

BROWN BAG SEMINAR

Thursday, April 16, 2015

(third Thursday of each month)

Noon - 1 p.m.

633 17th Street

2nd Floor Conference Room

(use elevator near Starbucks)

1 CLE (including .4 ethics)

Presented by

Craig Eley

Manager of Director's Office
Prehearing Administrative Law Judge
Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

Free

This outline covers ICAP and appellate decisions issued from

March 14, 2015 through April 10, 2015

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-952-696-01
& 3-850-643

IN THE MATTER OF THE CLAIM OF

CAROL CLUBB,
(re: Sturgeon Clubb, deceased)

Claimant,

v.

FINAL ORDER

RE MONKS,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated December 24, 2014, that dismissed her claim for death benefits and refused her request to reopen the settlement in W.C. No. 3-850-643. We affirm the decision of the ALJ.

The claimant's husband, Sturgeon Clubb, sustained work injuries to his arms and ribs on January 30, 1987, when he fell from a bulldozer while at work for the respondent employer. This claim was designated W.C. No. 3-850-643. Mr. Clubb's treatment involved numerous surgeries to his arms. Mr. Clubb was placed at maximum medical improvement (MMI) on December 2, 1994. At that point the respondents submitted a Final Admission of Liability dated December 5, 1994, which admitted liability for permanent total disability benefits in the amount of \$161.36 per week.

Several months later the parties negotiated a full and final settlement of Mr. Clubb's claim. The settlement agreement of December 19, 1995, provided Mr. Clubb would waive his rights to any further benefits pursuant to his work injury. In return, the respondents were to pay him a lump sum of \$37,000 and a monthly annuity of \$437. This monthly payment was to be paid for the balance of Mr. Clubb's natural life. In the event Mr. Clubb died within 20 years of the date of the settlement, the unpaid balance of the first 20 years of monthly payments would be made to his designated beneficiary. The

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claimant, his wife, was nominated as the beneficiary. The agreement specified the settlement agreement could not be reopened except on the ground of fraud or mutual mistake of material fact pursuant to § 8-43-303, C.R.S. In the event the settlement was reopened, the agreement provided any money paid by the respondents pursuant to the settlement would constitute a credit against any workers' compensation benefits ordered subsequent to such a reopening.

Mr. Clubb died on July 19, 1997, when he was taken to the emergency room at St. Thomas More Hospital due to several seizures and a cessation of cardiac function. The certificate of death completed by one of the attending physicians noted the cause as acute hemorrhagic bronchopneumonia. A subsequent autopsy concurred that Mr. Clubb expired due to acute hemorrhagic pneumonia complicated by a cardiac arrest.

The claimant, the decedent's wife, submitted a claim for death benefits on April 6, 2014. This claim was designated W.C. No. 4-952-696. The claimant filed an application for a hearing on August 1, 2014, seeking an award of the death benefits and the reopening of claim W.C. No. 3-850-643. The respondents asserted the death benefits should be denied due to the running of the two year statute of limitations in § 8-43-103(2) and the absence of any evidence Mr. Clubb's death was a result of his work injury. The respondents denied there was any fraud or mutual mistake of fact to justify a reopening of the settlement in W.C. No. 3-850-643.

After hearing on November 19, 2014, the ALJ determined the two year statute of limitations applied to bar the claimant's request for death benefits. The ALJ noted that at the time the claimant initiated her claim for death benefits, 17 years had passed since Mr. Clubb's death. The claimant had argued the running of the limitations period should be tolled in her case because of her ignorance of the law and because her consultations with Mr. Clubb's attorney after the death did not include information regarding the possibility of a claim for death benefits. The ALJ ruled a claimant is presumed to know their legal rights and the failure to exercise those rights due to a misunderstanding of legal options is not an excuse for an extension of the statute of limitations.

The ALJ also determined the evidence in the record established Mr. Clubb's death was not brought about by his work injuries. The ALJ observed the medical records showed that on January 27, 1997, Mr. Clubb was seen at a Veteran's Administration clinic with complaints of right knee swelling. At that time a history given by Mr. Clubb described how he suffered episodes of "pneumonia yearly until 1995 and a history of prior MI (myocardial infarction) at age 29." On July 19, 1997, the St. Thomas More

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emergency room records indicated Mr. Clubb had not recently been feeling well. That morning he awoke and felt much worse. An ambulance was dispatched and the medical technicians found Mr. Clubb unconscious. They noted Mr. Clubb experienced two seizures before arrival at the emergency room. His heart beat eventually slowed and then ceased entirely. Mr. Clubb was pronounced dead within an hour. As noted, the cause of death was listed by the treating doctors and by a later autopsy as acute hemorrhagic pneumonia complicated by a cardiac arrest. Mr. Clubb was deemed to suffer from several co-morbid conditions including hypertension, degenerative joint disease, bronchitis, ulcers, reflux esophagitis, depression and several pneumonias. The ALJ surmised the evidence was more persuasive than not that Mr. Clubb's death was brought on by an episode of pneumonia and a related cardiac arrest unconnected to his work injury ten years previously. Accordingly, the ALJ dismissed the claimant's request for an award of death benefits.

Finally, the ALJ determined that because the claimant had failed to show Mr. Clubb's death was caused by a work injury or that her claim was not barred by the statute of limitations, the ALJ's order "does not address the claimant's request for reopening the claim based upon fraud or mutual mistake of material fact."

I.

We agree with the ALJ that a claimant's mistake or ignorance concerning the time period for filing her claim, is not an excuse for her failure to file within the applicable statute of limitations. A claimant is presumed to know her legal rights, and a mistake in this regard does not constitute an excuse for filing a claim after the statute of limitations has run. *See Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981)(parties are presumed to know the law); *Ramos v. Sears Roebuck Co.*, W.C. No. 4-156-827 (February 10, 1994). Thus, a claimant's misunderstanding of her legal rights does not provide a basis for establishing a "reasonable excuse" for extending the statute of limitations under §8-43-103(2), C.R.S. *Patt v. City of Wheat Ridge*, W.C. No. 4-180-739 (July 24, 1997).

The claimant was the only witness to testify at the November 19, 2014, hearing. The claimant did not secure a transcript of the hearing proceedings to assist in her appeal. The attorney involved in the settlement of Mr. Clubb's claim is deceased. The period of delay represented by the claim for benefits, 17 years after Mr. Clubb's death, is significant and would impose a forbidding barrier to the respondents' ability to present evidence beyond the existing medical records in defense of the claim. Accordingly, we

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find no basis to question the ALJ's finding that the limitations period in § 8-43-103(2) applies to bar the claim for work related death benefits in W.C. No. 4-952-696.

Section 8-41-301(1)(c), C.R.S., creates the right to compensation where the worker's death is "proximately caused by an injury or occupational disease." Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a compensable injury. *See Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Whether the claimant sustained her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the evidentiary record. Section 8-43-301(8), C.R.S. "Substantial evidence is that quantum of probative evidence which a rational fact-finder could accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Further, as noted above, since the claimant did not request a copy of the transcript, we must presume that the ALJ's findings are supported by the evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988).

Here, the ALJ relied on the medical records from St. Thomas More Hospital and the autopsy from the Veteran's Administration. The ALJ also reviewed various medical records from Dr. Carlton, Dr. Walker, the Cardiology Clinic and the Veteran's Administration. These records are substantial evidence that support the ALJ's findings Mr. Clubb had a history of pneumonia, high blood pressure and other medical problems distinct from his work injuries that led to his death. We therefore affirm the conclusion of the ALJ that Mr. Clubb's death was not caused by his 1987 work injury.

II.

The ALJ's observation that his findings in regard to the death benefits claim contingent on § 8-42-114 (death caused by work injuries)¹ precluded his consideration of the issues of either reopening or death benefits from § 8-42-116 (death not due to work injuries) is in error. However, we ultimately view the omission as harmless based upon the record developed in the case.

The claimant has pursued her claims without assistance of counsel. However, the pleadings suggest she is pursuing three claims for relief. She has requested an award of

¹ By reference from § 8-42-115(1)(b).

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death benefits contending Mr. Clubb's death was caused by work injuries. The ALJ denied that claim. She has also sought to reopen the settlement in W.C. No. 3-850-643. In addition, the claim of reopening implicates a second claim she has for death benefits pursuant to § 8-42-116(1)(a). This statute pertains to death benefits available when the deceased employee dies from conditions not related to work. Here, those death benefits would include the remaining portion of the permanent total disability benefits Mr. Clubb would have received had he continued to live and received the benefits for six years.

The ALJ deduced from the claimant's testimony and her post hearing written statement that the claimant believes Mr. Clubb was "cheated" by the respondents through the settlement. She requests that the settlement be set aside and that she be awarded a higher periodic benefit than the \$437 per month provided by the settlement agreement. The ALJ viewed the claimant's position as one alleging fraud as an inducement for the settlement. However, the ALJ declined to consider the reopening claim or the death benefits pursuant to that claim. The ALJ reasoned:

... because claimant has failed to present 'competent evidence' to overcome the presumption that decedent's death was caused by his work related injuries or that her claim for death benefits is not subject to the applicable statute of limitations, this order does not address claimant's request for reopening the claim based upon fraud and/or mutual mistake of material fact. (finding of fact ¶ 15).

It is not clear as to how the ALJ applied these findings to preclude the claimant's issues of reopening or for death benefits in the event the deceased did not expire due to work injuries.

The statute of limitations in § 8-43-103(2) has no applicability to the reopening claim. Section 8-43-303(1) provides "a settlement may be reopened at any time" on the grounds of fraud or mutual mistake of material fact. Nor does the statute of limitations in § 8-43-103(2) apply to a claim for death benefits described in § 8-42-116. Section 8-43-103(2) requires that a claim for benefits be filed "within two years after the injury or after death resulting therefrom." However, because § 8-42-116 pertains to death benefits arising when the injured employee's death is not caused by the work injury, very few of the death benefit claims described in that section will even feature an injured employee's death within two years of the injury (as in this case). In addition, at no point will there be a death "resulting therefrom" *i.e.* from a work injury. Accordingly, the limitations period

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in § 8-43-103(2) has no application to the claimant's requests for benefits through W.C. No. 3-850-643.

The finding that the claimant did not establish Mr. Clubb's death was due to work injuries would not prevent litigation of a claim that the settlement was obtained through fraud or mutual mistake. Similarly, the absence of a finding of a work relationship to Mr. Clubb's death would be insignificant to a claim for death benefits premised specifically on that very absence of a connection to work.

Nonetheless, in regard to the claimant's request that the settlement agreement in W.C. No. 3-850-643 be reopened and set aside, we conclude the claimant does not have standing to attack the settlement for the reason that she is not a party to the settlement agreement and that agreement does not affect her claim for § 8-42-116 death benefits. The Court of Appeals in *Claimants of Hampton v. Director of Division of Labor*, 31 Colo. App. 141, 500 P.2d 1186 (1972), reviewed a claim for death benefits where the deceased employee had not timely filed a claim and did not thereby receive any benefits. However, when the employee died due to the work injuries, the court held his dependents could nonetheless maintain a claim for death benefits. The court surmised "the dependents' rights are independent and distinct from those of the employee." A review of the statute showed an "... indication of the independent nature of the relationship is found in [§ 8-41-504 C.R.S.] which states that the dependents are not parties in interest to any action by the injured employee during his lifetime." The court specifically reasoned that "As a consequence of the independent nature of dependents' right, the employee's release or waiver of his rights does not bar his dependents' subsequent claim for death benefits."² *Id.* at 31 Colo. App.145, 500 P.2d 1188. This independent status of a dependent's death benefits claim is recognized as generally applicable in workers' compensation law. "The settlement, compromise, or release by the deceased of his or her rights under the Act cannot bar the statutory rights of any dependents, since these rights are independently created by statute." *Larson's Workers' Compensation Law*, § 98.01 [2].

In this matter, the claimant was not a party to the settlement of W.C. No. 3-850-643. Therefore, the waiver by Mr. Clubb of his rights through that settlement have no effect on any statutory rights provided the claimant. Accordingly, the claimant does not have standing to attack the settlement agreement or request its reopening, but neither does that agreement serve as a bar to her claim for § 8-42-116 death benefits.

² § 8-41-504 also bars the participation by a dependent in any settlement of an employee's claim.

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III.

Despite the rule of independence that leaves open the claimant's claim for death benefits pursuant to § 8-42-116, it appears that in this case there are no remaining death benefits to be awarded. We conclude the payment of the settlement proceeds satisfied the liability for death benefits.

The record shows the respondents notified the Division of Workers' Compensation shortly after the completion of the settlement that Mr. Clubb's claim became closed. Unlike a claim for § 8-42-114 death benefits, which requires a separate administrative claim, a death benefits claim pursuant to § 8-42-116 is administered through the original employee's claim. This is due to the absence of any reference to a § 8-42-116 type of claim in § 8-43-103(2) dealing with the need to file a claim for benefits. It also follows from W.C. Rule of Procedure 5-8 (B)(3)(b), 7 Code Colo. Reg. 1101-3. That rule requires the respondent insurer to file a revised admission in the employee's claim advising as to the amount of remaining permanent total benefits being paid as death benefits to dependents when a permanent total claim is being closed on the basis of the employee's death. Consequently, while the claimant's death benefits claim is "independent and distinct from those of the employee," it is also administered as a part of Mr. Clubb's claim in W.C. No. 3-850-643.

Here, the reasons for the respondents' determination to pay no further permanent total benefits after the death of Mr. Clubb were due to the fact that the benefits had been 'paid.' Reference to the respondents' Final Payment Notice closing Mr. Clubb's claim asserts that the permanent total benefits that had been admitted were paid through the respondent's satisfaction of the stipulated consideration for the settlement. As a result, the respondents were not required by W.C. Rule of Procedure 5-8 (B)(3)(b) to file a revised Final Admission upon Mr. Clubb's death noting the amount of remaining permanent total benefits being paid as death benefits.

We agree with the respondents that even though the settlement of Mr. Clubb's claim is not binding on the claimant as specified in § 8-41-504 (no dependent is deemed a party to a settlement by an employee), in this case, the payments made by the respondents pursuant to the settlement may be credited to satisfy their liability for the claimant's § 8-42-116 death benefits.

Section 8-42-116(1)(a) specifies that when the work injury caused permanent total disability the dependents are entitled to a death benefit:

(1) If death occurs to an injured employee, other than as a proximate result of any injury, before disability indemnity ceases ...

(a) ... the death benefit shall consist of the unpaid and unaccrued portion of the permanent total disability benefit which the employee would have received had the employee lived until receiving compensation at the employee's regular rate for a period of six years.

While courts have acknowledged that even in the case of a death benefit claim not caused by work injuries as provided by § 8-42-116, the rule of independence will apply, it is also noted that this "statute should be construed in a manner that gives effect to the legislative purpose underlying its enactment." The decisions interpreting § 8-42-116 often have mitigated the effect of the rule of independence by seeking to construe the statute so as to achieve its legislative goal. This goal was observed in *Metro Glass & Glazing v. Orona*, 868 P.2d 1178 (Colo. App. 1994), to "provide dependents of deceased workers with a substitute for the support previously provided by the decedent through the receipt of permanent total disability benefits." The Court in *Singleton v. Kenya Corp.*, 961 P.2d 571 (Colo. App. 1998), noted the statute should "encompass only those benefits which the injured worker may have been entitled to had his death not precluded him from establishing such entitlement." In *In re Death of Winters*, 819 P.2d at 543, the Court rejected an interpretation that "works an unfairness against the employer to provide continuing benefits for an additional six years beyond death in all cases in which the death was not caused by the injury." The decision in *Schenfeld v. Shaffer*, 29 Colo. App. 425, 487 P.2d 818 (1971), admonished the interpretation to "read together all portions of the Workmen's Compensation Act and to harmonize them if possible."

To achieve the noted legislative intent, *Singleton* held the 'cessation' of indemnity benefits due to the employee's death prior to MMI would not bar a dependent's death benefits claim. The decision in *Metro Glass* found the employee's 'regular rate' would not be reduced due to the employee's receipt of Social Security disability benefits. *In re Death of Winters* held the longevity of the employee's life could serve to reduce the amount of death benefits.

The issue then, in this matter is the effect on the 'unpaid' status of permanent total benefits presented by the payments the respondents made pursuant to the settlement. Because the goal of § 8-42-116 is to "provide dependents of deceased workers with a substitute for the support previously provided by the decedent through the receipt of

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permanent total disability benefits” and is to “encompass only those benefits which the injured worker may have been entitled to had his death not precluded him from establishing such entitlement,” *Singleton v. Kenya Corp., supra*, 961 P.2d at 575, it is apparent the respondents should be given credit toward any obligation they may have for the claimant’s death benefits in the form of payments they made to settle Mr. Clubb’s claim.

Mr. Clubb’s award of permanent total benefits had been obtained prior to the settlement, so there was no contingent aspect to the settlement. The obligation being settled was for permanent total disability benefits. The claimant lived with Mr. Clubb during the course of the treatment for his injury, at the time of the settlement, and then until his death 18 months later. The settlement provided an annuity for Mr. Clubb, and a continuation of that annuity after his death to be paid to the claimant for another 18 ½ years. The settlement proceeds in this case served to provide the dependent claimant ‘with a substitute for the support previously provided by the decedent through the receipt of permanent total disability benefits.’ To the extent these settlement proceeds can be seen as a payment to resolve future unpaid and unaccrued permanent disability benefits, we hold that those permanent total disability benefits were ‘paid’.

In his order, the ALJ found Mr. Clubb was placed at MMI on December 2, 1994, and the respondents awarded him permanent total disability benefits as of that date in their admission of December 5, 1994. The claimant was paid permanent total benefits until his settlement one year later on December 19, 1995. An additional five years of permanent total benefits would total \$77,651.

The record also shows Mr. Clubb was paid by the respondents at the time of the settlement \$37,000 in a lump sum. In *Schenfeld v. Shaffer, supra*, the court determined lump sum awards payable to the employee prior to his death are to be excluded from the ‘unpaid’ portion of the permanent total benefits. The Court of Appeals ruled in *In re Death of Winters, supra* that the calculation of the ‘unpaid’ benefits would begin at the date of the award of permanent total benefits and not at the date of the employee’s death. Mr. Clubb had been paid \$9,497.19 in periodic permanent total benefits prior to the settlement. He was paid \$7,866 in monthly payments subsequent to the settlement and before his death. As a consequence, after the date of MMI and prior to his death, Mr. Clubb had been paid \$54,363.19 by the respondents to satisfy their obligation for permanent total benefits.

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The admission awarding Mr. Clubb permanent total benefits specified his regular weekly rate to be \$298.66 (albeit \$161.36 after the deduction of a Social Security offset which ended at death). *Metro Glass & Glazing v. Orona*, 868 P.2d 1178 (Colo. App. 1994). Mr. Clubb then, would have received during the six years following his date of MMI, \$93,181.92 in permanent total benefits at his regular rate. At the time of Mr. Clubb's death, after subtracting the \$54,363.19 in payments, the unpaid and unaccrued portion of the permanent total disability award totaled \$38,818.73.

The claimant was named as the third party beneficiary of Mr. Clubb's settlement annuity. As a result of that annuity the claimant was personally paid \$437 in benefits by the respondents every month. She has received a total of \$92,644 in payments from the respondents. The claimant then, has received payment from the respondents in lieu of death benefits in a figure which outstrips the \$38,818.73 amount of death benefits that could be awarded pursuant to § 8-42-116. Consequently, no additional death benefit is payable. *Schenfeld v. Shaffer*, 487 P.2d at 821.

To hold otherwise would be to allow a windfall where the claimant would receive the proceeds of the settlement of a permanent total disability claim and also an award of death benefits totaling an additional \$77,651 due to that same permanent total claim. "Such a result would be manifestly inequitable" and contrary to the purpose of the statute. *Metro Glass & Glazing v. Orona, supra* at 1179.

Accordingly, on the basis of our discussion above, we affirm the decision of the ALJ that denied the claimant death benefits.

IT IS THEREFORE ORDERED that the ALJ's order issued December 24, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

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CERTIFICATE OF MAILING

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

_____ 3/31/2015 _____ by _____ RP _____ .

CAROL CLUBB, Attn: FOR STURGEON E. CLUBB JR. (DECEASED), P O BOX 302,
COAL CREEK, CO, 81221 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLIJNG, ESQ., 7501 E. LOWRY
BLVD., DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: CRAIG R. ANDERSON, ESQ., 1401
17TH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-938-822-02

IN THE MATTER OF THE CLAIM OF
VENANCIO DE LA PAZ HERRERA,

Claimant,

v.

FINAL ORDER

BOHLENDER COLORADO FARMS,
LLC, and/or PRECISION HOME
BUILDINGS, LLC and/or CONCEPTOS
PAINTING and REMODLING, INC.

Employer,

and

PINNACOL ASSURANCE and/or
UNINSURED

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Michelle Jones (ALJ) dated October 24, 2014, that dismissed respondent employers, Precision Home Buildings, LLC and Bohlender Colorado Farms, LLC (Bohlender LLC). We set aside the ALJ's order insofar as it dismisses Precision Home Buildings, LLC, and affirm the dismissal of Bohlender LLC.

This matter went to hearing on the issues of compensability, temporary disability and medical benefits and penalties for uninsured employer. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was hired by Conceptos as a laborer and painter in January of 2012. Conceptos did not have workers' compensation insurance.

In mid-2012, Conceptos was hired by Precision Home Buildings, LLC, to paint the interior of a newly constructed home at 18500 CR 59, Holyoke, Colorado (farm home). When they were hired, Conceptos provided Precision Home Buildings, LLC a false workers' compensation certificate of insurance. Precision Home Buildings, LLC is a limited liability company that hires contractors for home building and remodeling and makes profits through sales and investments. Precision Home Buildings, LLC does not

perform any actual construction work. Precision Home Buildings, LLC has no employees other than the two co-owners and serves as a general contractor between homeowner or client and individual contractors who perform different parts of construction work on homes. Precision Home Buildings, LLC also invests in oil and gas wells, fire safety companies and invests in fix and flip work with homes. Precision Home Buildings, LLC is also non-insured for workers' compensation.

Precision Home Buildings, LLC was hired by Bohlender, LLC on December 9, 2011, to provide a broker/general contractor service in building a new residential farm home. Bohlender, LLC is a limited liability farming company with four principal members; Teldon Bohlender and his wife and Teldon Bohlender's parents. Bohlender LLC is not in the business of constructing houses or residential property. Bohlender LLC decided to build a residential home on a portion of the farm property for Teldon Bohlender, his wife and their children to live. The farm home was paid for and owned by Bohlender LLC. The Bohlender family moved into the home after its completion in late August or early September 2012 and used the home as a personal residence. Although Teldon Bohlender testified that he occasionally took business calls related to the farm business and conducted some minor business activities at the home, the ALJ found that the majority of the business for Bohlender LLC was performed on the farm itself and not at the home.

Bohlender LLC presented the testimony of Joanna Davidson as an expert in tax preparation and the IRS tax code. Ms. Davidson performed the tax returns for Bohlender, LLC and is familiar with the IRS requirements for a qualified residence. Ms. Davidson testified that the farm house qualifies under the IRS code as a qualified residence under Section 163 (h)(4)(A).

The claimant was at the farm home on July 10, 2012, to paint the home interior, when he fell off a ladder and fractured his left distal tibia and fibula. The claimant underwent surgery and as of November 2012, was full weight bearing on his left foot and was no longer being treated. Conceptos paid the claimant wages in the amount of \$2900 during the time he was unable to work. The claimant returned to work for Conceptos on November 1, 2012, at reduced hours and eventually left his employment with Conceptos for another job in September 2013.

The ALJ determined that the claimant sustained a compensable injury on July 10, 2012, when he fell off the ladder while he was painting for his employer, Conceptos, at the Bohlender farm house. The ALJ further determined that Precision Home Buildings, LLC was not a statutory employer because the specialized painting work was not part of

its regular business operations and the work contracted to Conceptos would not ordinarily be performed by the two co-owners/employees of Precision Home Buildings, LLC. The ALJ also noted that Precision Home Buildings engages in several other business and investment operations outside of home-building. The ALJ, therefore, concluded that Precision Home Buildings, LLC does not meet the test for statutory employer.

The ALJ went on to conclude that Bohlender LLC should be dismissed from the claim because the farm home met the requirements for the statutory exemption to liability as a statutory employer where they are the owner of residential real property that meets the definition of a qualified residence under §8-41-402(1), C.R.S. The ALJ determined that although the farm home was owned by Bohlender LLC and home construction was paid for by Bohlender LLC, the property was not used for business purposes after its construction, but rather was used as a personal residence for Teldon Bohlender, his wife and children. The ALJ found that because the home's primary use was as a residential property, it met the qualified residence exception.

The ALJ further awarded the claimant temporary disability and medical benefits and assessed a 50 percent penalty against Conceptos as an uninsured employer pursuant to §8-43-408(1), C.R.S. Conceptos was further ordered to deposit the sum of \$5435.49 with the Division of Workers' Compensation to secure the payment of all unpaid compensation and benefits awarded.

The claimant appealed. Conceptos and Precision Home Buildings, LLC, did not file a brief in opposition. On appeal the claimant contends that the ALJ erred in determining that Precision Home Buildings, LLC was not a statutory employer. The claimant also contends that the ALJ erred in her determination that the farm home met the definition of a qualified residence exemption. We agree that the ALJ misapplied the law with regard to the dismissal of Precision Home Buildings, LLC but affirm the dismissal of Bohlender, LLC.

I. Precision

Section 8-41-401(1)(a), C.R.S. provides that a person, company, or corporation engaged in conducting "any business by leasing or contracting out any part or all of the work thereof to any lessee, sublessee, contractor, or subcontractor," is "construed to be an employer as defined in articles 40 to 47 of this title." The purpose of this statute is to prevent "employers from avoiding responsibility under the workers' compensation act by contracting out *their regular work* to uninsured independent contractors rather than hiring the worker directly." *M & M Management Co. v. Industrial Claim Appeals Office*, 979

P.2d 574, 577 (Colo. App. 1998)(emphasis added). In *Finlay v. Storage Technology Corp.*, 764 P.2d 62 (Colo. 1988), the court of appeals recognized that there is a “broad definition” for “regular business.” The plaintiff in *Finlay* was employed by Allied Maintenance Corporation, an independent contractor who provided janitorial services to Storage Technology Corp. (STC). The claimant was injured while performing janitorial services at the STC site and received workers’ compensation benefits from Allied. The claimant then filed a common law negligence suit against STC. STC alleged it was the statutory employer of the claimant and therefore the claim was barred by the Workers’ Compensation Act. The court agreed that STC was a statutory employer even though STC was not in the business of providing janitorial services. The court stated that the inquiry is not limited to primary purpose of the constructive employer. But rather, the proper focus is on the “*constructive employer’s total business operation*, including the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer.” *Id.* Moreover, the question of whether the contracted work is part of the “regular business of the employer” is not affected by the fact that the “subcontractor is an independent entity who has a business of his own.” *Melody Homes Inc. v. Lay*, 610 P.2d 1081 (Colo. App. 1980).

The claimant contends that the ALJ erred in her application of the “regular business test” by only focusing on whether Precision Home Buildings, LLC had “employees” that would perform the painting in the absence of hiring Conceptos and an inquiry into Precision Home Building, LLC’s other business endeavors. We agree.

Whether a person or entity has the status of statutory employer is generally a question of fact. *Thornbury v. Allen*, 991 P.2d 335, 339 (Colo. App. 1999). Where the facts are undisputed, however, the determination of that status from the undisputed facts is a question of law that we review de novo. *Newsom v. Frank M. Hall & Co.*, 101 P.3d 1107, 1110 (Colo. App. 2004), *rev’d on other grounds*, 125 P.3d 444 (Colo. 2005).

Contrary to the ALJ’s order, whether or not Precision has actually performed the service with its own employees or had other business interests is not dispositive. See *Pioneer Construction Co. v. Davis*, 152 Colo. 121, 381 P.2d 22 (1963); *Melody Homes, Inc. v. Lay*, *supra*. (whether or not the contractor has actually performed the service with its own employees is not dispositive); see *Finlay v. Storage Technology Corp.*, *supra*. Rather, under *Finlay*, the analysis in this case is whether the painting was necessitated by the contract for building the farm home. Here, the ALJ found with record support, and the parties do not dispute, that Precision Home Buildings, LLC was hired to build a house and that as part of building that house, Precision Home Buildings, LLC hired Conceptos to paint the house. Bohlender Farm’s Exhibit L and Tr. at 73 and 76-77,

79. Given this evidence, the painting of the house was a regular part of Precision Home Building's business, which, but for the use of subcontractors, Precision would have to perform. We conclude therefore, that the claimant has satisfied his burden of establishing a statutory employment relationship between Conceptos and Precision Home Building, LLC under §8-41-401(1), C.R.S. and that the ALJ's determination to the contrary must be set aside. *See* §8-43-301(8), C.R.S.

Moreover, although the statutory employer sections contemplate that there is but one employer liable under the Act, (*Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970)), where as here, no party is insured, the panel has previously determined that the employers are jointly liable for the benefits due. *Hammond v. Industrial Commission*, 77 Colo. 414, 236 P.1006 (1925); *see Coffey v. Curry Graham d/b/a Affordable Roofing*, W.C. No. 3-909-714 (January 24, 1991). In *Hammond*, the court affirmed a decision of the Industrial Commission that both the uninsured general and uninsured subcontractor were liable to post bonds for the benefits awarded to the claimant. Similarly, in *Coffey*, the panel distinguished the application of *Herriott* on the basis that the statutory employer in *Herriott* was insured, thus relieving the uninsured immediate employer of liability. We are not aware of any authority which relieves an uninsured immediate employer of liability where the statutory employer is also uninsured. To the contrary, where all entities are uninsured the case law implies that there is joint liability. *Hammond v. Industrial Commission, supra; Sechler v. Pastore*, 103 Colo. 139, 84 P.2d 61 (1938).

Therefore, in the absence of an insured employer, neither Conceptos nor Precision Home Buildings, LLC are absolved from liability for the claimant's workers' compensation benefits. Under § 8-41-401, C.R.S., the general contractor is liable as an employer in addition to the uninsured immediate employer, where the general contractor contracts out a portion of its regular business to a subcontractor. This chain of liability is independent of that set forth in section 8-41-402, C.R.S. *Coffey v. Curry Graham d/b/a Affordable Roofing, supra*.

II. Bohlender LLC

The claimant also argues that the ALJ erred in her determination that the farm home met the requirements for the qualified residence exemption in §8-41-402(1), C.R.S. The claimant specifically contends that when he was injured, the house was in the middle of construction and the Bohlenders had not yet moved into the home and could not have been a "personal residence" at the time of the injury. We disagree.

Section 8-41-402(1), C.R.S., provides that the owner of real property who contracts out work to be done on the property is the statutory employer of the employees of the subcontractor. However, the statute also provides that the Workers' Compensation Act (Act) does not apply to the:

"owner or occupant, or both, of residential real property which meets the definition of a 'qualified residence' under section 163(h)(4)(A) of the federal 'Internal Revenue Code of 1986,' as amended, who contracts out any work done to the property, unless the person performing the work is otherwise an employee of the owner or occupant, or both, of the property."

Section 163(h)(4)(A) of the Internal Revenue Code (IRS) defines "qualified residence" as the taxpayer's principal residence and one other residence. In *Pozzie v. Advanced Home Technologies*, W.C. No. 4-336-001 (April 29, 1998), the panel held that a residence may qualify for the exemption even if the residence is actually owned by an LLC. The *Pozzie* order reasoned that,

"qualified residence" means the principal residence of the "taxpayer" and one other residence of the "taxpayer" which is selected by the "taxpayer" and used by the "taxpayer" as a residence within the meaning of § 280A. 26 USC § 163(h)(4)(A); *Organ v. Jorgensen*, 888 P.2d 336 (Colo. App. 1994). The Code defines "taxpayer" as "any person subject to any internal revenue tax." 26 USC § 7701(14) (1996). The Code defines the term "person" to include "an individual, a trust, estate, partnership, association, company or corporation." 26 USC § 7701(1) (1996). It follows that a limited liability company may be a "taxpayer" for purposes of owning a "qualified residence." Under 26 USC § 280A(d)(2)(A), a dwelling unit is considered to be used as a residence if used "for personal purposes by the taxpayer or any other person who has an interest in such unit." For example, where a dwelling is owned by an S corporation the term "any shareholder of the S corporation" is substituted for the term "the taxpayer." 26 USC § 280A(f)(2).

Thus, the *Pozzie* decision held that a corporate taxpayer may establish a qualified residence through the use of its shareholders. As we understand the claimant's argument, he does not dispute the underlying holding in *Pozzie*, but rather, attempts to distinguish it based on the facts. Thus, the relevant consideration before the ALJ in this case was whether the farm home was primarily used for business or personal reasons.

The ALJ credited Teldon Bohlender's testimony that the house he was constructing was for his personal use and not business. Tr. at 61-62. Teldon Bohlender testified that the house was paid for by Bohlender LLC because the LLC owned the land and farm and they did not want to break up the land. Tr. at 106. Teldon Bohlender testified that he moved into the house in August or September 2012, which was after the claimant's injury. Tr. at 109. Although the claimant argues that this fact alone means that the house was not for personal use at the time of the injury, we are not persuaded. The panel has previously recognized that IRS enforcement regulations allow a taxpayer to treat a home under construction as a qualified residence for a period of up to 24 months if the residence becomes a qualified residence at the time the residence is ready for occupancy. See Treas. Reg. 1.163-10 T(p)(5). Therefore, property owners who do not take occupancy of the property until after the industrial injury are not excluded from the homeowner's exemption. *Organ v. Jorgensen*, 888 P.2d 336; *See Durfee v. Amos Pamperien*, W.C. No. 4-278-412 (December 12, 1996).

The testimony of accountant Joanna Davidson further supports the ALJ's determination. Davidson testified that according to IRS Publication 523 the factors for determining a main home are referred to in Code Section 121 and include: the address on the driver's license, the address used for mailing bills and correspondence, car registration and federal registration. Tr. at 92. Davidson further testified that applying these main factors, the farm home met the qualified primary residence definition for the IRS. Tr. at 92.

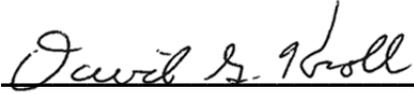
Although the claimant points to contrary evidence in the record to show that the residence was used for business purposes, we may not substitute our judgment for that of the ALJ concerning the sufficiency and probative weight of this evidence. *See Martinez v. Regional Transportation District*, 832 P.2d 1060 (Colo. App. 1992). Consequently, the existence of evidence in the record, which if credited, might support a contrary result does not establish grounds for appellate relief. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). We, therefore, conclude that the ALJ did not err in dismissing the claims against Bohlender LLC and Pinnacol Assurance.

IT IS THEREFORE ORDERED that the ALJ's order dated October 24, 2014, is set aside insofar as it dismissed Precision Home Buildings, LLC. Precision Home Buildings, LLC and Conceptos are jointly and severally liable for the claimant's work related injury. The ALJ's order is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

VENANCIO DE LA PAZ HERRERA
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CERTIFICATE OF MAILING

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

_____ 4/6/2015 _____ by _____ RP _____ .

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY
BLVD., DENVER, CO, 80230 (Insurer)
KAPLAN MORRELL, LLC, Attn: BRITTON MORRELL, ESQ./KELLI RILEY, ESQ., P O
BOX 1568, GREELEY, CO, 80632 (For Claimant)
LAW OFFICE OF DAVID K. WILLIAMS, Attn: DAVID K. WILLIAMS, JR., ESQ., P O
BOX 371416, DENVER, CO, 80237 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-899-106-02

IN THE MATTER OF THE CLAIM OF
SHIRLEY FINCH,

Claimant,

v.

FINAL ORDER

TARGET CORPORATION,

Employer,

and

SELF-INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Michelle E. Jones (ALJ) dated October 31, 2014, that determined the respondent had overcome the opinion of the Division Independent Medical Examination (DIME) physician on causation, that denied her request for temporary partial disability (TPD) benefits, and that granted the respondent's request to withdraw their previously filed General Admissions of Liability and Final Admission of Liability. We affirm.

The ALJ found that the claimant has worked for the respondent employer as a logistics team member since October 7, 2008. As part of her job duties, the claimant is required to unload tractor trailers of merchandise, sort merchandise, load pallets with merchandise, pull pallets from the back of the store to the floor, unload the pallets, rotate merchandise, and stock the shelves at the employer's store. When stocking shelves, the claimant is required to open boxes of merchandise, pull all of the current merchandise off the shelves, check for expiration dates, and then put the newest merchandise to the back of the display and the older merchandise in the front. The claimant alleged that she suffered an occupational injury to her wrist as a result of her employment. She claimed that she suffers from de Quervain's tenosynovitis with an onset on August 22, 2012.

The claimant first sought treatment for right wrist pain on August 25, 2012, from Kaiser Permanente, her personal primary care provider. The claimant complained of having right wrist pain shooting up from the base of her thumb to her mid arm. X-rays

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were taken of the claimant's right wrist and showed cysts in the carpal bones, most likely from degenerative changes. The claimant ultimately was diagnosed with de Quervain's tendonitis. Dr. Zallen from Kaiser noted that her de Quervain's tendonitis "seems clearly work related," and advised the claimant to follow-up with work.

The respondent employer sent the claimant to WorkWell. Dr. Otten assessed the claimant with tenosynovitis of the right hand, de Quervain's tenosynovitis of the right wrist, and possible left carpal tunnel syndrome. Dr. Otten opined that work activities were the cause of the claimant's problems.

Dr. Sollender performed an independent medical examination at the request of the respondent. Dr. Sollender diagnosed the claimant with right wrist de Quervain's tenosynovitis, early findings of mild left carpal tunnel syndrome by history, but without objective findings on examination, and radial tunnel syndrome right forearm. Dr. Sollender stated that the claimant does work that is repetitive in nature, but that a job demands analysis would provide objective, unbiased information to perform a full causal analysis.

The claimant subsequently underwent an electromyography (EMG) nerve conduction study performed by Dr. Green. The EMG revealed moderate carpal tunnel syndrome of the left wrist. On February 21, 2013, Dr. Prater performed a left extremity carpal tunnel release on the claimant's left wrist.

On October 8, 2013, a job demands analysis (JDA) was performed by vocational evaluator, Mr. Blythe. Mr. Blythe was not able to observe the claimant due to her injuries and the fact that she now works in a different part of the employer's store with different duties. Nevertheless, Mr. Blythe met with the claimant prior to the JDA assessment and she explained the exact details of her job duties prior to her injury. The claimant also advised Mr. Blythe as to which employees to follow and observe and specifically directed him to four separate employees performing different parts of her prior job duties. After observing the four employees, Mr. Blythe met again with the claimant and she gave him more details about the positions she had been working. After gathering the job performance data, Mr. Blythe did a specific Risk Factors Assessment of the relevant job tasks as outlined in the Medical Treatment Guidelines, Rule 17, Exhibit 5 (Guidelines) pertaining to cumulative trauma conditions. Mr. Blythe found that there were no primary or secondary risk factors present in the claimant's job duties.

After reviewing the JDA performed by Mr. Blythe, Dr. Sollender issued his opinion that the claimant's job duties at the time of the onset of her condition did not

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meet either primary or secondary risk factors in the Guidelines, nor were they close to meeting any of the threshold values for any risk factors. He opined that the claimant's work did not cause, aggravate, or accelerate her condition and that her condition was more likely due to the other numerous risk factors that were present.

Authorized treating physician, Dr. Mars from WorkWell, also issued an opinion after his review of the JDA performed by Mr. Blythe. Dr. Mars opined that the claimant's condition did not meet the criteria outlined by the Guidelines and, therefore, he did not feel this was a work-related injury. Dr. Mars placed the claimant at maximum medical improvement with regular duty work status, no maintenance treatment, no restrictions, and no impairment.

On November 19, 2013, the respondent filed a FAL consistent with Dr. Mars' report. The claimant objected to the respondent's FAL and sought a DIME. Dr. Gehrs performed the DIME examination on May 20, 2014. Dr. Gehrs opined that the claimant does not meet the definitions of risk factors based on the job analysis. But, Dr. Gehrs also stated "I don't feel that she would have the de Quervain's tenosynovitis if she were not exposed to her work conditions." Dr. Gehrs further opined that the studies used to determine causation under the Guidelines for cumulative trauma conditions were done on healthy worker populations and that the claimant did not fit into a healthy worker population. Dr. Gehrs stated that the claimant had risk factors including her age, gender, and obesity that made her at higher risk to develop de Quervain's as well as carpal tunnel syndrome. Dr. Gehrs ultimately opined "I feel that the de Quervain's is related to her work environment despite not meeting the necessary risk factors. I do not feel that her work is likely the cause of her carpal tunnel, this is a much more common problem. I feel that likely she would have gotten this whether or not she were working." She further stated that the claimant was not at MMI for the de Quervain's.

The respondent filed an application for hearing. After the hearing, the ALJ issued her order finding that the respondent had overcome, by clear and convincing evidence, the DIME physician's opinion that the claimant suffered an occupational injury. The ALJ concluded that after Drs. Sollender and Mars reviewed the JDA, their opinions that the claimant did not suffer a compensable occupational injury were highly probable and free from serious or substantial doubt. The ALJ ruled that the claimant did not meet one single primary or secondary risk factor pursuant to the Guidelines. She determined that the JDA did not show prolonged exposure or repetition to the degree that would cause the claimant's symptoms. The ALJ also concluded that while other medical providers opined that the claimant's condition was work related, these opinions were given without review of the JDA and without a causation analysis done under the Guidelines. With regard to

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Dr. Gehrs' opinion that the claimant's de Quervain's was work related, the ALJ concluded that this opinion was not detailed or explained, that Dr. Gehrs did not state how she came to this opinion, and Dr. Gehrs did not support her opinion.

I.

On appeal, the claimant raises a number of arguments as to why the ALJ abused her discretion in admitting Mr. Blythe's JDA into evidence. The claimant alleges the JDA was impermissibly admitted into evidence without foundation, the JDA should have been stricken as a sanction for the respondents' discovery violation, the JDA was irrelevant under §8-43-210, C.R.S. because it was based on an analysis of other employees, and the JDA was misleading because it was not an analysis of the claimant and, therefore, was inadmissible under CRE 402. We are not persuaded by the claimant's arguments.

Under §8-43-207(1), C.R.S., "the ALJ is vested with wide discretion in the conduct of evidentiary proceedings." *Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895, 897 (Colo. App. 2009). We may not interfere with the ALJ's evidentiary rulings in the absence of an abuse of discretion. *See Denver Symphony Ass'n v. Industrial Commission*, 34 Colo. App. 343, 526 P.2d 685 (1974). The standard on review of an alleged abuse of discretion is whether, under the totality of the circumstances, the ALJ's ruling exceeds the bounds of reason. *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985).

A.

To the extent the claimant argues that the JDA should not have been admitted into evidence without foundation, we disagree. Section 8-43-210, C.R.S., contains the basic evidentiary provisions applicable to workers' compensation claims in Colorado. Section 8-43-210, C.R.S. provides that "medical and hospital records, physicians' reports, vocational reports, and 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."

Here, in her brief in support, the claimant contends that since the respondent failed to adequately respond to her discovery requests regarding Mr. Blythe, his qualifications as a vocational expert, therefore, were "in dispute." However, during the hearing, the claimant did not directly allege that Mr. Blythe was not a vocational expert or was not qualified to draft a vocational report. Tr. at 8-12. Under the Colorado Rules of Evidence, before error may be predicated on an allegedly erroneous ruling admitting evidence, it must be shown that a contemporaneous objection was made which stated the specific

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ground of the objection. CRE 103(a)(1); *see also*, §8-43-210, C.R.S. (rules of evidence apply in workers' compensation proceedings); *Gallegos v. B & M Roofing*, W.C. 3-962-465 (January 25, 1991). Such action may be viewed as a waiver of an objection to the admission of Mr. Blythe's JDA on this ground. Regardless, even assuming the claimant did not waive this objection to the JDA, the ALJ ruled that the JDA was a vocational report pursuant to §8-43-210, C.R.S. Tr. at 12. Our review of the JDA supports the ALJ's determination in this regard. The report was drafted by "Joseph B. Blythe, MA, CRC Vocational Evaluator." Pursuant to Rule 15-7(A)(1), the Director of the Division of Workers' Compensation considers "CRC" as a Certified Rehabilitation Counselor who is qualified to write vocational rehabilitation plans. Additionally, Rule 1-4(C) does not limit the variety of documents covered by the term "vocational reports," but it does include any instance where the claimant participates in the completion of the report. As noted above, that is the case in this matter. Additionally, the JDA lists the types of physical activities and demands that the claimant experienced in her prior job, and it further detailed the force and repetition/duration of the claimant's former job tasks. Ex. B at 16-24. Thus, we will not disturb the ALJ's order on this ground.

To the extent the claimant argues that the JDA was irrelevant under §8-43-210, C.R.S. because it was based on an analysis of other employees, we disagree. Here, the ALJ ruled that the JDA was an accurate reflection of the claimant's position at the time she sustained her injury and was the best possible evaluation that could have been performed. She further ruled that the data gathered by Mr. Blythe in his report accurately reflected the claimant's job duties. During the hearing, Dr. Sollender opined that the JDA of another employee was a reasonable approximation of how the claimant performed her job. Tr. at 48. While during the hearing, and in her brief in support, the claimant cites to numerous inaccuracies in the JDA, this argument goes only to the weight the ALJ assigned to the evidence and does not affect the ALJ's ability to rely upon it. *See Industrial Commission v. Albo*, 167 Colo. 467, 447 P.2d 1006 (1968). The ALJ was free to reject all or part of the claimant's testimony regarding the inaccuracies and instead credit the JDA, as she did here. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000)(ALJ must make specific findings only as to evidence found persuasive and determinative and is not required to address evidence not found persuasive). Consequently, we will not disturb the ALJ's order on this ground.

To the extent the claimant argues that the JDA was misleading and irrelevant under CRE 402 because it purported to be an analysis of the claimant when it instead was an analysis of other employees, we again disagree. Pursuant to CRE 402, all relevant evidence, subject to certain exceptions, is admissible, and evidence which is not relevant

is not admissible. Under CRE 401, relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *See* Section 8-43-210, C.R.S. (rules of evidence for district courts applicable to workers’ compensation hearings). We cannot say as a matter of law that the JDA was misleading and irrelevant under CRE 402 simply because it was based on other employees performing the claimant’s prior job functions. Again, the ALJ found that the JDA was an accurate reflection of the claimant’s position at the time she sustained her injury and was the best possible evaluation that could have been performed. As conceded by the claimant in her brief in support, during the hearing, the claimant gave extensive testimony regarding her prior job duties so she was able to address any inaccuracies in the JDA. Tr. at 74-79. Again, as noted above, the ALJ was free to reject all or part of the claimant’s testimony regarding the inaccuracies and instead credit the JDA. *See Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Thus, in our view, the JDA can be seen as having a tendency to establish causation of the claimant’s de Quervain’s more probable or less probable than it would be without the evidence. As noted above, the JDA addressed the physical activities and demands of the claimant’s prior job, as well as the force and repetition/duration of her prior job tasks. Ex. B at 16-24. As such, the evidence was relevant under CRE 401 and CRE 402 and, therefore, we do not view the ALJ’s action in admitting the JDA into evidence as an abuse of discretion thereby requiring her order to be set aside. Section 8-43-210, C.R.S.

B.

The claimant also contends the ALJ erred in not striking the JDA report pursuant to C.R.C.P. 37 as a sanction for the respondent’s discovery violation. We are not persuaded that there is any error in the ALJ’s ruling.

Workers’ Compensation Rule of Procedure 9-1 applies to discovery in workers’ compensation procedures. Rule 9-1(E) provides that “[i]f any party fails to comply with the provisions of this rule and any action governed by, an administrative law judge may impose sanctions upon such party pursuant to statute and rule.” Section 8-43-207(1)(e), C.R.S., permits an ALJ to impose the sanctions provided in the civil rules of procedure for “willful” failure to comply with permitted discovery. *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991). We may only disturb the ALJ’s order in this respect if it exceeds the bounds of reason, such as where it is wholly unsupported by the evidence or is contrary to applicable law. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

As noted above, during the hearing, the claimant argued that the respondent did not provide sufficient discovery responses regarding Mr. Blythe, and her counsel then showed the discovery requests and responses to the ALJ. The ALJ, however, denied the claimant's request to exclude the JDA as a discovery sanction and instead ruled that the document was admissible without foundation pursuant to §8-43-210, C.R.S. Importantly, the record is devoid of any evidence showing that the claimant previously filed a motion to compel discovery responses from the respondent regarding Mr. Blythe. The record also demonstrates that the claimant had been provided with Mr. Blythe's JDA approximately one year prior to the hearing. Tr. at 12-15; Ex. B. It is well settled that the absence of a prior order compelling discovery precludes C.R.C.P. 37(b) sanctions for any alleged discovery violation. See *O'Reilly v. Physicians Mutual Insurance Co.*, 992 P.2d 644 (Colo. App. 1999)(absence of a prior order compelling discovery precluded C.R.C.P. 37(b) sanctions for any alleged violation); *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (March 25, 2013)(ALJ erred in drawing adverse inference as a discovery sanction when no order compelling discovery previously had been entered), *aff'd*. Consequently, we will not disturb the ALJ's order on this ground.

II.

The claimant also argues that the ALJ erred in ruling that the respondent had met its burden of proof in overcoming the DIME physician's opinion that the claimant's de Quervain's was work related. The respondent contends that the ALJ's ruling is not supported by the evidence. Again, we disagree.

Pursuant to §8-42-107(8)(b)(III), C.R.S., a DIME physician's finding of MMI is binding on the parties unless overcome by clear and convincing evidence. Because a MMI determination also requires the DIME physician to ascertain the cause of the claimant's medical conditions, the DIME physician's causation determination must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). The ALJ here correctly placed the burden on the respondent to overcome the DIME physician's opinion on causation by clear and convincing evidence.

Clear and convincing evidence means evidence which is stronger than a mere preponderance; it is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME physician's conclusion must demonstrate that it is highly probable that the DIME's opinion is incorrect. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Whether a party has met the burden of overcoming a DIME by clear and convincing evidence is a question of fact for the ALJ's determination. *Metro*

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Moving & Storage v. Gussert, supra. We must uphold the factual determinations of the ALJ if the decision is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Here, there is substantial evidence in the record supporting the ALJ's determination that the DIME physician's opinion on causation had been overcome. As noted above, when making her decision, the ALJ relied heavily upon the claimant's job duties not meeting any of the risk factors enunciated in WCRP 17, Exhibit 5 of the Guidelines. As recognized by the claimant, the ALJ may appropriately consider the Guidelines as an evidentiary tool. *See Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006) (appropriate for ALJ to consider Guidelines on question of diagnosis of RSD/CRPS), *aff'd Jones v. Industrial Claim Appeals Office*, Colo. App. No. 06CA1053 (Mar. 1, 2007). The opinions from Drs. Sollender and Mars provide ample support for the ALJ's ruling that the claimant's prior job duties did not satisfy any of the primary or secondary risk factors enunciated in the Guidelines for determining causation. During the hearing, Dr. Sollender testified that pursuant to the cumulative trauma conditions of the Guidelines, not a single primary or secondary occupational risk factor was present in the work that the claimant previously performed. He explained that in accordance with the Guidelines, the claimant's job was not repetitive, not forceful, not awkward, and did not involve computer work or mousing for over four hours. Dr. Sollender opined that from a cumulative trauma standpoint, the claimant's conditions were not caused by her occupation with the respondent. Tr. at 29-34, 43. Further, in his report dated November 13, 2013, Dr. Mars stated that after reviewing the JDA, the claimant's de Quervain's tenosynovitis did not meet the criteria outlined by the Guidelines. He therefore opined that the claimant's condition was not a work-related injury. Ex. E at 35.

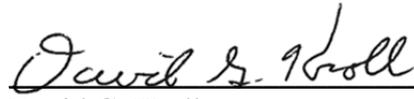
The claimant argues that the ALJ's reliance on the opinions of Drs. Sollender and Mars amounts only to a difference of medical opinion and, therefore, is insufficient to demonstrate that Dr. Gehrs' causation opinion was in error. The claimant's argument notwithstanding, the ALJ relied upon other factors when determining that the respondent had met its burden of proof in overcoming the DIME physician's opinion on causation. As noted above, the ALJ heavily relied on the Guidelines in determining that the claimant did not satisfy any of the primary or secondary risk factors to demonstrate her de Quervain's was caused by her work duties. The ALJ also concluded that the DIME examiner's opinion on causation was not detailed or explained, and Dr. Gehrs did not state how she came to her opinion and it was not supported. The ALJ also concluded that those medical providers who originally opined that the claimant's de Quervain's was work related had not reviewed the JDA and did not perform a causation analysis done under the Guidelines. Based upon our review, we conclude that the ALJ drew reasonable

inferences from the evidence that was presented and, as such, we must uphold them on appeal. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Consequently, we conclude that there is substantial evidence supporting the ALJ's determination. Section 8-43-301(8), C.R.S.

In her brief in support, the claimant argues extensively about other evidence which may support a contrary determination. The existence of other evidence which, if credited, might support a contrary determination does not afford us grounds to grant appellate relief, however. *See Colorado Fuel and Iron Corp. v. Industrial Commission*, 152 Colo. 25, 380 P.2d 28 (1963). We, therefore, perceive no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated October 31, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

SHIRLEY FINCH
W. C. No. 4-899-106-02
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CERTIFICATE OF MAILING

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

_____ 4/7/2015 _____ by _____ RP _____ .

TAUSSIG & TAUSSIG, P.C., Attn: DUSTIN BERGMAN, ESQ., 5377 MANHATTAN
CIRCLE, SUITE 203, BOULDER, CO, 80303 (For Claimant)
THOMAS POLLART & MILLER, LLC, Attn: ERIC J. POLLART, ESQ., 5600 S. QUEBEC
STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-842-550-05

IN THE MATTER OF THE CLAIM OF

RICHARD K. BLUNDELL,

Petitioner,

and

LLUVIA GUTIERREZ,

Claimant,

v.

FINAL ORDER

STARTEK USA INC,

Employer,

and

WAUSAU UNDERWRITERS
INSURANCE/LIBERTY MUTUAL,

Insurer,
Respondents.

The claimant's former counsel, Richard Blundell, Esq., (Blundell) seeks review of an order of Administrative Law Judge (ALJ) Allegretti dated November 4, 2014, that assessed attorney fees and costs against him personally in the amount of \$1,334.10 for raising an unripe issue. We affirm the ALJ's order.

This matter previously was before us. In an order dated August 29, 2014, we remanded the matter to the ALJ to determine whether attorney fees and costs were assessed against the claimant or Blundell as the claimant's former attorney. The ALJ entered factual findings that for purposes of appeal can be summarized as follows. The respondents filed a final admission of liability on March 24, 2011, admitting for the authorized treating physician's finding of maximum medical improvement, zero percent impairment and no maintenance medical benefits. The claimant then filed an objection and request for a Division-sponsored independent medical examination (DIME). The claimant did not set the DIME appointment.

The claimant instead filed an application for hearing on September 2, 2011, seeking penalties against two employees of the Division of Workers' Compensation DIME Unit for allegedly violating W.C.R.P. 11-3(N) and 11-10, and moved to add these two employees as parties. In an order dated December 7, 2011, ALJ Friend found that the employees could not have violated these pertinent sections and ruled that the claimant failed to state a claim for relief. ALJ Friend, therefore, struck the application for hearing.

The claimant then filed another application for hearing and notice to set on December 19, 2011, listing the sole issue for hearing "[t]o review and reconsider ALJ Friend's December 7, 2011 Order Striking Hearing Application dated September 2, 2011, in light of contrary binding precedent in *Jesus Munoz v. I.C.A.O.* (Colo. App. May 12, 2011)." The respondents filed a response to the claimant's application for hearing, asserting that the claimant had waived the DIME process, and requested an order that the claim had closed.

Thereafter, on March 30, 2012, ALJ Friend denied reconsideration of his December 7, 2011, Order. ALJ Friend ruled that it did not appear that the December 7, 2011, Order had granted or denied any benefits, but if it had, then the claimant's sole remedy was to seek review by the Industrial Claim Appeals Office by filing a petition to review. The claimant, however, never filed a petition to review.

The claimant was dissatisfied with ALJ Friend's March 30, 2012, Order and, on April 20, 2012, filed a request for specific findings of fact and conclusions of law, requesting a full order pursuant to §8-43-315, C.R.S. be issued. On April 25, 2012, ALJ Friend denied the claimant's request for specific findings, ruling that the March 30, 2012, Order was not a summary order, was not subject to a request for specific findings, and the request was not made within seven working days of the date of mailing of the March 30, 2012, Order. ALJ Friend further ruled that his Order did not grant or deny a benefit or penalty and was not subject to a petition to review.

Thereafter, on October 30, 2012, the respondents filed a petition to close the claim asserting that more than six months had passed without the claimant prosecuting or performing any activity on her case. An order to show cause was filed on November 14, 2012.

The claimant filed another application for hearing on December 14, 2012, and listed the following as an issue to be heard: "review and reconsider ALJ Friend's Orders, 4/25/2012, 12/07/2011." The respondents filed a response seeking penalties pursuant to

§8-43-304(1), C.R.S., alleging that the claimant endorsed unripe issues and that attorney fees and costs should be assessed pursuant to §8-43-211 (2) (d), C.R.S.

On June 25, 2013, ALJ Allegretti entered a “Procedural Order Striking Hearing Application and Assessing Attorney Fees.” ALJ Allegretti ruled that the sole issue endorsed by the claimant in the December 14, 2012, application for hearing was merely procedural and not an issue subject to a hearing on the merits. Thus, ALJ Allegretti ruled that the claimant raised a matter that was not fit for adjudication and, therefore, struck her application for hearing. ALJ Allegretti also awarded attorney fees and costs to the respondents in preparing for the hearing pursuant to §8-43-211(2) (d), C.R.S. ALJ Allegretti ruled that the respondents did not submit an affidavit in support of reasonable attorneys’ fees and costs and ordered the respondents to set a hearing on the matter of determining reasonable fees and costs.

A hearing ultimately was held on August 26, 2013, before ALJ Allegretti. Neither the claimant nor her former counsel appeared at the hearing. On March 5, 2014, ALJ Allegretti entered her order ordering the claimant to pay the respondents’ attorney fees and costs pursuant to §8-43-211(2) (d), C.R.S. for raising an unripe issue in the application for hearing. The amount of fees and costs that ALJ Allegretti awarded totaled \$1,334.10.

The claimant obtained new counsel, Pattie Ragland, Esq. The claimant argued on appeal that attorney fees and costs against her were not appropriate and that the matter should be remanded or reversed. We remanded for a determination of whether the ALJ assessed penalties against the claimant individually or against Blundell as the claimant’s counsel. On remand ALJ Allegretti determined that the penalties for the unripe issue should be assessed against Blundell as the “person” who filed the application for hearing on the unripe issue.

Blundell now appeals asserting that the ALJ abused her discretion in assessing attorney fees and costs. Blundell makes general allegations that he did not have notice of the possibility of fees being assessed against him personally and as a result has been denied due process and equal protection of the law. Blundell also asserts that the ALJ was biased against him. We perceive no reversible error.

In assessing attorney fees and costs, ALJ Allegretti applied the former version of §8-43-211(2) (d), C.R.S., which provided as follows:

If *any person* requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting. (emphasis added)

Section 8-43-211(2) (d), C.R.S. currently provides that attorney fees and costs may only be assessed against an attorney:

(d) If *an attorney* requests a hearing or files a notice to set a hearing on an issue that is not ripe for adjudication at the time the request or filing is made, the attorney may be assessed the reasonable attorney fees and costs of the opposing party in preparing for the hearing or setting. The requesting party must prove its attempt to have an unripe issue stricken by a prehearing administrative law judge to request fees or costs. Requested fees or costs incurred after a prehearing conference may only be awarded if they are directly caused by the listing of the unripe issue. (emphasis added)

Section 8 of chapter 301, Session Laws of Colorado 2013, provides that the act amending subsection (2)(d) applies to claims in existence on or after July 1, 2013.

As we recognized in our prior order, the former version of §8-43-211(2) (d), C.R.S. has been interpreted to allow for the imposition of attorney fees and costs against the “*person*” who has filed the application for hearing on an issue not ripe for adjudication. (emphasis added). In *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964 (Colo. App. 2012), for example, the Colorado Court of Appeals affirmed an order assessing attorney fees and costs against the claimant’s counsel, individually, because he had requested a hearing on an issue not ripe for adjudication in violation of the former version of §8-43-211(2)(d), C.R.S. See also *BCW Enters., Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997)(remanding matter for determination of attorney fees to be assessed against claimant's counsel pursuant to § 8-43-211(2)(d), C.R.S., which permitted recovery of fees for filing application for hearing on issues not ripe for consideration); see also *Morrow v. J.J. Maintenance*, W. C. No. 4-561-243 (Aug. 12, 2005)(respondents' counsel prematurely resorted to administrative process to resolve contention not legally postured for adjudication and became subject to attorney fees under §8-43-211(2)(d), C.R.S. as a result). Similarly, under the amended version of §8-43-211(2)(d), C.R.S., attorney fees and costs may only be assessed against an “*attorney*” who requests a hearing on an issue that is not ripe for adjudication at the time the request is made. (emphasis added) See *Barrera v. v. ABM Industries, Inc.*, W.C. No. 4-

865-048-03 (March 28, 2014)(applying amended version of §8-43-211(2)(d), C.R.S. and setting aside ALJ's order awarding attorney fees and costs against *pro se* claimant for filing application for hearing on issues not ripe for adjudication).

Under this statute an issue is "ripe for hearing when it is real, immediate, and fit for adjudication." *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964, 969 (Colo. App. 2012) (quoting *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006)). The term "fit for adjudication" refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. See *Maestas v. Wal Mart Stores, Inc.*, W.C. 4-717-132 (Jan. 22, 2009)(quoting *Olivas-Soto v. Genesis Consolidated Services*, W. C. No. 4-518-876) (November 02, 2005), *aff'd Olivas-Soto v. Industrial Claim Appeals Office, supra*). Whether an issue is ripe for review is a legal question that an appellate court reviews *de novo*. *Youngs v. Industrial Claim Appeals Office, supra*.

ALJ Allegretti determined that the December 14, 2012, application for hearing asking to "review and reconsider ALJ's Friend's Orders, 4/25/2012, 12/07/2011" was not ripe for hearing. We agree with the ALJ's determination that the issue listed by Blundell was not fit for adjudication. The fact that the claimant failed to timely appeal the orders in question constituted a legal impediment to adjudication because the issue was not legally postured for an order. On appeal, Blundell does not dispute the ALJ's findings that he was the "person" who filed the application for hearing on the issue. It was, therefore, appropriate for the ALJ to assess fees and costs against Blundell personally. Section 8-43-211(2)(d), C.R.S.

We are not persuaded by Blundell's contention that there was insufficient notice of the issue or a violation of due process. See *Nesbit v. Industrial Commission*, 43 Colo. App. 398, 607 P.2d 1024 (1979) (due process requires notice of the issues and evidence which will be presented). Blundell was copied on all briefs, motions, notices and orders. Specifically, the respondents' response to the application for hearing clearly noted that they were seeking attorney fees and costs pursuant to §8-43-211. Blundell does not allege that he failed to receive any of the pleadings in this case. We fail to see how Blundell did not have notice of the issue. We, therefore, have no reason to disturb the ALJ's order on this basis.

Blundell further argues that if he had received notice of the issue he would have moved to recuse the ALJ based on allegations of bias. Blundell then goes on to state that ALJ Allegretti's bias is demonstrated by her rulings against him on a change of venue request and the circumstances surrounding the determination of attorney fees and costs.

Blundell states that this ALJ has a “penchant for uniformly ruling against” his clients and “uniformly monetarily sanctioning them or him in each and every matter.” We note initially that the ALJ is entitled to the presumption that she is competent, impartial, and unbiased “until the contrary is shown.” *Wecker v. TBL Excavating, Inc.* 908 P.2d 1186, 1189 (Colo. App. 1995). To establish that a court was biased, a party must show that the court had “a substantial bent of mind against him or her. Speculative statements and conclusions are insufficient to satisfy the burden of proof.” *People v. James*, 40 P.3d 36, 44 (Colo. App. 2001).

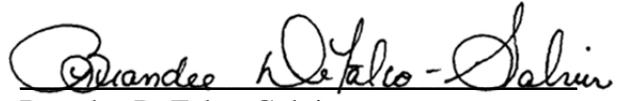
Blundell’s arguments do not demonstrate the ALJ’s bias. It is well established that adverse rulings, even if numerous and continuous, do not in themselves show bias. *Riva Ridge Apartments v. Robert G. Fisher Co., Inc.*, 745 P.2d 1034 (Colo. App. 1987); *In re Marriage of Johnson*, 40 Colo. App. 250, 576 P.2d 188 (1977). The specific allegations mentioned in Blundell’s Brief in Support reveal nothing to suggest that the ALJ’s actions were improper or the product of bias. Further, the statement that the ALJ “uniformly ruled against him” is a matter of opinion and unreviewable without further factual context.

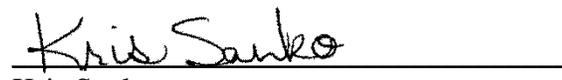
In our view, Blundell was afforded a fair opportunity to present evidence, challenge adverse evidence, and was afforded an opportunity to make argument. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (Colo. App. 1990) (where administrative adjudication turns on issues of fact, parties must be apprised of all evidence to be considered and afforded opportunity to present evidence, confront adverse evidence and present argument). Insofar as Blundell makes other general allegations of error, we find them to be without merit.

IT IS THEREFORE ORDERED that the ALJ’s order dated November 4, 2014, is affirmed.

LLUVIA GUTIERREZ
W. C. No. 4-842-550-05
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INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


Kris Sanko

LLUVIA GUTIERREZ
W. C. No. 4-842-550-05
Page 9

CERTIFICATE OF MAILING

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

_____ 4/9/2015 _____ by _____ RP _____ .

STEVEN U MULLENS PC, ATTN: PATTIE J RAGLAND ESQ, PO BOX 2940, COLORADO SPRINGS, CO, 80901 (For Claimant)

LAW OFFICES OF CHAD A ATKINS, ATTN: MAUREEN A HARRINGTON ESQ, 5670 GREENWOOD PLAZA BLVD STE 400, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K BLUNDELL ESQ, 1233 EIGHTH AVE, GREELEY, CO, 80631 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-890-061-02

IN THE MATTER OF THE CLAIM OF

DEAN LAABS,

Claimant,

v.

FINAL ORDER

INTEGRATED COMMUNICATION
SERVICE, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Lamphere (ALJ) dated September 30, 2014, that ordered suspension of the claimant's temporary disability benefits. We reverse.

The following facts are undisputed. The claimant sustained an admitted injury on June 5, 2012. The claimant's authorized treating physician originally placed the claimant at maximum medical improvement (MMI) on July 5, 2013, with a permanent impairment rating of 24% whole person. The respondents filed a Final Admission of Liability (FAL) and began paying permanent partial disability (PPD) benefits based on the permanent impairment rating from the claimant's authorized treating physician.

The claimant pursued a Division-sponsored Independent Medication Examination (DIME). The DIME physician ultimately opined that the claimant was not at MMI. The respondents then commenced payment of temporary total disability (TTD) benefits based on the opinion of the DIME physician. The respondents also paid a lump sum payment to the claimant on January 10, 2014, representing TTD benefits for the period of time from August 8, 2013, through January 9, 2014. The respondents previously had paid the claimant PPD benefits during this same period of time, as well as an automatic \$10,000 lump sum payment.

The respondents' FAL admitted for a total of \$52,005 in PPD benefits. The ALJ found that between the date of the FAL and before resuming TTD benefits, the respondents had paid a total of \$21,353.56 in PPD benefits.

Following the DIME physician's opinion that the claimant was not at MMI, the respondents filed a General Admission of Liability, which included a reservation of the right to claim any and all offsets and recover any and all overpayments. The respondents also took credit for the previously paid PPD payment.

Thereafter, on April 22, 2014, the respondents filed a motion to suspend temporary disability benefits. Relying upon the \$75,000 statutory cap set forth in §8-42-107.5, C.R.S. and the holding in *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995), the respondents requested they be allowed to suspend the claimant's temporary disability benefits upon reaching the \$75,000 cap, and begin crediting the claimant's temporary disability benefits against PPD benefits previously paid.¹ By the date of the filing of their motion to suspend, the respondents contended that they had paid a total of \$69,439.27 in combined temporary and permanent disability benefits. The claimant objected to the respondents' motion, arguing that the \$75,000 cap did not apply because none of the conditions enunciated in §8-42-105(3), C.R.S. had been met – the employee reaches MMI, the employee returns to regular or modified employment, the attending physician gives the employee a written release to return to regular employment, or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

The ALJ subsequently entered his order. The ALJ held that the decision announced in *Donald B. Murphy* was most analogous to this case. He found that the respondents had paid a total of \$69,439.27 in combined temporary and permanent disability benefits. The ALJ therefore ordered that the respondents were allowed to suspend temporary disability benefits upon reaching the \$75,000 cap set forth in §8-42-107.5, C.R.S.

On appeal, the claimant argues that the ALJ erred in relying on the holding in *Donald B. Murphy* to allow the respondents to suspend temporary disability benefits. Under the particular circumstances of this case, we agree with the claimant that the holding in *Donald B. Murphy* is inapplicable here. We instead conclude that application of the \$75,000 cap set forth in §8-42-107.5, C.R.S. is premature since the DIME

¹ As adjusted annually by the Director of the Division of Workers' Compensation, the applicable caps are \$76,605 and \$153,210. Section 8-42-107.5, C.R.S.

physician has opined that the claimant is not at MMI, his impairment rating has not been determined, and it is not known which cap applies. Consequently, it was error to grant the respondents' motion to suspend temporary disability benefits upon reaching the \$75,000 cap.

Section 8-42-107.5, C.R.S. provides in pertinent part as follows:

No claimant whose impairment rating is twenty-five percent or less may receive more than seventy-five thousand dollars from combined temporary disability payments and permanent partial disability payments. No claimant whose impairment rating is greater than twenty-five percent may receive more than one hundred fifty thousand dollars from combined temporary disability payments and permanent partial disability payments.

Additionally, §8-42-107(8)(c), C.R.S. requires a determination of a medical impairment rating after MMI has been reached. Section 8-40-201(11.5), C.R.S. defines MMI as:

(11.5) 'Maximum medical improvement' means a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition. The requirement for future medical maintenance which will not significantly improve the condition or the possibility of improvement or deterioration resulting from the passage of time shall not affect a finding of maximum medical improvement. The possibility of improvement or deterioration resulting from the passage of time alone shall not affect a finding of maximum medical improvement.

Consequently, only after the claimant has reached MMI and his medical impairment rating is established can the applicable cap set forth in §8-42-107.5, C.R.S. be determined. *See Leprino Foods Co. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005)(since claimant had not yet reached MMI, her permanent impairment rating could not yet be determined and application of the cap was premature); *compare Grogan v. Lutheran Med. Ctr., Inc.*, 950 P.2d 690 (Colo. App. 1997)(cap is applicable where claimant's medical condition had stabilized and her medical impairment rating had been determined at a level implicating the cap); *see also* §8-42-107(8)(b)(III), C.R.S.

Here, it is undisputed that the DIME physician has opined that the claimant is not at MMI. Because a medical impairment rating cannot be determined until the claimant

has reached MMI, then application of the \$75,000 cap set forth in §8-42-107.5, C.R.S. is premature. The ALJ therefore erred in concluding that the \$75,000 cap set forth in §8-42-107.5, C.R.S. applied and allowing the respondents to suspend payment of temporary disability benefits once that cap is reached. Since the claimant has not yet reached MMI and has not been given an impairment rating, he is entitled to receive temporary disability benefits during this time period. It is well settled that employers must continue paying temporary benefits without application of the cap until such time as a claimant reaches MMI. Section 8-42-105(3)(a), C.R.S.; see *Leprino Foods Co. v. Industrial Claim Appeals Office*, *supra*. Once the claimant has reached MMI and his impairment rating is determined, then the applicable cap set forth in §8-42-107.5, C.R.S. can be determined—whether it be the \$75,000 or the \$150,000 cap. See *Grogan v. Lutheran Med. Ctr., Inc.*, *supra*.

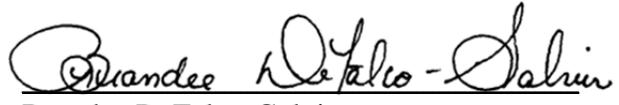
The respondents' argument notwithstanding, the holding in *Donald B. Murphy* does not mandate a different conclusion. In *Donald B. Murphy*, the Court held that application of the cap set forth in §8-42-107.5, C.R.S. is premature if a claimant has not reached MMI, as defined in §8-40-201(11.5), C.R.S. The Court reasoned that a claimant's impairment rating and, therefore, application of the cap cannot be determined until the claimant reaches MMI and an impairment rating is established. *Id.* at 613.

Further, there is no duplication of benefits as argued by the respondents. It is well settled that PPD and TTD do not compensate for the same loss. Temporary disability benefits are designed to replace the claimant's actual lost wages during the period he is recovering from the industrial injury. *Dillard v. Indus. Claim Appeals Office*, 134 P.3d 407 (Colo. 2006). Conversely, permanent disability benefits compensate the claimant for a future loss of earning capacity. *Husson v. Industrial Claim Appeals Office*, 991 P.2d 346 (Colo. App. 1999)(temporary total disability benefits compensate employee for lost wages, while PPD benefits compensate for loss of future earning capacity). The court, therefore, has concluded that the fact that previously awarded PPD benefits were paid concurrently with the additional award for TTD benefits does not constitute a duplication of benefits. See *Mesa Manor v. Industrial Claim Appeals Office*, 881 P.2d 443, 445 (Colo. App. 1994).

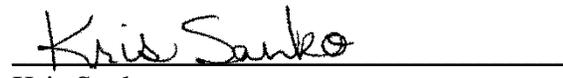
IT IS THEREFORE ORDERED that the ALJ's order dated September 30, 2014, is reversed.

DEAN LAABS
W. C. No. 4-890-061-02
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INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/19/2015 _____ by _____ RP _____ .

PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY
BLVD., DENVER, CO, 80230 (Insurer)

HEUSER & HEUSER, L.L.P., Attn: BARKLEY D. HEUSER, ESQ., 625 N. CASCADE
AVENUE, SUITE 300, COLORADO SPRINGS, CO, 80903 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: CRAIG R. ANDERSON, ESQ., 1401
SEVENTEENTH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-767-157-06

IN THE MATTER OF THE CLAIM OF
ROBERT ROMERO,

Claimant,

v.

FINAL ORDER

ALSTOM, INC.,

Employer,

and

ZURICH AMERICAN INSURANCE,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated October 23, 2014, that ordered payment of permanent total disability benefits. We affirm the order of the ALJ.

Following hearings in this matter held on November 18, 2013, and June 20, 2014, the ALJ found the respondents had overcome the determination of the Division Independent Medical Examiner (DIME) that the claimant had not achieved maximum medical improvement (MMI). The ALJ determined the claimant was unable to earn any wages and awarded permanent total disability benefits (PTD). The ALJ also allowed the respondents credit for temporary benefits paid past the date of MMI towards their obligation for PTD payments, and the ALJ granted medical benefits for maintenance care past the date of MMI.

The respondents appeal arguing the ALJ committed error when he concluded the claimant's ability to tell the truth did not disqualify him from an award of PTD benefits. The respondents also contend the claimant's failure to stop smoking, maintain his blood glucose levels and attend medical appointments should be characterized as an injurious practice precluding his eligibility for benefits.

The claimant was injured on June 27, 2008, while working for the employer as a welder. The claimant fell on some scaffolding and injured his right shoulder and neck.

ROBERT ROMERO

W. C. No. 4-767-157-06

Page 2

The claimant left work a few weeks later. The respondents admitted liability for the injuries. The claimant eventually underwent two surgical repairs of his shoulder, in June, 2010, and in December, 2010. The claimant also had surgery to his cervical spine, an anterior arthrodesis at C3-4, in September, 2009. One of the claimant's treating doctors, Dr. Castrejon, found the claimant to be at MMI on June 18, 2012. However, the claimant underwent a DIME review performed by Dr. Orgel. Dr. Orgel observed the claimant was not at MMI for the reason that he still needed psychological consultation and treatment.

The claimant proved to be a difficult patient. Medical records documented a traumatic head injury sustained by the claimant when he was approximately 11 years old. As a result, the claimant had been in a coma for several days. It appeared this injury left the claimant with cognitive deficits and possibly some personality disorders. The claimant was treated for depression several years prior to his work injury. During evaluations with Dr. Kleinman, Dr. Gutterman, Dr. Jacobs and Dr. Castrejon, the claimant would deny the existence of any prior psychological conditions. The claimant manufactured incredible stories regarding his military experiences. He claimed to be a Vietnam war veteran, decorated for valor and exposed to Agent Orange. However, his military record revealed he was in the Navy for no more than 35 days. He was discharged for having an anti-social personality and presenting other behavioral problems. The claimant had been a regular cigarette smoker for 50 years and had uncontrolled diabetes. His cervical surgery had to be delayed for many months because the claimant refused to take steps to get his glucose levels under control. Following Dr. Orgel's recommendation for psychological treatment, the claimant objected to participation in counseling sessions. The claimant's second shoulder surgery failed in part due to his disinclination to follow up with physical rehabilitation treatment. A third surgery was recommended to repair his rotator cuff tear. His doctor would not schedule the surgery until the claimant ceased smoking in order to maximize the chances of healing. The claimant, however, refused to stop smoking and avoided the surgery. Dr. Kleinman, a psychiatrist, surmised the claimant suffered from an adjustment disorder featuring mixed anxiety and depression. This condition was not related to his work injury. The doctor was skeptical the claimant would respond to traditional psychological treatment for this diagnosis due to his inability to tell the truth and his tendency to embellish and exaggerate. Dr. Kleinman also observed the claimant was unmotivated to take care of himself or his health.

The ALJ held the DIME was shown by clear and convincing evidence to have been mistaken when he noted the claimant was not at MMI. The ALJ reasoned the claimant would not participate in further psychological treatment. As a result, the ALJ

concluded medical therapy had been exhausted and the claimant was not likely to see his condition improve.

The ALJ credited the opinion of Dr. Castrejon that the claimant could realistically only work in jobs featuring a sedentary level of activity. He noted the claimant had refused to participate fully in two functional capacity exams. The ALJ deduced that because Dr. Castrejon had treated the claimant extensively, his opinion in regard to the likely level of work function was persuasive. The ALJ noted the claimant was 64 years old, did not have a high school diploma, nor a GED, and had only worked in jobs characterized as being in the heavy work category. The ALJ deemed the vocational opinion of the claimant's vocational expert to be authoritative. That opinion advised there was no employment available for the claimant in the local labor market. Accordingly, the ALJ adjudged the claimant was incapable of earning wages. He was awarded PT benefits.

I.

On appeal, the respondents argue the ALJ was in error in finding the claimant's preexisting psychological condition should be a factor in the determination he was unable to earn any wages. The respondents also dispute the ALJ's finding that the claimant's inability to be truthful can actually be seen as an employment disability, instead of an artifice used to obtain an undeserved award of benefits.

The ALJ noted the opinions of Dr. Kleinman and of Dr. Gutterman that the claimant was consciously making up his history and that the claimant was a "chronic liar." The ALJ stated "the claimant's lack of credibility does not mean that he is not permanently and totally disabled." "Indeed, the ALJ infers and finds that the claimant's poor credibility renders him even less employable than if he was a credible individual." (Findings ¶ 94). The ALJ did not hold that the claimant's tendency to dissemble was caused by his work injury. The ALJ did hold that the functional limitations presented by the claimant's work injury, when combined "with the claimant's preexisting conditions of having a difficult and uncooperative personality and the claimant's propensity to fabricate untruthful stories ... render the claimant even less employable and incapable of earning a wage in the competitive labor market ...". (¶ L, Supplemental Conclusions of Law). Reference was made to *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Although the claimant is not required to establish that an industrial injury is the sole cause of his inability to earn wages, the claimant must nonetheless demonstrate that the industrial injury is a "significant causative factor" in his permanent total disability. *Seifried supra*. This means the claimant must establish a "direct causal

relationship” between the industrial injury and the permanent total disability. *Id*; *Lindner Chevrolet v. Industrial Claim Appeals Office*, 914 P.2d 496 (Colo. App. 1995), *reversed on other grounds*, *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). Under this test, the ALJ must determine the residual impairment caused by the industrial injury, and determine whether it was sufficient to result in permanent total disability without regard to the effects of subsequent intervening events or preexisting conditions. Resolution of the causation issue is one of fact for the ALJ. In determining whether a claimant is permanently and totally disabled, the ALJ may consider a wide range of factors including the claimant's age, work experience and training, the claimant's overall physical condition and mental abilities, and the availability of work the claimant can perform. The claimant's overall condition necessarily includes characteristics of the claimant present prior to sustaining his work injury. In this case, that would include the claimant's reluctance to be forthright about himself. The ALJ is given the widest possible discretion in determining the issue of permanent total disability, and ultimately the issue is one of fact. *Professional Fire Protection, Inc. v. Long*, 867 P.2d 175 (Colo. App. 1993). Because these issues are 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. The ALJ's conclusion that the claimant's statements and testimony are largely unbelievable does present a certain difficulty in sorting out the evidence in this case. However, the ALJ was able to rely on other sources of information, such as medical and vocational records, to provide a measure of objectivity by which to evaluate the claimant's version of the facts.

Here, the ALJ pointed out that despite the claimant's preexisting proclivity for dishonesty, he did successfully maintain employment as a welder for twenty years. It was not until his work injury presented substantial additional barriers to his ability to be employed that he became unable to earn wages. The ALJ adjudged the effects of the industrial injury were significant and bore a direct causal relationship between the precipitating event and the resulting disability. This is consistent with *Seifried* and we perceive no basis to disturb the ALJ's order on appeal. The claimant's treating doctor assigned the claimant sedentary work restrictions. This represented a considerable change from the claimant's previous heavy work capability. The ALJ observed the vocational opinion of the claimant's expert that these restrictions, combined with the claimant's previous education and work experience, prevented the claimant from obtaining employment. The record contains substantial evidence to support the ALJ's findings the functional restrictions implicated in the claimant's inability to earn wages were directly related to the 'admitted' shoulder and neck injury.

II.

The respondents contend the claimant was involved in an injurious practice when he frustrated his doctor's attempts to provide him with treatment. These practices are said to include the claimant's inability to control the levels of glucose in his blood, his failure to show up for medical appointments and his refusal to stop smoking. The ALJ noted the claimant tried to comply with recommendations to take better care of himself but was unable to do so.

Section 8-43-404(3) provides that an ALJ has the "discretion to reduce or suspend the compensation" of a claimant who engages in an "injurious practice" tending to impair recovery. Because application of this section is discretionary, we must uphold the ALJ's order unless it is beyond the bounds of reason. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). An abuse of discretion occurs if the ALJ's order is contrary to law or unsupported by substantial evidence in the record. *Coates, Reid & Waldron v. Vigil, supra*.

The respondents complain that the claimant's failure to take medication or monitor his diet so as to control his blood glucose levels, led his spine surgeon to delay for many months his cervical spine surgery due to his diabetes. The claimant was also accused by the respondents of delaying the attainment of MMI when he refused to attend or reschedule appointments for psychological therapy as required by the DIME physician. However, the claimant eventually did undergo the spine surgery and the ALJ overruled the DIME doctor's declaration the claimant was not at MMI.

In March of 2012, Dr. Weinstein reevaluated the claimant's right shoulder after previously performing two shoulder surgeries. Dr. Weinstein found the claimant had again torn his rotator cuff. The doctor recommended a repeat surgical repair but required the claimant to first stop smoking for a period of six weeks. Dr. Castrejon offered patches and referrals to assist the claimant with his smoking cessation. The claimant declined these offers and stated he would try to quit on his own. The claimant never quit and the shoulder surgery was never completed. Dr. Castrejon then determined the surgery would not be accomplished and placed the claimant at MMI on June 18, 2012.

The ALJ applied a 'reasonableness' standard in order to discern whether the claimant's failure to quit smoking and comply with medical recommendations constituted an 'injurious practice.' The ALJ deemed it appropriate to ask whether the claimant acted in a volitional manner and exercised a degree of control over the refusals to comply with the medical recommendation to quit smoking. The ALJ reasoned: "As found, he is who he is and he had no control over his non-cooperation in surgery or further psychological/psychiatric treatment." (§ j, Supplemental Conclusions of Law). The

claimant was therefore deemed to have been reasonable in his failure to adhere to the suggestions for treatment. This conclusion of the ALJ represents a misapplication of his discretion. However, in light of the totality of the record, we find this error to be harmless.

The ALJ's observation that the claimant may disobey medical recommendations simply because 'he is who he is' is an invitation to an arbitrary and unequal application of § 8-43-404(3). The result is either that the prohibition of injurious practices is made unenforceable, or that an ALJ is to sort claimants between those it is felt are able to ignore medical treatment directions, and those who are not, based on the insubstantial standard of who 'he is.'

Claimants are frequently asked by their medical care providers to undertake certain actions and behaviors in order to maximize their recovery from illness or injury. These requests often take the form of suggestions to take medication, lose weight, avoid alcohol, attend appointments and stop smoking. These activities are all under the control of the claimant. If the ALJ is to find that the claimant's performance of an injurious practice does not justify the statutory sanction to "reduce or suspend the compensation" of the claimant, he must employ a more objective standard. That standard would inquire as to what a reasonable person would do given the circumstances facing the claimant. Its application would implicate the history of treatment, contrary medical opinions, the importance of the proposed recommendation to the medical outcome and other circumstances substantially bearing on the ability of a patient to comply with the medical directions.

Here, the record does not contain much explanation as to why the claimant should not have been expected to stop smoking for six weeks to allow the recommended shoulder surgery to be accomplished. A finding that the claimant had a disagreeable and unaccommodating personality as a basis for allowing the claimant to ignore medical recommendations is not an appropriate application of the ALJ's discretion.

Nonetheless, before a claimant may be sanctioned for pursuing an injurious practice, it is incumbent on the respondents to "show that the surgery is calculated to effect a cure ..." *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002), or that "such medical or surgical treatment ... *is reasonably essential to promote recovery*," § 8-43-404(3). The respondents do not point to evidence in the record which reveals how the proposed shoulder surgery would promote recovery for the claimant. The March 10, 2012, report of Dr. Weinstein suggesting the rotator cuff repair does not contain any prognosis for improvement or explanation of the benefits to be

obtained from the surgery. Exhibit 53. Dr. Castrejon describes only one purpose to be served by the shoulder surgery. In his June 21, 2013, deposition the doctor states: "... but my goal is to get him down to where he's taking between 60 and 90 milligrams [of oxycodone], and I anticipate that might be for a while, to be honest with you, because if he doesn't get that shoulder fixed, that is a source of pain and it's going to be a source of pain further on ..." (pg. 24, lines 16-20). However, Dr. Castrejon identified two additional sources of the claimant's pain, besides the unrepaired shoulder, that would probably frustrate any attempt to reduce the prescription of pain medication regardless of a successful shoulder surgery. These include pain from the claimant's cervical spine and pain sensitivity stemming from the long duration of the shoulder and spinal injuries. Dr. Castrejon explained: "I think he's going to be on neuropathic medicine indefinitely, and the reason I say that is because when you have the problem that he has in his shoulder and neck, it isn't something that's expected to resolve. If it was a lumbar surgery, we'd say he had failed back syndrome. In terms of his neck it's more like a failed neck syndrome." (pg. 35-36). Of even more significance than the claimant's additional injury to his cervical spine, was the chronic nature of the claimant's pain.

Q: Say he had stopped smoking and was able to do these surgeries. Would that be any guarantee that his pain and function would have decreased, or that his pain would have decreased and his function would have increased?

Dr. Castrejon: I think that's a difficult question because chronic pain is something that is very difficult to treat. And it's an entity that has come about over the last 10 to 15 years. And studies have now shown that people with chronic pain, their nociceptors and all the input that is received to the spinal cord and brain is altered. So their perception of pain is much different than somebody who had not been placed through a chronic pain period, or something that creates chronic pain. To them the perception of pain is high. ... So my assumption or my thinking is that even if you were to have additional surgery I'm not sure how much pain relief he would achieve. Tr. Nov. 18, 2013, pg. 198-99.

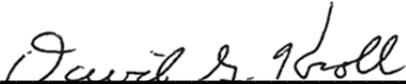
There is no other medical explanation given for the shoulder surgery. The evidence in the record then, does not establish the medical or surgical treatment ... *is reasonably essential to promote recovery*, as required by § 8-43-404(3). When the best result for a therapy is described in such an ambivalent fashion, an injurious practice frustrating that treatment cannot justify the sanction of reducing or suspending the

claimant's compensation. Because the respondents were unable to show the usefulness of the surgical shoulder repair, the ALJ, for that reason, did not commit error when he declined to apply the sanctions provided by § 8-43-404(3) relating to a claimant's injurious practice.

Accordingly, we find no basis to question the ALJ's Supplemental Order finding the claimant to be at MMI as of June 18, 2012, and awarding permanent total disability benefits as of that date.

IT IS THEREFORE ORDERED that the ALJ's order issued October 23, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

ROBERT ROMERO
W. C. No. 4-767-157-06
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CERTIFICATE OF MAILING

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

_____ 4/9/2015 _____ by _____ RP _____ .

ANDERSON & LOPEZ, A PROFESSIONAL CORPORATION, Attn: RICK PAUL LOPEZ, ESQ., 4905 N. UNION BLVD., SUITE 302, COLORADO SPRINGS, CO, 80918 (For Claimant)

THOMAS POLLART & MILLER, LLC, Attn: ERIC J. POLLART, ESQ., 5600 S. QUEBEC STREET, SUITE 220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-870-626-01

IN THE MATTER OF THE CLAIM OF
JOHN ROSCOE,

Claimant,

v.

FINAL ORDER

LOOKOUT MOUNTAIN WATER
DISTRICT,

Employer,

and

COLORADO SPECIAL DISTRICTS
P&L POOL,
c/o COUNTY TECHNICAL
SERVICES, INC.

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Margot Jones (ALJ) dated October 22, 2014, that denied the respondents' request to modify the general admission of liability to decrease the claimant's average weekly wage. We affirm.

This matter went to hearing on the respondents' petition to modify. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was a professional engineer with a background in mining and civil engineering, management road and dam construction and water development. When the claimant worked as a paid consultant his professional fees ranged from \$50/hour to \$100/hour. In 1988 the claimant was elected to the first Board of Lookout Mountain Water District (District). He later became president, serving consecutive terms as president until his admitted injury on October 11, 2011. On this date the claimant was inspecting a water facility site when he slipped, fell and fractured his skull.

The respondents filed a general admission of liability on November 23, 2011, admitting for an average weekly wage at the maximum rate of \$828.03 pursuant to §8-40-202 (1)(a)(II), C.R.S., which provides that the rate of compensation "of every

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nonsalaried person in the service of the state of any county, city town or irrigation, drainage or school district therein, or of any public institution or administrative board thereof,” including “nonsalaried elective officials...shall be at the maximum rate provided by article 40 to 47 of this title.”

The respondents subsequently filed a petition to modify the claimant’s average weekly wage asserting that the claimant did not meet the definition of §8-40-202(1)(a)(II), C.R.S., because he was actually a “salaried employee” and, therefore, his average weekly wage should be based upon the “wages” he actually received which the respondent calculated to be \$25.00 per week.

The ALJ found that the District adopted rules, pursuant to statute, §32-1-902 (3)(b), C.R.S., giving the Board discretionary authority to pay itself compensation, but only for attendance at Board meetings. Under this policy, the claimant was compensated \$100 per Board meeting he attended but could not exceed \$1600 per year. The Board meetings were held monthly. The District issued W-2s to the Board members, reflecting the sum of the \$100-per-meeting payment made to them. No income tax was withheld because the sum was too small to trigger any withholding requirements.

In addition to his attendance at the monthly board meetings, the claimant performed a myriad of other duties for the District including visiting water facility sites to pay contractors and determine whether a project had been completed. He met with state regulators, engineers, legal counsel, financial advisors, consultants and periodically attended conferences. As the Board president, the claimant signed all contracts, deed notes, debentures, warrants and other instruments on behalf of the District and was responsible for oversight of all legal and budgetary matters. The claimant reviewed written reports and design specifications and used his professional expertise to discuss these with paid contractors. The claimant spent an estimated 20 hours per week on the District’s business and was not paid for any of these activities.

The ALJ also found that the District’s workers’ compensation renewal documents with the insurer pool stated that all five directors on the Board were volunteers. In 2012, the respondents re-named a reservoir and dam after the claimant. The Board’s resolution in this regard recited that the claimant had “provided superior leadership and countless hours of volunteer time to maintain and improve the District’s ability to serve its residents in a responsible and cost effective manner and to plan for the future.”

Based on these findings, the ALJ concluded that the claimant was in fact a “nonsalaried” elective official for purposes of §8-40-202(1)(a)(II), C.R.S. and should be compensated based upon the maximum average weekly wage.

On appeal, the respondents renew the arguments made at hearing and contend that that the evidence compels the conclusion that the claimant was a salaried employee. We are not persuaded that the ALJ committed reversible error and affirm the ALJ’s order.

Because the respondents sought to modify the general admission of liability, they had the burden of proof on this issue. Section 8-43-201, C.R.S. provides, in pertinent part, a party seeking to modify an issue determined by a general or final admission...shall bear the burden of proof for any such modification. *See City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014).

The statute at issue, §8-40-202(1)(a)(II), C.R.S. states that that a nonsalaried elective official shall be compensated based on the maximum rate. The court has recognized that the legislative intent in providing maximum compensation to public volunteers is to encourage public service. *Parker Fire Protection District v. Poage*, 843 P.2d 108 (Colo. App. 1992).

Section 8-40-201(19) C.R.S. defines the term “wages” to mean the money rate at which services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied, and shall not include gratuities received from employers or others.

Here, the ALJ found, and the respondents do not dispute, that the claimant volunteered to serve as an elective official for the District and was not compensated for the many services he performed. At the time of the claimant’s injury there was no enforceable agreement between the parties to pay any salary, only the stipend for attending the monthly Board meetings. Under these circumstances, we agree with the ALJ’s conclusion that the claimant was a nonsalaried elective official entitled to the maximum rate of compensation pursuant to §8-40-202(1)(a)(II), C.R.S.

If a party performs services without the expectation of remuneration the person is a “volunteer,” and not an employee within the meaning of the Workers’ Compensation Act. Thus, in *Hall v. State Compensation Insurance Fund*, 154 Colo. 47, 387 P.2d 899 (1963), the court held that a claimant providing charitable services to a hospital was not an employee despite the fact that the hospital provided free meals to the claimant. As stated by the Court of Appeals, the status of a volunteer is not negated by

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"the fact that the alleged employer may provide some benefit on a gratuitous basis." *Aspen Highlands Skiing Corp. v. Apostolou*, 854 P.2d 1357, 1360 (Colo. App. 1992), *aff'd* 866 P.2d 1384. The respondents' argument ignores the ordinary definition of the term "salary." The word can be described as "a fixed payment at regular intervals for services, esp. when clerical or professional." *Websters New World College Dictionary* (4th ed. 2010), or:

A salary is a form of periodic payment from an employer to an employee, which may be specified in an employment contract. It is contrasted with piece wages, where each job, hour or other unit is paid separately, rather than on a periodic basis. *Wikipedia the free encyclopedia*, (Jan. 8, 2015).

The payment made to the claimant here pursuant to § 32-1-902(3)(a)(II), C.R.S. is payable only when the claimant attends a meeting. The payment, therefore, does not coincide with the above descriptions of a salary as a periodic payment and, is instead, an episodic payment.

The workers' compensation statute itself ascribes a meaning to the word "salary" distinct from that assigned by the respondents. Section 8-42-102, C.R.S., discusses the standard to be used for a determination of the average weekly wage. Subsection (2)(a) describes the circumstances involving a payment by the month, (b) references payment by the week, (c) describes daily payment, (d) deals with hourly rates, (e) references piecework, tonnage and commissions, and (f) pertains to payment by the mile. Only in subparagraph (a), pertinent to monthly payments, is the payment characterized as a "salary." Because the claimant could attend meetings in a haphazard fashion, and be paid in a similar manner, his remuneration would not be consistent with the monthly definition of salary in this subparagraph (a).

As noted by the parties, there is very little case law directly on point with this issue. The claimant points to the case of *State Compensation Insurance Fund v. Keane*, 160 Colo., 292, 417 P.2d 8 (1966), in support of his contention that he is a "nonsalaried" volunteer. In *Keane*, the decedent was a deputy sheriff who received no compensation other than civil fees which he collected for the service of papers. Although the respondents in *Keane* argued that these fees should be characterized as a "salary" payable to the claimant, the court disagreed. The court recognized that it was the intent of the legislature to provide that the specifically enumerated nonsalaried volunteers be paid at the maximum rate of compensation. The court awarded dependent benefits based upon the maximum rate of compensation.

Similarly in *University of Colorado v. Spencer*, Colo. App. No. 88CA1508 (October 2, 1989) *not selected for publication*, the court of appeals set aside the conclusion of the ALJ and the panel that a \$250 payment to an otherwise nonsalaried volunteer turned the claimant into a “salaried” employee for purposes of the statute. The claimant in *Spencer* was a student at the University of Colorado and appeared as an actor in a play produced by the University in conjunction with the Parks and Recreation Department. During the performance the claimant fell striking his head on a steel stake and sustained a severe brain injury. The court stated that the claimant had volunteered for this acting role and for five previous theatrical productions sponsored by the University. The claimant had never received any compensation for his services and did not expect to be paid for his work in the plays. After the claimant was selected for this acting role, the cast and crew members were advised that the play had been budgeted and that they would share in any “left-over monies” if the show was performed under budget. Approximately one month after his injury, the claimant received \$250 as his share of the play’s excess budget funds. The court stated that this amount reflected only a partial reimbursement of the claimant’s theatrical expenses. The court said that at the time of the injury there was no enforceable agreement between the parties to pay any salary and that the \$250 received by the claimant could not properly be classified as salary received for his services.

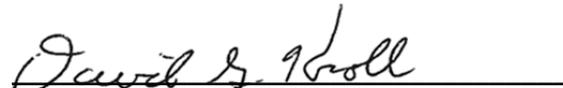
The *Keane* and *Spencer* cases are analogous to the present claim and we are not persuaded by the respondents’ arguments that this case is somehow distinguishable. We agree with the ALJ’s conclusion, that under the totality of the circumstances, the \$100 the claimant received for Board meeting attendance is a nominal benefit, essentially akin to a gratuity. In view of the other many duties that the claimant performed for the District without pay, this amount should not negate the claimant’s status as a nonsalaried volunteer. Christina Shea, a contractor who handles accounting and administration for the District, testified that the claimant was not required to perform any of the extra duties in order to get paid, but that he volunteered these services on behalf of the District. Tr. at 35. The claimant’s wife further stated that he performed his volunteer activities for the District because he cared about his community and based on the belief that he would not be paid. Tr. at 106.

We, therefore, agree with the ALJ’s determination that the claimant was a “nonsalaried” elective official within the meaning of §8-40-202(1)(a)(II), C.R.S. and thus, properly compensated based on the maximum rate.

IT IS THEREFORE ORDERED that the ALJ's order dated October 22, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


David G. Kroll

JOHN ROSCOE
W. C. No. 4-870-626-01
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CERTIFICATE OF MAILING

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

_____ 3/17/2015 _____ by _____ RP _____ .

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DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: CAMERON
J. RICHARDS, ESQ., 3900 EAST MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210
(For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-937-322-01

IN THE MATTER OF THE CLAIM OF

ELAINE WILSON,

Claimant,

v.

FINAL ORDER

DILLON COMPANIES, INC.,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Mottram (ALJ) dated October 15, 2014, that determined the claimant sustained a compensable injury after a fall in the employer's parking lot and awarded medical and temporary disability benefits. We affirm.

A hearing was held on compensability, medical and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed by the employer as a barista for the coffee shop contained within the respondent's store #440. The claimant's normal work schedule was from 8:30 a.m. until 5:00 p.m., five days per week. The employer had designated two areas on the property for employee parking. The employees were asked to park in these areas so the customers have easier access to the store but employees have not been disciplined for parking close to the store. These areas were also available for customers to park and employees were not prohibited from parking off-site.

On December 11, 2013, the claimant completed her shift and clocked out at 5:03 p.m. The claimant then did some personal grocery shopping, paid for her groceries and left the store. The claimant testified that it was not unusual for her to do her grocery shopping after work and she received an employee discount for groceries purchased at the store. The claimant exited the store and began walking to her car, past the pharmacy drive through. There was a car at the drive through and the claimant needed to step off of

the curb to get to where her car was parked. The claimant slipped and fell on ice in the parking lot of the employer's premises. The claimant was taken by ambulance to the emergency room where she was diagnosed with a closed neurovascularly intact left tibia and fibula fracture and a rib fracture.

The respondent denied the claim contending that the claimant's act of grocery shopping was a personal deviation that took the claimant out of the course and scope of her employment. The ALJ found that although the claimant's shopping could constitute a personal deviation, the ALJ concluded that "any personal deviation had concluded by the time the claimant paid for her groceries and began walking to her car." The ALJ went on to conclude that the claimant's injury was compensable and ordered the respondent to pay for medical treatment and temporary disability benefits.

On appeal, the respondent argues that the ALJ erred in his analysis of the claim. The respondent also asserts that the ALJ abused his discretion in determining that the claimant's "personal deviation" ended after the claimant checked out and walked out of the store and that the ALJ erred in referencing the "exclusive remedy" provision in his order. We are not persuaded the ALJ committed reversible error.

In Colorado, only those injuries "arising out of" and "in the course of employment," are compensable under the Workers' Compensation Act. Section 8-41-301(1)(b), C.R.S. The course of employment requirement is satisfied when the claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991). Here, the ALJ found that the claimant's injury met the course and scope test. The claimant sustained an injury in the employer controlled parking lot shortly after she clocked out from her shift. We are not persuaded by the respondent's arguments that the claimant's injury was not sustained in the course and scope of employment because the claimant was not necessarily required to park in the areas designated by the employer as employee parking or the fact that she could have parked off site. The panel has previously recognized that "[i]t is now 'practically' universally accepted that a parking lot adjacent to the employer's business is a part of the employer's premises." *Rodriguez v. Exempla Healthcare, Inc.*, W.C. No. 4-705-673 (April 30, 2008). In support of this holding, the Panel quoted Professor Larson as follows:

As to parking lots owned by the employer, or maintained by the employer for its employees, practically all jurisdictions now consider them part of the "premises," whether within the main company premises or separated from it. *This rule is by no means confined to parking lots owned,*

controlled, or maintained by the employer. The doctrine has been applied when the lot, although not owned by the employer, was exclusively used, or used with the owner's permission, or just used, by the employees of this employer. Thus, if the owner of the building in which the employee works provides a parking lot for the convenience of all tenants, or if a shopping center parking lot is used by employees of businesses located in the center, the rule is applicable. (emphasis in original).

Larson's Workers' Compensation Law, § 13.04 [2] [a] [b] (footnotes omitted); *see also State Compensation Insurance Fund v. Walter, supra* (upholding award of compensation to claimant injured while crossing public street between employer's parking lot and employer's shop); *Woodruff World Travel, Inc. v. Industrial Commission, supra* (parking lot was provided for use by employer's employees, employer was aware its employees used the lot, and lot constituted "an obvious fringe benefit to claimant"); *Friedman's Market, Inc. v. Welham*, 653 P.2d 760 (Colo. App. 1982) (fact that the respondent did not own or control the parking lot does not, as a matter of law, mandate a different result). Additionally, once a parking lot has achieved the status of "a portion of the employer's premises, compensation coverage attaches to any injury that would be compensable on the main premises." *Larson's Workers' Compensation Law*, § 13.04 [2] [b].

In the present case, the parking lot where the claimant fell was situated adjacent to the building where the claimant worked. Further it was undisputed that the employer's employees used this parking lot and that the employer knew its employees used such parking lot. Tr. at 76. Misty Herman, store manager, testified that the employees were asked to park in certain areas of the parking lot so that the customers had easier access to the doors. Tr. at 88. Herman further testified that although they requested that the employees comply with this parking policy, she did not have a way to monitor the employee's cars to insure compliance. Tr. at 89. Even though the employer may not have disciplined employees for failing to park in the designated areas, and even though the lot was open to the general public, the ALJ nevertheless concluded, with record support, that the parking lot was owned and maintained by the employer and the employer directed the employees where to park, indicating a degree of control over the employees' parking decision. *Friedman's Market, Inc. v. Welham, supra*. Injuries sustained in parking lots which are provided by the employer for the benefit of employees arise out of the employment because they are a normal incident to the employment relationship. *Seltzer v. Foley's Department Store*, W. C. No. 4-432-260 (September 21, 2000) (claimant's parking lot injury compensable even though it occurred

ELAINE WILSON

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while claimant was off the clock, and at a place where the risk was shared by the general public).

Moreover, while the claimant had clocked out from work, it is well settled that the "course of employment" embraces a reasonable interval before and after official working hours when the employee is on the employer's property. *Larson, Workers' Compensation Law* § 21.06(1); *Industrial Commission v. Hayden Coal Co.*, 113 Colo. 62, 155 P.2d 158 (1944) (interval of up to 35 minutes has been allowed for arrival and departure from work); *Ventura v. Albertson's Inc.*, 856 P.2d 35 (Colo. App. 1992). The ALJ specifically found that the claimant's injury here occurred a short time (approximately 15 minutes) after she had clocked out. Therefore, because it is supported by substantial evidence in the record, we are bound by the ALJ's factual finding that the claimant was injured during the time and place of her employment. Section 8-43-301(8), C.R.S.

The inquiry does not stop there, however, and the claimant must also satisfy the "arising out of" requirement for compensability. The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, supra. The "arising out of" test is one of causation. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient "nexus" or causal relationship between the claimant's employment and the injury is one of fact which the ALJ must determine based on the totality of the circumstances. *City of Brighton v. Rodriquez*, supra.

In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. *See Employers' Mutual Ins. Co. v. Industrial Commission*, 76 Colo. 84, 230 P. 394 (1924). Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some specific benefit to the employer so long as the employee's activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *See also Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996) (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment"). It is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment. *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). Whether

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a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary, and an accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995)

In contrast, if an employee substantially deviates from the mandatory or incidental functions of her employment, such that she is acting for her sole benefit at the time of an injury, then the injury is not compensable. *Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986); *see also Callahan v. Nekoosa Papers, Inc.*, W.C. No. 3-866-766 (May 8, 1989)(claimant working on his car in the employer's parking lot with his own tools was not engaged in an activity incidental to his employment). When a personal deviation is asserted, the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship. *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006).

Here, the ALJ found that "even if Claimant's shopping following the completion of her shift represented a personal deviation, that deviation ended once Claimant completed her check out and walked out of the store to her car" and the claimant was "back within the course and scope of her employment." The respondent contends that the ALJ necessarily found that there was a substantial deviation removing the claimant from her employment duties and that this mandates conclusion that the claimant's injury did not arise out of her employment. We disagree.

Here, as noted in the ALJ's order, there is evidence from which the ALJ could have determined that it was common and customary and an accepted part of the employment for the employees to do personal shopping which would create a sufficient nexus to the claimant's employment by virtue of his findings that the claimant received an incentive to shop at the grocery store through an employee discount and regularly did so following her shift. Thus, contrary to the respondent's assertion, we do not read the ALJ's findings to actually determine there was a substantial deviation. The ALJ merely determined that "even if" there was a personal deviation from employment, that deviation ended once the claimant checked out and walked out of the store to her car.

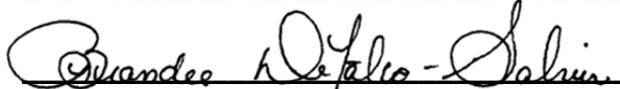
The question of when a personal deviation has ended and the claimant has commenced the return to employment duties is generally one of fact for determination by the ALJ. Further, the claimant bears the burden of proof on this issue. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). Because the issue is factual, we must uphold the ALJ's order if supported by substantial evidence in the

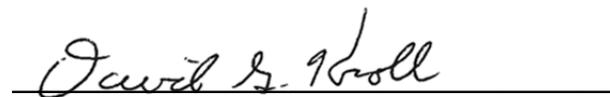
record. Section 8-43-301(8), C.R.S. The claimant testified that pursuant to the employer's request, she always parks on the east side of the building when she is working. Tr. at 24. The claimant would have taken the same path to her car whether she left immediately after her shift or after 15 minutes of shopping. Tr. at 69. The claimant's act of walking to her car to leave for the day was contemplated by her employment duties as employers are expected to provide a safe ingress and egress to the premises and the claimant would have had to exit the building regardless of whether or not she had stopped to do personal shopping. Moreover, the ALJ specifically found it was the black ice in the parking lot that caused the claimant to fall and not the fact that she was carrying grocery bags. Because the ALJ's findings in this regard are supported by substantial evidence and those findings in turn support the conclusion that any personal deviation the claimant might have engaged in had ended, we have no basis to disturb the ALJ's order. Section 8-43-301(8), C.R.S.

The respondent also takes issue with a footnote in the ALJ's order discussing the fact that the determination in this case was "consistent with the established principle of workers' compensation to provide for the quick and efficient delivery of benefits without consideration of fault, in exchange for waiving the right to pursue a judgment against an employer in a civil court." Although this appears to be superfluous commentary, in our view, it does not alter the ALJ's dispositive findings and conclusion that the claimant sustained an injury arising out of and in the course and scope of her employment when she fell in the employer's parking lot. We, therefore, perceive no reversible error in this regard.

IT IS THEREFORE ORDERED that the ALJ's order dated October 15, 2014, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


David G. Kroll

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CERTIFICATE OF MAILING

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

_____ 3/16/2015 _____ by _____ RP _____ .

WITHERS SEIDMAN RICE & MUELLER, PC, Attn: SEAN E. P. GOODBODY, ESQ., 101
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