

BROWN BAG SEMINAR

Thursday, April 17, 2014

(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, 2014 through April 11, 2014

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-865-048-03

IN THE MATTER OF THE CLAIM OF

VICTOR BARRERA,

Claimant,

v.

FINAL ORDER

ABM INDUSTRIES, INC.,
d/b/a AMPCO SYSTEM TRANSPORTATION

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,
Respondents.

The *pro se* claimant seeks review of orders of Administrative Law Judge (ALJ) Cain dated September 23, 2013, and ALJ Harr dated October 31, 2013, that denied the claimant's request for temporary disability benefits and ordered the claimant to pay attorney fees pursuant to §8-43-211(2)(d), C.R.S. We affirm the denial of temporary disability benefits and reverse the award of attorney fees.

This matter has an extensive procedural history. For purposes of review, however, the facts may be summarized as follows. On December 20, 2010, the claimant sustained an admitted injury while working for the employer. The claimant continued light duty work for the employer following his injury. The claimant was released to return to regular work on January 31, 2011.

On March 11, 2013, the claimant filed an application for hearing seeking temporary total disability benefits. The claimant also listed the issues of compensability and medical benefits (authorized provider and reasonably necessary). On June 25, 2013, a hearing was conducted by ALJ Cain in which the respondents alleged that none of the claimant's issues were ripe for hearing and requested attorney fees and costs pursuant to §8-43-211(2)(d), C.R.S. The ALJ instructed the respondents to file a written motion for summary judgment which they did and, after direction by the court, supplemented the motion with written documentation. On September 23, 2013, ALJ Cain issued an order partially granting the respondents' motion for summary judgment. ALJ Cain determined that, as a matter of law, the issues of compensability and medical benefits were not ripe for hearing and, therefore, struck these issues. The ALJ ordered a hearing to be

conducted on the issues of the claimant's entitlement to temporary total disability benefits and the amount of attorney fees, if any, to be assessed against the claimant for filing an application for hearing on issues not ripe for hearing.

The hearing on temporary disability benefits and attorney fees and costs went forward in front of ALJ Harr. ALJ Harr determined that the claimant failed to show it more probably true than not that his injury proximately caused any wage loss between December 20, 2010, and January 31, 2011, when he was released to regular work. ALJ Harr found that the claimant failed to show that he left work as a result of the injury and that there was no persuasive evidence otherwise showing that the claimant lost time from work because of the admitted injury. ALJ Harr, therefore, denied and dismissed the claimant's claim for temporary total disability benefits.

ALJ Harr further determined that the respondents showed it more probably true than not that counsel for the respondents reasonably expended \$678 in legal fees on legal work related to the issues ALJ Cain determined were not ripe for hearing. The ALJ, therefore, ordered the claimant to pay \$678 in attorney fees and costs pursuant to §8-43-211(2)(d), C.R.S.

The claimant filed a petition to review of both the September 23, 2013, order and the October 31, 2013, order. The claimant submitted additional documents and a compact disc with his petition to review that do not appear to have been provided to the ALJ. Consequently, we may not consider them now on appeal. *See generally, Frank v. Industrial Commission*, 96 Colo. 364, 43 P.2d 158 (1935) (parties are expected to present all evidence at the appointed hearing); *Denver Post Corp. v. Industrial Commission*, 677 P.2d 436 (Colo. App. 1984) (evidence presented for the first time on review will not be considered). Although the claimant filed a detailed petition to review, he did not file a brief in support of petition to review. *See Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986)(the filing of a brief in support of a petition to review is not a jurisdictional prerequisite to appellate review). The claimant also failed to request a transcript of the hearing.

After the matter was green-sheeted to the panel, the respondents filed motion for extension of time, out of time, to file a brief in opposition to petition to review. The respondents cite to the confusion surrounding the Office of Administrative Courts' (OAC) new address and the conflicting notice on the October 31, 2013, order directing the parties to file a petition to review at the OAC's old address. Although it is unclear how this caused the delay in the respondents' brief, as the respondents appear to have received the December 4, 2013, briefing schedule setting forth the time limits for brief filing, we have, nonetheless, considered the respondents' brief in opposition. Section 8-43-301(9), C.R.S.

The claimant's petition to review states that he is appealing the ALJ's order "in regards to my TTD benefits and the amount of money for attorney fees." Although we perceive no error in the ALJ's denial of temporary disability benefits, the ALJ erred as a matter of law in assessing attorney fees and costs against the *pro se* claimant.

I.

Temporary disability benefits are payable for actual wage loss while the claimant is disabled from performing work as a result of the industrial injury. Section 8-43-103 (1), C.R.S.; *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Whether the claimant is temporarily disabled by the injury is a question of fact to be resolved by the ALJ. *Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Because of the factual nature of the issue, the ALJ's determination must be upheld if supported by substantial evidence. Section 8-43-301(8), C.R.S. In applying this standard we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Furthermore, in the absence of a transcript we must assume the ALJ's findings of fact are supported by substantial evidence in the record. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo.App.1988).

We have reviewed the record and the ALJ's findings of fact. The ALJ's findings on temporary disability indicate that he resolved any conflicts in the evidence in favor of the respondents and that these findings are supported. The respondents submitted payroll records for the time period in question showing that the claimant was working for the respondent employer and was paid wages. Respondents' Exhibit B. The respondents also submitted a medical report showing that the claimant had been released to return to regular employment on January 31, 2011. Respondents' Exhibit C. The ALJ's findings support the denial of benefits and the claimant has not provided a basis for relief on review.

The claimant makes general arguments relating to alleged due process violations such as the fact that he was forced to pay for a translator, he was denied additional time to prepare evidence and he did not receive requested employment records. However, in the absence of a transcript, as well as a more specific assertion, which would establish a violation of the claimant's due process rights, we may not interfere with the ALJ's order on this ground. *See Nesbit v. Industrial Commission*, 43 Colo. App. 398, 607 P.2d 1024 (1979); *see also Frank v. Industrial Commission, supra*.

We have considered the claimant's remaining arguments and are not persuaded that there is a basis to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

II.

To the extent that the claimant has asserted that the award of attorney fees was improper, we agree. Pursuant to §8-43-301(8), C.R.S., we have authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law. Here, the ALJ's award of attorney fees and costs is unsupported by applicable law.

In assessing attorney fees and costs against the claimant, the ALJ applied the former version of §8-43-211(2)(d), C.R.S. which provided, in pertinent part,

(d) 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., however, was amended in 2013 by SB 13-285. Laws 2013, Ch. 301, § 5, eff. July 1, 2013. As the statute currently reads, attorney fees and costs may only be assessed against an attorney. The statute was changed to read:

(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...

Emphasis added.

The General Assembly declared that these changes to the statute were procedural and also explicitly stated that, "This act takes effect July 1, 2013, and applies to claims in existence on or after said date." While substantive rights and liabilities of the parties are determined by the law in effect at the time of the claimant's injury, procedural changes become effective during the pendency of a claim. *Specialty*

Restaurants Corp. v. Nelson, 231 P.3d 393 (Colo. 2010). Because the 2013 amendments to §8-43-211(2)(d), C.R.S. only changed who the attorney fees and costs may be assessed against, it is consistent with a procedural change and may be applied retroactively. *Specialty Restaurants Corp v. Nelson, supra.* (procedural statute relates only to remedies or modes of procedure to enforce existing substantive rights or liabilities, and may be applied retroactively without invoking constitutional considerations.)

Thus, under the current language of the statute, attorney fees and costs may not be assessed against a *pro se* claimant. If the General Assembly had wished to impose attorney fees against individual parties, it would have done so. Since it did not, we have no authority to create such a remedy. *See Natkin & Co. v. Eubanks*, 775 P.2d 88 (Colo. App. 1989)(authority to award attorney fees in workers' compensation cases is strictly a creature of statute, and no attorney fees may be awarded where no statutory authority exists).

The claimant in this case was *pro se* when he filed the application for hearing and during the course of these proceedings. Therefore, there is no attorney against whom fees and costs can be assessed under the statute. *See Forbes v. Barbee's Freeway Ford*, W.C. No. 4-797-103 (November 7, 2011); *Stapleton v. United Parcel Service*, W.C. No. 4-636-195 (October 18, 2007) (addressing similar language in §8-43-301(14), C.R.S. Consequently, we conclude that the ALJ's October 31, 2013, order for attorney fees and costs against the claimant is not authorized under the current version of §8-43-211(2)(d), C.R.S..

IT IS THEREFORE ORDERED that the ALJ's orders dated September 23, 2013, and October 31, 2013, are affirmed as to the denial and dismissal of the claimant's claim for temporary total disability benefits.

IT IS FURTHER ORDERED that the ALJ's award of attorney fees and costs against the claimant is reversed and the respondents' claim is denied.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

CERTIFICATE OF MAILING

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

_____ 3/28/2014 _____ by _____ KG _____ .

VICTOR BARRERA, 5101 DILLON STREET, DENVER, CO, 80239 (Claimant)
ABM INDUSTRIES, INC., 26410 EAST 78TH AVENUE, DENVER, CO, 80249 (Employer)
ACE AMERICAN INSURANCE COMPANY, Attn: ANITA FRESQUEZ-MONTOYA, C/O:
ACE/ESIS WEST WC CLAIMS, P O BOX 6569, SCRANTON, PA, 18505-6569 (Insurer)
CLIFTON, MUELLER & BOVARNICK, P.C., Attn: RICHARD A. BOVARNICK, ESQ., 789
SHERMAN STREET, SUITE 500, DENVER, CO, 80203 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-901-980-01

IN THE MATTER OF THE CLAIM OF

JOSE BRISENO,

Claimant,

v.

FINAL ORDER

BOISE PAPER HOLDINGS, LLC.,

Employer,

and

AMERICAN INSURANCE GROUP PLAN,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Harr (ALJ) dated August 6, 2013, that determined the claimant's average weekly wage and ordered the respondents to pay temporary disability benefits based on that calculation. We affirm.

The parties agreed to bifurcate the issue of average weekly wage and continue and reset the matter on the remaining issues for hearing. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on May 11, 2012. The respondents filed a general admission of liability admitting for an average weekly wage of \$724.00, and temporary total disability benefits from May 24, 2013, and continuing. This represented an hourly rate of \$18.10, for 40 hours per week.

The wage records submitted for hearing demonstrated that beginning March 19, 2012, the respondent employer had raised the claimant's hourly wage by \$.50 to reach \$18.10 and that the claimant worked full-time for the employer with overtime hours which were paid at the hourly rate of \$27.10. Based on the wage records submitted at hearing, the ALJ determined that over the seven weeks between March 19, 2012, and May 6, 2012, the claimant earned gross wages of \$5,994.25. The ALJ determined that this period of earnings fairly approximated the claimant's earning capacity while working for the employer because it included wages paid at \$18.10, plus overtime paid prior to the claimant's admitted injury. Thus, the ALJ determined that the claimant's average weekly wage should be calculated at \$856.32 ($\$5,994.25/7 \text{ weeks} = \856.32).

The ALJ also adopted the stipulation of the parties in finding that effective July 1, 2013, the claimant's average weekly wage should increase by \$277.95 to reflect the replacement cost of the claimant's health insurance premium. The ALJ, therefore, concluded that the respondents were liable for temporary disability benefits from May 24, 2013, through June 30, 2013, based on an average weekly wage of \$856.32 and from July 1, 2013, and continuing, based on the average weekly wage of \$1,134.27.

On appeal, the respondents contend that the ALJ's order is unsupported by the evidence and that the ALJ abused his discretion by including \$252.00 that is designated as RTE (retroactive pay) and RTO (retroactive overtime) in the wage records for the period the ALJ used to calculate the average weekly wage. We disagree that the ALJ committed reversible error and affirm.

Section 8-42-102(3), C.R.S., grants the ALJ substantial discretion to calculate the average weekly wage if any of the statutorily prescribed methods will not "fairly compute" the average weekly wage. Because the statute affords such discretion, we may not interfere with the ALJ's order unless an abuse is shown. An abuse of discretion exists if the ALJ's order is beyond the bounds of reason, as where it is contrary to law or unsupported by the evidence. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001). However, we may not interfere with the ALJ's findings of fact if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to uphold the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003).

Here, the record reflects that the parties presented conflicting theories concerning the proper calculation of the claimant's average weekly wage. The respondents' proposed calculation was based on the claimant's earnings for the 14 weeks immediately prior to the industrial injury. The claimant's calculation was based on the seven weeks preceding the injury. The ALJ explicitly found the claimant's method of calculation to be fair because it was based on the claimant's earnings after receiving his last pre-injury pay increase on March 19, 2013, and included overtime hours. In our view the ALJ reasonably concluded that the claimant's method best accounts for the variable pay and overtime hours. Further, we cannot say the ALJ's findings are unsupported by the evidence or that his conclusion constitutes an abuse of discretion.

The claimant testified that he worked 40 hours per week plus over time. (Tr. at 28). The wage records in evidence show varying overtime hours and certain amounts designated as RTE and RTO. The respondents take issue with the ALJ's finding that the claimant "earned" the \$252 designated as RTE and RTO during the seven week period the ALJ used to calculate the average weekly wage. However, under §8-40-201(19)(a),

C.R.S., the term “wage” is defined as “the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury.” The wage records in evidence show that the claimant was paid \$252 in gross wages during this time period regardless of whether it was designated as RTE or RTO. As noted by the ALJ, the fact that this money was delineated as “retroactive” does not compel the conclusion that it was paid for services outside the period in question.

Moreover, the RTE and RTO codes appear in the wage records for subsequent weeks, specifically for the pay periods ending April 15, 2012, April 22, 2012 and April 29, 2012. During these periods it appears that the amounts designated as RTE and RTO were actually subtracted from the claimant’s gross earnings. Although the respondents submitted an affidavit from Claudia Brush which asserted that that RTE and RTO designate “retroactive pay,” the affidavit provides no explanation as to why any pay is retroactive, or why these acronyms appear on no less than four pay dates and yet do not precisely correspond to the gross pay recorded for that date. Given the fluctuations in the use of RTE and RTO, it was entirely plausible that the ALJ would determine that these amounts should be included in the calculation. Consequently, we cannot say that the ALJ abused his discretion in calculating the claimant’s average weekly wage.

The respondents also contend that the ALJ erred in placing the burden on them to prove that the \$252 should not be included in seven week time period. We again disagree that the ALJ erred. The ALJ specifically noted in his order that the claimant had the burden of proof. Section 8-43-201, C.R.S. (ALJ Order at 3). As we understand the ALJ’s order, the ALJ determined that the claimant presented sufficient evidence with the wage records submitted into evidence to persuade the ALJ that he presented a prima facie case to increase the average weekly wage and, therefore, the burden then shifted to the respondents. *See Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). We do not read the ALJ’s order to alter the claimant’s underlying burden to persuade the ALJ in the first instance. *See Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

The respondents’ arguments notwithstanding, the ALJ’s findings are supported by the record evidence and his plausible inferences from that evidence. Those findings, in turn, support the ALJ’s calculation of average weekly wage and we have no basis to disturb the ALJ’s order §8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ’s order dated August 6, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


David G. Kroll

CERTIFICATE OF MAILING

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

_____ 3/18/2014 _____ by _____ KG _____ .

JOSE BRISENO, 5455 TULSA, DENVER, CO, 80239 (Claimant)
BOISE PAPER HOLDINGS, LLC., 13400 E 39TH AVE, DENVER, CO, 80239-3533
(Employer)
AMERICAN INSURANCE GROUP PLAN, 3131 CAMINO DEL RIO NORTH, SAN DIEGO,
CA, 92108 (Insurer)
LAW OFFICE OF BARBARA J. FURUTANI, Attn: BARBARA J. FURUTANI, ESQ., 1732
RACE STREET, DENVER, CO, 80206 (For Claimant)
THOMAS, POLLART & MILLER LLC., Attn: BRAD J. MILLER, ESQ., 5600 S QUEBEC ST
#220-A, GREENWOOD VILLAGE, CO, 80111 (For Respondents)
SEDGWICK CMS, PO BOX 14493, LEXINGTON, KY, 40512-4493 (Other Party)
BOISE PAPER HOLDINGS, LLC., PO BOX 25236, SALT LAKE CITY, UT, 84125-0236
(Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-897-030-02

IN THE MATTER OF THE CLAIM OF

MISTY KEEL, dependent of JOHN ERIC KEEL,

Claimant,

v.

ORDER OF REMAND

TRANSPORTATION TECHNOLOGY SERVICES,

Employer,

and

ACE AMERICAN INSURANCE COMPANY
CARRIER NO 494C186588-6,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated November 13, 2013, that granted the respondents' cross-motion for summary judgment and determined the respondents correctly calculated interest due and owing to the claimant on past due death benefits, and correctly calculated the Social Security offset. We set aside that portion of the ALJ's order regarding the amount of interest due and owing the claimant, and remand for further findings and a new order on this issue. In all other regards, we affirm the ALJ's order.

It is undisputed that at the time the deceased employee was killed on October 27, 2010, in a Colorado industrial accident, he and his wife and son were residents of Mississippi. A claim for workers' compensation benefits initially was brought in the state of Mississippi for the decedent's death. The respondents admitted the claim under Mississippi's workers' compensation act, and began paying benefits commencing on October 28, 2010. The respondents admitted for a compensation rate of \$337.58.

The claimants, the wife and son of the deceased, later made a claim for death benefits under Colorado's workers' compensation system. A hearing ultimately was held before ALJ Friend on the claimants' claim. On April 3, 2013, ALJ Friend determined that Colorado had jurisdiction over the claimants' claim. ALJ Friend, however, did not determine the decedent's average weekly wage under Colorado law, the equitable division of death benefits between the claimants, or offsets for the receipt of Social Security benefits or for workers' compensation benefits paid under the Mississippi claim.

MISTY KEEL

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On September 3, 2013, the respondents filed a Fatal Case - General Admission in Colorado. The respondents admitted for the maximum temporary total disability rate of \$1,216.00 for a weekly compensation rate of \$810.67. On September 20, 2013, the respondents filed a Fatal Case - Amended General Admission, admitting for death benefits under Colorado's workers' compensation system totaling \$66,822.00 from October 28, 2010, to August 28, 2013, and death benefits from August 29, 2013, and ongoing at a weekly rate of \$620.29 for the son and wife of the deceased. The Amended General Admission asserted the respondents were entitled to take a Social Security offset in the amount of \$190.38 per week since the date of the incident forward. This offset was computed based on each claimant receiving Social Security benefits totaling \$825.00 per month.

It is undisputed that between the day after the decedent's death and the respondents' filing of their General Admission in Colorado, the respondents paid the claimant a total of \$49,961.84 under Mississippi's workers' compensation system. The respondents also paid 8% interest on \$16,860.16, or the difference between the workers' compensation benefits that actually were paid to the claimant under Mississippi's workers' compensation system (\$49,961.84), and the workers' compensation benefits that they assert should have been paid under Colorado's workers' compensation system (\$66,822.00).

Thereafter, the claimant, the wife of the deceased, filed an application for hearing listing the following as issues to be heard: amount of Colorado death benefits for which the insurer is liable, offsets of Social Security Survivor benefits and Mississippi workers' compensation death benefits.

Prior to the hearing, the claimants filed a summary judgment motion, arguing that the respondents miscalculated past-due and ongoing death benefits, miscalculated the amount of interest due and owing on past-due death benefits, and miscalculated the Social Security offset by using 52 weeks rather than 52.14 weeks for the number of weeks in a year. The respondents filed a cross-motion for summary judgment, arguing that they corrected the Social Security offset, and they filed an Amended General Admission reflecting the correct offset. The respondents further argued they correctly calculated death benefits and interest.

The ALJ subsequently granted the respondents' cross-motion for summary judgment, determining that the respondents correctly calculated the amount of interest due and owing to the claimant on the past-due death benefits. The ALJ found that between the day after the decedent's death and the respondents' filing of their General Admission in Colorado, the respondents paid the claimant \$49,961.84 under Mississippi's workers' compensation system. The ALJ found that since the claimant would have received \$66,822 for the same time period under Colorado's workers' compensation system, the claimant lost use of \$16,860.16. The ALJ further found that the respondents paid the claimant 8% interest on the \$16,860.16. The ALJ also

determined the respondents correctly calculated the Social Security offset as being \$190.38 per week. The ALJ specifically rejected the claimant's argument that since there are 52.14 weeks in a year, it was improper to use 52 weeks for calculating the Social Security offset.

I.

The claimant has appealed the ALJ's order granting the respondents' cross-motion for summary judgment.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. See Office of Administrative Courts Rule of Procedure (OACRP) 17, 1 Code Colo. Reg. 104-3 at 7. Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

Summary judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). Once the moving party establishes that no material fact is in dispute, however, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

In the context of summary judgment, we review the ALJ's legal conclusions de novo. See *A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). Pursuant to § 8-43-301(8), C.R.S., we only have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

A.

On review, the claimant appears to argue that she is entitled to recover concurrent death benefits under both Mississippi's and Colorado's workers' compensation systems for the total combined amount of \$116,783.84. The respondents contend that the claimant's argument is raised for the first time on review and, therefore, we should summarily disregard it. We disagree with both arguments.

MISTY KEEL

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Neither Mississippi law nor Colorado law allow a claimant to collect duplicate workers' compensation benefits. Mississippi law allows for a 100% offset of benefits paid to a claimant, when that claimant receives workers' compensation benefits under another state's laws. *See Southland Supply Co, Inc. v. Patrick*, 397 So.2d 77 (Miss. 1981)(claimant, who received workers' compensation benefits under Mississippi law, was not precluded from seeking workers' compensation benefits under Louisiana law, and the trial court correctly awarded such benefits subject to full credit for any amounts previously paid under Mississippi's Workers' Compensation Act).

Further, §8-42-114, C.R.S., the statutory provision governing offsets for death benefits paid to dependents of a deceased worker under Colorado's Workers' Compensation Act, provides as follows:

In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. *In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.* (emphasis added)

In interpreting statutes, we must give effect to the intent of the General Assembly, and if the statutory language is clear and unambiguous, we must give the words their ordinary meaning and apply the statute as written. *See Cochran v. West Glenwood Springs Sanitation Dist.*, 223 P.3d 123, 125-26 (Colo. App. 2009). In doing so, we must read and consider the statute as a whole and interpret it in a manner giving consistent, harmonious, and sensible effect to all of its parts. *Lujan v. Life Care Centers*, 222 P.3d 970, 973 (Colo. App. 2009). We should not interpret the statute so as to render any part of it either meaningless or absurd. *Id.* Additionally, nonexistent provisions should not be read into the workers' compensation act. *Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985).

Initially, we reject the respondents' contention that the claimant's argument for concurrent workers' compensation benefits under both Mississippi and Colorado law is raised for the first time on appeal and, therefore, we must summarily disregard it. In her application for benefits, the claimant listed Mississippi workers' compensation death benefits as an issue to be heard. Further, in her summary judgment motion, the claimant raised the issue of entitlement to workers' compensation benefits under §8-42-114,

C.R.S., which addresses death benefits payable under the workers' compensation act of another state.

Additionally, the respondents have provided documents in support of their brief in opposition that were not presented to the ALJ for her consideration. As the respondents correctly note in their brief, we may not consider such documents on appeal. *See City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995) (Panel's review restricted to evidence before ALJ).

Here, under either Mississippi law or Colorado law, the claimant is not entitled to recover the aggregate amount of workers' compensation benefits under the laws of both states. Rather, Mississippi law allows for a complete offset of workers' compensation benefits paid when a claimant recovers workers' compensation benefits under another state's laws. Further, the plain language of §8-42-114, C.R.S. provides that if a claimant is entitled to recover death benefits under Colorado's workers' compensation system, Colorado law provides that the aggregate of death benefits payable in Colorado shall be reduced, but not below zero, by an amount equal to fifty percent of the periodic benefits awarded under Social Security and under another state's workers' compensation act. Colorado law does not allow for the claimant to collect the full aggregate amount of workers' compensation benefits from two applicable states. As such, we disagree with the claimant's argument that she is entitled to recover of \$116,783.84, or the full aggregate of death benefits under both Mississippi's and Colorado's workers' compensation laws. Section 8-42-114, C.R.S.

B.

The claimant further argues that the Social Security offset taken by the ALJ is in error because it is based on an imprecise mathematical formula. The claimant reasons the Social Security offset calculation should be divided by 52.14 weeks rather than by 52 weeks. The claimant argues that using 52 weeks is both inaccurate and amounts to a deprivation of benefits. We are not persuaded to disturb the ALJ's order on this ground.

Both the General Assembly and the Division of Workers' Compensation consistently have used 52 weeks, rather than 52.14 weeks, when computing wages and offsets. Section 8-42-102(2)(a), C.R.S. provides that in computing average weekly wage at the time of injury, 52 weeks is used:

(2) Average weekly wages for the purpose of computing benefits provided in articles 40 to 47 of this title, except as provided in this section, shall be calculated upon the monthly, weekly, daily, hourly, or other remuneration which the injured or deceased employee was receiving at the time of the injury, and in the following manner. . . :

(a) Where the employee is being paid by the month for services under a contract of hire, *the weekly wage shall be determined by multiplying the monthly wage or salary at the time of the accident by twelve and dividing by fifty-two.* (emphasis added)

Similarly, in instructing insurance adjusters on how to calculate statutory offsets, the Division of Workers' Compensation (Division) also has used 52 weeks rather than 52.14 weeks. The Division has published the Adjuster's guide which instructs on using the following formula when calculating Social Security offset:

Initial monthly (SSDI award x 12) ÷ 52 x 50% = Amount of offset per week

Weekly TTD, PPD, or PTD Benefit – Amount of offset = Weekly benefit rate

Thus, we conclude that the ALJ properly calculated the Social Security offset using 52 weeks as opposed to 52.14 weeks. Consequently, we will not disturb the ALJ's order on this ground.

C.

Last, the claimant argues that the ALJ erred in determining she is entitled to recover interest for the loss of use of only \$16,860.16, which is the difference between the death benefits due and owing under Colorado law and the death benefits paid under Mississippi law. The claimant asserts she is instead entitled to recover 8% interest on the full amount of \$66,822.00, or the total sum she was due from October 28, 2010, through August 28, 2013, under Colorado's workers' compensation Act. Conversely, the respondent argues the ALJ correctly determined that the claimant is entitled to recover only 8% interest on \$16,860.16. We conclude that the ALJ's order regarding the amount of interest due and owing is in error. As such, we necessarily remand the matter for new findings and a new order with regard to the amount of interest due and owing to the claimant.

Section 8-43-410(2), C.R.S. provides as follows regarding interest on an award of workers' compensation benefits:

Every employer or insurance carrier of an employer shall pay interest at the rate of eight percent per annum upon all sums not paid upon the date fixed by the award of the director or administrative law judge for the payment thereof or the date the employer or insurance carrier became aware of an injury, whichever date is later. Upon application and satisfactory showing to the director or administrative law judge of the valid reasons therefor, said director or administrative law judge, upon such terms or conditions as the director or administrative law judge may determine, may relieve such

employer or insurer from the payment of interest after the date of the order therefor; and proof that payment of the amount fixed has been offered or tendered to the person designated by the award shall be such sufficient valid reason.

Interest is a statutory right and applies automatically on the date payment is due. *Beatrice Foods Co., Inc. v. Padilla*, 747 P.2d 685 (Colo. App. 1987). The date payment is due is the date on which the claimant becomes entitled to the benefits, and not necessarily the date of the ALJ's order. *Subsequent Injury Fund v. Industrial Claim Appeals Office*, 899 P.2d 220 (Colo. App. 1994).

Here, the ALJ found that the claimant timely received \$49,961.84 in Mississippi workers' compensation death benefits for the period of October 28, 2010, through August 28, 2013. Further, the ALJ found that the death benefits that were due and owing under Colorado Workers' Compensation Act for the time period of October 28, 2010, through August 28, 2013, totaled \$66,822.00 for 148 weeks. This amount was calculated using the 50% offset for receipt of Mississippi workers' compensation benefits, and the 50% offset for Social Security as follows:

Deceased's Colorado weekly compensation rate:	\$810.67
50% of Mississippi's workers' compensation benefit:	<u>-\$168.79</u>
	\$641.88
50% of Social Security offset:	<u>-\$190.38</u>
	\$451.50 x 148 weeks
Total Colorado death benefits:	=\$66,822

ALJ Friend found, however, that Colorado had jurisdiction over this matter. Consequently, the Mississippi workers' compensation death benefits that the respondents timely paid for the period of October 28, 2010, through August 28, 2013, actually were subsumed by or converted to Colorado workers' compensation benefits. It was as if, therefore, the Mississippi workers' compensation death benefits never were paid and it was not necessary to pay them due to the 100% offset of benefits paid through the Colorado claim. As such, the respondents are precluded from taking the 50% offset for receipt of another state's workers' compensation benefits under §8-42-114, C.R.S. Thus, the 8% interest in §8-43-410(2), C.R.S. should be applied to the amount of Colorado death benefits that were due and owing to the claimant and not paid by the respondents. Using the ALJ's findings, this amount totals \$41,841.08, and is calculated as follows:

Colorado death benefits: \$620.29 per week x 148 weeks =	\$91,802.92
Mississippi benefits paid:	<u>-\$49,961.84</u>

Total Colorado benefits on which to pay 8% interest: =\$41,841.08

As mentioned above, the ALJ found that the respondents were instead required to pay 8% interest on \$16,860.16, or the difference between the amount of workers' compensation death benefits due and owing under Colorado's workers' compensation law (\$66,822.00) and that amount of workers' compensation death benefits paid under Mississippi law (\$49,961.84). This is in error. Instead, under §8-43-410(2), C.R.S., the claimant is entitled to recover 8% interest on \$41,841.08. Consequently, we necessarily remand the matter for the ALJ to calculate the correct amount of interest due and owing to the claimant on the full amount of \$41,841.08. The Division has published a Benefits Calculator Program and interest calculator to assist parties in accurately calculating the interest due and owing at <http://www.coworkforce.com/benefits/>.

IT IS THEREFORE ORDERED that portion of the ALJ's order dated November 13, 2013, and regarding the amount of interest due and owing to the claimant, is set aside and remanded for further findings and a new order on this issue;

IT IS FURTHER ORDERED that in all other respects, the ALJ's order is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

MISTY KEEL

W. C. No. 4-897-030-02

Page 9

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

_____ 4/1/2014 _____ by _____ KG _____ .

MISTY KEEL, Attn: DEPENDENT OF JOHN ERIC KEEL, 143A PRE EDDY ROAD,
LUCEDALE, MS, 39452 (Claimant)

TRANSPORTATION TECHNOLOGY SERVICES, 175 WESTWOOD STE 100,
SOUTHLAKE, TX, 76092 (Employer)

ACE AMERICAN INSURANCE COMPANY, Attn: ESIS HOUSTON WC CLAIMS OFFICE,
C/O: CARRIER NO 494C186588-6, PO BOX 31108, TAMPA, FL, 33631 (Insurer)

KILLIAN, DAVIS, RICHTER & MAYLE P.C., Attn: ERIN C. BURKE ESQ, C/O: J. KEITH
KILIAN ESQ, PO BOX 4859, GRAND JUNCTION, CO, 81502 (For Claimant)

THOMAS POLLART & MILLER, LLC., Attn: ERIC POLLART, ESQ., C/O: FORREST V.
PLESKO, ESQ., 5600 QUEBEC ST, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-851-315-03

IN THE MATTER OF THE CLAIM OF

GABRIEL MADRID,

Claimant,

v.

FINAL ORDER

TRINET GROUP, INC.,

Employer,

and

NATIONAL UNION FIRE INSURANCE COMPANY,

Insurer,

Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated October 22, 2013, that affirmed the determination of the Division Independent Medical Examiner (DIME) that the claimant was not at MMI and ordered authorization of a trial of a spinal cord stimulator implant. We affirm the order.

The respondents contend on appeal that the ALJ's order was prohibited by the doctrine of issue preclusion. They additionally argue that because the ALJ's order is inconsistent with the standards set forth in the Director's Medical Treatment Guidelines, that order must be set aside.

The claimant sustained an injury to his right forearm and wrist on March 18, 2011, while working for the employer installing an automobile windshield. He had been attempting to remove glass by applying pressure to a two handled knife when he felt pain in his arm. The claimant was referred by the employer to a HealthOne clinic where he treated with Dr. Arthur Kuper. When the claimant's symptoms did not improve, Dr. Kuper referred the claimant to hand specialist Dr. Thomas Mordick. Dr. Mordick performed injections of pain medication and reviewed an MRI of the hand and wrist. After six weeks of no improvement, Dr. Mordick performed an arthroscopic surgery on the right wrist. The claimant was continued on restricted duty. The claimant returned to Dr. Mordick and to Dr. Kuper with complaints of continued pain in the wrist and forearm that would shoot up the arm with activities at work. An EMG study was obtained on August 8, 2011. This test was negative for carpal tunnel syndrome, neuropathy, myopathy or cervical radiculopathy. The claimant reported to Dr. Mordick and to Dr. Kuper a diffuse pain pattern of shooting pain from the forearm into the wrist and hand.

Clinical exams did not reveal any unusual signs. Dr. Kuper referred the claimant to Dr. Chan. Dr. Chan suggested a triple phase bone scan and a thermogram. These tests indicated to Dr. Chan some type of peripheral pain generator although negative for complex regional pain syndrome (CRPS). In October, 2011, the claimant reported almost constant pain that was now radiating into his upper arm and shoulder. In November, 2011, Dr. Kuper noted skin color changes in the claimant's arm, a mottling appearance, a coolness to the touch and abnormal hair growth. The doctor diagnosed sympathetically mediated pain syndrome. A stellate ganglion block provided no pain relief. Dr. Kuper prescribed Percocet and Oxycontin to relieve some of the claimant's arm pain. On January 16, 2012, Dr. Kuper referenced the negative MRI, EMG nerve conduction studies, thermogram and reaction to the nerve blocks when he concluded he had little more to offer the claimant. He placed the claimant at maximum medical improvement (MMI) and assigned a 16% rating of the upper extremity. The respondents filed a Final Admission of Liability adopting this rating on January 16, 2012.

The claimant requested a DIME review which was performed by Dr. Richard Stieg. On June 7, 2012, the doctor noted the absence of objective findings and summarized the claimant's complaints as persistent pain greatly in excess of the injury that had now spread to other portions of the right side of the body, including to the claimant's neck and leg. Dr. Stieg surmised the diagnosis could include CRPS, somatoform pain disorder or malingering. He determined the claimant was not at MMI until repeat thermography, triple phase bone scan and a psychological assessment were completed.

Because the claimant was dissatisfied with Dr. Chan, Dr. Kuper referred him to Dr. Usama Ghazi. Dr. Ghazi ordered follow up exams as recommended by Dr. Stieg as well as another MRI, EMG and nerve blocks. These repeat exams were all normal or negative. However, the claimant did experience considerable relief with suprascapular nerve block injections administered by Dr. Ghazi. In November and December, 2012, the claimant reported to Dr. Kuper and to Dr. Ghazi continuing sudden bursts of pain into his shoulder, back and neck as well as up and down his right arm. Dr. Ghazi again noted on exam temperature abnormalities, skin blotchiness, edema and a pattern of white spots on the claimant's arm. Dr. Ghazi had recommended massage therapy for the claimant but it had only been approved by the respondents for areas below the elbow. It was felt the neck and shoulder were not related to the work injury. Dr. Ghazi asserted he believed the original injury to the claimant's arm also put pressure on his neck. This, he believed, had led to a cervical nerve injury which was causing many of the claimant's symptoms. The claimant underwent massage therapy to his right arm. In January, 2013, the massage therapist reported no improvement in pain complaints, range of motion, strength or improvement in function.

In response to Dr. Ghazi's request for massage therapy to the claimant's shoulder and neck, the respondents filed an application for a hearing. A hearing was held before ALJ Allegretti on January 20, 2013. The ALJ issued an order on April 12, 2013. Noting the delay in the development of symptoms from the claimant's wrist to his entire arm, and the negative results from objective testing, ALJ Allegretti determined "the claimant has failed to establish by a preponderance of the evidence that the symptoms that the claimant is now reporting above his elbow are causally related to the work injury ..." A further reference to the lack of relief provided by the previous physical therapy led the ALJ to also conclude "... there is no persuasive objective evidence to establish that this expanded massage therapy is necessary or reasonable to treat the symptoms above the elbow ... There was no persuasive evidence that this treatment improves the claimant's function ... the massage therapist reported no improvement for subjective complaints, no change to range of motion or strength and no improvement in function." Accordingly, ALJ Allegretti denied the request for massage therapy above the elbow. The claimant timely appealed the order. On September 27, 2013, ALJ Allegretti submitted an order staying a briefing schedule in the matter until a petition to review was filed subsequent to another hearing in the claim scheduled for October 7, 2013. The stay was to be considered lifted when a briefing schedule pertinent to an appeal of any order stemming from the October 7 hearing was issued, such that the appeals from both orders could be considered simultaneously.

Dr. Ghazi referred the claimant to Dr. Bradley Villims for pain treatment. On April 30, 2013, Dr. Villims reviewed the lack of response the claimant had to previous therapies and injections. Dr. Villims believed the claimant suffered from a neuropathic pain condition. He recommended a trial of a spinal cord stimulator. The respondents requested a hearing in regard to this recommendation.

The claimant returned to see Dr. Stieg for a follow up DIME on July 9, 2013. In his physical examination on that date, the doctor noted edema of the hand and forearm, blotchiness of the skin on the right, ridging and brittleness of the fingernails, moderate touch allodynia over the right shoulder, forearm and hand, diminution to pinprick sensation and cold sensation. Dr. Stieg diagnosed CRPS type I. The doctor referenced the Director's Medical Treatment Guidelines, Exhibit 7, CRPS/RSD, and commented that his findings in examination met the diagnostic criteria for 'clinical' CRPS. Dr. Steig acknowledged the Guidelines also discuss a diagnosis for 'confirmed' CRPS. He observed the medical record did not contain the evidence required to meet the Guidelines standard for confirmed CRPS. The 'confirmed' diagnoses asked for positive results on several objective medical tests. However, Dr. Steig set forth his position that the 'confirmed' classification was not based upon evaluation of actual studies or medical literature. Instead, he believed that category was an attempt to achieve a consensus among the members serving on the task force drafting the Guidelines and the 'confirmed'

classification was artificial and arbitrary. The significance of the distinction between a ‘clinical’ and a ‘confirmed’ CRPS diagnosis is explained in the Guidelines. A clinical diagnosis allows authorization for relatively conservative therapies such as physical therapy, sympathetic blocks and oral steroids. Treatment described as “invasive or complex” requires a ‘confirmed’ diagnosis. A spinal cord stimulator is in this latter group. Dr. Steig concluded the claimant did bear a diagnosis of CRPS and that regardless of the absence of a confirmed diagnosis, a spinal cord stimulator was an appropriate treatment for the claimant. Without that trial, Dr. Stieg was not prepared to place the claimant at MMI.

The respondents requested a hearing regarding Dr. Stieg’s determination the claimant was not at MMI. That issue was combined with the respondents’ previous request for a hearing pertinent to the request for a spinal cord stimulator. A hearing featuring both issues was completed on October 7, 2013, before ALJ Felter. Among the various medical records submitted at the hearing, the respondents presented the second opinion report and deposition testimony of Dr. Kathy McCranie. Dr. McCranie discussed the Medical Treatment Guidelines and the basis for their classification of CRPS diagnosis into ‘clinical’ and ‘confirmed’ categories. The respondents argued the Guidelines applied in this matter and Dr. Stieg’s refusal to follow those Guidelines required that his DIME opinion regarding MMI be set aside and the request for a spinal cord stimulator be denied. The respondents also asserted that ALJ Allegretti’s April 12 order had already decided the propriety of medical treatment to body parts beyond the right arm and above the elbow and had determined that treatment to be not related. This previous ruling, it was argued, functioned as an adjudication of the issue and precluded further litigation of the spinal cord stimulator or a finding of non MMI premised on treatment beyond the lower right arm.

ALJ Felter ruled the non MMI determination of Dr. Steig was correct and authorized the trial of the spinal cord stimulator. The ALJ reasoned the prior order of ALJ Allegretti did not constitute a source of issue preclusion because she had not decided an issue identical to that presented at the October 7 hearing. ALJ Felter surmised that the circumstances of the claimant’s case were significantly different than they had been in January of 2012. Because Dr. Stieg was making a causal determination based on more information than was available to ALJ Allegretti, those two were making decisions regarding essentially different issues. ALJ Felter also concluded the Medical Treatment Guidelines were not to be treated as authority that dictated the outcome of treatment, and MMI disputes. He found them to be advisory and need not be followed in appropriate cases.

I.

We agree with the ALJ that the previous order of ALJ Alegretti does not serve to preclude litigation surrounding the statutory findings of the Division IME. That would include the finding a claimant is not at MMI. Our analysis however, is premised on a different reasoning. We recently reviewed this same issue in *Ortega v. JBS USA*, W.C. No. 4-804-825 (June 27, 2013). The summary of the case law in *Ortega* began with the Supreme Court's decision in *Sunny Acres Villa v. Cooper*, 25 P.3d 44 (Colo. 2001), which set forth the criteria necessary to apply the doctrine of issue preclusion. Pertinent to this case, those criteria required that the previous issue decided be "identical" to the issue sought to be precluded and that there must have been a final judgment on the merits in the prior proceeding.

ALJ Allegretti's order was not final because it had been appealed by the claimant and that appeal was not decided until ALJ Felter's order was also reviewed by this panel. See *Madrid v. Trinet Group*, W.C. No. 4-851-315-2, (April 1, 2014). Section 8-43-301(12), allows for subsequent hearings to be conducted while a petition to review of an earlier order is pending. In the order just cited, we affirm ALJ Allegretti's order. That affirmance will not be final for another 20 days, and longer if there is a further appeal. However, regardless of that order's pending finality, for the reasons discussed below, we conclude the order of ALJ Alegretti does not have preclusive effect on the order of ALJ Felter.

The Court of Appeals has noted that issue preclusion may not apply where the burdens of proof involved in the two adjudications were not the same. In that circumstance, the issues could not be considered identical. In *Holnam v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2007), the court noted that in the case of 'claim preclusion' a differing standard of proof was not significant. However, the situation would be the reverse if the consideration was 'issue preclusion.' The court stated: "... issue preclusion (collateral estoppel) may be affected by the difference in the burden of proof, see Restatement, supra, § 28(4), that principle does not translate to the realm of claim preclusion." (*Holnam*, 159 P. 3d at 799). In *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002), the court held that only those opinions of a DIME physician delegated to the physician by statute (MMI and permanent impairment) need be overcome by 'clear and convincing' evidence as opposed to a 'preponderance of the evidence.' Therefore, a DIME physician's determination regarding the existence of a compensable injury had no standing in the face of a prior ALJ decision of no compensable injury because they were both subject to a preponderance of the evidence standard. However, the "IME physician's opinion concerning cause of [a] particular component of claimant's overall impairment must be overcome by clear and convincing evidence." See, *Qual-Med v. Industrial Claims Appeals Office*, 961 P.2d 590 (Colo. App.

1998).

Accordingly, we held in *Braun v. Vista Mesa*, W.C. No. 4-637-254 (April 15, 2010), that a previous decision of an ALJ that found the claimant had sustained a compensable injury in the form of thoracic outlet syndrome did not serve as issue preclusion when a DIME doctor later determined the claimant did not have thoracic outlet syndrome and did not require further treatment for that condition such that the claimant was at MMI. In a hearing featuring the issue of a challenge to the DIME determinations, a second ALJ upheld the DIME's findings. The claimant appealed urging that the ALJ's order be set aside based upon issue preclusion due to the first ALJ's order. The Panel noted the evidentiary standards involved in the two ALJ decisions were indeed distinct such that issue preclusion did not apply:

Here, there were different burdens of proof in the hearing before ALJ Martinez (preponderance) and before ALJ Mottram (clear and convincing). As we understand *Holnam* these differences in the burden of proof may prevent the application of issue preclusion as argued by the claimant here. Therefore, we are not persuaded that ALJ Mottram erred in refusing to apply the doctrine of issue preclusion and disregard the DIME physician's opinion on MMI and the resulting denial of TTD benefits beyond those at the date of MMI as found by the DIME physician.

In *Ortega*, the posture of the case was similar to that in *Braun*. An earlier ALJ had ruled the work injury did not serve to aggravate the claimant's preexisting arthritis. However, when providing an impairment rating, the DIME physician concluded the arthritis was aggravated by the work injury. A subsequent ALJ upheld the causation determination of the DIME physician and rejected the respondents' argument of issue preclusion by the prior order of the first ALJ. We upheld the rejection of the issue preclusion defense.

ALJ Henk reviewed the compensability of the various injuries for which the claimant complains based upon a preponderance of the evidence. The DIME, however, is charged by the statute with making a determination as to which body parts and conditions have been permanently affected by the work injury. Those determinations are reviewed by the ALJ using a clear and convincing evidence standard. The issue then, determined by ALJ Henk is not

identical to the later issue decided by ALJ Cain.
Issue preclusion does not constrain either the
DIME physician or the decision of ALJ Cain.

Consistent with our prior decisions in both *Braun* and *Ortega*, we conclude that issue preclusion does not apply in this matter because the issue decided by ALJ Allegretti was not identical to the issue determined by ALJ Felter. ALJ Allegretti made a decision pertinent to the compensability of a body part in the context of a request for medical treatment of that body part. Her decision was predicated on a preponderance of the evidence standard. However, ALJ Felter was asked to review a determination of a DIME physician that the claimant was not at MMI because the claimant did require treatment for the same body part found not compensable by ALJ Allegretti. ALJ Felter's order was based upon a clear and convincing evidence standard. Since 'clear and convincing' requires more evidence than is necessary for a 'preponderance of the evidence,' the ALJ's were not deciding identical issues and issue preclusion does not apply.

II.

The respondents argue that DIME Dr. Stieg's refusal to apply the director's Medical Treatment Guidelines in his recommendation that a trial of a spinal cord be approved is legal error. It is argued the directions in the Guidelines are mandatory and, if applicable, determine the result of disputes over treatment.

Dr. McCranie, in her deposition testimony, pointed out that the Guidelines in Exhibit 7, relating to Complex Regional Pain Syndrome/Reflex Sympathetic Dystrophy, provide for distinctions in CRPS diagnosis for medical reasons. She states that a 'clinical' CRPS diagnosis is based on subjective symptoms reported by the patient and upon some clinical observations made by the medical provider in the examination room. However, patients often misinterpret or misunderstand symptoms which affects their ability to accurately report them. In addition, clinical observation can be misleading based as it is on viewing only the patient's exterior and their performance on some movements directed by the provider. For this reason, Dr. McCranie explains that the Guidelines hold therapies requiring invasive treatment or complex applications should only be approved where a 'confirmed' CRPS diagnosis can be obtained. In the Guidelines a 'confirmed' diagnosis requires, in addition to the clinical diagnosis, confirmation through objective medical measures such as X rays, thermography, a QSART battery and sympathetic block injections. Dr. Stieg asserts in his July 9, 2013, DIME report that these objective tests are not so reliable. Because the CRPS condition progresses and changes its location, the objective measures will often miss the injury completely. He believes that is not an appropriate basis upon which to withhold useful treatment.

The Guidelines are developed by the Director pursuant to legislative direction in § 8-42-101(3.5)(a). The statute directs in § 8-42-101(3)(b) that the Guidelines “shall be used by health care practitioners for compliance with this section.” The Guidelines in W.C. Rule of Procedure 17, 7 Code Colo. Reg. 1101-3, also provide in Rule 17-2 that “all health care providers shall use the medical treatment guidelines.” In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid. However, the Rule also specifies in 17-5(c) that “the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.” In those cases the Rule refers the provider to the preauthorization procedures in Rule 16-9. That section, and its following Rule 16-10, state that disputes over preauthorization requests are to eventually be referred to adjudication procedures through the Office of Administrative Courts. That would be a hearing before an ALJ. It is apparent then, that an ALJ has some discretion to approve medical treatment which deviates from the Guidelines.

We previously have noted the lack of authority mandating that an ALJ award or deny medical benefits based on the Guidelines. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006), *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (NSOP) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive). We therefore disagree with the contention of the respondents that the ALJ committed legal error in upholding the non MMI determination of Dr. Stieg although that determination is based on an admitted deviation from the Guidelines. Similarly, the ALJ’s authorization of the trial of a spinal cord stimulator is not in error solely because that approval represents a departure from the Guidelines.

Instead, we must uphold the ALJ's factual determinations if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence which a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This standard of review is deferential and the scope of our review is exceedingly narrow. *Id.* Moreover, we may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Rockwell Int'l. v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990) (ALJ, as fact finder, is charged with resolving conflicts in expert testimony). Further, it is the prerogative of the ALJ to credit one

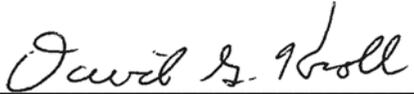
medical opinion to the exclusion of a contrary medical opinion. *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992).

Here, the ALJ relied upon the medical opinions of Dr. Steig and Dr. Villims that a trial of a spinal cord stimulator is an appropriate treatment for the claimant. Dr. Steig determined the claimant did meet the diagnosis criteria for CRPS provided in the Guidelines. His disagreement with the Guidelines largely centered on the point at which the stimulator should be tried. Dr. Villims agreed with this analysis. The Guidelines themselves, in Exhibit 9, Chronic Pain Disorder, provide “Spinal Cord Stimulation may be most effective in patients with CRPS I or II who have not achieved relief with oral medications, rehabilitation therapy, or therapeutic nerve blocks, and in whom the pain has persisted for longer than 6 months.” This is a fair description of the findings made by both Dr. Stieg and Dr. Villims. There is substantial evidence in the record to support the order of ALJ Felter in regard to the authorization of the spinal cord stimulator and the need for that treatment before MMI is attained as determined by the DIME physician.

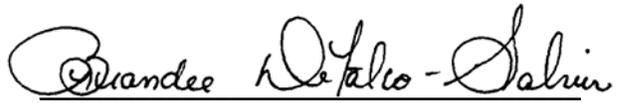
We do not then, find cause to disagree with the findings or order of the ALJ.

IT IS THEREFORE ORDERED that the ALJ’s order issued October 22, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_____ 4/1/2014 _____ by _____ KG _____ .

GABRIEL MADRID, 8381 VINE STREET, DENVER, CO, 80229 (Claimant)
TRINET GROUP, INC., Attn: KIMBERLY KING, 9000 TOWN CENTER PARKWAY,
BRADENTON, FL, 34202 (Employer)
NATIONAL UNION FIRE INSURANCE COMPANY, Attn: KELLY REDOUTEY, C/O:
CHARTIS INSURANCE INC., P O BOX 25971, SHAWNEE MISSION, KS, 66225 (Insurer)
CHRIS FORSYTH LAW OFFICE, LLC, Attn: CHRIS FORSYTH, ESQ., 303 EAST 17TH
AVE., SUITE 1080, DENVER, CO, 80203 (For Claimant)
SENER GOLDFARB & RICE, L.L.C., Attn: WILLIAM M. STERCK, ESQ., 1700
BROADWAY, SUITE 1700, DENVER, CO, 80290 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-594-683-07

IN THE MATTER OF THE CLAIM OF

MAY B MCCORMICK,

Claimant,

v.

FINAL ORDER

EXEMPLA HEALTHCARE,

Employer,

and

SEDGWICK CLAIMS MGMT SERVICES, INC,

Self-Insured Respondent.

The respondent seeks review of an order of Administrative Law Judge Felter (ALJ) dated November 12, 2013, that ordered the respondent to pay the claimant permanent total disability (PTD) benefits. We dismiss, without prejudice, the respondents' petition to review the order reserving post maximum medical improvement (post-MMI) benefits for future determination and otherwise affirm.

This matter previously was before us. On March 25, 2013, we issued an order setting aside, in part, the ALJ's order that drew an adverse inference against the respondent for its failure to "voluntarily produce" the personnel files of Michelle Horning, the claims administrator for the self-insured respondent employer, and Dr. Woo, the Director of Occupational Medicine for the respondent employer and the claimant's authorized treating physician. Our previous order was based on the absence of any order by the ALJ compelling the respondent to produce such personnel files or the absence of any finding that the respondent willfully failed to comply with discovery or failed to comply with the provisions of W.C. Rule 9-1 regarding discovery matters. *See O'Reilly v. Physicians Mut. Ins. Co.*, 992 P.2d 644 (Colo. App. 1999)(absence of a prior order compelling discovery precluded C.R.C.P. 37(b) sanctions against party for any alleged discovery violation); §8-43-207(1)(e), C.R.S. (ALJ may impose sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery); W.C. Rule 9-1(E), 7 CCR 1101-3 ("If any party fails to comply with the provisions of this rule [providing for discovery] and any action governed by it, an administrative law judge may impose sanctions upon such party pursuant to statute and rule."). We also set aside the ALJ's determination to award the claimant PTD benefits since it was unclear as to whether the ALJ relied upon the adverse inference when

making his PTD decision. We remanded the matter to the ALJ to enter further findings and a new order.

After remand, the ALJ issued his order stating he had drawn no adverse inference based upon the respondent's failure to "voluntarily produce" the personnel files of Ms. Horning and Dr. Woo. The ALJ also stated he had conducted an *in camera* inspection of Ms. Horning's and Dr. Woo's personnel files. The ALJ stated that he decided to remain bound by a previous order entered by prehearing ALJ Eley, which determined the personnel files were irrelevant.

In his order upon remand, the ALJ made the following findings. The claimant, a registered nurse, had a 15 to 20 year history of bilateral carpal tunnel syndrome prior to her employment with the respondent employer. On August 20, 2003, the claimant suffered an admitted aggravating injury to her right upper extremity (RUE). From 2003 to 2004, the claimant treated with Dr. Woo. On July 14, 2004, Dr. Woo determined the claimant had reached maximum medical improvement (MMI) with a permanent scheduled impairment of 12% of the right upper extremity. Dr. Woo originally assigned permanent medical restrictions of five pounds maximum lifting, ten pounds pushing and pulling, and no forceful gripping, grasping, or twisting with the right hand or wrist. Dr. Woo also determined that the claimant's left upper extremity condition was not work related, but instead was preexisting. The respondent did not file a final admission of liability (FAL) on this opinion.

After Dr. Woo's MMI date of July 14, 2004, Dr. Hemler performed an independent medical examination at the request of the respondent. Dr. Hemler issued a report concluding the claimant had sustained a short-lived right wrist flexor strain and that she had fully recovered without sequelae as of September 4, 2003. After reviewing Dr. Hemler's report, Dr. Woo changed his opinion in December 2004, and he agreed that the claimant's RUE had fully resolved as of September 4, 2003. Between Dr. Woo's original opinion and his changed opinion, Dr. Woo had conversations about the claimant's case with Ms. Horning.

On December 27, 2004, Dr. Woo wrote a letter to counsel for the respondent, changing his opinion to the following: "I would agree with the report of Dr. Hemler who stated that the work injury on August 20, 2003 'was a relatively short-lived right wrist flexor strain.'"

No FAL was filed based on Dr. Woo's changed opinion for the next five-and-one-half years. On July 19, 2010, ALJ Friend ordered the respondent to file a FAL. Thereafter, the claimant requested a DIME, which was performed by Dr. Douthit on July 25, 2011. Dr. Douthit assessed an 8% permanent scheduled impairment of the claimant's RUE. Dr. Douthit stated that apportionment was not applicable.

The respondent filed its Amended FAL on October 10, 2011, after receiving Dr. Douthit's opinion. The Amended FAL admitted for permanent scheduled impairment of 8% RUE, pursuant to Dr. Douthit's opinion, variable temporary partial disability benefits, and denied liability for post-MMI benefits.

The claimant filed an application for hearing, listing PTD benefits, overcoming the DIME, and penalties as issues to be heard. In her application for hearing, the claimant did not endorse the issue of Grover medical benefits for hearing. The claimant added the issue of spoliation of evidence in her Case Information Sheet. In its response to the claimant's application for hearing, the respondent endorsed the issues of statute of limitations on penalties, statutory offsets and credits, overcoming the DIME, apportionment of PTD benefits, and intervening cause.

In his order upon remand, the ALJ determined the claimant was permanently and totally disabled. The ALJ based his PTD decision on the claimant's age of 74, her education consisting of a GED, her RN certificate and long-term work as an RN until her admitted injury to her RUE, and the claimant's present human factors. The ALJ also credited the vocational expert opinions of Ms. Shriver over those of the respondent's vocational expert, Ms. Montoya, that the claimant is not capable of earning wages because she has a limited vocational history and her physical limitations of the RUE render her unable to tolerate any job requiring productive performance on a part-time or a full-time shift if hand use was an essential function. The ALJ further credited the vocational opinions of Ms. Wonn that the claimant's work restrictions were so significant that the claimant was not only unable to perform a full range of sedentary work, but also that she was impacted with regard to taking part in activities of daily living. The ALJ specifically discredited the changed opinions of Dr. Woo, and also discredited Dr. Hemler's opinions regarding lack of permanent impairment and no permanent restrictions. Rather, based on Dr. Woo's original, restrictive restrictions of the RUE, and the credible vocational opinions of Ms. Shriver and Ms. Wonn, the ALJ found the claimant was unable to earn wages in the open, competitive job market. The ALJ found that this has been so since the claimant reached MMI. Further, the ALJ specifically held that the claimant's permanent and total disability was caused by her compensable injury to her RUE on August 20, 2003. As such, the ALJ held that apportionment was not warranted. The ALJ reserved for future determination unresolved issues, including post-MMI benefits.

I.

On review, the respondent argues that its due process rights were violated when the ALJ failed to recuse himself after conducting the *in camera* review of Ms. Horning's and Dr. Woo's personnel files. The respondent asserts that after reviewing these files, the ALJ formed improper adverse inferences that "permanently and unconsciously tainted his opinions," and he then erred in re-issuing an order without addressing the alleged

“appearance of impropriety” of being the fact finder who reviewed privileged documents. The claimant contends that these arguments are not preserved for appeal because the respondent previously did not file a motion to recuse the ALJ with a supporting affidavit as required by C.R.C.P. 97. We are not persuaded by the respondent’s arguments.

It is well settled that an ALJ is presumed to be unbiased and their actions are entitled to a presumption of integrity, honesty, and impartiality, unless the contrary is shown. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995). Due process requires that there be a neutral and detached decision maker, and the presumption of regularity is a rebuttable one. *deKoevend v. Board of Education*, 688 P.2d 219 (Colo. 1984). A party or the party's attorney may be entitled to have an ALJ recuse himself if sufficient facts are alleged from which it may be inferred that the judge is prejudiced or biased, or appears to be prejudiced or biased against a party or the party's attorney. *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988). Mere opinions and conclusions regarding the judge's alleged bias are insufficient. *Goebel v. Benton*, 830 P.2d 995 (Colo. 1992).

Additionally, C.R.C.P. 97 provides that a judge may disqualify himself, or “any party may move for such disqualification and a motion by a party for disqualification shall be supported by affidavit.” This rule has been interpreted to require a verified affidavit setting forth factual allegations which, if true, would show bias or the appearance of bias and prejudice. If the moving party presents a verified affidavit, it is the responsibility of the judge to accept the allegations as true and decide whether they are legally sufficient to require recusal. *Goebel v. Benton, supra*. The rules of civil procedure apply to workers' compensation proceedings if they are not inconsistent with the statutory procedures established by the Workers' Compensation Act. The procedures established by C.R.C.P. 97, pertaining to “change of judge,” are not inconsistent with the Act and apply in workers' compensation cases. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192(Colo. App. 2002); *Menor v. Jefferson County School*, W.C. No. 4-006-520 (August 5, 2002).

Here, it is true, as the claimant argues, that the respondent failed to file a motion for recusal of the ALJ after we remanded the matter to the ALJ to enter further findings and a new order. *See* C.R.C.P. 97 (waiver may exist if motion for disqualification is not timely made); *People ex rel. A.G.*, 262 P.3d 646 (Colo. 2011). The respondent asserts, however, that it filed for a new hearing with a different ALJ on the basis that the ALJ was biased due to his alleged improper review of privileged documents as the finder of fact. We agree with the claimant that the respondent’s allegation of the ALJ’s bias was not timely presented. In our prior order, we rejected the respondent’s request to remand the matter to a new ALJ on the grounds of the ALJ’s impartiality. Our review of the record did not demonstrate that the ALJ showed prejudice or bias against the respondent. Consequently, the respondent’s recourse was to file a motion for recusal

with the ALJ, which the respondent failed to do at any time prior to the ALJ issuing his order on remand. Instead, the respondent waited until after the ALJ issued his order upon remand, and then alleged in its brief in support that the ALJ was biased and prejudiced for reviewing *in camera* the personnel files of Ms. Horning and Dr. Woo. *See People ex rel. A.G., supra* (motion for disqualification must be timely filed so judge has opportunity to ensure that trial proceeds without any appearance of impropriety; when motion is not made until after ruling has been issued, it does not give judge opportunity to disqualify himself); *Youngs v. Industrial Claim Appeals Office*, 316 P.3d 50 (Colo. App. 2013)(motion for recusal filed months after the hearing occurred and the order issued is not timely); *Rea v. Corrections Corp. of America*, 272 P.3d 1143 (Colo. App. 2012) (challenge based on the appearance of impropriety waived when not timely presented).

Even assuming, however, the respondent timely alleged ALJ bias due to his *in camera* review of Ms. Horning's and Dr. Woo's personnel files, we conclude that recusal was not warranted under the circumstances presented here. Initially, we note that during the hearing, the ALJ stated that he needed to do his own *in camera* review of the personnel files of Dr. Woo and Ms. Horning, and the respondent stated "[t]hat's fine." Tr. at 121, 138-141, 168-170. *See Hatterman v. Industrial Commission*, 171 Colo. 370, 467 P.2d 820 (1970) (waiver exists where party knows evidence will be considered but does not seek to object to consideration).

Regardless, the respondent's mere opinion of bias due to the ALJ's *in camera* review of Ms. Horning's and Dr. Woo's personnel files, is insufficient to overcome the presumption of fairness and impartiality. *See Nesbit v. Industrial Commission*, 43 Colo. App. 398, 607 P.2d 1024 (1979)(substantial showing of bias necessary to support conclusion that hearing was unfair). ALJs and trial judges routinely conduct *in camera* review of evidence alleged to be protected from discovery by a privilege, in order to determine whether such evidence is discoverable. *See Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991)(ALJ properly dismissed workers' compensation claim alleging work-related mental disability as sanction for claimant's refusal to comply with order to make psychiatric records available to court for *in camera* proceeding and decision as to whether records should be released to insurer); *cf. Martinelli v. District Court*, 199 Colo. 163, 612 P.2d 1083 (1980)(in civil action brought against individual police officers and others due to prior arrest of the plaintiff, it was necessary for trial court, when faced with claim of police officers to a right of privacy in their personnel files, to conduct *in camera* examination of files in a tripartite balancing inquiry). A judge is not recusable for bias that is based on the facts and circumstances of the case, even where the court is exceedingly ill disposed toward party. *Watson v. Cal-Three, LLC*, 254 P.3d 1189, 1192 (Colo. App. 2011); *see also Colorado State Bd. of Pharmacy v. Priem*, 272 P.3d 1136 (Colo. App. 2012)(court unpersuaded by argument that simply because Board members previously voted to deny pharmacist's license, they were incapable of

rendering a fair and unbiased decision regarding pharmacist's application to be pharmacy intern).

Additionally, the respondent's plain assertions of due process violations and the appearance of impropriety due to reviewing *in camera* the personnel files, do not, in our view, provide an adequate basis for requiring the ALJ's recusal. See *Nesbit v. Industrial Commission, supra*; see also *In Re Marriage of Johnson*, 40 Colo. App. 250, 576 P.2d 188 (Colo. App. 1977)(adverse ruling alone does not support conclusion that hearing officer biased); *People ex rel. A.G., supra* (party's allegation of bias did not contain any facts to support conclusion that judge was actually biased). The respondent's argument notwithstanding, the ALJ was not precluded from reviewing the personnel files *in camera* merely because prehearing ALJ Eley previously ruled that such files were irrelevant. While the orders of a PALJ are binding upon the parties, see §8-43-207.5(3), C.R.S., the statute does not confer exclusive jurisdiction in the PALJ to resolve discovery matters or evidentiary disputes. See *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430 (Colo. App. 2003)(employer presented no authority which convinced Court that ALJ lacked authority to override PALJ's discovery ruling). Rather, an ALJ may consider and rule on a party's request to reconsider a PALJ's discovery ruling, which was done here. *Id.*

Further, our standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). The respondent's argument notwithstanding, the ALJ's credibility determinations with regard to Ms. Horning and Dr. Woo were not based on his prior drawing of an adverse inference pertaining to the personnel files, or on the respondent's failure to file a FAL on the claimant's MMI date. Rather, in his order upon remand, the ALJ expressly stated that "no adverse inferences are drawn based on Dr. Woo's and Michelle Horning's failure to voluntarily produce their personnel files." (emphasis in original) Order Upon Remand at 2. Moreover, it is apparent that the ALJ's credibility findings and inferences with regard to Ms. Horning and Dr. Woo were instead based on the evidence presented during the hearing. For example, during his hearing testimony, Dr. Woo explained that he previously testified before the General Assembly that if a doctor communicates with the insurer, it should be documented. Dr. Woo also testified that he did not document his communication with Ms. Horning about the claimant's case because there was no requirement for that. Tr. (July 16, 2012) at 19-20, 21-22. Similarly, Ms. Horning testified that she previously had talked to Dr. Woo about the claimant's case, and that she raised questions with him regarding the work relatedness of the claimant's claim. Tr. (July 16, 2012) at 106-107; Tr. (July 11, 2005) at 264-268; Ex. 32; Tr. (June 11, 2012) at 149. Although the evidence could have been construed differently, in our view it was

plausible for the ALJ to make the inferences he did. *See Eisnach v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981) (plausible inferences drawn by the ALJ from conflicting evidence cannot be altered on review). It necessarily follows, therefore, that we are not persuaded to disturb the ALJ's order on the basis that the ALJ was biased due to reviewing *in camera* the personnel files of Mr. Horning and Dr. Woo. *See Wecker v. TBL Excavating, Inc., supra*.

Additionally, we do not perceive the Colorado Court of Appeals' decision in *State Compensation Ins. Fund v. Fulkerson*, 680 P.2d 1325 (Colo. App. 1984) as mandating a different result. In that case, the Court held that the referee's prejudgment of the facts without review of the actual evidence and record, necessitated a remand for review of the record and entry of findings by a new referee. The Court explained that remanding the case to the same referee would promote the appearance of injustice, due to the procedure leading up to the making of the findings by the referee being constitutionally defective. Conversely, here, our review of the record does not demonstrate the ALJ showed prejudice or bias against the respondent. Rather, the ALJ gave the respondent the opportunity to present its case and to provide evidence and supporting documentation, which the ALJ fairly and fully considered.

II.

The respondent next contends the ALJ's award of PTD benefits is not supported by substantial evidence. The respondent asserts that substantial evidence does not support the ALJ's finding that the claimant's right wrist and hand injury was a significant causative factor in her permanent total disability. The respondent further argues that substantial evidence does not support the ALJ's determination not to apportion benefits. The respondent also raises numerous factual discrepancies with the ALJ's PTD determination. We are not persuaded that the ALJ erred.

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute, the claimant carries the burden of proof to establish permanent total disability. While a claimant is not required to establish that an industrial injury is the sole cause of her inability to earn wages, she nevertheless must demonstrate that the industrial injury is a "significant causative factor" in her permanent total disability. *Seifreid v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). The claimant, therefore, 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), *rev'd 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. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001).

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 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. As mentioned above, this standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office, supra*.

Initially, we are not persuaded by the respondent's argument that the claimant's RUE injury is not a significant causative factor in her disability and that apportionment was warranted. The ALJ explicitly found that the claimant's PTD was caused by the admitted August 2003 industrial injury. Conclusions of Law at 36-37 ¶¶. The ALJ also specifically held that despite the claimant suffering from a pre-existing condition of her RUE, the claimant was able to perform her full duties of a RN until the admitted, compensable injury to her RUE on August 20, 2003. The ALJ found that after suffering the admitted RUE injury, the claimant not only was unable to work at her pre-injury job as a RN, but she could not work in any open, competitive market job on a reasonably sustainable basis. Findings of Fact at 6, 19 ¶¶6, 31; Conclusions of Law at 36-37 ¶¶. The ALJ also credited the opinions of Ms. Shriver. Ms. Shriver testified that if the claimant's RUE is all that is found related to her industrial injury, she nevertheless is unable to earn a wage. Ms. Shriver explained that the claimant's scores for her right dominant hand were so low that even if she gave the left hand normal scores to meet the average on a curve, it would not bring the claimant up high enough to be competitive. Tr. at 99, 102-103. Similarly, the ALJ credited the opinions of Ms. Wonn. Ms. Wonn concluded that the claimant's "work restrictions are so significant, she is not only unable to perform a full range of sedentary work, but is impacted with regard to taking part in activities of daily living." Ex. 2 at 49; see also Ex. 3 at 94. Since substantial evidence supports the ALJ's finding in this regard, we will not disturb his order. Section 8-43-301(8), C.R.S.; *Joslins Dry Goods Co. v. Industrial Claim Appeals Office, supra* (the ALJ explicitly found that claimant's PTD was caused by the 1993 industrial injury; ALJ credited the physician's testimony that all of claimant's medical conditions were secondary to the work-related injury).

Moreover, we conclude that substantial evidence supports the ALJ's determination that the claimant is permanently and totally disabled. As detailed above, the ALJ credited the opinions of vocational experts, Ms. Shriver and Ms. Wonn, that the claimant was not capable of earning wages because of her limited vocational history and the physical limitations of her RUE. During the hearing, Ms. Shriver testified that due to the combination of the claimant's medical conditions, her physical limitations, and her work restrictions, the claimant is unable to earn any wage. Ms. Shriver explained that the claimant was unable to perform the jobs recommended by Ms. Montoya, such as a receptionist, interviewer, or customer service representative because the claimant does not have hand use endurance or bimanual dexterity necessary to perform these jobs. Tr. at 41-47. In Ms. Wonn's report, she opined that the claimant is unemployable and unable to earn wages. She explained that the claimant's work restrictions, as originally delineated by Dr. Woo, prohibited her from returning to her usual and customary occupation as a nurse, and the physical work restrictions outlined by her treating physicians rendered her unable to perform a full range of sedentary work. Ex. 2 at 43. Section 8-43-301(8), C.R.S.

To the extent the respondent relies on the opinions of other physicians, including Dr. Hemler, in support of its argument, and argues that the ALJ "summarily ignored" its evidence, we are not persuaded there is any error. The ALJ is not obligated to make specific findings of fact concerning evidence which he concludes is not persuasive. The ALJ is only required to enter findings concerning the evidence which he finds to be dispositive of the issues involved. Evidence not mentioned in the order was presumably rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). Further, it is presumed that when making his determination, the ALJ considered all of the evidence. *Crandall v. Watson-Wilson Transportation System, Inc.*, 171 Colo. 329, 467 P.2d 48 (1970)(ALJ is presumed to have considered entire record). Regardless, the ALJ did, in fact, expressly recognize that the claimant had a 15 to 20 year history of bilateral carpal tunnel syndrome prior to her employment with the respondent employer. Findings of Fact at 4 ¶1. And, during the hearing, the respondent cross-examined Ms. Shriver regarding the claimant's rheumatoid arthritis. Tr. (June 11, 2012) at 72-75. Further, we note that we are required to defer to the ALJ's credibility determinations. *Wilson v. Industrial Claim Appeals Office, supra*. Here, the ALJ specifically discredited Dr. Hemler's opinions, which certainly was his prerogative. *Metro Moving and Storage, Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Findings of Fact at 21 ¶36.

Moreover, the respondent's arguments regarding the claimant's post-MMI employment do not persuade us to hold otherwise. A worker's ability to secure sheltered, or occasional employment under rare or unusual circumstances, does not preclude a determination of permanent total disability. *New Jersey Zinc Co. v. Industrial Commission*, 165 Colo. 482, 440 P.2d 284 (1968). If the evidence shows that the

claimant is not physically able to sustain post injury employment, or that such employment is “unlikely to become available to a claimant again in view of the particular circumstances, the ALJ need not find that the claimant is capable of earning wages.” *Joslins Dry Goods Co. v. Industrial Claim Appeals Office, supra*. Thus, in *Joslins*, an award of PTD benefits was upheld despite the fact the claimant was working at the time of the hearing, six years after the injury. The evidence in that case showed the claimant was “protected” by a supervisor and received assistance from students when performing her job as a food service worker. A vocational expert testified the claimant's job did not constitute employment because of the limited hours and because the job was not generally available to the public. The *Joslins* Court found the evidence supported the ALJ's implicit determination that the job did not constitute “bona fide” employment. *See also Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). Similarly, here, the ALJ found, with record support, that the claimant’s post-MMI employment with the respondent employer was not regular, competitive-open market employment. The ALJ found that the respondent offered the claimant modified employment that was especially tailored to conform to her permanent medical restrictions arising out of her August 20, 2003, injury. Ms. Shriver testified that the claimant worked as a greeter/ambassador for the respondent employer in a modified capacity. Tr. (June 11, 2012) at 62-66. Similarly, Ms. Wonn opined that the greeter position that the claimant performed had been extensively modified, and that is not the type of work generally available to the public upon submitting an application for employment with the respondent employer. Ex. 2 at 44-49, 51-52. Section 8-43-301(8), C.R.S.

III.

Last, the respondent argues the ALJ erred by reserving post-MMI medical benefits for the claimant’s RUE. The respondent contends that medical benefits were not an issue endorsed for hearing by either party, and they now are closed pursuant to §8-43-203(2)(b)(II), C.R.S. We conclude this portion of the ALJ’s order is not currently subject to review.

Under §8-43-301(2), C.R.S., a party dissatisfied with an order "which requires any party to pay a penalty or benefits or denies a claimant a benefit or penalty," may file a petition to review. Orders which do not require the payment of benefits or penalties, or deny the claimant benefits or penalties are interlocutory and not subject to review. *See Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Furthermore, orders may be final in part and interlocutory in part. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989).

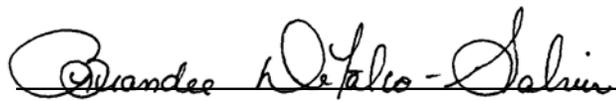
Here, it does not appear as though the claimant asserted any claim for *Grover* medical benefits at the time of the hearing before the ALJ. Further, implicit in the ALJ's order is that the issue of *Grover* medical benefits was not tried. Rather, the ALJ

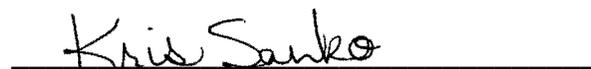
specifically ordered that “any and all issues not determined herein, including post maximum medical improvement medical maintenance benefits, are reserved for future decision.” Order at 40 ¶¶D. *See Hire Quest LLC v. Industrial Claim Appeals Office*, 264 P.3d 632 (Colo. App. 2011)(the claimant’s claim for *Grover* medical benefits was not waived for failure to request such benefits at the time the permanent disability was heard because the ALJ’s reservation clause preserved the claimant’s claim for *Grover* medical benefits). Thus, the ALJ did not specifically award any *Grover* medical benefits but, rather, intended to reserve unresolved issues such as entitlement to *Grover* medical benefits. Consequently, this part of the ALJ’s order does not award or deny the claimant any particular medical benefit. We conclude, therefore, that this part of the ALJ’s order is interlocutory and not reviewable. Section 8-43-301(2), C.R.S.

Due to our determinations above, we decline to address the claimant’s arguments that PALJ Eley erred in ruling that the personnel files of Ms. Horning and Dr. Woo were irrelevant and, therefore, not discoverable.

IT IS THEREFORE ORDERED that the respondents’ petition to review the ALJ’s Order dated, November 12, 2013, which reserves post-MMI benefits for future determination is dismissed without prejudice. In all other respects the ALJ’s order is affirmed.

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

_____ 4/1/2014 _____ by _____ KG _____ .

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SEDGWICK CLAIMS MGMT SERVICES, INC, Attn: LORI HASTING, PO BOX 5107,
GREENWOOD VILLAGE, CO, 80155 (Insurer)
CHRIS FORSYTH LAW OFFICE, LLC, Attn: CHRIS FORSYTH, ESQ., 303 EAST 17TH
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THOMAS POLLART & MILLER LLC, Attn: BRAD MILLER, ESQ., 5600 SOUTH QUEBEC
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BROADSPIRE, P O BOX 14348, LEXINGTON, KY, 40512-4348 (Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-912-834-01

IN THE MATTER OF THE CLAIM OF

TOM NIGHTINGALE,

Claimant,

v.

FINAL ORDER

LOWES HOME IMPROVEMENT
WAREHOUSE, INC.,

Employer,

and

SELF INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Mottram (ALJ) dated November 5, 2013, that denied its request for a fifty percent reduction in the claimant's temporary benefits pursuant to §8-42-112(1)(a) and (b), C.R.S. We affirm.

A hearing was held on whether the respondent was entitled to reduce the claimant's temporary disability benefits by fifty percent pursuant to §8-42-112(1)(a) and (b), C.R.S. for the claimant's willful failure to obey a safety rule of, or for the willful failure to properly utilize a safety device provided by, the respondent employer. Finding there was insufficient evidence to establish that the claimant willfully failed to use the safety device or willfully violated a safety rule of the respondent employer, the ALJ denied and dismissed the respondent's request for the fifty percent reduction in temporary benefits.

The claimant was employed as a receiver/stocker for the respondent employer. The claimant was required to stock shelves using equipment provided by the respondent employer, including an Order Picker. An Order Picker is a large mechanical operation that allows an employee to be lifted off the ground to reach the upper shelves in the respondent employer's store. The respondent employer's safety rule requires the operator of the Order Picker to attach himself to the Order Picker harness. The harness then attaches to a hook that provides the operator with fall protection. The operator of the Order Picker is to never detach the harness from the hook that tethered the harness to the fall protection device.

On March 7, 2013, the claimant was working on an Order Picker. The claimant fell from the Order Picker and sustained significant injuries. The claimant's fall was not witnessed, and the claimant has no recollection of the fall. The ALJ found, however, that the claimant was wearing safety equipment that was designed to protect against the type of fall that the claimant experienced on March 7, 2013.

The ALJ credited the testimony of Mr. Perez who testified that five minutes prior to the claimant's fall, the claimant was on the Order Picker wearing the safety harness and the harness was attached to the tether. The ALJ found there was no credible evidence that in the five minutes between when Mr. Perez last saw the claimant and when the claimant was found on the floor, the claimant willfully detached the harness from the tether. The ALJ also found that the claimant previously had been written-up for unhooking the harness from the tether in order to allow a manager for the respondent employer into the building. The ALJ found, however, that the claimant's previous infraction did not prove that the claimant's actions were willful on March 7, 2013.

On review, the respondent argues the ALJ's findings of fact are not supported by substantial evidence in the record, and the findings of fact do not support the order. The respondent specifically argues that it is clear that at some point within the five minutes after Mr. Perez saw the claimant wearing the safety harness and tether, the claimant then became detached from the tether. The respondent contends they presented testimony from Mr. Powell, which was not refuted, that the harness and tether worked properly and were not defective. According to the respondent, therefore, the only logical inference is that the claimant detached himself from the tether. The respondent also points to the claimant's previous infraction as support for their argument that the claimant willfully detached the harness. We perceive no error in the ALJ's order.

Section 8-42-112(1), C.R.S., provides for a fifty percent reduction in benefits if the employee is injured due to a willful violation of a safety rule or the employee's willful failure to use safety devices provided by the employer. The term "willful" connotes deliberate intent, but mere carelessness, negligence, forgetfulness, remissness or oversight does not satisfy the statutory standard. *Bennett Properties Co. v. Industrial Commission*, 165 Colo. 135, 437 P.2d 548 (1968). The respondent, however, is not required to present direct evidence concerning the claimant's state of mind or prove the claimant had the rule "in mind" when he did the prohibited act. Rather, a "willful" violation may be inferred from evidence the claimant knew the safety rule and did the prohibited act. *Id.*

The respondent bears the burden of proof to establish that the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). The question of whether the respondent carried the burden of proof was one of fact for determination by the ALJ. *City of Las Animas v. Maupin*, 804 P.2d 285 (Colo. App. 1990). Thus, we are required to uphold the ALJ's order if supported by

substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying this standard, we must defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). This standard of review requires that we consider the evidence in a light most favorable to the prevailing party, and defer to the ALJ's resolution of conflicts in the evidence, credibility determinations and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert, supra*.

Here, substantial evidence supports the ALJ's determination that the respondent failed to satisfy its burden of proving the claimant willfully failed to use the respondent employer's safety device or willfully violated the respondent employer's safety rule. As mentioned above, the ALJ credited the testimony of Mr. Perez who testified that five minutes prior to the claimant's fall, the claimant was on the Order Picker wearing the safety harness and tether. Mr. Perez testified that he saw the claimant's harness attached to the tether because he saw the claimant reaching for a box and saw the tether pulled with the claimant at that time. Tr. at 45-46. Further, the ALJ found the claimant's testimony credible and persuasive. Findings of Fact ¶13. While the claimant testified he had no recollection of the fall, he also testified that based on his knowledge of and his adherence to the respondent employer's safety rule, he would not have unclipped the harness. The claimant testified regarding the importance of the respondent employer's safety rule, and explained that when the Order Picker is up in the air, the safety rule is of extreme importance in order to protect from falls. Tr. at 63-71.

The claimant also explained his previous infraction for unclipping his harness rather than completely removing the entire harness. The claimant testified that he lowered the machine down to the ground, turned the machine off, detached the harness, and got off in order to open the door for one of the respondent employer's managers who continued to ring the doorbell. The claimant explained that he received a write-up for this incident, and that he was highly bothered by it because it was important to him to do a good job for his employer. He also testified that due to that infraction, the safety rule was forefront in his mind, he was more cognizant of it, and he did not ever violate the rule again. The claimant testified that he knew he had to take the harness off rather than unclip it. Tr. at 66-71, 75-76. Section 8-43-301(8), C.R.S.

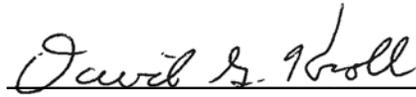
Moreover, throughout its brief in support, the respondent points to evidence, which if credited, might permit a contrary result. While the record may contain some evidence from which the ALJ might have inferred that the claimant willfully unclipped his harness, this does not allow us to grant appellate relief. *Cordova v. Industrial Claim*

Appeals Office, 55 P.3d 186 (Colo. App. 2002)(the existence of evidence which, if credited, might support a contrary determination does not afford us grounds to grant appellate relief). It was for the ALJ to assess the evidence, and we decline the respondent's invitation to substitute our judgment for the ALJ's concerning the inferences to be drawn from the record. *See May D & F v. Industrial Claim Appeals Office*, 752 P.2d 589 (Colo. App. 1988). Additionally, we agree with the ALJ that merely because the claimant had a previous infraction under different circumstances, that this did not definitively demonstrate the claimant willfully violated the respondent employer's safety rule or willfully failed to use the respondent employer's safety device on March 7, 2013. The claimant testified he knew he was not supposed to unclip the harness from the tether, he agreed with the rule, and he understood that the rule was for safety reasons to prevent a fall. Tr. at 63-64. Again, after the claimant's previous write-up, he testified that he never violated the rule again, that the rule was forefront in his mind, that he informed the respondent employer that he knew the safety rule, and that the safety rule violation would not happen again. He further testified that the reason he unclipped versus taking off the harness previously was because he was trying to open the door quickly. Tr. at 63-71. Section 8-43-301(8), C.R.S.

We similarly are not persuaded by the respondent's argument that since there was no defect in the harness and tether, the only logical inference is that the claimant willfully detached himself from the tether. As detailed above, it was the respondent's burden to prove the claimant's conduct was willful. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, *supra*. The mere fact that the claimant fell from the Order Picker or that the harness was detached from the tether does not necessarily demonstrate the claimant acted with deliberate intent in detaching the harness. *See Johnson v. Denver Tramway Corp.*, 115 Colo. 214, 171 P.2d 410 (1946). Again, the ALJ specifically found there was no credible evidence that in the five minutes between when Mr. Perez last saw the claimant and when he was found on the floor, that the claimant willfully detached the harness from the tether. The ALJ further found that it was just as likely that the harness was improperly attached to the tether thereby causing the safety equipment to fail. The respondents' argument notwithstanding, this was a logical inference from the evidence presented. The ALJ could reasonably infer that even though the harness and tether were not defective or faulty, the harness was not correctly or adequately attached to the tether, and that this was the result of mere carelessness, negligence, or oversight rather than willful conduct. *See May D & F v. Industrial Claim Appeals Office*, *supra*. Based on the foregoing circumstances, we conclude that the ALJ's findings of fact are supported by substantial evidence in the record, and the findings of fact support the order. Section 8-43-301(8), C.R.S. Consequently, we will not disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated November 5, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 4/3/2014 _____ by _____ KG _____ .

TOM NIGHTINGALE, 732 BENNETT AVENUE, GLENWOOD SPRINGS, CO, 81601
(Claimant)

LOWES HOME IMPROVEMENT WAREHOUSE, INC., C/O: JAKE MCMILLAN HR MGR,
251 WEST MEADOWS DRIVE, GLENWOOD SPRINGS, CO, 81601 (Employer)

SEDGWICK CMS, C/O: SHIRIN CHOWDHURY, PO BOX 14493, LEXINGTON, KY, 40512
(Insurer)

KILLIAN DAVIS RICHTER & MAYLE, PC., C/O: ERIN C. BURKE, ESQ., 202 N SEVENTH
STREET, GRAND JUNCTION, CO, 81502 (For Claimant)

RITSEMA & LYON, PC., C/O: CAROL A FINLEY, ESQ, 225 N 5TH STREET STE 1010,
GRAND JUNCTION, CO, 81501 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-886-842-06

IN THE MATTER OF THE CLAIM OF

HALIMO SALAD,

Claimant,

v.

FINAL ORDER

JBS USA, LLC,

Employer,

and

ZURICH AMERICAN INSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Harr (ALJ) dated November 1, 2013, that struck the claimant's application for hearing on the issue of penalties. We affirm the ALJ's order.

The claimant sustained an admitted injury on July 29, 2011. The claimant filed an application for hearing on July 26, 2013, alleging penalties against the respondents for,

[f]iling or relying on false and fraudulent Entry of Appearance and other pleadings and correspondence to conceal, advance, and further longstanding fraud involving designation of non-existent employer in this and countless other workers' compensation matters and in likewise fraudulently claiming it's a "clerical error," contrary to 8-43-304(1) and 8-43-402.

The respondents filed a motion for summary judgment requesting that the claimant's application for hearing be stricken for failure to plead penalties with specificity as required by §8-43-304(4), C.R.S. The respondents argued that the claimant's application for hearing failed to identify the alleged fraudulent practice engaged in by the respondents or the specific documents that allegedly support the claimant's contentions or identify the dates the alleged violations began and ended. In response, the claimant argued that summary judgment and C.R.C.P. 56 were not applicable to the determination or resolution of matter due to an alleged failure of the specificity of an allegation. The claimant further contended that, "Respondents' counsel

well know and has always known both the legal and factual bases for Claimant's penalty claims."

The ALJ agreed with the respondents and granted the motion for summary judgment. The ALJ determined that the claimant failed to plead the penalty claims alleged in the July 26, 2013, application for hearing with specificity as required by §8-43-304, C.R.S. and, therefore, struck the application for hearing with prejudice.

The claimant now appeals. The claimant did not file a brief. The claimant's petition to review contains general allegations of error derived from §8-43-301(8), C.R.S., and an assertion that the ALJ's decision is the result of a longstanding bias against the claimant's counsel. Because the claimant has not filed a brief in support of the petition to review, the effectiveness of our review is limited. *Ortiz v. Industrial Commission*, 734 P.2d 642 (Colo. App. 1986). We have reviewed the order and the record provided and we do not see reversible error.

Office of Administrative Courts Rule of Procedure Rule (OACRP) 17, allows an ALJ to enter summary judgment where there are no disputed issues of material fact. *See Office of Administrative Courts Rule of Procedure (OACRP) 17,1 Code Colo. Reg. 104-3 at 7.* Moreover, to the extent that it does not conflict with OACRP 17, C.R.C.P. 56 also applies in workers' compensation proceedings. *Fera v. Industrial Claim Appeals Office*, 169 P.3d 231 (Colo. App. 2007); *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988)(the Colorado rules of civil procedure apply insofar as they are not inconsistent with the procedural or statutory provisions of the Act).

Summary Judgment is a drastic remedy and is not warranted unless the moving party demonstrates that it is entitled to judgment as a matter of law. *Van Alstyne v. Housing Authority of Pueblo*, 985 P.2d 97 (Colo. App. 1999). All doubts as to the existence of disputed facts must be resolved against the moving party, and the party against whom judgment is to be entered is entitled to all favorable inferences that may be drawn from the facts. *Kaiser Foundation Health Plan v. Sharp*, 741 P.2d 714 (Colo. App. 1987). However, once the moving party establishes that no material fact is in dispute, the burden of proving the existence of a factual dispute shifts to the opposing party. The failure of the opposing party to satisfy its burden entitles the moving party to summary judgment. *Gifford v. City of Colorado Springs*, 815 P.2d 1008 (Colo. App. 1991).

In the context of summary judgment, we review the ALJ's legal conclusions de novo. *See A.C. Excavating v. Yacht Club II Homeowners Association*, 114 P.3d 862 (Colo. 2005). Pursuant to § 8-43-301(8), C.R.S., we only have authority to set aside an ALJ's order where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the

evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law.

Section 8-43-304(1), C.R.S., allows an ALJ to impose penalties of up to \$1000.00 per day against any party “who violates any provision of articles 40 to 47 of [Title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided, or fails, neglects, or refuses to obey any lawful order made by the director or panel or any judgment or decree made by any court” The imposition of penalties under §8-43-304(1), C.R.S., is a two step process. The ALJ must first determine whether the disputed conduct constituted a violation of the Act, of a duty lawfully enjoined, or of an order. If the ALJ finds such a violation, he may impose penalties if he also finds that the actions were objectively unreasonable. *See City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003).

Section 8-43-304 (4), C.R.S., requires that the party requesting penalties “shall state with specificity the grounds on which the penalty is being asserted.” Failure to state with specificity the grounds on which a penalty is asserted subjects a claim for penalties to dismissal. *See Salad v. JBS USA, LLC*, W.C. No. 4-886-842-04 (March 5, 2014); *Young v. Bobby Brown Bail Bonds, Inc.*, W.C. No. 4-632-376 (April 7, 2010); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010); *Gonzales v. Denver Public School District Number 1*, W. C. Nos. 4-437-328, 4-441-546 (December 27, 2001); *Brown v. Durango Transportation Inc.*, W. C. No. 4-255-485 (October 2, 1996).

The claimant has not alleged that there are any material facts in dispute concerning the respondents’ contention that the claim for penalties lacked the specificity required by §8-43-304(4), C.R.S. Therefore, resolution by summary judgment is appropriate.

We agree with the ALJ that the claimant has failed to state a basis for the alleged penalty claim or the relief the claimant requested. The claimant’s application for hearing and response to motion for summary judgment make reference to the fact that the respondents incorrectly captioned this claim and others. The claimant, however, failed to identify the statute, rule or order that was allegedly violated by the error. The claimant’s reference to certain statutory sections in the application for hearing are either inapplicable or simply general penalty or attorney fee provisions and the claimant makes no reference how these are implicated in her penalty claim. *See Allison v. Industrial Claim Appeals Office*, 916 P.2d 623 (Colo. App. 1995) (penalties may not be awarded where there is no violation).

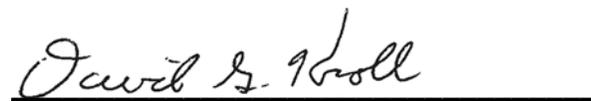
Moreover, the claimant failed to specify which of the respondents' filings are at issue or how the respondents' error impacts the claim in any manner. Based on these deficiencies, we cannot say that the ALJ abused his discretion in concluding that the claimant failed to provide sufficient specificity for the alleged penalty claim and in granting the respondents' motion for summary judgment.

Additionally, we see no evidence of "bias and hatred" on the part of the ALJ as alleged by the claimant. The claimant appears to argue that the ALJ's resolution of the conflicts in the evidence demonstrates his bias. However, the mere fact that an ALJ resolves conflicting evidence against a party is insufficient to show bias or prejudice. *See Kiewit Western, Inc. v. Patterson*, 768 P.2d 1272 (Colo. App. 1989). As noted, the record in this matter discloses no evidence of bias or partiality on the part of the ALJ. It follows that the claimant made no showing of facts to overcome the presumption of competency, and fairness, which resides with the ALJ. *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186 (Colo. App. 1995).

IT IS THEREFORE ORDERED that the ALJ's order dated November 1, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL


Brandee DeFalco-Galvin


David G. Kroll

CERTIFICATE OF MAILING

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

_____ 3/27/2014 _____ by _____ KG _____ .

HALIMO SALAD, 716 15TH STREET APT #36, GREELEY, CO, 80631 (Claimant)
JBS USA, LLC, Attn: GINA GRIEGO - WC COORDINATOR, C/O: JBS USA HOLDINGS,
INC., 1770 PROMONTORY CIRCLE, GREELEY, CO, 80634 (Employer)
ZURICH AMERICAN INSURANCE, Attn: JACOB BREJCHA, C/O: SEDGWICK CMS, 7400
E. ORCHARD RD., #4015, GREENWOOD VILLAGE, CO, 80111 (Insurer)
LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K. BLUNDELL, ESQ., 1233
EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)
DWORKIN, CHAMBERS, WILLIAMS, YORK, BENSON & EVANS, P.C., Attn: DAVID J.
DWORKIN, ESQ., 3900 EAST MEXICO AVENUE, SUITE 1300, DENVER, CO, 80210 (For
Respondents)
STEVEN U. MULLENS, P.C., Attn: PATTIE RAGLAND, ESQ., P O BOX 2940, COLORADO
SPRINGS, CO, 80901-2940 (Other Party)
SEDGWICK CMS, Attn: MICHAEL FARNHAM, P O BOX 14493, LEXINGTON, KY, 40512
(Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-877-091-02

IN THE MATTER OF THE CLAIM OF

SCOTT SIMPSON,

Claimant,

v.

FINAL ORDER

SAFEWORKS, LLC,

Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated August 27, 2013, that determined the respondents failed to overcome the maximum medical improvement (MMI) opinion of the Division Independent Medical Examination (DIME) physician and awarded temporary disability benefits. We affirm the ALJ's order.

A hearing was held on the issues of MMI and temporary total disability benefits. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury on January 11, 2012, to his right inguinal area while working as a rigger for the respondent employer. The claimant received treatment and underwent surgery to repair a right inguinal hernia. The claimant continued to perform his job duties through April 25, 2012, and resigned on April 26, 2012. The claimant continued to experience pain as a result of this injury and Dr. Dallenbach subsequently imposed work restrictions. The claimant continued to receive treatment to address his pain complaints.

On January 16, 2013, Dr. Dallenbach released the claimant to full duty work and placed the claimant at MMI with a three percent impairment rating due to the ilionguinal pain. Dr. Dallenbach also noted that the claimant should continue with pain medications. The respondents filed a final admission of liability consistent with this report.

On March 25, 2013, the claimant underwent a DIME with Dr. DiNapoli, who agreed the claimant was at MMI as of January 16, 2013, and needed maintenance medical benefits for continued pain. The DIME physician rated the claimant's permanent impairment at four percent. The insurer filed a final admission of liability consistent with this report.

Dr. Healey performed an IME and in his opinion the claimant was not at MMI and was not able to return to full duty work. Dr. Healey noted that the claimant was still in pain and the medications were not giving him full pain relief. Dr. Healey recommended the possibility of nerve blocks and a surgical evaluation.

On June 12, 2013, Dr. Dallenbach reported that he agreed with Dr. Healey that the claimant was not at MMI and that he agreed with Dr. Healey's treatment recommendations. Dr. Dallenbach also testified at hearing that medications could only manage the claimant's nerve entrapment problem but that ultimately the claimant would need surgery or at least a diagnostic workup to treat the condition. Dr. Dallenbach also stated that it was premature to place the claimant at MMI when he did and the only reason he gave claimant the release to return to work was because the claimant requested it. In Dr. Dallenbach's opinion, work restrictions are appropriate and the claimant is not able to return to his regular occupation.

On August 5, 2013, the DIME physician testified by deposition, making a number of statements about the claimant's MMI status. The DIME physician noted the problems the claimant was experiencing with the medications and pain relief but assumed the claimant was still at MMI on January 16, 2013, and needed Gabapentin as a maintenance medication. Immediately after the deposition testimony, the DIME physician issued an addendum to his DIME report and concluded that the claimant was not at MMI.

The ALJ determined that the record contained conflicting MMI determinations by the DIME physician but that the DIME physician ultimately determined that the claimant was not at MMI. Therefore, the ALJ determined that the respondents had the burden to overcome the DIME physician's MMI opinion by clear and convincing evidence and that they had failed to do so. The ALJ also noted that Dr. Dallenbach and Dr. Healey were in agreement that the claimant was not at MMI and, in fact, the record contained no contrary opinions.

The ALJ also determined that the claimant had shown that he was unable to return to his regular employment as a result of the injury, as Dr. Dallenbach rescinded his prior release to return to full duty. The ALJ, therefore, awarded the claimant temporary total disability benefits beginning January 16, 2013, and continuing.

On appeal, the respondents contend that the ALJ erred in admitting the DIME physician's addendum report and in switching the burden to the respondents to overcome the DIME physician's MMI opinion. The respondents further contend that the ALJ erred by not allowing them to proceed on the affirmative defense of the offer of modified duty. We are not persuaded that the ALJ erred.

Generally, the DIME physician's finding concerning the date of MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S. If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000); *Stephens v. North & Air Package Express Services*, W. C. No. 4-492-570 (February 16, 2005), *aff'd*, *Stephens v. Industrial Claim Appeals Office* (Colo. App. 05CA0491, January 26, 2006)(not selected for publication). In so doing, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. *See Andrade v. Industrial Claim Appeals Office*, 121 P.3d 328 (Colo. App. 2005)(ALJ properly considered DIME physician's deposition testimony where he withdrew his original opinion of impairment after viewing a surveillance video); *see also, Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002)(noting that DIME physician retracted original permanent impairment rating after viewing videotapes showing the claimant performing activities inconsistent with the symptoms and disabilities she had reported). We may not interfere with the ALJ's resolution of these issues if supported by substantial evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*.

Here, the ALJ determined, with record support based on deposition testimony and all of the DIME physician's reports, the DIME physician's true opinion was that the claimant was not at MMI as of January 16, 2013. Given the DIME physician's ambiguous statements concerning MMI in his deposition and the subsequent addendum report in which the DIME physician unequivocally stated that the claimant is not at MMI, it was reasonable for the ALJ to reach this conclusion and we see no basis upon which to disturb this finding. Section 8-43-301(8), C.R.S.

I.

The respondents initially contend that good cause was not shown to include the DIME physician's addendum in the record and it violated the respondents' due process rights. We disagree.

As the respondents point out, the 20 day rule in §8-43-210, C.R.S. of the Act requires that “all relevant medical records, vocational reports, expert witness reports and employer records shall be exchanged with all other parties at least 20 days prior to the hearing date.” The court of appeals has recognized that exceptions to the 20 day rule are clearly contemplated by the allowance of continuances to file additional reports in appropriate circumstances. *Ortega v. Industrial Claim Appeals Office*, 207 P.3d 895 (Colo. App. 2009).

The ALJ exercises “wide discretion” in conducting evidentiary proceedings. *See* §8-43-207(1), C.R.S. (detailing ALJ's authority to conduct evidentiary hearings); *see also, IPMC Transportation. v. Industrial Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (construing predecessor statute to §8-43-207 to provide hearing officer with wide discretion in conduct of evidentiary proceedings). We defer to the ALJ's evidentiary determinations unless his ruling constitutes an abuse of his discretion by “exceeding the bounds of reason.” *See, e.g. Rosenberg v. Board of Education*, 710 P.2d 1095 (Colo. 1985). We agree with the ALJ's determination here to admit the DIME physician's addendum report as the report was relevant and clarified the DIME physician's MMI position. *See Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra.* (ALJ should consider all of the DIME physician's written and oral testimony).

Moreover, we perceive no due process violation in the ALJ's decision to admit the report. The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of their positions. Inherent in these requirements is the rule that parties will receive adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. *See Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076 (1990).

Here, the claimant offered to reconvene the deposition of the DIME physician at the claimant's expense to allow the respondents to ask any additional questions that may have come up in light of the addendum report. Tr. at 12. *See Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000)(recognizing entitlement of opposing party to cross-examine author of admitted report), *aff'd on other grounds sub nom. Colorado Dep't of Labor and Employment*, 30 P.3d 189 (Colo. 2001). Although the respondents now argue in the Brief in Support that they were unable to obtain a separate opinion to address the change in the DIME physician's testimony, they failed to inform the ALJ at hearing that they wished to keep the record open for additional evidence. The ALJ specifically stated at hearing that he would give the respondents the opportunity at the end of the hearing to inform him whether they were ready for an order or needed to obtain further evidence from the DIME physician. Tr. at 13. However, at the conclusion

of the hearing, the respondents stated that they were not requesting any follow-up with the DIME physician and that they were resting their case. Tr. at 68.

In our view the respondents received both notice and the opportunity to be heard concerning the DIME physician's addendum report. See *Whiteside v. Smith*, 67 P.3d 1240 (Colo. 2003); *City of Boulder v. Dinsmore*, 902 P.2d 925 (Colo. App. 1995); *Stephens v. North & Air Package Express Services*, *supra*. In these circumstances, we cannot say the respondents were deprived of due process.

II.

The respondents further argue that the ALJ erred in assigning them the burden of proof to overcome the DIME physician's MMI opinion because it was the claimant's burden to overcome the DIME physician's original MMI opinion. We are not persuaded the ALJ erred.

It is now well-settled case law that if a DIME physician issues conflicting or ambiguous opinions concerning MMI, it is the ALJ's province to determine the DIME physician's true opinion as a matter of fact and once the ALJ determines the DIME physician's opinion, the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence. In *Fera v. Resources One, LLC, D/B/A Terra Firma*, W. C. No. 4-589-175 (May 25, 2005) *aff'd*, *Resources One, LLC v. Industrial Claim Appeals Office*, 148 P.3d 287 (Colo. App. 2006), the panel found that when the ALJ determined the DIME physician's true opinion on MMI, the ALJ did not err in assigning the respondents the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Villoch v. Opus Northwest, LLC*, W. C. No. 4-514-339 (June 17, 2005).

Additionally, in *Lambert & Sons, Inc.*, *supra*, the DIME physician opined that the claimant had a 12 percent whole person physical impairment rating, but later in a deposition stated that all of the claimant's impairment was pre-existing. The ALJ denied the respondents' request to apportion the claimant's impairment, finding that the respondents had failed to overcome by clear and convincing evidence the 12 percent impairment rating issued by the DIME physician. The court agreed with the respondents that the opinion of the DIME physician stated at the subsequent deposition should be considered, together with the initial report, as part of the DIME physician's "finding" for the purposes of §8-42-107(8)(c), C.R.S. However, the court determined that the ALJ had adopted the 12 percent impairment rating and properly required the respondents to overcome that rating. The court found no error in the ALJ's placement on the respondent the burden of proof to overcome by clear and convincing evidence the DIME physician's 12 percent impairment rating. Following the principles articulated in these cases, we

perceive no error in the ALJ's placement of the burden of proof on the respondents in the present case.

III.

We also reject the respondents' contention that the ALJ erred by not allowing the respondents to go forward at hearing on the issue of modified duty. The respondents assert that they adequately raised the affirmative defense of modified duty because they listed §8-42-105(3), C.R.S. and W.C.R.P. 6-1(A), in the response to application for hearing section marked "Other issues to be heard for hearing" and re-raised the issue in front of the ALJ at hearing. The ALJ, however, determined that the respondents had not properly endorsed the affirmative defense of modified duty and failed to provide the claimant with the appropriate notice in the answers to interrogatories. We perceive no reversible error.

As noted above, the ALJ has considerable discretion in matters involving the time and conduct of administrative hearing and an ALJ's ruling in this regard will not be set aside absent an abuse of discretion. *See IPMC Transportation Co. v. Industrial Claim Appeal Office, supra.* An affirmative defense must be explicitly pled and is deemed waived if not raised at a point in the proceedings which affords the opposing party an opportunity to present rebuttal evidence. *See C.R.C.P. 8(c), Kersting v. Industrial Commission, 39 Colo. App. 297, 567 P.2d 394, (1977); Terry v. Terry, 154 Colo. 41, 387 P.2d 902 (1963); Lewis v. Scientific Supply Co., 897 P.2d 905 (Colo. App. 1995).* This principle protects the parties' due process rights to notice and an opportunity to be heard. *Hendricks v. Industrial Claim Appeals Office, supra; See also Office of Administrative Court Rule 12 (after the date of the setting, issues may only be added by written agreement of the parties or order of a judge or designee clerk for good cause shown).*

We agree with the ALJ's determination here that the respondents' general endorsement of §8-42-105(3), C.R.S. and W.C.R.P. 6-1, did not necessarily notify the claimant that the respondents intended to assert the affirmative defense of a modified duty job offer. This is especially true where the claimant requested that the respondents state what affirmative defenses they were going to pursue at hearing, and the respondents failed to identify the issue of modified duty. Tr. at 9. Thus, we cannot say that the ALJ abused his discretion in not allowing the respondents to proceed on this issue.

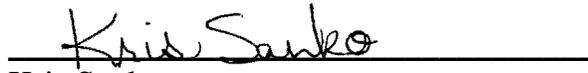
The ALJ's findings are supported by substantial evidence in the record. Those findings, in turn, support the ALJ's determination that the respondents failed to overcome the DIME physician's MMI opinion by clear and convincing evidence and that the claimant proved his entitlement to temporary disability benefits.

IT IS THEREFORE ORDERED that the ALJ's order dated August 27, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin
Brandee DeFalco-Galvin



Kris Sanko
Kris Sanko

CERTIFICATE OF MAILING

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

_____ 1/23/2014 _____ by _____ RP _____ .

SCOTT SIMPSON, Attn: VESTA LEACH, P O BOX 427, PENROSE, CO, 81240 (Claimant)
SAFEWORKS, LLC, Attn: FRANCES SILVERTHORN, 365 UPLAND DRIVE, TUKWILA,
WA, 98188 (Employer)

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Attn: ELIZABETH
CONYERS, C/O: CHARTIS INSURANCE, INC., P O BOX 25971, SHAWNEE MISSION,
KS, 66225 (Insurer)

SCHIFF & SCHIFF, P.C., Attn: HERBERT S. SCHIFF, ESQ., 332 BROADWAY AVENUE,
PUEBLO, CO, 81004 (For Claimant)

SENDER GOLDFARB & RICE, L.L.C., Attn: SEAN ELLIOTT, ESQ./WILLIAM M. STERCK,
ESQ., 1700 BROADWAY, SUITE 1700, DENVER, CO, 80290 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-800-423 &
4-795-922-01

IN THE MATTER OF THE CLAIM OF
MARGARITA SOLIS,

Claimant,

v.

FINAL ORDER

SCHWARTZ'S KRAUTBURGER
KITCHEN, INC.,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Henk (ALJ) dated August 30, 2013, that found the permanent impairment rating of the DIME physician to be invalid and ordered an award of permanent partial disability benefits based upon ratings provided by treating and reviewing physicians. We affirm the order.

The ALJ considered in her order two separate work injuries sustained by the claimant. On June 6, 2009, the claimant injured her right hand when she caught it in a mixer. On June 15, 2009, the claimant was rear ended while stopped at a red light while making a delivery. The claimant asserted the latter injury affected her low back and cervical spine.

The claimant was referred by the employer for treatment by Dr. John Charbonneau. Dr. Charbonneau treated the claimant with anti-inflammatory and pain medications and physical therapy. Throughout his treatment, Dr. Charbonneau made notations pertinent to complaints of pain and limitations by the claimant which were inconsistent with his examinations, his observation of her unguarded movements and objective medical tests. The doctor concluded the claimant's presentation should be characterized as involving "symptom magnification", "replete with inconsistencies" and including "non-organic features." Dr. Charbonneau ordered an MRI of the claimant's spine, an EMG study of her arm, an evaluation with Dr. Douglas Scott, a psychological evaluation by Dr. Bruns and a surgical evaluation by Dr. Nieves and Dr. Beard. Dr. Nieves read the MRI as showing degenerative disease of the spine and the EMG revealed

some nerve slowing in the right arm. He provided injections to the cervical spine. Noting “inappropriate illness behavior” he placed the claimant at MMI on April 2, 2010. Dr. Charbonneau reviewed his medical records previous to June, 2009. These records documented the claimant’s previous back injuries at work in 2001 and in 2008. She was treating with pain medication just weeks prior to her June, 2009, work injuries. Dr. Charbonneau reviewed surveillance video of the claimant taken in August, 2009, which he felt showed movements inconsistent with the claimant’s reports given to him in his office. The videos suggested no restrictions in the claimant’s ability to move or to function. Dr. Charbonneau determined the claimant was at MMI as of November 23, 2009, and assigned her a permanent impairment rating of 3% of the right upper extremity. The respondents filed a Final Admission of Liability for this rating.

The claimant’s injury was reviewed through a Division Independent Medical Exam (DIME) conducted by Dr. Caroline Gellrick. On March 23, 2010, Dr. Gellrick determined the claimant was not at MMI for her right arm injury. Following that review, Dr. Charbonneau ordered a repeat MRI and sought surgical opinions from Dr. Nieves and Dr. Beard. The MRI showed no evidence of radiculopathy. Dr. Nieves and Dr. Beard reasoned the claimant was not a surgical candidate. Dr. Charbonneau concluded the claimant was still at MMI.

Dr. Gellrick completed a follow up DIME report on August 9, 2011. The claimant informed Dr. Gellrick she had undergone an L 4-5 fusion surgery on her lumbar spine in June, 2011, performed by Dr. Dhupar. This surgery was pursued without request to, authorization of, or payment by the respondents. Dr. Gellrick found the claimant to be at MMI. The doctor calculated a 13% upper extremity impairment rating for her right hand and wrist. After being advised she was to provide an impairment rating for injuries to the claimant’s spine as well, Dr. Gellrick saw the claimant a third time on April 3, 2012. On that date the doctor determined the claimant had accumulated a 10% rating due to her surgically operated spine and a 12% rating for a lack of range of motion. Combined, the claimant was credited with a 21% whole person rating for the lumbar spine. Dr. Gellrick found no rating could be derived from the claimant’s cervical spine condition or from psychiatric impairment.

Prior to Dr. Gellrick’s determination of MMI, a medical review and examination was performed by Dr. Marc Steinmetz at the behest of the respondents. In his report, Dr. Steinmetz reviewed the considerable records of medical treatment the claimant received for her lumbar spine prior to June of 2009. Dr. Steinmetz also noted the inconsistencies in the claimant’s histories given to her various medical providers. The histories were said to be inconsistent with both the medical records and her own statements. The doctor then reviewed the surveillance video tape previously viewed by Dr. Charbonneau. He agreed with the conclusion of Dr. Charbonneau that the video showed normal function by the

claimant insofar as her lumbar or cervical spine was concerned. In his reports and in his deposition testimony, Dr. Steinmetz pointed out flaws in the DIME report of Dr. Gellrick. He reasoned the rating by Dr. Gellrick which included a table 53 diagnosis of an operated back and related range of motion deficits was not correct. Dr. Steinmetz offered the opinion that Dr. Gellrick was misled by the instructions she was given by the parties' legal counsel in the case. She wrote that she participated in a conference with the respective attorneys after her second DIME report. Dr. Gellrick related in her final report of April 3, 2012, that "request was made to consider any ratable impairment on the spine." Dr. Steinmetz observed that, as a result of Dr. Gellrick's interpretation of this instruction, she did not make determinations as to whether there was a contribution by the work injury of June, 15, 2009, to the spine condition she was rating. Dr. Steinmetz pointed to the instruction present in Table 53 of the *AMA Guides* when it references the presence of "pain and rigidity" "with medically documented injury." The doctor noted the June 15, 2009, auto accident occurred at a very low speed and the only damage to the vehicles involved was a broken taillight on the claimant's vehicle. The claimant's description of her reaction to the collision varied in every account given. Because prior documentation of treatment for a lumbar pain condition was extensive and subsequent MRIs did not reveal any acute findings, it was clear her lumbar condition was preexisting. The opinions of Dr. Charbonneau, Dr. Nieves and Dr. Beard found that not only was surgery not related to the MVA, but any surgery to the lumbar spine was also not reasonable or necessary. Dr. Steinmetz deduced then, that the 10% rating from Table 53 was not due to the work injury, and was also premised on a completely gratuitous and unnecessary surgery. Similarly, the 12% rating for the loss of range of motion was derived from deficits caused by the unrelated, unnecessary, surgery. Dr. Steinmetz surmised that no rating could be accurately assigned to the 2009 motor vehicle accident, but he conceded Dr. Charbonneau's 5% rating for the lumbar spine could be arguably supported.

The ALJ ruled that Dr. Steinmetz' opinion was persuasive and constituted clear and convincing evidence that the DIME opinion of Dr. Gellrick was in error and was not prepared in accordance with the *AMA Guides*. Because the lumbar surgery was unrelated to the work injury, it was deemed incorrect to include it in the diagnosis based rating taken from Table 53 of the *Guides*, and to include a rating derived from range of motion measurements affected by that surgery. The respondents had stipulated to accepting the 5% rating allowed by Dr. Steinmetz and Dr. Charbonneau, and the 13% extremity rating from Dr. Gellrick. Accordingly, the ALJ ordered permanent partial disability benefits calculated through the use of those ratings.

On appeal, the claimant contends the respondents failed to provide all the medical records available to the DIME physician, that the respondents did not depose the DIME physician as allowed by the ALJ, that the claimant's lumbar range of motion "has likely

increased since her lumbar surgery”, and the respondents did not cite any authority holding it was improper to reference Table 53 IIE of the *AMA Guides* after the performance of an allegedly unauthorized surgery.

The claimant’s complaint that the respondents did not provide to the DIME doctor medical records, primarily those documenting treatment prior to the date of the work injury, is unavailing. The claimant also had copies of those records. W.C. rule of Procedure 11-3 (I), 7 Code Colo. Reg. 1101-3, provides that in the event the respondents fail to timely submit medical records, the claimant may request cancellation of the DIME appointment or the claimant may submit all medical records she has available. Because the claimant did neither in this case, she has waived the right to complain at this juncture of the absence of additional records. A party is not allowed to wait until the IME review is finished to make an objection based on their dissatisfaction with the results of the review. *Hester v. Eco Express, LLC*, W.C. No. 4-838-236 (March 11, 2014).

The record of the November 9, 2012, hearing reveals the respondents did not request a deposition of Dr. Gellrick, the DIME physician. The claimant requested that deposition. The ALJ did authorize the deposition. However, the claimant cannot assert as a reason to question the ALJ’s order the respondent’s failure to take the deposition when the opportunity to take the deposition was afforded to the claimant, and not the respondents.

The claimant testified the lumbar surgery performed was a spine fusion procedure. She also stated it provided no long term benefit. Dr. Steinmetz pointed out in his deposition that a fusion surgery would serve to increase the stiffness in the claimant’s spine. Therefore, the claimant’s argument that the claimant’s lumbar range of motion “has likely increased since her lumbar surgery” is not based on any evidence in the record. In addition, an ALJ could only speculate as to whether any increased spinal range of motion would likely increase or reduce the impairment rating assigned.

The claimant argues there is no authority in the *AMA Guides* to preclude the use of an impairment rating from Table 53 in the case of an unauthorized surgery to the claimant’s back. The respondent’s position, and that of Dr. Steinmetz, was to say the surgery involved was not necessary, and that it was not required by the work injury. It was not critical that the surgery was ‘unauthorized’. The *American Medical Association Guidelines to the Evaluation of Permanent Impairment, Third Edition, Revised* (*AMA Guides*) direct that causation and aggravation must be determined for purposes of devising an impairment rating pertinent to its use in benefit systems. (Appendix A, pg. 244). The impairment determination is to evaluate changes that have occurred over a period of time because of injury or disease. (Section 1.2, pg. 3). Dr. Steinmetz noted this instruction is also present in Table 53 of the *Guides* when it references the presence of

“pain and rigidity” “with medically documented injury.” (Section 3.3, pg. 80). The pertinent “injury” is that incurred by the claimant related to work and is the subject of the claim. This is consistent with the statute when it provides for indemnity benefits due to injuries “proximately caused by an injury or disease arising out of and in the course of the employee’s employment.” Section 8-41-301(1)(c), C.R.S. The ALJ was correct in holding that the application of Table 53 must be justified by the effect of a compensable “injury” before an impairment rating may be derived.

Section 8-42-107(8)(b)(III) and (c), C.R.S. provide that the DIME physician’s finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician’s finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The ALJ’s decision that the DIME physician’s determination of permanent medical impairment was successfully overcome was supported by substantial evidence in the record. We may not substitute our judgment by reweighing the evidence in an attempt to reach inferences different from those the ALJ drew from the evidence. *See Sullivan v. Industrial Claim Appeals Office*, 796 P.2d 31, 32-33 (Colo. App. 1990). Given the nature of the record and the medical dispute involved, we cannot say the ALJ committed error in setting aside the DIME’s impairment rating and affirming the stipulation of the respondents that the correct rating was 5% whole person for the lumbar spine and 13% for the right upper extremity.

IT IS THEREFORE ORDERED that the ALJ’s order issued August 30, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

3/18/2014 by KG.

SCHWARTZ'S KRAUTBURGER KITCHEN, INC., Attn: DAVE SCHWARTZ, 820 39TH STREET, EVANS, CO, 80620 (Employer)

TRUCK INSURANCE EXCHANGE, Attn: ELIZABETH NEU, C/O: WORKER'S COMPENSATION BCO-DENVER, PO BOX 108843, OKLAHOMA CITY, OK, 73101-8843 (Insurer)

LAW OFFICES OF RICHARD K. BLUNDELL, Attn: RICHARD K BLUNDELL, ESQ, 1233 EIGHTH AVENUE, GREELEY, CO, 80631 (For Claimant)

HUNTER & ASSOCIATES, Attn: JOE ESPINOSA, ESQ., 1801 BROADWAY, STE 1300, DENVER, CO, 80202-3878 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-897-476-01

IN THE MATTER OF THE CLAIM OF

TRINA TAYLOR,

Claimant,

v.

FINAL ORDER

SUMMIT COUNTY,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The respondent seeks review of an order of Administrative Law Judge Friend (ALJ) dated September 24, 2013, that ordered the claim was not barred by the statute of limitations and ordered the respondents to provide the claimant evaluation and treatment by Dr. George. We affirm.

The respondent appeals the ALJ's order of compensability on the basis that a September 12, 2012, worker's claim for compensation pertinent to an injury occurring January 19, 2010, is barred by the two year statute of limitations provided in § 8-43-103(2), C.R.S.

The claimant injured her right hip when she slipped and fell on ice on January 19, 2010, while working as a bus driver for the respondent. The claimant reported the injury a few days later to the employer's human resources manager. She was referred to Dr. Lawrence George at High Country Healthcare. Dr. George ordered an X-ray of the hip and later, an MRI. The doctor referred the claimant to physical therapy, chiropractic treatments and acupuncture. Dr. George also prescribed ibuprofen. Dr. George maintained the claimant on full duty at work. The claimant last saw Dr. George on June 28, 2010. She treated with the chiropractor through November, 2010. The claimant reported some improvement to Dr. George, but she testified at hearing that she continues to perceive pain in her hip.

The claimant later complained of stiffness in her neck which she believed was due to the need to look above eye level to monitor controls in the bus and because her bus routinely slipped out of gear thereby jostling the claimant's neck and head. On January

11, 2011, the claimant saw Dr. Adele Morano, a partner of Dr. George at High Country Healthcare. The claimant complained to Dr. Morano about her neck and her hip. Dr. Morano recommended a modified duty restriction of “no job requiring neck extension”.

The claimant continued to experience pain in her hip. On September 12, 2012, she filed with the Division of Workers’ Compensation a Worker’s Claim for Compensation form. The respondent completed a Notice of Contest on September 26, 2012. On May 15, 2013, the claimant submitted an application for a hearing endorsing as issues compensability and medical benefits. The respondent added the issue of the statute of limitations. At the August 13, 2013, hearing, the claimant requested an order of compensability and an order that she be able to see Dr. George for additional treatment. The respondents did not deny the claimant suffered an injury to her hip on January 19, 2010, but asserted the claim for benefits was now time barred and that the claimant’s current symptoms were not related to the 2010 fall on the ice.

The ALJ submitted a summary order and then a full findings of fact, conclusions of law and order on September 24, 2013. He concluded the claim was compensable and not precluded by the statute of limitations in § 8-43-103(2). The ALJ found the two year limitations period referenced in that section did not begin to run until the claimant became aware that her injury was such that it would require her to miss more than three days from work in the future, or lead to permanent impairment. He observed that the medical treatment the claimant received in 2010 was not sufficient to put the claimant on notice that her injury was serious enough to justify missing that much time from work, or permanent impairment. The ALJ noted the claimant did not receive any restrictions pertaining to her job until January 11, 2011. Because that date was less than two years prior to the September 12, 2012, date of her claim for compensation, the claim was deemed as timely filed and was not barred.

On appeal, the respondent contends the evidence reveals a reasonable claimant would have been advised within the first six months of her medical treatment that she had suffered a disabling injury. The respondent also argues the ALJ’s finding that January 11, 2011, was the date the claimant was found to have been aware of the seriousness of her injury, and that it would be disabling, is in error because the treatment and restrictions recommended on that date pertained solely to the claimant’s neck injury.

The respondents review the treatment the claimant received prior to June of 2010, and argue the circumstances would have informed a reasonable person of the seriousness of the claimant’s hip injury. The respondents cite the securing of both an X-ray and an MRI and the small amount of relief the claimant states she obtained from the physical therapy, acupuncture and chiropractic treatments.

Section 8-43-103(2), C.R.S., provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years after the injury. The statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). For purposes of the statute of limitations, a "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne, supra; Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the claimant must appreciate a causal relationship between the employment and the condition. The claimant must also know that the injury is disabling and may entitle her to disability benefits. Temporary disability benefits are payable if the injury causes the claimant to miss more than three shifts from work. Section 8-43-103(1)(a), C.R.S.; *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998); *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Entitlement to disability benefits also occurs in the case of a fatality or permanent physical impairment. Sections 8-43-101(1) and 8-43-203(1)(a).

In *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967), the claimant was injured while working as a fireman for the employer and was treated on the date of his accident. He did not, however, file a claim for benefits until six years later. The Court found the claim was not barred by the statute of limitations. The evidence showed that despite the receipt of medical treatment, the claimant did not receive a diagnosis that linked his inability to work at his job to his work accident until many years after the accident. The court ruled that an 'injury' was distinct from the definition of an 'accident'.

Accident is the cause and Injury is the effect. It does not follow in every instance that the two occur simultaneously. At least, in many instances, the total or ultimate effect is not immediately apparent. The slow, progressive development of the ultimate effect in the instant case was neither apparent to several doctors who treated claimant nor to the claimant. Surely, it was not contemplated by the legislature that a workman have greater medical perception than a physician.

...

Since no benefits flow to a workman merely because he has been the victim of an Accident and since Injuries must be of sufficient magnitude to prevent him from working for

more than [three] days before they are compensable, it follows that the term ‘injury,’ as it is employed in [8-43-103(2)], means Compensable injury. In fact, the statute so states, in slightly different verbiage. It requires notice to be given ‘of an injury, for which compensation and benefits are payable * * * and the furnishing of medical, surgical or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section.’ *Id.* at 350-351.

The fact then, that the claimant received physical therapy, acupuncture and chiropractic treatments after the time of her accident in January, 2010, would not necessarily lead to the conclusion she was reasonably to be aware she had a compensable injury which would justify the need to file a claim for compensation. While knowledge of a compensable claim may also be seen as present when the claimant recognizes she will be required by her injury to miss more than three days from work in the future, *Born v. University of Denver*, 4-337-504 (May 9, 2001), *Ficco v. Owens Brothers Concrete*, 4-546-848 (November 20, 2003), the claimant did not receive that type of medical recommendation until she was seen for neck pain in January, 2011. Prior to that date she had always been given a full duty return to work release by her physician.

The determination of when the claimant recognized the probable compensable character of the injury is a question of fact for resolution by the ALJ. Therefore, we must uphold the ALJ’s determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2000. *Kerstiens v. All American Four Wheel Drive*, W.C. No. 4-865-825 (August 1, 2013). Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The finding by the ALJ in this claim that the claimant was not aware of the compensable nature of her injury until some point after September of 2010, is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

The respondent asserts a disabling injury is not solely one that requires the payment of compensation benefits. The respondent points to *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999), as stating that “medical incapacity” is a form of ‘disability’ and to *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998), as authority that an inability to work only insofar as the ability to perform regular job duties is affected is also a ‘disability’ for purposes of the statute of limitations in § 8-43-103(2).

The respondents misconstrue a statement in *Culver* to arrive at their assertion. The Court did make an observation in that case that:

The “disability concept is a blend of two ingredients, ... The first ingredient is medical incapacity evidenced by a loss of a limb, muscular movement, or other bodily function. The second ingredient is wage-earning incapacity evidenced by an employee's inability to resume his or her prior work. *Culver*, 971 P.2d at 649.

The ‘medical incapacity’ to which the Court refers is the award of permanent partial disability benefits premised upon “permanent medical impairment” as ascertained by use of the *AMA Guides to the Evaluation of Permanent Impairment*. See § 8-42-107(8)(b.5)(II), C.R.S. (Section 8-42-107 is titled “permanent partial disability benefits” and specifies those benefits are comprised of compensation calculated using a medical impairment rating either from a ‘scheduled injury’ listed in subsection (2), or by use of an equation involving the impairment rating, age and wage rate of the claimant as set forth in subsection (8)(d)). The ‘medical incapacity’ then, as used in the *Culver* decision, is indeed a reference to ‘compensation’, not simply to functional restrictions.

The Court of Appeals in *Ortiz v. Charles J. Murphy* was not discussing the statute of limitations in § 8-43-103(2). That decision dealt with a determination of the date of injury, or ‘onset’, of an occupational disease. Unlike the terms of § 8-43-103(2) which turns on a disabling injury, §8-43-303(1) sets forth that the time limit for reopening begins to run from the “date” the accident occurred or the ‘onset,’ which is the equivalent in cases of an occupational disease. Where the claimant’s injury is in the nature of an occupational disease, the rights and liabilities of the parties are governed by the law in effect at the "onset of disability," and the disease is not compensable unless it causes disability. *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991). However, an occupational disease may cause "disability" which does not entitle the claimant to disability benefits. This is true because the claimant suffers the onset of disability when the occupational disease impairs the claimant’s ability to effectively and properly perform his regular employment. *Ricks v. Industrial Claim Appeals Office*, 809 P.2d 1118 (Colo. App. 1991). Under such circumstances, the claimant is "disabled" but not necessarily entitled to disability benefits if modified work is provided at the claimant’s pre-injury wage. Accordingly, the "onset of disability" rule does not govern the statute of limitations for filing a workers’ compensation claim. *Ficco v. Owens Brothers Concrete Co.*, W.C. No. 4-546-848 (November 20, 2003), *rev’d in part*, *Ficco v. Industrial Claim Appeals Office*, (Colo. App. No. 2005CA2269, November 24, 2004) (not selected for

publication), and *Ficco v. Owens Brothers Concrete Co.*, W.C. No. 4-546-848 (January 5, 2006). *Contra, Ott v. Pediatric Services*, W.C. No. 4-705-444 (January 14, 2009).

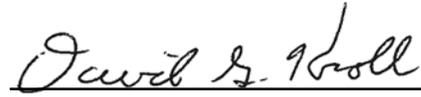
The standard then, that applies is that set forth in *City of Boulder v. Payne, supra*, that the statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury," with "compensable" meaning entitlement to the payment of compensation benefits.

Finally, the respondents assert the ALJ was in error in making a finding that the claimant was not adequately put on notice as to the compensable nature of her claim until January 11, 2011. The respondents point out that on that date the claimant saw Dr. Morano with complaints pertaining to a neck injury, and the work restrictions provided were explicitly directed at the neck condition. Regardless of the merits of this contention, it is not critical to the finding of the claimant's knowledge she may have a disabling injury as compared to the date she filed her claim for compensation. The ALJ did not find the claimant should have been aware she sustained a disabling injury prior to September 12, 2010. That would be two years prior to the filing of her claim for compensation. The ALJ's finding was that "the fact that claimant received several medical and chiropractic treatments after the time of her accident in 2010 would not necessarily lead to the conclusion she was reasonably to be aware she had a compensable injury which would justify the need to file a claim for compensation." (Conclusions of law, ¶ 7). This was the treatment the claimant received prior to September 12, 2010. Accordingly, the ALJ's finding that the claim for benefits was timely filed is supported by his findings of fact and conclusions of law. The reference to work restrictions imposed in January, 2011, would be of no consequence to the statute of limitations issue. As noted above, we find the ALJ's conclusion the claimant was not aware she suffered a disabling injury within two years of the date of her claim for compensation is supported by substantial evidence in the record. It may eventually turn out that the claimant's hip injury never entitles her to compensation benefits. That eventuality however, does not affect her ability to file her claim for benefits in 2012.

Based upon the ALJ's findings, supported by the record, we agree the claimant's claim for benefits was timely filed and the ALJ's award of medical benefits need not be set aside.

IT IS THEREFORE ORDERED that the ALJ's order issued September 24, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Handwritten signature of David G. Kroll in cursive script.

David G. Kroll

Handwritten signature of Kris Sanko in cursive script.

Kris Sanko

CERTIFICATE OF MAILING

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

_____ 3/18/2014 _____ by _____ KG _____ .

TRINA TAYLOR, PO BOX 2333, BRECKENRIDGE, CO, 80424 (Claimant)
SUMMIT COUNTY, Attn: DONNA CORBETT, PO BOX 68, BRECKENRIDGE, CO, 80424
(Employer)
SELF INSURED, Attn: DEBBIE MCDERMOTT, C/O: CTSI, INC., 800 GRANT ST #400,
DENVER, CO, 80203 (Insurer)
THE BREWER LAW OFFICES, P.C., C/O: AMY L. BREWER, ESQ., PO BOX 2309,
BRECKENRIDGE, CO, 80424 (For Claimant)
DWORKIN, CHAMBERS, WILLIAMS,, Attn: DAVID J. DWORKIN, ESQ., C/O: YORK,
BENSON & EVANS, P.C., 3900 EAST MEXICO AVE, STE 1300, DENVER, CO, 80210 (For
Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-884-343-03

IN THE MATTER OF THE CLAIM OF

LUCRETIA WILCOX,

Claimant,

v.

FINAL ORDER

JHCI HOLDINGS,

Employer,

and

ZURICH AMERICAN INSURANCE
COMPANY,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated July 1, 2013, that denied and dismissed the claimant's claim for workers' compensation benefits. We affirm the ALJ's order.

A hearing was held on the issues of compensability, medical benefits and whether benefits should be reduced by 50 percent for willfully misleading the employer. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant was employed as an on-site truck driver for the employer. On February 17, 2012, at approximately 2:45 a.m., the claimant allegedly sustained an injury to her right shoulder while closing the door of a trailer at work. The claimant reported the incident to her supervisor, Mr. Rivers. The claimant did not request medical care but sought to go home. At about 5:15 a.m. on this date, the claimant visited the Lutheran Emergency Room because of severe right shoulder pain. The claimant reported that she was lifting a 100 gallon fish tank and experienced a burning sensation down her right arm. The doctor suspected a right rotator-cuff tear and referred the claimant to her personal physician, Dr. Maybach. The claimant visited Dr. Maybach later that day and again reported that she had injured her right shoulder after moving a heavy fish tank four days earlier.

The claimant had a prior workers' compensation injury to her right shoulder with a different employer in 2008. The claimant was placed at maximum medical improvement

(MMI) for this injury with permanent work restrictions of no lifting in excess of 15 pounds, occasional reaching away from the body and occasional overhead reaching with the right arm. The claimant settled this claim on a full and final basis. Rivers, and co-worker Jim Horton, testified at hearing that the claimant had difficulties performing her job with the respondent employer because her right shoulder would pop in and out from the old injury and prior surgery.

On February 21, 2012, the claimant visited Dr. Erickson for an evaluation. Dr. Erickson treated the claimant for the 2008 workers' compensation injury. Dr. Erickson stated that the claimant's "case was closed, but she was still having significant difficulties." Referring to the 2008 injury, Dr. Erickson further stated that, "I believe that her current problems are a continuation of her work injury." Dr. Erickson continued that, "as the patient never reached a point where her shoulder was functioning anywhere close to normal and still painful, I believe that she was placed at MMI without justification and that her condition, even while she attempted to continue working, has progressed. I believe her current condition is definitely related to her prior work injury." On February 22, 2012, the claimant prepared a statement for the respondent employer reiterating that her right shoulder condition was an old injury and that she was recently advised that she required shoulder replacement surgery and that this was not the responsibility of the respondent employer.

On May 4, 2012, Dr. Erickson authored a letter in which he stated that he had changed his opinion and that the claimant actually sustained all of the damage to her shoulder while performing work activities for the respondent employer. Dr. Erickson later stated on August 14, 2012, that there had been a significant error with the claimant's clinical history because the claimant's friend had erroneously completed registration sheets. In Dr. Erickson's opinion, the February 17, 2012, incident actually "caused a severe aggravation, requiring joint replacement."

The claimant testified at hearing that she initially told medical providers that she injured her right shoulder while lifting a fish tank because she did not want to be treated by workers' compensation. The claimant also stated that she told Dr. Erickson about trailer door incident but that Dr. Erickson initially attributed her condition to the prior work injury because the claimant's roommate's daughter incorrectly completed her registration paperwork.

Dr. Shih conducted an independent medical examination of the claimant and noted the numerous discrepancies in the claimant's explanation of her right shoulder symptoms. According to Dr. Shih, the medical records were inconsistent regarding the mechanism of the claimant's right shoulder injury and he was unable to attribute the right shoulder symptoms to the February 17, 2012, incident.

The ALJ found the opinion of Dr. Shih more credible and persuasive than the opinion of Dr. Erickson and the testimony of the claimant. The ALJ, therefore, concluded that the claimant failed to demonstrate that her employment duties on February 17, 2012, aggravated, accelerated or combined with her pre-existing right shoulder condition to produce the need for medical treatment.

On appeal the claimant asserts that the ALJ erred in his determination to deny the claim. The claimant argues that the respondents conceded there was an incident on February 17, 2012, and that the evidence compels a conclusion that the claimant aggravated her pre-existing shoulder condition on this date. We are not persuaded the ALJ erred.

As the claimant correctly points out, a pre-existing condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (1997).

The ALJ is charged with making pertinent factual determinations, including those concerning liability for benefits, under a preponderance of the evidence standard. Section 8-43-201, C.R.S. Under this standard, the ALJ assesses the credibility of the witnesses, the weight of the evidence, and determines whether the burden of proof has been satisfied. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). It is solely for the trier of fact to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. *Id.*

Because the question of whether the claimant met her burden to prove compensability is factual in nature, we are bound by the ALJ's determinations in this regard if they are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This standard of review requires us to consider the evidence in the light most favorable to the prevailing party and defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Panera Bread, LLC v. Industrial Claims Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006). We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

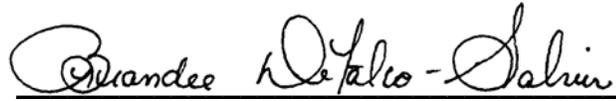
Here, the ALJ determined that the claimant failed to prove she sustained an injury at work on February 17, 2012. The ALJ's order reflects that he considered the claimant's explanations as to how she injured her right shoulder and the discrepancies in her reporting of the alleged injury and that he rejected those explanations. In rejecting the claimant's testimony and Dr. Erickson's opinion, the ALJ's order pointed out the numerous inconsistencies in the claimant's version of events. It was for the ALJ to resolve any inconsistencies and assign such weight and credibility as the ALJ determined was appropriate. *See Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993). The mere fact the evidence might support a different result affords no basis for relief on appeal. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). We may not interfere with the ALJ's decision to credit the testimony of witnesses unless, in extreme circumstances, the testimony is overwhelmingly rebutted by such hard certain evidence the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). That is not the case here.

The claimant contends that the respondents conceded at hearing that her injury occurred at work. The respondent's attorney, however, stated at hearing, "Respondents concede that she sustained an *incident* at work," with the trailer door. February 19, 2013, Tr. at 17 (*emphasis added*). Contrary to the claimant's assertion, we do not understand the respondents to have conceded that the claimant sustained an *injury* as a result of this incident and that was the issue for ALJ's resolution. *See City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967) (no benefits flow to the victim of an industrial accident unless the accident results in a compensable injury.)

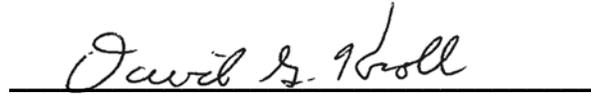
We conclude that the ALJ's dispositive findings are supported by substantial evidence and that the ALJ did not abuse his discretion in making his findings. The ALJ's findings, in turn, support his decision to deny the claimant's claim for benefits and we perceive no basis upon which to disturb the order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated July 1, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Handwritten signature of Brandee DeFalco-Galvin in cursive script, written above a horizontal line.

Brandee DeFalco-Galvin

Handwritten signature of David G. Kroll in cursive script, written above a horizontal line.

David G. Kroll

CERTIFICATE OF MAILING

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

_____ 1/23/2014 _____ by _____ RP _____ .

LUCRETIA WILCOX, 8511 FRANKLIN STREET, DENVER, CO, 80229 (Claimant)
ZURICH AMERICAN INSURANCE COMPANY, Attn: SHARON CAMARA, C/O:
GALLAGHER BASSETT INSURANCE COMPANY, P O BOX 4068, ENGLEWOOD, CO,
80155 (Insurer)
DARRELL S. ELLIOTT, P.C., Attn: ROBERT F. JAMES, ESQ., 1600 PENNSYLVANIA
STREET, DENVER, CO, 80203 (For Claimant)
THE KITCH LAW FIRM, Attn: MARSHA A. KITCH, ESQ., 3064 WHITMAN DRIVE,
SUITE 200, EVERGREEN, CO, 80439 (For Respondents)

13CA1748 Western States Fire v ICAO 03-27-2014

COLORADO COURT OF APPEALS

DATE FILED: March 27, 2014
CASE NUMBER: 2013CA1748

Court of Appeals No. 13CA1748
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-891-495

Western States Fire Protection/API Group, Inc. and Ace American Insurance Company,

Petitioners,

v.

Industrial Claim Appeals Office of the State of Colorado and Paul Olsen,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE ASHBY
Casebolt and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced March 27, 2014

Thomas Pollart & Miller LLC, Brad J. Miller, Greenwood Village, Colorado, for
Petitioners

No Appearance for Respondent Industrial Claim Appeals Office

The Eley Law Firm, P.C., Clifford E. Eley, Denver, Colorado, for Respondent
Paul Olsen

In this workers' compensation action, employer Western Fire

Protection Group, Inc., and its insurer, ACE American Insurance Company (collectively employer), seek review of the final order of the Industrial Claim Appeals Office (Panel), which affirmed the decision of the administrative law judge (ALJ) awarding claimant, Paul Olsen, medical benefits and temporary total disability (TTD) benefits. The ALJ found claimant sustained an occupational disease to his back as a result of sitting in and driving employer's pick-up truck. Because we conclude that substantial evidence in the record supports these factual findings, we affirm.

I. Background

Claimant worked for employer as a NICET Level 3 fire life safety technician from January 12 through June 29, 2012. Employer issued claimant a company truck – a 2004 Chevrolet Colorado with approximately 180,000 miles on it – to drive from his home in Bailey, Colorado, to employer's office in Fort Collins, and to his clients' locations in northern Colorado and southern Wyoming. Claimant testified that he "repeatedly" complained to employer that the truck's driver's seat was uncomfortable and "very well worn," that the truck's "suspension was extremely rough," and that the

more he drove the truck “the more it hurt [his] back.”

Claimant first noticed the back pain about a month after he commenced working for employer and driving the truck. Claimant testified that his back pain generally resolved itself after he got out of the truck and moved around. But, on June 29, 2012, after driving the truck approximately 400 miles and conducting a nearly two-hour conference call from the driver’s seat while the truck was parked on the side of the road, he experienced “extreme” back pain and required his wife’s assistance to get out of the truck. Since that date, claimant has not been able to return to work.

Employer contested claimant’s claim for benefits, arguing that claimant’s condition was preexisting and that the truck seat functioned properly and could not be the cause of claimant’s injury. The ALJ was not persuaded, however, and found that claimant had demonstrated by a preponderance of the evidence that his job duties had caused an occupational disease to his back. The ALJ therefore awarded claimant medical and TTD benefits, which were to continue until “termination thereof is warranted by law.” The Panel determined that substantial evidence supported the ALJ’s

decision and affirmed. This appeal followed.

II. Analysis

Employer contends that there is insufficient evidence to support the ALJ's decision. It argues that the evidence presented can only lead to the conclusion that claimant did not sustain a compensable injury arising out of his employment. It further claims that the evidence overwhelmingly establishes that the truck seat was not defective and therefore could not have caused claimant's occupational disease. We are not persuaded.

A. Governing Law

Under the Workers' Compensation Act, an occupational disease is

a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

§ 8-40-201(14), C.R.S. 2013. An occupational disease arises "from

a prolonged exposure occasioned by the nature of the employment.”
Colo. Mental Health Inst. v. Austill, 940 P.2d 1125, 1128 (Colo. App.
1997).

To prove the existence of a work-related occupational disease, a claimant must establish, by a preponderance of the evidence, that the disease “was directly and proximately caused by the claimant’s employment or working conditions.” *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251, 252 (Colo. App. 1999); *see also Cowin & Co. v. Medina*, 860 P.2d 535, 537 (Colo. App. 1992) (“[A] claimant must establish the existence of a disease, that it was directly and proximately caused by claimant’s employment or working conditions and resulted from exposure to a hazard presented by those conditions, and the extent of the resulting disability.”).

Whether a claimant has met this burden is a question of fact for determination by the ALJ. *See Subsequent Injury Fund v. Indus. Claim Appeals Office*, 131 P.3d 1224, 1228 (Colo. App. 2006) (whether worker’s death was caused by an occupational disease is a question of fact); *Rockwell Int’l v. Turnbull*, 802 P.2d 1182, 1183-84 (Colo. App. 1990) (affirming ALJ’s decision weighing evidence in

claimant's favor). Like the Panel, we may not disturb the ALJ's determination if it is supported by substantial evidence in the record. *See Wal-Mart Stores, Inc.*, 989 P.2d at 252.

B. Substantial Evidence Supports the ALJ's Decision

Employer argues that the evidence established that the truck's seat was not defective and was not a hazard unique to claimant's employment. It is true that an occupational disease must not arise from "a hazard to which the worker would have been equally exposed outside of the employment." § 8-40-201(14); *see also Anderson v. Brinkhoff*, 859 P.2d 819, 823 (Colo. 1993) (noting the statutory elements of an occupational disease).

Here, the ALJ found that claimant had established the statutory elements of an occupational disease, with a last injurious exposure on the day claimant's back condition became disabling. We conclude that the evidence supports this determination.

There is no evidence in the record that claimant was exposed to any other hazard or condition that aggravated his back.

Employer asserts that claimant "would have been equally exposed" to the driving hazard "outside of his employment," but offers no

evidence indicating where else claimant may have been exposed to an uncomfortable seat or other condition that may have contributed to his back injury. The evidence suggests a temporal connection between claimant's back pain and his use of the truck, as both claimant and one of his coworkers testified that claimant began to complain of back pain caused by the seat within a month after he began driving the truck. Claimant also testified that his back, even with evidence of degenerative disc disease, was asymptomatic until he drove the truck. Indeed, it is undisputed that claimant's severe and debilitating back pain commenced immediately after a particularly lengthy drive in the truck. This evidence supports the ALJ's determination that the seat caused his occupational disease.

Contrary to employer's contention, the lack of definitive evidence establishing that the seat was defective does not preclude compensation. We know of no authority, and employer has not pointed to any, mandating that claimant prove the seat was defective before benefits can accrue. As explained by a physician retained by claimant, Dr. Jeffrey Kleiner, a seat need not malfunction to be the cause of back pain; the seat could be the

source of the problem simply because it did not provide the right support for claimant “and his body habitus.”

Moreover, despite employer’s insistence that the evidence did not establish that the seat was defective, the ALJ concluded, with record support, that the tests conducted on the seat were inadequate and unpersuasive. An occupational therapist who examined the seat at employer’s request only analyzed if the seat’s mechanisms functioned; she did not drive the vehicle, observe how the seat fit claimant, or check its suspension or springs. Claimant was not present for any of the seat testing.

Employer’s own medical expert, Dr. Lawrence Goldman, testified that because claimant was not present for any of the testing of the seat, the tests did not meet his criteria or recommendation for an ergonomic evaluation. And, as Dr. Kleiner explained, because “everyone’s different,” an individual can sustain an injury “from things which wouldn’t hurt other people who are not susceptible.” Thus, Dr. Kleiner concluded, a normal, non-defective seat could cause a worker to sustain an injury like claimant’s. The record thus amply supports the ALJ’s conclusion

that the seat caused claimant's injury.

Nor are we persuaded to reach a different result by employer's suggestion that, henceforth, employers may be liable for an occupational disease to anyone who drives a couple of hours per day. In our view, this outcome is specific to the facts of this case, and the determination that the seat was a hazard to this claimant is supported by the evidence presented to the ALJ. Any future claim for back pain caused by a car's seat would have to be evaluated on the totality of circumstances unique to that case and the credibility of the evidence weighed by an ALJ on its own merits. *See Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (appellate court defers to the ALJ's credibility determinations and resolution of conflicts in the evidence, including the medical evidence).

Finally, to the extent employer contends that the evidence does not support the conclusion that claimant sustained an injury, we note that the evidence here, too, amply supports the ALJ's factual determination. In particular, Dr. Kleiner testified and opined that because claimant's back pain became symptomatic after driving the

truck, it was medically probable that the truck's seat caused claimant's back injury. Although Dr. Goldman testified that it was only possible, but not medically probable, that the seat was the culprit, the ALJ was free to weigh the credibility of the physicians' testimony. Doing so, the ALJ exercised his discretion when he concluded that Dr. Goldman's opinion was less credible and persuasive than that of Dr. Kleiner. *See Rockwell Int'l*, 802 P.2d at 1183 (“[T]he weight to be accorded to [expert] testimony is a matter exclusively within the discretion of the [ALJ] as fact-finder.”).

Because the weight and credibility given expert witnesses is within the ALJ's sound discretion, such findings “may not be disturbed absent a showing that the ALJ's credibility determination is ‘overwhelmingly rebutted by hard, certain evidence’ to the contrary.” *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 224 (Colo. App. 2008) (quoting *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000)). Consequently, we may not disturb the ALJ's finding that Dr. Kleiner's testimony and opinions were more credible and persuasive than Dr. Goldman's.

Because substantial evidence supports the ALJ's factual

findings and conclusions, we cannot set aside the ALJ's decision. See § 8-43-308, C.R.S. 2013; *Wal-Mart Stores, Inc.*, 989 P.2d at 252 (where substantial evidence supported ALJ's determination that claimant's neck problems were work-related, decision would not be disturbed). Accordingly, we conclude that the Panel committed no error when it affirmed the ALJ's order awarding claimant medical and TTD benefits. See § 8-43-301(8), C.R.S. 2013.

The order is affirmed.

JUDGE CASEBOLT and JUDGE RICHMAN concur.