposition. As noted above, the ALJ further was not persuaded that the circumstantial evidence- the scuff marks on the stair treads, the wing bolt, and the 90-degree turn in the staircase- proved the claimant's injury resulted from the violation of a safety rule. The ALJ explained that it was at least equally likely the claimant was at the top of the staircase when the set screw

came loose, causing him to tumble down the stairs. Our review of the record persuades us that the ALJ made reasonable inferences from the evidence presented. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). While the respondents point to evidence that supports their position, the existence of evidence which, if credited, might permit a contrary result also affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). Accordingly, we have no basis to disturb the ALJ's order on this ground. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated November 7, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

NOTICE

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2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

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Copies of this order were mailed to the parties at the addresses shown below on

4/17/18 by TT .

HEUSER & HEUSER LLP, Attn: GORDON J HEUSER ESQ, 625 N CASCADE AVENUE SUITE 300, COLORADO SPRINGS, CO, 80903 (For Claimant)
HALL & EVANS LLC, Attn: DOUGLAS J KOTAREK ESQ, 1001 SEVENTEENTH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-661-263-02

IN THE MATTER OF THE CLAIM OF:

SARA ORTEGA,

Claimant,

v.

FINAL ORDER

BLUE STAR HOLDING COMPANY,

Employer,

and

FIDELITY & GUARANTY INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Michelle Jones (ALJ) dated November 16, 2017, that denied and dismissed the respondents' request to terminate the claimant's dependent widow death benefits. We affirm the ALJ's order.

This matter went to hearing on the respondents' request to terminate the claimant's dependent widow death benefits, alleging that the claimant was common law married to Andrew Gardner. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant married the decedent, Gabriel Ortega, in 1999. The couple had a child together, referenced by AO, born on November 4, 1999. The decedent sustained fatal injuries on August 7, 2005, when he was involved in a motor vehicle accident. The claimant was awarded workers' compensation death benefits as the surviving widow. Death benefits remain ongoing.

On October 12, 2009, the claimant had a second child, referenced by initials JG, who was fathered by Andrew Gardner. Around the time of JG's birth, Mr. Gardner moved into the home owned by the claimant which she purchased in 2006. The claimant is the sole owner and the sole person listed on the home's mortgage. At the time of the hearing, the claimant, Mr. Gardner, AO and JG reside at the home. Mr. Gardner and the claimant stated that they thought it would be best for JG to be in a co-parenting situation and the best way to do that was to share a living space. Mr. Gardner pays the claimant

$300 per month for rent.

There was no evidence introduced that the claimant or Mr. Gardner held themselves out publicly to be married, that they referred to each other as spouses or that they intended to be married. The claimant and Mr. Gardner do not own property together, have no joint bank accounts or credit cards. They list themselves as single on various policies. The claimant and Mr. Gardner own separate vehicles. Although the vehicles are insured together in a joint policy, they are identified as single on the policy. Tax documents for Mr. Gardner list him as single.

The claimant and Mr. Gardner sometimes buy items together, cook and eat together with the children and share duties of the house. The claimant and Mr. Gardner, AO and JG went on a vacation together with other relatives. The claimant paid for the expenses for herself and AO while Mr. Gardner paid for himself and JG.

The claimant and Mr. Gardner testified that they consider each other to be boyfriend and girlfriend but not husband and wife. Both testified that they have an open relationship.

The ALJ found the claimant and Mr. Gardner to be credible. The ALJ determined neither the claimant nor Mr. Gardner indicated any intent to be married nor have they held themselves out to be married. The ALJ concluded that the weight of the credible and persuasive evidence establishes that no common law marriage exists. The ALJ, therefore, denied the respondents' request to terminate the claimant's dependent widow death benefits due to remarriage.

On appeal the respondents contend that the ALJ erred in crediting the claimant's testimony and that the overwhelming evidence established a common law marriage. We disagree and affirm the ALJ's order.

Section 8-42-114 C.R.S, provides that in the case of a death arising out of and in the course of employment death benefits shall be paid to the "to a dependent widow or widower. Section 8-42-120 C.R.S., provides that death benefits terminate upon "remarriage" of the surviving spouse.

In Colorado marriage can be created through a formal ceremony or by common law. Section 14-2-104 C.R.S.; *People v. Lucero*, 747 P.2d 660 (Colo. 1987). A common-law marriage is established by mutual consent or agreement of the parties, followed by mutual and open assumption of the marital relationship. *Id.* This test contemplates the

parties will exhibit conduct manifesting their agreement to become man and wife. *Id.* The two most important factors demonstrating the parties' agreement are cohabitation and reputation among persons in the community that the parties hold themselves out as man and wife. *Id.* Numerous behaviors may be considered as evidence of the parties' intention such as maintenance of joint bank accounts, ownership of joint property, use of the man's surname by the woman and the filing of joint tax returns. There is no determinative single form of evidence required. The ultimate determination "turns on issues of fact and credibility, which are properly within the trial court's discretion." *Id.* at 665.

Because the determination of whether a common law marriage existed is one of fact for determination by the ALJ, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to view the evidence in a light most favorable to the prevailing party and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Further, we note the ALJ is not obliged to enter findings concerning all the evidence in the record, but only that evidence which she finds dispositive of the issues involved. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The respondents' arguments notwithstanding, the record contains ample evidence that the claimant and Mr. Gardner were not common law married. Although the two cohabitated they did not hold themselves out as married in the community where they resided. The ALJ credited the testimony of the claimant and Mr. Gardner combined with the lack of evidence to establish that the parties held themselves out to be common law married. The weight to be accorded this evidence in determining whether a common law marriage existed was a matter for the ALJ and was to be balanced against all other facts in the case. *See Moffat Coal Co. v. Industrial Commission*, 108 Colo. 388, 118 P. 2d 769 (1941). We cannot say the ALJ erred as a matter of law in concluding the evidence weighed in favor of finding that no common law marriage existed.

The respondents take issue with the ALJ finding the claimant credible after the claimant signed an affidavit saying she was not common law married or co-habitating with Mr. Gardner. During a “widow check,” the insurer sent an investigator to the claimant’s home. The claimant indicated to the investigator that she had not remarried and had no plans to do so. The claimant reported that Mr. Gardner still remained her boyfriend and that they had a child in common. The investigator indicated that he had the claimant sign an affidavit in his presence while in the home. The affidavit signed by the claimant includes a statement that she was not engaged in cohabitation and had not

remarried since the passing of her husband. The claimant testified, however, that she has an 11th grade education, has not obtained her GED and is not advanced at reading and writing. The claimant stated that the statement she signed was put in front of her by the investigator who told her that by signing she was stating that she was not married or in a co-marriage and that is why she signed it. The claimant also maintained that that she had always told the investigator that Mr. Gardner was living at her house.

It was the ALJ's sole prerogative to determine the weight and sufficiency of the evidence. In making the credibility determinations the ALJ appropriately considered, among other things, the consistency or inconsistency of the claimant's testimony and actions or the reasonableness or unreasonableness of the testimony and action, the motives of the claimant, whether the testimony was contradicted and bias, prejudice or interest. *See Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684, 687 (Colo. App. 2008) (in weighing credibility of testimony, ALJ can consider its reasonableness or unreasonableness, consistency or lack of consistency, and contradiction or support by other evidence). The ALJ's credibility determinations are binding unless rebutted by hard, certain evidence to the contrary. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998). Therefore, we may not interfere with an ALJ's credibility determinations except in extreme circumstances. There are no extreme circumstances here which would warrant our disturbing the ALJ's credibility determinations. The ALJ expressly credited the claimant's testimony as persuasive and, in conjunction with that of the lack of other evidence establishing a common law marriage, there is ample support in the record for the ALJ's findings. Those findings support the conclusion that the claimant is not common law married and, therefore, the ALJ correctly denied the respondents' request to terminate benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated November 16, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

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LAW OFFICE OF OTOOLE & SBARBARO PC, Attn: JOHN A SBARBARO ESQ, 226 W 12TH AVE, DENVER, CO, 80204-3625 (For Claimant)
HALL & EVANS LLC, Attn: DOUGLAS J KOTAREK ESQ, 1001 17TH STREET SUITE 300, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-019-466-01

IN THE MATTER OF THE CLAIM OF:

KENNIA RAMIREZ-CHAVEZ,

Claimant,

v.

FINAL ORDER

IN-OUT OIL FIELD SERVICES,

Employer,

and

FARMINGTON CASUALTY COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Cayce (ALJ) dated August 31, 2017, that determined the finding of maximum medical improvement (MMI) by the Division sponsored Independent Medical Examination (DIME) physician had been overcome and ordered the respondents liable for an EMG study, physical therapy and lumbar epidural steroid injections. We affirm the decision of the ALJ.

The claimant worked for the employer as a welder. On April 6, 2015, while lifting pieces of sheet metal she noted a pop in her back and developed local pain in her low back and eventually radiating pain into her legs. The claimant reported her injury and was referred by the employer to the Workwell clinic. The claimant was treated with physical therapy, chiropractic treatment, dry needling and electrical stimulation. She was seen by Dr. Cazden, Dr. Mars, Dr. Webb and nurse practitioner (NP) Ford. During the course of her treatment, the claimant reported symptoms that varied considerably. The claimant explained her levels of activity affected her symptoms. The claimant was assigned lifting restrictions that ranged at different points from 10 pounds to 25 pounds. During the period of her treatment at Workwell, the claimant continued to work for the employer on light duty.

On August 21, 2015, NP Ford evaluated the claimant and noted reports of improvement in her pain complaints. NP Ford determined the claimant was at MMI. He

concluded the claimant should finish her previous prescription of chiropractor visits after which no further treatment would be required. The claimant was recommended to return to regular duty work with no restrictions and no permanent impairment. NP Ford's report of August 21 was countersigned by Dr. Webb.

The claimant continued to work for the employer until January 2016. She was laid off at that point due to a slow-down in work. The claimant had a baby in March 2016. Following the receipt of unemployment insurance benefits for several months, the claimant resumed work in September 2016 as a waitress at two different restaurants. The claimant retained counsel to assist with her injury claim. The respondents then filed a Final Admission of Liability (FAL) July 14, 2016. The FAL denied any temporary or permanent indemnity benefits but awarded maintenance medical benefits following the August 21, 2015, date of MMI. The claimant requested a DIME review through an August 9 Notice and Proposal selection form.

The claimant arranged for an independent evaluation by Dr. Wunder in September 2016. Dr. Wunder's examination led him to suspect the claimant suffered from radiculopathy generated by a disc herniation at the L3-4 or L4-5 level of the spine. The doctor recommended an MRI scan of the lumbar area, physical therapy and a lumbar epidural injection.

Dr. Higginbotham was selected to perform the DIME review. He met with the claimant on November 28, 2016. Dr. Higginbotham disagreed with Dr. Wunder that the claimant had signs of radiculopathy. He diagnosed the claimant as suffering from lumbalgia, myofascial sensations, a right sided sacroiliac strain and a left sided iliopsoas strain. Dr. Higginbotham agreed with the MMI date of August 21, 2015. He assigned a permanent impairment rating of 10% whole person premised on spinal range of motion deficits and an injury to the spine described in Table 53 of the AMA Guides. The doctor recommended medium level work restrictions but found no need for continuing medical treatment. The respondents filed a corresponding FAL on December 19, 2016, admitting for the 10% permanent impairment rating but denying an award of any future medical treatment.

The claimant filed an application for a hearing. At the July 12, 2017, hearing the claimant indicated she was disputing only the DIME physician's finding of MMI. She requested authorization for the EMG study, physical therapy and epidural steroid injections recommended by Dr. Wunder. The claimant testified she had never ceased experiencing pain symptoms in her back. Both Dr. Wunder and Dr. Higginbotham testified at the hearing and advocated for their respective diagnosis.

The ALJ found that Dr. Higginbotham's determination the claimant was at MMI was mistaken. The ALJ ruled the medical treatment requested by the claimant was inconsistent with the status of MMI. The recommendations were characterized as diagnostic procedures and additional medical treatment designed to reduce pain and to improve function. The ALJ therefore determined the claimant was required to establish by clear and convincing evidence as required by § 8-42-107(8)(b)(III), that the DIME's finding of MMI had been overcome. The ALJ credited the medical records, the testimony of the claimant and of Dr. Wunder, and concluded they demonstrated it was highly probable the MMI determination of Dr. Higginbotham was incorrect. The ALJ then deemed the requested medical procedures were shown by a preponderance of the evidence to be reasonably necessary and related medical treatment. The claimant's request for additional medical benefits was authorized.

I.

The claimant requested a DIME review following the receipt of a July 14, 2016, FAL which admitted for no temporary or permanent indemnity benefits. Section 8-42-107.2(2)(a) provides the time for the selection of a DIME commences on the date of a mailing of an FAL. However, the Supreme Court in *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), has held that claims which do not feature payable temporary or permanent indemnity benefits are not controlled by findings of MMI. That decision held "… the statutory consequences of a finding of 'maximum medical improvement' can apply only to injuries as to which disability indemnity is payable." *Id.* at 331**.** *Loofbourrow* was concerned with the premature closing of a claim for temporary disability benefits by an authorized treating physician's (ATP) finding of MMI when the claimant shortly thereafter suffered increased symptoms leading to missed time from work. The Court concluded, "[a]s will ever be the case with a worsening injury that initially required treatment but did not result in excess of three days' lost work time, no award of temporary disability benefits or admission of final liability was possible …." 320 P.3d at 331. *Kazazian v. Vail Resorts*, W.C. No 4-915-969-03 (April 24, 2017). Nonetheless, while this prohibition concerning the respondents' inability to file a FAL on July 14 affects the validity of that FAL to close the claim or to limit the time within which the claimant is required to request a DIME, it does not serve to restrict the claimant's ability to initiate the DIME process.[1]

[1] *Loofbourrow* noted the statutory significance of a finding of MMI applies only to those cases which must be reported to the Division. The decision refers to §§ 8-43-101(1) and 8-43-103(1) that require the filing of injuries featuring the loss of more than three shifts from work, permanent impairment or a fatality. Those circumstances also require the payment of indemnity benefits. Workers Compensation Rule of Procedure 5-5(E), controlling the filing of an FAL, also states it applies only to "those injuries required to be filed with the Division …."

The holding in *Loofbourrow*, concerned as it was with the methods for closing a claim, was not intended to produce a procedural conflict between the aim of § 8-42-107(8) to ensure DIME reviews of MMI and no permanent impairment determinations, and the goal of implementing the closure of claims. If this procedure relative to claim closing included in § 8-42-107.2(a))I)(A)(requiring the mailing of an FAL) were a prerequisite to the selection of a DIME, there would be no procedure for a claimant to select a DIME in this case in order to dispute the ATP's finding of MMI or of no permanent impairment.[2]

In pursuit of the construction of statutory directions we are obligated by § 2-4-201(1)(b) to note "the entire statute is intended to be effective" and (d) "a result feasible of execution is intended." In that regard the Supreme Court has ruled: "Where possible, courts must give effect to every word in a statute …." *Steedle v. Sereff*, 167 P.3d 135, 140 (Colo. 2007). To construe § 8-42-107.2(2)(a) to require the filing of an FAL as a precondition to any request for a DIME review would render ineffective the direction that "If any party disputes the finding or determination of the ATP such party shall request the selection of an IME" which includes "a finding that there is no medical impairment …." §§ 8-42-107(8)(b)(II) and 8-42-107(8)(b.5)(II). A party returning to work subsequent to an injury with no ATP assigned impairment would, in fact, not be able to dispute the finding of an ATP. The instruction that the 'entire statute is to be effective' and a result 'feasible of execution' must apply, indicates an FAL is not required to be present in every instance in which a DIME is requested.

The application of § 2-4-201(1) insists a FAL is not always required prior to the commencement of the DIME process. The statement that a FAL signals the ability of a claimant to request a DIME applies as a precondition to close a claim, but not as a prerequisite to the initiation of a DIME selection. In *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000), because the respondents asserted the claim involved only a scheduled impairment rating, and a DIME review of impairment is only provided for non-scheduled ratings, the respondents did not file an FAL when MMI was determined. Instead, they filed only an application for a hearing. The claimant requested a DIME selection asserting her impairment was due to a non-scheduled injury. The Court held "even though the statute did not so require, …" the DIME report "should have been considered "[b]efore the permanent benefits issue was resolved …." The ALJ's

[2] Section 8-42-107(8)(b)(III) C.R.S. provides that no hearing pertinent to a challenge to a finding by an authorized treating physician that the claimant is at MMI or has (or has not) permanent impairment, may take place until a finding by a DIME has been filed with the Division. The selection of a DIME physician may only be initiated when a party seeks to dispute a finding by an ATP that the claimant has reached MMI, § 8-42-107(8)(b)(I) and (II).

permanent impairment order was set aside and the case remanded for consideration of a DIME report. Similarly, in *Baran v. Amgen, Inc*., W.C. No. 4-906-018-01 (October 16, 2015), we held a FAL was not required before the DIME selection commenced and the resulting DIME determination must be considered before permanent disability may be resolved by an ALJ.

The Director has deemed the W.C. Rules concerning requests for the selection of a DIME need not include the requirement that a FAL precede the request. In 1996, § 8-42-107(8)(a) was amended to provide the DIME procedure shall also be available to review MMI determinations in the case of scheduled injuries. Accordingly, W.C. Rule 5-5(E)(1)(c) was added to direct that a claimant may request a DIME review despite the absence of any FAL. Additionally, W.C. Rule 11-3(A)(1), concerning the application process for DIMEs, provides any party may apply for a DIME, without including any reference to the prior filing of a FAL.

In limited circumstances such as in this matter, where a request for the selection of a DIME to review MMI or a determination of no permanent impairment does not have a time for which the DIME selection process is to commence, as provided in § 8-42-107.2(2)(a)(I)(A), due to the inability of the respondents to file a valid FAL in the absence of a prior award of temporary indemnity benefits, the claimant may nonetheless commence the selection of a DIME pursuant to § 8-42-107.2(2)(b) when an ATP has issued a statement of MMI with no permanent impairment. Accordingly, despite the absence of a valid FAL filed by the respondents on July 14, 2016, the claimant' s Notice & Proposal for a DIME submitted on August 9, 2016, is a valid DIME request. The ensuing DIME review conducted by Dr. Higginbotham is accorded the authority of a DIME determination as described in § 8-42-107(8)(c) and § 8-42-107.2(4)(c).[3]

Dr. Higginbotham did find the claimant had sustained permanent impairment from her work injury. In addition, the respondents submitted a second FAL on December 19, 2016, which awarded the claimant permanent disability benefits consistent with Dr. Higginbotham's impairment rating. Because the doctor's DIME authority was in accordance with § 8-42-107(8)(b), the procedures described in § 8-43-203(2)(b)(II) upon the filing of the subsequent FAL applied. As required, the claimant filed a timely

[3] In *Kazazian v. Vail Resorts, supra*, featuring a FAL similar to the July 14 FAL filed in this case, we held the FAL to be ineffective to close the claim or to close the period within which the claimant may request a DIME review. However, to the extent we also noted in that opinion the claimant would be unable to initiate the DIME process, we now modify that language as stated in the text above to interpret the statute to allow the claimant to request a DIME. This is not because of the respondents' FAL(which was invalid to close the claim or to limit the period to request a DIME), but because the statute allows a DIME review despite the absence of an FAL in those circumstances.

application for a hearing to challenge the finding of MMI by the DIME physician. Accordingly, the ALJ acquired jurisdiction to hear the matter pursuant to § 8-42-107(8)(b)(III).

II.

On appeal, the respondents present two contentions. First, the respondents assert Dr. Higginbotham's concession that an EMG study would be acceptable is not treatment inconsistent with his determination of MMI. The respondents reason that only in the event the EMG is positive will there be a question as to the integrity of the MMI decision. Second, the respondents argue the authorization of the physical therapy and lumbar steroid injections are premature and should not be considered until a completed EMG demonstrates the claimant is actually not at MMI.

The ALJ recognized the request for additional medical treatment to improve the compensable medical condition is a challenge to a finding of MMI. Until the determination of MMI by either an ATP or a DIME is set aside, the finding of MMI ends the claimant's entitlement to further medical treatment to cure and relieve the effects of the claimant's injury. *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003); *Portillo v. Shoco Oil, Inc*. W.C. No. 4-942-783-01 (May 1, 2017), *aff'd*, *Portillo v. Industrial Claim Appeals Office*, 17CA0895, (March 18, 2018)(not selected for publication).

In her decision, the ALJ pointed to several items in the record which led to the conclusion it was highly probable Dr. Higginbotham's MMI determination was incorrect. The ALJ noted the claimant's testimony that included her description of pain radiating into her lower extremities. The claimant indicated this pain was present on August 21, 2015, and had not abated as of the date of the hearing two years later. The ALJ observed that subsequent to Dr. Higginbotham's DIME opinion, an MRI of the claimant's lumbar spine was completed. The report reading the MRI results revealed that at the L5-S1 level of the spine there was a broad based disc bulge which impinged a nerve due to an annular tear. This condition was characterized as a mild to moderate stenosis. The MRI also indicated chronic disc desiccation. Dr. Wunder testified the MRI showed a disc intrusion one level lower than he suspected. However, Dr. Wunder explained that the swelling and movement of the extruded disc material at the L5-S1 level was consistent with his prior findings of radiculopathy and justified his recommendation for lumbar injections, physical therapy and even a surgical consult. The ALJ referenced Dr. Wunder's critique of Dr. Higginbotham's DIME report which reasoned the Director's Medical Treatment Guidelines concerning the diagnosis of sacroiliac dysfunction had not been correctly

applied by Dr. Higginbotham when he made a diagnosis of that condition. The ALJ found particularly significant the responses Dr. Higginbotham provided to cross examination questions surrounding the MRI report. He stated that if the claimant was indeed currently complaining of numbness into her leg at the conclusion of a work shift as a waitress, an EMG exam should be administered to confirm the presence of radiculopathy. If confirmed, the doctor would surmise the claimant was not at MMI and would require further treatment to address that condition. Premised on this evidence, the ALJ deemed the DIME determination of MMI had been overcome by clear and convincing evidence.

The ALJ found persuasive Dr. Wunder's recommendation for lumbar injections and physical therapy. The ALJ concluded these treatments were designed to improve, or 'cure,' the claimant's condition and were therefore inconsistent with the status of MMI. The ALJ adjudged that a preponderance of the evidence demonstrated these treatments to be reasonable and necessary and related to the compensable injury. She ordered the procedures authorized.

The ALJ was not in error to resolve the MMI issue prior to the completion of an EMG study. While that exam may constitute relevant evidence, the record completed at hearing contained a substantial amount of pertinent information concerning diagnosis and MMI. Section 8-42-107(8)(c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* To the extent the ALJ's decision is supported by substantial evidence in the record, we may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990). The ALJ's reliance on the claimant's testimony, Dr. Wunder's opinions and the MRI report comprises substantial evidence to support her conclusion the DIME determination of MMI was mistaken.

It is the prerogative of the ALJ to resolve conflicts in the evidence and determine the credibility of witnesses and the probative value of the evidence. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993). So long as such determination is supported by substantial evidence in the record, it is binding on review.

See May D & F v. Industrial Claim Appeals Office, 752 P.2d 589 (Colo. App. 1988). Substantial evidence is probative evidence, which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory or contrary inferences. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). *Ackerman v. Hilton's Mech. Men*, 914 P.2d 524, 527-28 (Colo. App. 1996). We may not interfere with the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986); *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997). Claimant's arguments notwithstanding, we perceive no extreme circumstances here.

IT IS THEREFORE ORDERED that the ALJ's order issued August 31, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Examiner DeFalco-Galvin concurs:

I believe that the ALJ's order should be affirmed and, therefore, I concur in the result. I disagree, however, with the application of *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), to invalidate the July 14, 2016, final admission of liability under the facts of this case.

The Court in *Loofbourrow* held that MMI, as a "statutory term of art," has no applicability or significance for "injuries insufficiently serious to entail disability indemnity compensation in the first place." The Court cited to the statute of limitations in §8-43-103(2), C.R.S. and recognized that although the "statutory scheme mandates that a worker notify his employer of an injury," the court explicitly recognized that "[g]iving notice however, is not the same thing as *filing a claim for disability benefits*." (emphasis added).

Loofbourrow's reference to the statute of limitations standard for filing a claim for disability benefits is a distinguishing factor and limits the application of the principles

announced in that case to claims where a claim for compensation has not yet been filed. It is well settled under §8-43-103(2), C.R.S. that the claimant must file a claim for disability benefits within two years from when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). For purposes of the statute of limitations, a "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne, supra*. Therefore, to recognize the "probable compensable character" of an injury, the claimant must appreciate a causal relationship between the employment and the condition. The claimant must also know that the injury is disabling and may entitle him to disability benefits.

Although the claimant in *Loofbourrow* notified the employer of her injury in November of 2008, she did not file a claim for disability benefits until she filed an application for hearing in September of 2009, which was after the MMI determination in December of 2008. There was no final admission of liability in that case. The present case, however, differs from *Loofbourrow* in that it was sufficiently serious to entail disability indemnity compensation. The Division records indicate that the claimant here filed a worker's claim for compensation on July 8, 2016. (It is not readily apparent from the file on review whether she actually alleged that she sustained permanent disability benefits in the claim, but, she nonetheless filed a "claim for compensation." *See* §8-43-103(2) "a notice claiming compensation is filed with the division.") The employer filed a general admission and then filed a final admission of liability on July 14, 2016, denying liability for temporary or permanent disability benefits. The present case followed the procedure dictated by statute and rule.

Permanent disability benefits were arguably "payable" in the present case, and in fact, the DIME physician determined that the claimant did sustain permanent disability. In my view the principles announced in *Loofbourrow* are limited to the particular facts of that case and should not be read to invalidate an otherwise final admission of liability that follows both the statute and the worker's compensation rules of procedure.

NOTICE

- This order is **FINAL** unless you appeal it to the **COLORADO COURT OF APPEALS**. To do so, you must file a notice of appeal in that court, either by mail or in person, but it must be **RECEIVED BY** the court at the address shown below within twenty-one (21) calendar days of the mailing date of this order, as shown on the certificate of mailing.

- A complete copy of this final order, including the mailing date shown, must be attached to the notice of appeal, and you must provide a copy of both the notice of appeal and the complete final order to the Colorado Court of Appeals.

- You must also provide copies of the complete notice of appeal package to the Industrial Claim Appeals Office, the Attorney General's Office (addresses shown below), and all other parties or their representative whose addresses are shown on the Certificate of Mailing on the next page.

- In addition, the notice of appeal must include a certificate of service, which is a statement certifying when and how you provided these copies, showing the names and addresses of these parties and the date you mailed or otherwise delivered these copies to them.

- An appeal to the Colorado Court of Appeals is based on the existing record before the Administrative Law Judge and the Industrial Claim Appeals Office, and the court will not consider documents and new factual statements that were not previously presented or new arguments that were not previously raised.

- Forms are available for you to use in filing a notice of appeal and the certificate of service. You may obtain these forms from the Colorado Court of Appeals online at its website, www.colorado.gov/cdle/CTAPPFORM or in person, or from the Industrial Claim Appeals Office. **Please note address changes as listed below.**

- The court encourages use of these forms. Proper use of the forms will satisfy the procedural requirements of the Colorado Appellate Rules for appeals to the Colorado Court of Appeals. **For more information regarding an appeal, you may contact the Court of Appeals directly at 720-625-5150.**

Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203

Industrial Claim Appeals Office
633 17th Street, Suite 200
Denver, CO 80202

Office of the Attorney General
State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

Copies of this order were mailed to the parties at the addresses shown below on

4/12/18 by TT .

RING & ASSOCIATES PC, Attn: BOB L RING ESQ, 2550 STOVER STREET BUILDING C, FORT COLLINS, CO, 80525 (For Claimant)
RAY LEGO & ASSOCIATES, Attn: GREGORY W PLANK ESQ, 6060 S WILLOW DRIVE SUTIE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

HOUSE BILL 18-1308

BY REPRESENTATIVE(S) Kraft-Tharp and Becker J., Arndt, Liston, Buckner, Covarrubias, Gray, Landgraf, Van Winkle;
also SENATOR(S) Hill and Kagan, Kefalas, Kerr, Moreno, Priola, Scott, Aguilar, Baumgardner, Cooke, Donovan, Garcia, Gardner, Guzman, Jahn, Marble, Martinez Humenik, Merrifield, Neville T., Sonnenberg, Tate, Todd, Williams A., Grantham.

CONCERNING AN EXEMPTION FROM THE "WORKERS' COMPENSATION ACT OF COLORADO" FOR NONRESIDENT EMPLOYERS WHOSE EMPLOYEES ARE TEMPORARILY WORKING IN COLORADO.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 8-41-212 as follows:

8-41-212. Exemptions - laws of other state furnish exclusive remedy - definitions. (1) AN EMPLOYEE WHO WAS HIRED OR IS REGULARLY EMPLOYED OUTSIDE OF COLORADO BY AN OUT-OF-STATE EMPLOYER AND THE OUT-OF-STATE EMPLOYER OF THE EMPLOYEE ARE EXEMPT FROM ARTICLES 40 TO 47 OF THIS TITLE 8 WHILE THE EMPLOYEE IS TEMPORARILY WORKING FOR THE OUT-OF-STATE EMPLOYER WITHIN COLORADO IF:

_____
Capital letters or bold & italic numbers indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(a) THE OUT-OF-STATE EMPLOYER HAS FURNISHED COVERAGE PURSUANT TO THE WORKERS' COMPENSATION LAWS OF THE STATE IN WHICH THE EMPLOYEE WAS HIRED OR IS REGULARLY EMPLOYED, WHICH COVERAGE APPLIES TO THE EMPLOYEE WHILE TEMPORARILY WORKING IN COLORADO; AND

(b) THE STATE IN WHICH THE EMPLOYEE IS FURNISHED COVERAGE:

(I) IS CONTIGUOUS TO COLORADO; AND

(II) RECOGNIZES THIS SECTION AND PROVIDES THE SAME EXEMPTION FROM THE APPLICATION OF ITS WORKERS' COMPENSATION LAWS FOR COLORADO EMPLOYERS WHOSE EMPLOYEES ARE TEMPORARILY WORKING IN THE CONTIGUOUS STATE.

(2) FOR AN OUT-OF-STATE EMPLOYEE AND OUT-OF-STATE EMPLOYER TO WHICH THIS SECTION APPLIES, THE BENEFITS PROVIDED UNDER THE WORKERS' COMPENSATION LAWS OF THE STATE IN WHICH THE EMPLOYEE IS FURNISHED COVERAGE ARE THE EXCLUSIVE REMEDY AGAINST THE OUT-OF-STATE EMPLOYER FOR ANY INJURY, WHETHER RESULTING IN DEATH OR NOT, THAT THE EMPLOYEE INCURS WHILE WORKING FOR THE OUT-OF-STATE EMPLOYER IN COLORADO.

(3) THE DIVISION MAY ENTER INTO AN AGREEMENT WITH ANY WORKERS' COMPENSATION DIVISION OR SIMILAR AGENCY OF A CONTIGUOUS STATE TO PROMULGATE RULES CONSISTENT WITH THIS SECTION TO CARRY OUT THE EXTRATERRITORIAL APPLICATION OF THE WORKERS' COMPENSATION OR SIMILAR LAW OF THE AGREEING STATE.

(4) NOTHING IN THIS SECTION CONTRAVENES THE LEGAL OBLIGATIONS OF COLORADO EMPLOYERS TO PROVIDE WORKERS' COMPENSATION TO THEIR EMPLOYEES IN COMPLIANCE WITH ARTICLES 40 TO 47 OF THIS TITLE 8.

(5) AS USED IN THIS SECTION:

(a) "OUT-OF-STATE EMPLOYER" MEANS AN EMPLOYER THAT IS DOMICILED IN ANOTHER STATE.

(b) "TEMPORARILY" OR "TEMPORARILY WORKING" MEANS:

(I) A PERIOD OF SUSTAINED WORK THAT DOES NOT EXCEED SIX MONTHS; OR

(II) ENGAGING IN THE INTERSTATE MOVEMENT OF GOODS OR COMMODITIES.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Crisanta Duran SPEAKER OF THE HOUSE OF REPRESENTATIVES	Kevin J. Grantham PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Effie Ameen SECRETARY OF THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

SENATE BILL 18-178

BY SENATOR(S) Smallwood, Baumgardner, Coram, Crowder, Holbert, Jahn, Kefalas, Lambert, Lundberg, Marble, Martinez Humenik, Neville T., Priola, Scott, Sonnenberg, Tate, Williams A., Grantham;
also REPRESENTATIVE(S) Kraft-Tharp, Liston, Reyher, Winkler.

CONCERNING THE DEFINITION OF SIMILAR COVERAGE FOR WORKERS' COMPENSATION FOR CERTAIN OPERATORS OF COMMERCIAL VEHICLES.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 40-11.5-102, **amend** (5)(a) and (5)(b); and **add** (5)(a.5), (5)(d), and (5)(e) as follows:

40-11.5-102. Lease provisions - definitions - rules. (5) (a) Any lease or contract executed pursuant to this section ~~shall~~ MUST provide for coverage under workers' compensation or ~~a private~~ AN OCCUPATIONAL ACCIDENT insurance policy that provides similar coverage.

(a.5) IF AN OPERATOR OF A COMMERCIAL VEHICLE, AS DEFINED IN SECTION 42-4-235 (1)(a)(I)(B), OBTAINS SIMILAR COVERAGE PURSUANT TO THIS SUBSECTION (5), THEN THE OPERATOR:

(I) IS EXCLUDED FROM THE DEFINITION OF EMPLOYEE FOR PURPOSES

Capital letters or bold & italic numbers indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

OF SECTION 8-40-202 (2);

(II) SHALL NOTIFY THE DIVISION OF WORKERS' COMPENSATION IN THE DEPARTMENT OF LABOR AND EMPLOYMENT OF THE ELECTION, IN A MANNER DETERMINED BY THE DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION BY RULE; AND

(III) SHALL, ALONG WITH THE MOTOR CARRIER AND CONTRACT CARRIER, PROVIDE PROOF OF THE SIMILAR COVERAGE UPON REQUEST TO INTERESTED PARTIES, INCLUDING THE CARRIER'S WORKERS' COMPENSATION INSURANCE PROVIDER, THE DIVISION OF WORKERS' COMPENSATION, AND THE DIVISION OF INSURANCE.

(b) For purposes of this subsection (5), "similar coverage":

(I) Means ~~disability insurance for on and off the job injury, health insurance, and life~~ insurance BENEFITS DESIGNED FOR INDEPENDENT CONTRACTORS AND SOLE PROPRIETORS WHO REJECT WORKERS' COMPENSATION COVERAGE AND ELECT, PURSUANT TO THIS SUBSECTION (5), COVERAGE PROVIDING MEDICAL, TEMPORARY AND PERMANENT DISABILITY, DEATH AND DISMEMBERMENT, AND SURVIVOR BENEFITS THAT ARE SUBJECT TO REGULATION BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES. The specifications of ~~such~~ THE insurance, including ~~the amount of any deductible, shall~~ COVERAGES, EXCLUSIONS, POLICY LIMITS, AND THE AMOUNT, IF ANY, OF ANY DEDUCTIBLES OR COPAYMENTS, MUST BE FILED WITH THE DIVISION OF INSURANCE. THE SPECIFICATIONS MUST meet or exceed standards set by the division of insurance ~~in the department of regulatory agencies,~~ and ~~such~~ THE standards ~~shall~~ MUST specify that the benefits offered by ~~such~~ THE insurance coverage ~~shall~~ MUST be at least comparable to the benefits offered under the workers' compensation system.

(II) FOR SERVICES PERFORMED BY OPERATORS OF COMMERCIAL VEHICLES, AS DEFINED IN SECTION 42-4-235 (1)(a)(I)(B), MEANS INSURANCE BENEFITS DEFINED IN SUBSECTION (5)(b)(I) OF THIS SECTION. THE SPECIFICATIONS OF THE INSURANCE, INCLUDING MINIMUM THRESHOLDS FOR COVERAGE AND THE AMOUNT, IF ANY, OF ANY DEDUCTIBLES OR COPAYMENTS, MUST MEET OR EXCEED THE STANDARDS SET, BY RULE, BY THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES.

(d) NOTWITHSTANDING ANY OTHER LAW, IF AN OPERATOR OF A COMMERCIAL VEHICLE, AS DEFINED IN SECTION 42-4-235 (1)(a)(I)(B), A MOTOR CARRIER, OR A CONTRACT CARRIER OBTAINS SIMILAR COVERAGE PURSUANT TO THIS SUBSECTION (5), ARTICLES 40 TO 47 OF TITLE 8 DO NOT APPLY.

(e) THE COMMISSIONER OF INSURANCE IN THE DIVISION OF INSURANCE IN THE DEPARTMENT OF REGULATORY AGENCIES SHALL PROMULGATE RULES ESTABLISHING THE MINIMUM COVERAGES FOR BENEFITS UNDER AN OCCUPATIONAL ACCIDENT POLICY UNDER THIS SUBSECTION (5).

SECTION 2. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018

and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

Kevin J. Grantham PRESIDENT OF THE SENATE	Crisanta Duran SPEAKER OF THE HOUSE OF REPRESENTATIVES
Effie Ameen SECRETARY OF THE SENATE	Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO