

# **BROWN BAG SEMINAR**

**Thursday, April 18, 2013**

(third Thursday of each month)

Noon - 1 p.m.

633 17<sup>th</sup> 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 16, 2013 through April 12, 2013

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**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-875-956

IN THE MATTER OF THE CLAIM OF

ALEXANDER ALEMAN,

Claimant,

v.

ORDER

TOWN HOLDINGS, INC.,

Employer,

and

SELF-INSURED,

Insurer,  
Respondent.

The respondent seeks review of an order of Administrative Law Judge (ALJ) Walsh dated October 18, 2012, that determined the claimant sustained a compensable injury and awarded medical and temporary disability benefits. We modify the order to reflect the parties' stipulation concerning temporary total disability (TTD) benefits from December 4 through December 5, 2011, set aside and remand for further findings on the ALJ's award of TTD from April 5, 2012 and continuing, and otherwise affirm the ALJ's order.

A hearing was held on the issues of compensability, medical and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of our order can be summarized as follows. The claimant was employed by the respondent as a valet supervisor since approximately September 12, 2011. The claimant's duty location was at a local hospital. While the claimant was on duty on or about October 12, 2011, a heavy concrete pillar barrier was knocked over by a car in the parking lot. The barrier created an obstruction to the respondent's business and the claimant proceeded to lift the pillar up and move it back into place. When the claimant lifted the barrier he felt pain and a burning sensation in his lower back. Initially he believed that the pain he felt was temporary and would heal given sufficient time.

While working the following week, on or about October 18, 2011, the claimant pushed a stalled vehicle to move it out of the way. At this time the pain from moving the pillar had not resolved; nonetheless, the claimant pushed the vehicle and felt pain in his

back as a result. The claimant's version of events was corroborated by Kassandra Marin, a co-employee of the claimant during October 2011, who witnessed the claimant moving the pillar and was aware of the stalled vehicle and the claimant's subsequent back complaints. Nathan Holgreen, also an employee of the respondent, testified that around mid-October 2011, the claimant's activity slowed and he appeared to be in intense pain.

The claimant continued working from October 19, 2011 until November 30, 2011, when he went to the emergency room at Penrose Hospital because he noticed blood in his urine. He also reported back pain on this date. The claimant was given pain medication and released from care. The claimant was also released from work on this date. The claimant returned to Penrose Hospital on December 1, 2011, complaining of low back pain for the prior two months. The claimant was diagnosed with sciatica and referred to the Colorado Spine Center and released from work. The claimant was seen by Physician's Assistant, Joseph Mullen, at the Colorado Spine Center on December 6, 2011, who noted that the claimant had acute low back pain. Mr. Mullen gave the claimant a prescription for Percocet and referred him for epidural steroid injections and an MRI. The claimant was given three steroid injections between January and February of 2012, receiving temporary relief for three to four weeks.

In early January the claimant went to speak with his supervisor Darren Kiefer, about his injury and job status. Mr. Keifer informed the claimant that if he was not able to return to full duty, without restrictions, his employment would be terminated. Following this discussion, the claimant went to see Mr. Mullen and requested that he be released to work without restrictions. Mr. Mullen provided the release dated January 11, 2012, although the claimant testified that Mr. Mullen was reluctant to do this. After this date, the claimant had difficulties getting to work on time because the medicine he was taking for his back caused him not to wake up on time. The claimant was given written discipline warnings which stated that the claimant was late to work or missed work because of his back injury and also that the claimant was not able to perform the work duties because of back pain. The claimant was terminated on April 5, 2012.

The ALJ found the claimant's testimony concerning compensability credible and found that the claimant sustained an injury to his back arising out of the course and scope of employment on October 12, 2011, and that this injury was exacerbated on or about October 18, 2011. The ALJ also found, however, that the claimant did not report the injury until January 11, 2012 and, therefore, the medical treatment the claimant received from October 12, 2011 through January 11, 2012, was not authorized by the respondent. With regard to TTD, the ALJ determined that the claimant missed time from work from November 30, 2011, through January 11, 2012, as a result of his work related injury and that the claimant was entitled to TTD for this period. The ALJ went on to find that the claimant's wage loss for the time missed from work from April 5, 2012, and ongoing is

a result of his disability caused by his work-related injury and the respondent failed to show that the claimant was responsible for his termination.

On appeal the respondent argues that substantial evidence does not support the ALJ's compensability determination. The respondent also contends the ALJ erred in awarding TTD benefits for December 4 through December 5, 2011 and beginning April 5, 2012 and continuing. We affirm the ALJ's compensability determination, modify the ALJ's award of TTD from December 4 through December 5, 2011, and set aside and remand the ALJ's award of TTD from April 5, 2012, and continuing.

I.

The respondent first contends that several of the ALJ's findings of fact concerning compensability are not supported by substantial evidence. We disagree.

The question of whether the claimant proved an injury proximately caused by the employment is one of fact for determination by the ALJ. Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claims Appeals Office*, 989 P.2d 251 (Colo. App. 1999). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*. Testimony is not incredible as a matter of law absent extreme circumstances where the testimony is rebutted by such hard, certain evidence that 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). Nor is testimony incredible as a matter of law merely because it is inconsistent or conflicts with other evidence. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001). Further, to the extent the testimony of a witness is internally inconsistent, or subject to conflicting inferences, the ALJ may resolve the inconsistency by crediting part or none of the testimony. *Johnson v. Industrial Claim Appeals Office*, 973 P.2d 624 (Colo. App. 1997).

The respondent specifically contends that the ALJ erred in finding that the claimant lifted the two concrete posts on October 12, 2011. The respondent submits it is impossible to believe that the claimant could, or did, lift the two concrete posts. It is true that other witnesses contradicted the claimant's version of events and alleged that the concrete posts weighed in excess of 500 pounds. The ALJ, however, was not persuaded by this testimony. Moreover, in addition to the claimant's testimony that he did indeed lift the posts, the ALJ also relied on the testimony of Marin who testified that she witnessed the posts being moved by the claimant. Thus, we cannot say that the claimant's testimony was contradicted by such hard, certain evidence that the ALJ erred as a matter

of law in giving it credit.

The respondent also alleges that the ALJ erred in finding an injury occurred in view of the contemporaneous medical records that fail to mention that the claimant reported the incidents of moving the concrete pillars or the stalled car as the cause of his back pain. The respondent's assertion notwithstanding, the ALJ credited the claimant's testimony that the incidents involving the concrete pillars and the stalled car were the cause of his pain complaints and his reason for seeing the medical providers. Claimant Exhibit 2 at 14 ("...feels he could of hurt himself at work" and "The patient seems to have inflamed his right SI joint while either working or during ADL."); Claimant Exhibit 4 at 35. Although the evidence could have been construed differently, in our view it was plausible for the ALJ to infer that claimant's complaints of pain to medical providers during the time of the incidents supported the claimant's injury allegations. Consequently, we have no basis to disturb the ALJ's order. *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).

## II.

The respondent appeals the ALJ's award of TTD from December 4 through December 5, 2011, because the claimant did not endorse the issue of TTD for these dates. In his brief in opposition to petition to review the claimant stipulates that he did not endorse the issue of TTD for these dates. Brief in Opposition at 13. The ALJ, therefore, erred in awarding TTD for this time period and we modify the ALJ's award of TTD to reflect the parties' stipulation.

The respondent also asserts that it is undisputed that the claimant was released to regular employment on January 11, 2012, thereby compelling the termination of TTD as of that date. We conclude that additional findings are necessary. *See* §8-43-301(8), C.R.S., (panel may remand when findings of fact are insufficient for appellate review); *see also Regional Transportation District v. Jackson*, 805 P.2d 1190 (Colo. App. 1991) (factual findings are sufficient if they identify the evidence ALJ deemed persuasive and determinative of issues).

Section 8-42-105(3)(c), C.R.S., provides that the claimant's right to TTD ceases when the "attending physician gives the employee a written release to return to regular employment." If multiple authorized treating physicians offer conflicting opinions concerning the claimant's ability to perform regular employment, or a single authorized treating physician issues conflicting or ambiguous opinions, the ALJ may resolve the issue as a matter of fact. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999).

Here, although Mr. Mullen released the claimant to return to regular employment, we cannot discern from the ALJ's decision what weight, if any, he gave to Mr. Mullen's January 11, 2012, release to regular duties. Claimant Exhibit 11 at 94. It could be, as the claimant implies, that the ALJ found Mr. Mullen's release was ambiguous because as the claimant testified, it was clear that Mr. Mullen did not want to give the claimant a work release and only did so reluctantly. Tr. at 38-39, Order at 4-5 ¶ 12. However, that is for the ALJ to determine. Since this issue is factual in nature, it is the ALJ's responsibility to determine the weight and credibility of the testimony, as well as the inferences to be drawn from the evidence. We may not substitute our judgment for his concerning these matters. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); Section 8-43-301(8), C.R.S. Nor should we be understood as expressing any opinion concerning the credibility of the claimant or the proper inference to be drawn from Mr. Mullen's January 11, 2012, report.

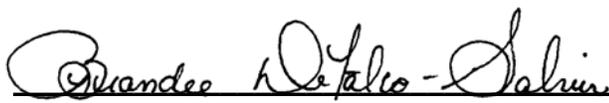
Therefore, on remand the ALJ must enter findings of fact concerning the provisions of §8-42-105(3)(c), C.R.S. and the effect of Mr. Mullen's release of the claimant to regular duties as of January 11, 2012.

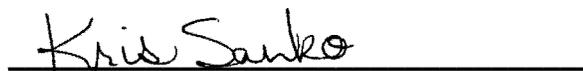
**IT IS THEREFORE ORDERED** that the ALJ's order dated October 18, 2012, is modified to reflect the parties' stipulation on TTD from December 4 through December 5, 2011.

**IT IS FURTHER ORDERED** that the ALJ's award of TTD after April 5, 2012, and continuing, is set aside and remanded for further findings and entry of an order consistent with the views expressed herein.

**IT IS FURTHER ORDERED** that the ALJ's order is otherwise affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

ALEXANDER ALEMAN

W. C. No. 4-875-956

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CERTIFICATE OF MAILING

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

\_\_\_\_\_ 3/25/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

ALEXANDER ALEMAN, 6377 FIRESTAR LANE, COLORADO SPRINGS, CO, 80918  
(Claimant)

TOWN HOLDINGS, INC., Attn: DARREN KIEFFER, ONE PARK PLACE, SUITE 200,  
ANNAPOLIS, MD, 21401 (Employer)

THE LAW FIRM OF JARAY & WEBSTER, LLC, Attn: DAVID J. WEBSTER, ESQ., 985  
PICO POINT, COLORADO SPRINGS, CO, 80905 (For Claimant)

RUEGSEGGER SIMONS SMITH & STERN, LLC, Attn: CRAIG R. ANDERSON, ESQ., 1401  
17TH STREET, SUITE 900, DENVER, CO, 80202 (For Respondents)

GALLAGHER BASSETT SERVICES, INC., Attn: ANN ADKINS, 7935 EAST PRENTICE  
AVE., SUITE 305, ENGLEWOOD, CO, 80111 (Other Party)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-740-818-02

IN THE MATTER OF THE CLAIM OF

ALICE CASIAS,

Claimant,

v.

ORDER

INTERSTATE BRANDS CORPORATION,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Friend (ALJ) dated September 20, 2012, that ordered the claimant's average weekly wage (AWW) increased pursuant to §8-40-201(19), C.R.S. for the replacement cost of continuing the claimant's health insurance coverage. We set aside the ALJ's order regarding the increase of the claimant's AWW for the continuation cost of the employer's health insurance plan and remand for further findings and an order on the claimant's AWW based on the cost of conversion to a similar or lesser insurance plan. In all other respects, we affirm the ALJ's order.

The claimant sustained a compensable injury on August 15, 2007. The claimant reached maximum medical improvement (MMI) on February 19, 2008. The respondent insurer filed a final admission of liability (FAL) on March 20, 2008, admitting for the AWW of \$350.70. The respondent insurer also admitted liability for temporary total and permanent partial disability benefits.

The claimant's health insurance coverage with the respondent employer was terminated on February 29, 2008. A COBRA letter was mailed to the claimant on April 11, 2008, which stated that the monthly cost of continuing health insurance coverage was \$636. The claimant did not realize the significance of the letter.

A hearing ultimately was held before ALJ Henk on February 4, 2009, on the issue of permanent total disability (PTD) benefits. AWW was not an issue, and the parties

reserved the issue of the amount of the Social Security offset. ALJ Henk awarded PTD benefits at the rate of \$233.80 per week subject to Social Security retirement benefits offset pursuant to §8-42-103(1)(c)(II)(A), C.R.S. The order reserved all matters not resolved for future determination.

The respondent insurer filed a FAL on June 16, 2009, admitting liability for PTD benefits subject to a Social Security offset. The respondent insurer stated that the claimant's AWW was \$350.70. The claimant requested a lump sum payment on June 26, 2009.

The respondent insurer filed another FAL on July 15, 2009, again stating that the claimant's AWW was \$350.70. The respondent insurer admitted liability for PTD benefits from February 19, 2008, to May 30, 2008, at the rate of \$237.11 per week and from July 15, 2008, at the rate of \$19.75 per week.

The respondent insurer then filed a petition to reopen on July 16, 2009, for error or mistake on the issue of the correct calculation of the respondents' offset for the claimant's Social Security disability benefits. The claimant filed a response and did not endorse the issue of AWW. The parties eventually entered into a stipulation and submitted a Stipulated Motion Regarding Social Security Offset Amount. The parties agreed that the respondents were entitled to an overpayment in the amount of \$6,353.88 for benefits paid and that the respondents could reduce the claimant's weekly benefits to zero until any overpayment was paid in full. This stipulation did not meet the requirements of a settlement under §8-43-204, C.R.S. or W.C. Rule 7.2.

The respondent insurer filed another FAL on September 11, 2009, stating that the claimant's AWW was \$350.70. The FAL noted that the insurer was taking a Social Security offset of \$6,353.88 through August 16, 2009, per the parties' stipulation. The claimant did not file an objection to the FAL.

Counsel for the claimant eventually received a copy of the COBRA letter that previously had been mailed to the claimant. The claimant's counsel mailed a copy to the respondents' counsel on January 24, 2012. The ALJ found that there was no evidence that either counsel was aware that the claimant had received health insurance benefits from the respondent employer prior to this time.

On May 18, 2012, the claimant then filed an application for hearing on the issue of AWW or on the improper calculation of a fringe benefit. In the application, the claimant asserted that the improper calculation was based on COBRA, and she attached the COBRA letter to her application. The claimant requested that an adjustment be made in the disability rate.

After hearing, ALJ Friend issued his order finding and concluding that the claimant's AWW was an error or mistake. ALJ Friend therefore increased the claimant's

AWW for the replacement cost of the claimant's health insurance, or from \$350.70 to \$497.47. ALJ Friend rejected the respondents' defense that there was no jurisdiction to reopen because the claimant failed to file a petition to reopen as required by W.C. Rule 7-3. ALJ Friend determined that the rule does not present a jurisdictional bar to reopening a closed claim. ALJ Friend then found and concluded that the claimant's AWW was an error or mistake on the part of both parties and that such error or mistake justified reopening the claimant's claim. ALJ Friend also rejected the respondents' argument that the claimant waived her right to object to the calculation of AWW and benefits by failing to object to the FALs and by entering into the previous stipulations with the respondents.

### I.

On review, the respondents argue that ALJ Friend erred in reopening the claimant's claim. The respondents contend that the claimant's claim was closed as a matter of law under §8-43-203(2)(b)(II), C.R.S. when she failed to object to the respondents' FAL. The respondents also contend that the claimant did not file a petition to reopen or assert any basis for reopening of the claim. We perceive no error.

Section 8-43-303, C.R.S. specifically provides that within six years after the date of injury, an ALJ may reopen an award of the ground of error or mistake:

At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition, except for those settlements entered into pursuant to section 8-43-204 in which the claimant waived all right to reopen an award.

...

*See also* §8-43-203(2)(b)(II), C.R.S. (where claimant fails to object to FAL, issues admitted in the FAL are automatically closed and claimant is barred from obtaining further benefits in the absence of an order reopening claim under § 8-43-303, C.R.S.); *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo. App. 1994).

ALJs have very broad discretion in deciding whether to reopen a claim for the adjustment of benefits previously awarded. *E.g.*, *Wallace v. Industrial Commission*, 629 P.2d 1091 (Colo. App. 1982) (reopening statute is purely permissive and vests broad discretion regarding whether to reopen); *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996) (ALJ's authority to reopen is broad); *see also Ward v. Azotea Contractors*, 748 P.2d 338, FN 5 (Colo.1987)(petitioner's application for a hearing was effectively a petition to reopen; regardless, a petition to reopen is not a statutory requirement but, rather, it serves to call the matter to the director's attention, section 8-53-119 contemplates that a decision to reopen will be predicated on the director's own motion); *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo.

1985). The reopening statute is informed by a legislative policy that favors a just result over the interest of the litigants in a final resolution of the claim. *Padilla v. Industrial Commission, supra*.

Here, it is undisputed that the claimant did not object to the respondents' September 11, 2009, FAL and she also did not file a formal petition to reopen. We conclude, however, that this did not preclude ALJ Friend from reopening this case for a redetermination of the claimant's AWW. Section 8-43-303, C.R.S. specifically vests broad discretion in an ALJ to reopen a claim on the grounds of an error or mistake provided that a settlement has not been entered into pursuant to §8-43-204, C.R.S. in which the claimant waived all right to reopen. *Ward v. Azotea Contractors, supra*. Additionally, it is well settled that §8-43-303, C.R.S. does not mandate the filing of a formal petition to reopen in order to confer jurisdiction on an ALJ to determine whether, in fact, a claim should be reopened. *Ward v. Azotea Contractors, supra; Padilla v. Industrial Commission, supra; Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986) (ALJ not required to dismiss petition to reopen where claimant failed to file accompanying medical report which complied with requirements of Rule); *Gardner v. Noreen*, W.C. No. 4-756-007-03 (Feb. 22, 2012)(while courts have held procedural rules governing filing of petitions to reopen may be enforced, they have not held such rules erect jurisdictional barriers to adjudicating reopenings where the rules have not been complied with).

We further note that in their brief in support, the respondents do not allege that they did not have notice of the disputed issues to be considered at the hearing or that they were unable to present a defense to such issues. For instance, in her application for hearing, the claimant listed as issues to be considered the improper calculation of AWW, and an increase of disability benefits due to COBRA. The claimant also attached the claimant's COBRA letter to her application for hearing. Ex. A at 25. Additionally, during the hearing, the respondents presented their defenses to the claimant's argument that her AWW should be increased based on the replacement cost of health insurance. The respondents presented evidence that the claimant did not object to the respondents' FALs or file a petition to reopen, that the claimant did not previously object to the calculation of her AWW or that she previously entered into stipulations which would have implicated her AWW. Tr. at 14, 16-17, 27-30, 33-38. Thus, the claimant's failure to file a formal petition to reopen did not constitute a legal impediment to her lodging a challenge to the alleged improper computation of AWW. *See* §8-43-303 C.R.S.; *Osborne v. Industrial Commission, supra; Gardner v. Noreen, supra*. As such, we conclude that ALJ Friend correctly determined he had jurisdiction to decide whether there was error or mistake and whether such error or mistake justified reopening the claimant's claim.

II.

Next, the respondents argue that the claimant is not entitled to the cost of COBRA continuation because she is eligible for a similar or lesser insurance plan and she is a Medicare beneficiary. The respondents further argue that the claimant waived any right to request an increase in AWW for the cost of replacement insurance. The respondents reason that the claimant never challenged the respondents' calculation of AWW after receiving the COBRA letter in April 2008, and she entered into two separate stipulations regarding her entitlement to PTD benefits and the rate at which those benefits should be paid. We conclude that ALJ Friend erred in increasing the claimant's AWW based on the replacement cost of continuing the employer's health insurance plan. We instead conclude that the claimant is entitled to recover the cost of converting to a similar or lesser insurance plan as set forth in §8-40-201(1)(b), C.R.S. and her AWW should be adjusted accordingly.

As noted above, reopening a claim under §8-43-303 C.R.S. may be based on an error or mistake. *Renz v. Larimer County School District Poudre R-1, supra*. The reopening authority granted ALJs by §8-43-303, C.R.S. "is permissive, and whether to reopen a prior award when the statutory criteria have been met is left to the sound discretion of the ALJ." *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002). The party seeking reopening bears "the burden of proof as to any issues sought to be reopened." Section 8-43-303(4), C.R.S.

In *Schelly v. Industrial Claim Appeals Office*, 961 P.2d 547 (Colo. App. 1997), the claimant was permanently totally disabled. She argued that her wages should include the cost of the employer-paid health care based on the value provided to her in exchange for services she rendered to the employer at the time of the injury. The claimant chose to continue her employer-provided health insurance pursuant to COBRA. The employer initially agreed to increase the claimant's average weekly wage to reflect the increased cost of purchasing individual coverage. The claimant, however, failed to purchase any individual coverage when the COBRA continuation period expired, and the employer reduced her AWW to the original figure which did not include the cost of any COBRA insurance. In the interim, the claimant became entitled to coverage under Medicare. The Court held that AWW includes the cost to the claimant of converting to a similar or lesser plan upon termination of the continuation period, not the employer's cost of health insurance at the time of the injury. *Id.* at 549. The Court stated that §8-40-201(19)(b), C.R.S. was enacted "to insure that a disabled claimant would have access to funds for the purchase of 'similar or lesser' health insurance regardless of whether the cost was more or less than the cost of employer-provided insurance." *Id.* The Court explained that the claimant's AWW is determined by reference to § 8-40-201(19)(b), C.R.S. which provides that: "The term 'wages' shall include the amount of the employee's cost of continuing the

employer's group health insurance plan and, upon termination of the continuation, the employee's cost of conversion to a similar or lesser insurance plan....”

Here, we conclude that the holding in *Schelly* is dispositive. During the hearing, the claimant testified that while she worked for the respondent employer she had a supplemental health insurance policy, and she also was a Medicare beneficiary since 1997. Tr. at 8-9, 14. ALJ Friend found that claimant’s health insurance coverage terminated on February 29, 2008. Findings of Fact at 2 ¶3. As noted above, §8-40-201(19)(b), C.R.S. specifically provides that “[t]he term ‘wages’ includes the amount of the employee’s cost of continuing the employer’s group health insurance plan and, upon termination of the continuation, the employee’s cost of conversion to a similar or lesser insurance plan. . . .” Similar to *Schelly*, since the claimant was on Medicare, or a similar or lesser insurance plan at the time her supplemental health insurance policy with her employer terminated on February 29, 2008, we conclude that her AWW includes the cost of converting to such similar or lesser plan, not the employer's cost of health insurance at the time of the injury. We further note that the COBRA letter sent to the claimant stated that her continuation coverage ends under a number of circumstances, including the point she becomes entitled to Medicare coverage. Since the claimant was enrolled in Medicare, the relevant inquiry then is not the cost of “continuing” her supplemental health insurance policy but, rather, the cost of “converting” to a similar or lesser plan. In *Industrial Claim Appeals Office v. Ray*, 145 P.3d 661, 668 (Colo. 2006), the Court held that it is possible for a claimant to “convert” to another form of health care benefits such as Medicare without actually purchasing “continuing” coverage as defined by COBRA.

Since ALJ Friend made no findings regarding the cost to the claimant of converting to the similar or lesser plan, we remand for further findings and an order on this issue. We note that in their brief in support, the respondents allege that the claimant is enrolled in Part A Medicare coverage. Brief In Support at 16. In their position statement, however, the respondents contended that the claimant is enrolled in Part B, C, and D Medicare coverage. Yet, in Exhibit C of their hearing exhibits, it indicates that the claimant is enrolled in Part B Medicare. Consequently, it is necessary for the ALJ to resolve this issue for purposes of correctly calculating the claimant’s AWW. See §8-43-301(8), C.R.S. (Panel may set aside if findings of fact are not sufficient to permit appellate review).

Additionally, we agree with ALJ Friend that the claimant has not waived the right to have her AWW correctly determined. It is well settled that the failure to exercise procedural or appellate rights is not dispositive, and an ALJ may conclude that reopening is appropriate even though a party failed to exercise procedural rights. See *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). The Colorado Supreme Court has reiterated that a “final” award in the context of a workers’ compensation claim means

only that the matter has been concluded unless reopened. The reopening authority vested in the director is indicative of a “strong legislative policy” that the goal of achieving a just result overrides the interest of litigants in obtaining a final resolution of their dispute in workmen's compensation cases. *See Loffland Brothers Co. v. Industrial Claim Appeals Panel*, 770 P.2d 1221 (Colo.1989)(citing *Padilla v. Industrial Commission, supra*). Consequently, the claimant’s previous failure to challenge the respondents’ calculation of AWW and her entering into stipulations regarding the rate at which PTD benefits should be paid, do not preclude the reopening of her claim. As stated above, §8-40-201(19), C.R.S. specifically required that the cost of continuing or conversion of the claimant’s health insurance plan be included in her AWW. Thus, we are not persuaded to disturb ALJ Friend’s order based on this ground.

### III.

The respondents contend that the claimant is estopped from challenging her AWW. The respondents specifically argue that the doctrines of issue preclusion, judicial estoppel, and equitable estoppel prevent the claimant from raising the issue of the improper computation of her AWW. Once again, we are not persuaded.

The doctrines of *res judicata* and collateral estoppel are applicable in administrative proceedings to bar subsequent litigation of an issue of fact which the parties had an opportunity to litigate. *See Industrial Commission v. Moffat County School District RE No. 1*, 732 P.2d 616 (Colo.1987). We previously have rejected, however, application of the principle of *res judicata* to a case involving reopening, based upon the broad discretion afforded in the area of reopening. *Hernandez v. Cattle King Beef Company, supra* (noting that the ALJ had the discretion to reopen *sua sponte* in the absence of a petition to reopen). There is tension between strict application of these preclusive doctrines urged by the respondents and the ALJ’s broad discretion in deciding whether to reopen a claim for the adjustment of benefits previously awarded. *E.g., Wallace v. Industrial Commission, supra* (reopening statute is purely permissive and vests broad discretion regarding whether to reopen); *Renz v. Larimer County School District Poudre R-1, supra*. In our view, however, our resolution of this issue furthers the legislative policy incorporated in the Workers' Compensation Act that favors a just result over the interest of the litigants in a final resolution of the claim. *Padilla v. Industrial Commission*, 696 P.2d 273 (Colo. 1985). Here, ALJ Friend retained the discretion to reopen the claim and to correctly compute the claimant’s AWW. We therefore reject the respondents’ request to apply the doctrines of issue preclusion, judicial estoppel, and equitable estoppel to preclude the ALJ or the claimant from reopening the claim for purposes of correctly calculating her AWW.

**IT IS THEREFORE ORDERED**, that ALJ Friend’s order dated September 20, 2012, is set aside regarding the increase of the claimant’s AWW for the continuation cost of the employer’s health insurance plan.

**IT IS FURTHER ORDERED** that the ALJ's order is remanded for further findings and an order to compute AWW based on the claimant's cost of conversion to a similar or lesser insurance plan, and in all other respects, we affirm the ALJ's order.

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_  
David Kroll

  
\_\_\_\_\_  
Kris Sanko

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 3/25/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

ALICE CASIAS, 940 S BRYANT STREET, DENVER, CO, 80219 (Claimant)  
INTERSTATE BRANDS CORPORATION, Attn: JIM GAGNON, CPCU, AIC, C/O:  
REGIONAL CLAIM MANAGER, 80 EAST 62ND AVENUE, DENVER, CO, 80216  
(Employer)  
ACE AMERICAN INSURANCE COMPANY, Attn: EVELYN RADEMACHER, C/O: ESIS  
PORTLAND WC - CLAIM C780C3863761, P O BOX 6569, SCRANTON, PA, 18505-6569  
(Insurer)  
LAW OFFICE OF O'TOOLE & SBARBARO, P.C., Attn: NEIL D. O'TOOLE, ESQ., 226  
WEST 12TH AVENUE, DENVER, CO, 80204 (For Claimant)  
MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP, Attn: KATHERINE A.  
KELLEY, ESQ., 5600 S. QUEBEC STREET, SUITE C-100, GREENWOOD VILLAGE, CO,  
80111 (For Respondents)  
INTERSTATE BRANDS CORPORATION, Attn: BILL PENDERGAST/JIM GAGNON, 8500  
DURANGO STREET NW, LAKEWOOD, WA, 98499 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-818-579-01

IN THE MATTER OF THE CLAIM OF

ANN FRANCO,

Claimant,

v.

DENVER PUBLIC SCHOOLS,

Employer,

and

SELF INSURED,

Insurer,  
Respondent.

ORDER OF REMAND

The claimant seeks review of an order of Administrative Law Judge (ALJ) Allegretti dated October 15, 2012, that denied additional permanent partial disability (PPD) benefits and determined that the claimant's wrist and shoulder conditions were not causally related to the claimant's work injury. We set aside the ALJ's order on whether the claimant's wrist and shoulder conditions are causally related to the claimant's work injury and remand for further findings and a new order on this issue. If the ALJ determines that the claimant's wrist and shoulder conditions are causally related to the claimant's industrial accident, then the ALJ may also consider whether the claimant's injury was scheduled or non-scheduled. In all other respects, we affirm the ALJ's order.

This matter proceeded to hearing to determine whether the claimant was entitled to PPD benefits based on a whole person impairment rating. Following the hearing, the ALJ found that on December 1, 2009, the claimant was working as a school teacher when she slipped and fell on her left knee in a parking lot. The claimant received authorized treatment through Dr. Dunkle at HealthOne. Dr. Dunkle treated the claimant over several months. It was not until March 2010, however, that the claimant first complained to Dr. Dunkle about her left wrist and left shoulder pain.

The claimant's medical care eventually transferred to Dr. Parsons at HealthOne, whose treatment included the claimant's left wrist and shoulder. Dr. Mason later became the claimant's primary care physician. The claimant underwent surgery on her left wrist. On October 17, 2011, Dr. Mason placed the claimant at maximum medical improvement. Dr. Mason assigned an upper extremity impairment of 23 percent, which would convert to a whole person impairment rating of 14 percent. Dr. Mason rated the claimant's left

knee at 11 percent, which would convert to a four percent whole person impairment rating. The claimant's entire extremity ratings would result in a total whole person impairment rating of 17 percent.

The respondent filed a final admission of liability (FAL) for the extremity ratings. The claimant objected to the FAL and applied for a hearing on PPD benefits and whole person versus scheduled impairment. The respondent's response to the application endorsed PPD benefits as an issue, as well. Near the beginning of the hearing, the parties and the ALJ discussed whether the respondent could litigate causation in relation to the issue of PPD benefits. The ALJ "reserved ruling" on the issue and parties presented their evidence. Tr. at 17-18. The ALJ allowed the parties to take the post-hearing deposition of Dr. Basse and file post-hearing briefs or proposed findings of fact and conclusions of law.

The ALJ determined that absent a Division-sponsored independent medical examination (DIME) she could proceed to determine both causation and the extent of the claimant's impairment. The ALJ ultimately found that the claimant failed to carry her burden to establish nonscheduled injuries. The ALJ also was persuaded that the claimant's upper extremity impairment was not causally related to her work injury. The ALJ therefore denied PPD benefits based on a whole person impairment rating, as well as any PPD benefits related to her wrist and shoulder. The claimant appealed and submitted a brief in support of her petition for review. The respondent has not filed a brief in opposition.

#### I.

The claimant asserts that the respondent is bound by its FAL and, therefore, the ALJ erred by determining whether the claimant's wrist and shoulder conditions were causally related to her industrial injury. We perceive no error on this ground.

As a general rule, once an employer admits liability, it is bound by that admission and must pay benefits accordingly. Section 8-43-203(2)(d), C.R.S.; *see, e.g., Cibola Construction v. Indus. Claim Appeals Office*, 971 P.2d 666, 668 (Colo. App. 1998) (employer admitting liability bound by admission and must pay, accordingly). Moreover, issues admitted to in a filed FAL are closed unless the claimant timely objects. Section 8-43-203(2)(b)(II)(A), C.R.S. In this case, the claimant objected to the respondent's FAL. Thus, any payments would continue according to the admitted liability pending the ALJ's resolution of the matter. Section 8-43-203(2)(d), C.R.S.

In *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), the court of appeals held that an admission of liability may be contested by either party, and that the "determination of the matter thus placed in issue is subject to determination

by the ALJ at the adversary hearing.” *Id.* at 253. The court further stated that the admission is binding only until the controverted issue is determined and the ALJ issues an order. *See Pacesetter v. Collett*, 33 P.3d 1230 (Colo. App. 2001); *see also Rodriguez v. Industrial Claim Appeals Office*, \_\_\_ P.3d \_\_\_ (Colo. App. No. 11CA1868, Aug. 16, 2012). Thus, the respondent may controvert its own admission of liability by timely applying for a hearing or, as here, filing a response to the application for hearing. *See Id.*; *Bauer v. Boulder County*, W.C. No. 4-020-145, (March 22, 1993).

## II.

The claimant further asserts that the respondent could not challenge the propriety of the claimant’s rated impairments absent a DIME. Again, we perceive no reversible error on this ground.

The increased burden of proof required by the DIME procedures is inapplicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that “[w]hen an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8).” Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has stated in this respect that:

Scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of §8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

*Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

## III.

The claimant also challenges the ALJ’s consideration of the causation of her medical conditions on the ground that the respondent failed to properly raise causation as an issue for hearing. The claimant appears to argue that the respondent failed to list causation as an issue on its response to the claimant’s application for hearing. The

claimant further contends that the ALJ was precluded from addressing causation under Office of Administrative Courts Rule 12. Again, we perceive no reversible error.

At hearing, the respondent's counsel advised the ALJ that the respondent was "not moving to withdraw the final admission." Nonetheless, its counsel took the position that it admitted the claimant sustained a compensable, scheduled injury that did not extend to her wrist and shoulder. Tr. at 8. The claimant's counsel asserted that the respondent needed to request a DIME to contest their admissions for extremity ratings. Tr. at 5-6, 9-10. The claimant's attorney also argued that a DIME was necessary before the respondent could challenge causation of the claimant's condition. Tr. at 12. The claimant's attorney referred to the reports of Dr. Basse that indicated the claimant's arm injury was not caused by the claimant's work injury. Tr. at 14. She further asserted that the respondent did not list causation as an issue. Tr. at 14. The respondent's counsel replied that a DIME was not required to challenge the causation of scheduled injuries and asserted that causation was included in the issue of PPD. Tr. at 15-16. In addition, the respondent's counsel represented that he had discussed causation regarding the claimant's upper extremity with the claimant's counsel prior to the hearing. Tr. at 6-8. The claimant's counsel stated at the outset of the hearing that if the issue was heard she would need to ask additional questions of the claimant and Dr. Basse. The ALJ elected not to restrict the scope of testimony and deferred ruling on the claimant's objections. Tr. at 17-18. The parties were allowed to take the post-hearing evidentiary deposition of Dr. Basse. Included in the respondent's exhibits was Dr. Basse's report issued prior to the hearing. Exhibit C. Thus, it appears that the claimant objected to the introduction of causation in relation to the issue of PPD on the basis of formal legal contentions, rather than due to a lack of notice.

As discussed above, the filing of a FAL did not prevent the respondent from challenging the extent of the claimant's permanent partial impairment without first seeking a DIME. *Delaney v. Industrial Claim Appeals Office, supra; HLJ Management Group, Inc. v. Kim, supra*. Additionally, as noted above, in its response to the application for hearing, the respondent listed PPD as an issue to be considered. We agree with the ALJ that under §8-42-107(1)(a), C.R.S., she could determine whether the claimant's industrial injury resulted in permanent impairment. Order at 16. A causal relationship between the permanent impairment and the upper extremity is a prerequisite to an award of PPD benefits. Section 8-42-107(1)(a) and (2), C.R.S. While we note that the better approach is to specifically identify causation as an issue to be considered at the hearing, under the circumstances presented here, the parties had a full and fair opportunity to litigate the issue of causation, and there is no contention to the contrary. *Compare Hendricks v. Industrial Claim Appeals Office*, 809 P.2d 1076, 1077 (Colo. App. 1990)(due process contemplates parties will be apprised of evidence to be considered,

and afforded a reasonable opportunity to present evidence and argument in support of their positions).

The claimant also argues that the ALJ could not consider causation based on Office of Administrative Courts Rule 12. By its terms, OAC Rule 12 does not apply to the listing of issues in a response to an application for a hearing. The first sentence in OAC Rule 12 speaks of adding issues prior to the date of the setting and the second sentence specifies that after the date of the setting issues can only be added by agreement or by order. OAC Rule 8 (F) provides, however, that the setting date must be no later than 20 days from the date of the application for hearing while OAC Rule 8 (G) states a response to the application may be filed up to 30 days from the date of the application. Since then, a response listing issues may be filed after the setting date, Rule 12 could only be referring to issues to be added by the party filing the application for a hearing, not the party filing a response. The adequacy of notice as it pertains to issues added, or not added, in a response is measured by reference to the standards of procedural due process. As noted above, the parties had a full and fair opportunity to litigate the issue of causation, and the claimant does not contend to the contrary. *See Hendricks v. Industrial Claim Appeals Office, supra.*

#### IV.

Relying upon the holding in *Rodriguez v. Industrial Claim Appeals Office, supra*, the claimant argues that the ALJ improperly placed the burden on her to establish a causal link between her upper extremity conditions and her industrial injury. We agree and remand for further findings and a new order on this ground.

In *Rodriguez*, the Colorado Court of Appeals held that ordinarily, a claimant bears the burden of establishing the conditions of recovery. See § 8-43-201, C.R.S. When, however, the employer admits liability and then seeks to modify an issue determined by such admission, the burden shifts from the claimant to the employer to prove for any such modification. See § 8-43-201(1), C.R.S. (“[A] party seeking to modify an issue determined by a general or final admission ... shall bear the burden of proof for any such modification.”). The *Rodriguez* Court concluded that since the employer initially admitted liability, it was required to prove that the claimant’s injury did not arise out of her employment. The Court determined that the ALJ’s finding that the claimant’s fall was unexplained demonstrated that the employer failed to sustain its burden of proof. Thus, the Court concluded that the respondent was precluded from withdrawing its admission of liability.

Here, because the respondent filed a FAL concerning the extent of the claimant’s PPD benefits, it bore the burden of reducing its liability for such benefits. See § 8-43-201(1), C.R.S. In her order, however, the ALJ did not expressly allocate the burden of

proof to the respondent. Rather, in her order the ALJ generally allocated the burden of proof to the claimant to prove entitlement to benefits by a preponderance of the evidence. Order at 15. While we note that the ALJ's order thoroughly details the evidence presented and credits the respondent's evidence, the order does not specifically state that under §8-43-201(1), C.R.S., the respondent was seeking to modify an issue determined by its FAL and it bore the burden of proof for such modification. Nor are we able to say as a matter of law that the order implicitly allocates the burden of proof to the respondent for such modification. Since it is not clear from the order that the ALJ properly allocated the burden of proof to the respondent to establish a modification of its FAL, we necessarily remand for further findings and a new order on this issue. Section 8-43-301(8), C.R.S.

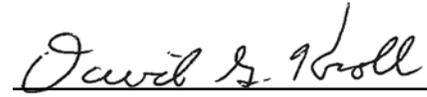
We further note that the ALJ properly recognized that the claimant had the burden of showing the extent of her impairment by a preponderance of the evidence, or showing that her injury was scheduled or non-scheduled. *See Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Strauch v. Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996). Thus, to the extent it is the claimant who is seeking to modify the FAL by asserting that the impairment rating should be based upon an injury not on the schedule of disabilities, the burden of proof is hers. Insofar, however, that it is the respondent that is requesting the FAL be modified so as to reduce the impairment rating because the upper extremity is not involved, the respondent bears the burden of proof on that issue.

Based on our determinations above, we need not address the claimant's remaining factual arguments.

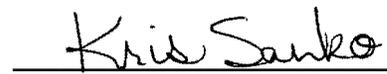
**IT IS THEREFORE ORDERED** that the ALJ's order dated October 15, 2012, is set aside and remanded for further findings and a new order on the issue of causality of the claimant's shoulder and wrist conditions.

**IT IS FURTHER ORDERED** that if the ALJ determines that the claimant's wrist and shoulder conditions are causally related to the claimant's industrial accident, then the ALJ may also consider whether the claimant's injury was scheduled or non-scheduled. In all other respects, the ALJ's order 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

\_\_\_\_\_ 4/8/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

ANN FRANCO, 3835 STUART STREET, DENVER, CO, 80212 (Claimant)  
DENVER PUBLIC SCHOOLS, Attn: KAREN BRIGHT, 750 GALAPAGO STREET,  
DENVER, CO, 80246 (Employer)  
THE LAW OFFICES OF BARBARA J. FURUTANI, P.C., Attn: BARBARA J. FURUTANI,  
ESQ., 1732 RACE STREET, DENVER, CO, 80206 (For Claimant)  
RITSEMA & LYON, P.C., Attn: PENNY MERKEL, ESQ., 999 18TH STREET, SUITE 3100,  
DENVER, CO, 80202 (For Respondents)  
TRISTAR RISK MANAGEMENT, Attn: AL HARO, P O BOX 5228, JANESVILLE, WI,  
53547 (Other Party)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-875-758

IN THE MATTER OF THE CLAIM OF

BEVERLY GALLEGOS,

Claimant,

v.

ORDER OF REMAND

KING SOOPERS,

Employer,

and

SELF-INSURED,

Insurer,  
Respondent.

The respondent seeks review of an order of Administrative Law Judge Cannici (ALJ) dated November 9, 2012, that determined the claimant's injury was compensable and ordered the respondent to pay medical and temporary disability benefits. We set aside the ALJ's order and remand the matter for further findings.

A hearing was held on the issues of compensability, and medical and temporary disability benefits. After hearing the ALJ entered factual findings that for purposes of this order can be summarized as follows. The claimant was employed as a deli clerk for the employer. On November 4, 2011, the claimant began her work shift at 2:02 a.m. and completed her work shift without incident, punching out at 10:29 a.m. After finishing her shift the claimant went to the employer's break room to retrieve her personal items. Although the claimant typically left the premises after gathering her belongings, on that day she decided to do some shopping in the store. Approximately 20 minutes after the claimant "punched out" she was pushing a shopping cart down aisle 21 to pick up shampoo. The claimant encountered a puddle of water on the floor, slipped and twisted her right knee. The ALJ found that the puddle was likely caused by a leaking roof that was undergoing extensive repairs. The claimant reported the incident to her assistant manager and the respondent denied the claim.

The ALJ found that the claimant's injury occurred within a reasonable interval after she had clocked out and while she was on the employer's premises. The ALJ, therefore, determined that the claimant injured her right knee during the course of her employment. The ALJ also determined that although the claimant's shopping did not constitute a strict employment requirement or confer a specific benefit to the employer,

the claimant's act of purchasing shampoo was incidental to the conditions and circumstances of her employment and did not sever the employment relationship. Thus, the ALJ concluded that the claimant met her burden to prove that the right knee injury arose out of her employment with the respondent on November 4, 2011. The ALJ determined the claim was compensable and ordered the respondent to pay medical and temporary disability benefits.

On appeal the respondent argues that the claimant failed to prove that her injury arose out of her employment. The respondent specifically contends that her shopping activity was purely personal and provided no benefit to the employer. The ALJ's findings on this point are insufficient to permit appellate review and we, therefore, remand for further findings.

To be compensable, the claimant's injury must have been sustained while performing services arising out of and in the course of the employment at the time of the injury. Section 8-41-301(1), C.R.S.; *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation. *Popovich v. Irlando*, 811 P.2d 379, (Colo. 1991). As pointed out by the ALJ, the courts have previously recognized that the "time" limits of employment embrace a reasonable interval before and after official working hours when the employee is on the employer's property. *Antalovic v. Crop Production*, W.C. No. 4-846-566 (September 1, 2011); *2 Larson, Workmen's Compensation Law* § 21.60(a) (2005); *See Industrial Commission v. Hayden Coal Co.*, 113 Colo. 62, 155 P.2d 158 (1944)(an interval up to thirty five minutes has been allowed for the arrival and departure from work). Here, the ALJ determined that the claimant's injury occurred within a reasonable time period of clocking out, in an area where she, as well as any customer, was permitted. We perceive no basis on which to disturb the ALJ's finding in this regard.

The question remains, however, whether the circumstances of the claimant's injury satisfy the "arising out of" requirement for compensability. The "arising out of" element is narrower than the "course" element and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando, supra*. The "arising out of" test is one of causation. *See Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968).

In order to satisfy the arising out of requirement, it is not necessary that the claimant actually be engaged in performing job duties at the time of the injury. Our courts have recognized that it is not essential for the compensability determination that the activities of an employee emanate from an obligatory job function or result in some

specific benefit to the employer so long as the employee's activities are sufficiently incidental to the work itself as to be properly considered as arising out of and in the course of employment. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *see also Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996) (an activity arises out of employment if it is sufficiently "interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment"). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary, and an accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995); 2 Larson Workers' Compensation Law, §27.22 (a) (1997).

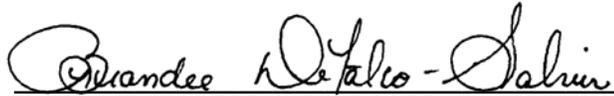
In contrast, if an employee substantially deviates from the mandatory or incidental functions of her employment, such that she is acting for her sole benefit at the time of an injury, then the injury is not compensable. *Kater v. Industrial Commission*, 728 P.2d 746 (Colo. App. 1986); *see also Callahan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

Although the question of whether the claimant's injuries arose out of employment is one of fact for resolution by the ALJ, we 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 8-43-301(8), C.R.S.

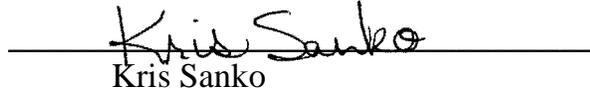
Here, the ALJ's findings are insufficient to permit appellate review. Although the ALJ summarily concluded that the claimant's act of shopping was "incidental" to her employment duties, the findings are not sufficient to reveal the factual basis for the ALJ's conclusion in this regard. Although there may be evidence in the record from which the ALJ could infer that it was common, customary and an accepted part of the employment for the employees to do personal shopping, the order does not indicate what, if any, evidence the ALJ relied upon in reaching this conclusion. Under these circumstances the matter must be remanded to the ALJ for entry of a new order.

**IT IS THEREFORE ORDERED** that the ALJ's order issued November 9, 2012, is set aside and remanded for further findings consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

BEVERLY GALLEGOS

W. C. No. 4-875-758

Page 5

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 4/11/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

DARRELL S. ELLIOTT, P.C., Attn: ROBERT F. JAMES, ESQ., 1600 PENNSYLVANIA STREET, DENVER, CO, 80203 (For Claimant)

NATHAN, BREMER, DUMM & MYERS, P.C., Attn: MARK H. DUMM, ESQ., 7900 EAST UNION AVENUE, SUITE 600, DENVER, CO, 80237-2776 (For Respondents)

SEDGWICK, CMS, Attn: SHARMIE JENSEN, P O BOX 14485, LEXINGTON, KY, 40512-4485 (Other Party)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-871-670-03 &  
4-822-051-03

IN THE MATTER OF THE CLAIM OF

FARAH HASSAN,

Claimant,

v.

FINAL ORDER

CARGILL MEAT SOLUTIONS,

Employer,

and

INSURANCE COMPANY OF THE  
STATE OF PENNSYLVANIA,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Friend (ALJ) dated November 27, 2012, that determined the claimant was responsible for his wage loss and denied his claim for temporary total disability benefits pursuant to §8-42-103(1)(g) and 8-42-105(4)(a) C.R.S. We affirm the ALJ's order.

A hearing was held on the issues of the average weekly wage (AWW), disfigurement and temporary total disability benefits on November 7, 2012. Only the issues of temporary benefits and fault for termination of employment were actually presented by the parties and determined by the ALJ. At the conclusion of the hearing the ALJ entered factual findings that can be summarized as follows. The claimant sustained a left shoulder injury on August 23, 2010, W.C. No. 4-871-670. He had also injured his right hand on February 2, 2010, W.C. No. 4-822-051. A third injury occurred on August 16, 2011, when the claimant injured his low back, W.C. No. 4-871-363. The claimant worked in the employer's meat packing plant in Greeley. The claimant underwent left shoulder surgery on January 17, 2012. The claimant returned to modified duty with the employer after the surgery and did not miss any time from work prior to February 14, 2012. As of that date, the claimant had work restrictions of five pounds lifting with the left arm and no work at over the shoulder heights. On February 14, the claimant complained of new back pain at work. He was carried in a chair to the employer's nurse's station. While there, the claimant called 911 and an ambulance was eventually summoned. Prior to the arrival of the ambulance, the employer's safety director took a seat in front of the claimant and attempted to speak with him. The claimant then punched

the safety director on the right side of his face. Another employee separated the two. Shortly thereafter, the claimant was taken to a hospital emergency room.

The ALJ, with record support, noted the claimant had been previously advised of the company policy which prohibited violence in the workplace. On February 5, 2010, the claimant had been suspended for five days as a disciplinary action for violating the policy. He was reinstated on February 10, 2010, accompanied by a written final warning that any further violations of the policy would result in termination.

After conducting an investigation of the punching incident on February 14, 2012, the employer terminated the claimant from employment on February 16 due to the violation of the no violence policy. The ALJ found the claimant's actions on February 14 were a volitional act and that the claimant exercised a degree of control over the circumstances which led to his termination. The ALJ determined the claimant was responsible for his termination and was therefore barred from receiving temporary disability benefits pursuant to §8-42-103(1)(g) and 8-42-105(4)(a) C.R.S.

The claimant appeals arguing it was not shown he had a motive to hit the safety director, his left arm was in a sling making it impossible for him to hit the right side of the safety director's face and the claimant was taken off work on February 14 due to his back pain thereby rendering his wage loss a result of injury rather than his termination from employment. We do not find these arguments persuasive.

## I.

The claimant argues there were no findings by the ALJ as to what motive the claimant may have had to punch the safety director. He also asserts it was impossible for the claimant to hit the safety director because the claimant's left arm was in a sling. The question whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is ordinarily one of fact for the ALJ. *See Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). Therefore, we must uphold the ALJ's findings if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). This standard of review requires us to view the evidence in the light most favorable to the prevailing party, and to accept the ALJ's resolution of conflicts in the evidence as well as plausible inferences which he drew from the evidence. *Id.* The ALJ relied on the testimony of witness Bernadine Galindo which stated the claimant punched the safety director with his left hand which was therefore not in a sling. There is no testimony in the record stating the claimant's arm was in a sling on February 14, nor does the claimant point to any such evidence.

Furthermore, the ALJ need not determine the claimant's motive for punching the safety director. The ALJ must only determine if the claimant acted volitionally or had some control over the circumstances. There is record support for the ALJ's findings in this regard. Those findings then, may not be disturbed on review. A witness did testify the claimant appeared angry. The record shows the claimant was sitting in a chair in the nurse's station. He was not being attacked or threatened. The safety director sat in a chair in front of the claimant and began to speak to him. The claimant then hit him in the face. Unless there is evidence to establish the claimant's state of mind prevented him from committing a volitional act, his motive is not essential to a finding the claimant was responsible for his termination. The claimant did not state his mental capacity was impaired. In fact, he stated he was the person that called 911 to summon an ambulance while in the nurse's station. The ALJ's finding there was a volitional act on the part of the claimant is supported by substantial evidence in the record.

## II.

The claimant also reasons that when the claimant went to the emergency room on February 14, after hitting the safety director, the emergency room physician took the claimant off work due to the low back pain he experienced prior to hitting the safety director. The claimant asserts then, that the claimant was already unable to work before he punched the safety director and that incident therefore played no role in his wage loss. We disagree. The claimant cannot avoid the effect of §8-42-103(1)(g) and 8-42-105(4)(a) C.R.S. simply because the claimant was restricted from returning to work for the employer after the date of injury, but prior to the point of termination.

In enacting §8-42-105(4) and §8-42-103(1)(g) the legislature amended two statutes with identical language. Section 8-42-103, C.R.S., sets forth the threshold conditions that must apply before a claimant becomes entitled to temporary total disability benefits. By amending that section through the addition of §8-42-103(1)(g) we infer that the legislature intended that threshold entitlement to temporary total disability benefits be precluded where the employee is responsible for the termination of employment. However, as noted, the legislature also added identical language to §8-42-105, which deals with the termination of temporary total disability benefits rather than with threshold entitlement. By adding the identical language to §8-42-103 and to §8-42-105, we infer that the legislature intended that the termination from employment be a potential factor both in the threshold entitlement determination and in the termination of temporary total disability benefits once begun. *See, Palmer v. Borders Group, Inc.*, W.C. Nos. 4-751-397, 4-723-172 (November 28, 2008). In this case, the ALJ determined the claimant was responsible for his termination. The claimant then, has not met the

FARAH HASSAN

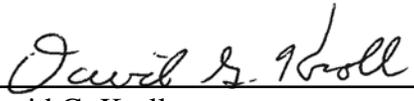
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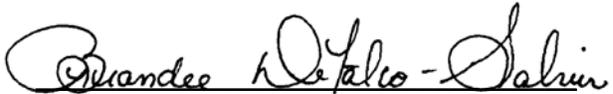
Page 4

threshold requirement to be eligible for temporary benefits. The ALJ was correct in denying the claim for temporary benefits.

**IT IS THEREFORE ORDERED** that the ALJ's order issued November 27, 2012 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

\_\_\_\_\_ 4/11/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

FARAH HASSAN, 624 LINCOLN STREET, APT 4, FORT MORGAN, CO, 80701 (Claimant)  
CARGILL MEAT SOLUTIONS, Attn: ESTHELA NUNEZ-SCHNEE, C.S. 4100, FORT  
MORGAN, CO, 80701 (Employer)  
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Attn: LAURA GLAVICH,  
C/O: SEDGWICK CMS, P O BOX 14155, LEXINGTON, KY, 40512 (Insurer)  
KAPLAN MORRELL, LLC, Attn: BRITTON MORELL, ESQ., P O BOX 1568, GREELEY,  
CO, 80632 (For Claimant)  
RITSEMA & LYON, P.C., Attn: TAMA L. LEVINE, ESQ., 999 18TH STREET, SUITE 3100,  
DENVER, CO, 80202-2499 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-594-683

IN THE MATTER OF THE CLAIM OF

MAY B MCCORMICK,

Claimant,

v.

EXEMPLA HEALTHCARE,

Employer,

and

SEDGWICK CLAIMS MGMT SERVICES, INC,

Self-Insured Respondent.

**ORDER**

The respondent seeks review of an order and supplemental order of Administrative Law Judge Felter (ALJ) dated August 16, 2012, and December 19, 2012, respectively, that drew an adverse inference and ordered the respondent to pay the claimant permanent total disability (PTD) benefits. We set aside the ALJ's determination to draw an adverse inference and the determination that the claimant is permanently and totally disabled and remand for further findings and a new order. In all other respects, we affirm the ALJ's order.

This case has a protracted history. This is the ninth time that this case has been before the Industrial Claim Appeals Panel (Panel), and the Colorado Court of Appeals has issued several decisions on appeal from the Panel. We set forth only the procedural history necessary to resolve the issues that are raised on review before us.

A hearing was held on the issues of PTD benefits, overcoming the division independent medical examination (DIME) of Dr. Douthit, penalties against the respondent for the alleged dictation of medical care to the authorized treating physician, Dr. Woo, bodily disfigurement, statute of limitations on penalties, offsets and credits, apportionment of PTD benefits, and intervening cause.

After hearing, the ALJ found that the claimant had a 15-20 year history of bilateral carpal tunnel syndrome prior to her employment with the self-insured respondent employer. The claimant had been working for the respondent for just over two months as a registered nurse at the time of her work injury. On August 20, 2003, the claimant

suffered an admitted aggravating injury to her right wrist. The claimant also alleged injuries to her left wrist and elbows as well.

From 2003 to 2004, the claimant treated with Dr. Woo, who is the Director of Occupational Medicine for the respondent employer. On July 14, 2004, Dr. Woo determined that the claimant had reached maximum medical improvement (MMI) with a permanent scheduled impairment of 12% of the right upper extremity. Dr. Woo assigned permanent medical restrictions of 5 pounds maximum lifting, 10 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 that the claimant had sustained a short-lived right wrist flexor strain and that she had fully recovered without sequelae as of September 3, 2003.

After reviewing Dr. Hemler's report, Dr. Woo changed his opinion in December 2004, and he agreed that the claimant's right upper extremity condition had fully resolved as of September 3, 2003, with no restrictions. Findings of Fact at 9-10 ¶¶7, 8. Between Dr. Woo's original opinion and his changed opinion, Dr. Woo had conversations about the claimant's case with Ms. Horning, the claims administrator for the self-insured employer.

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 right upper extremity. Dr. Douthit stated that apportionment was not applicable.

On October 10, 2011, the respondent mailed its amended FAL, admitting for an 8% permanent scheduled impairment of the right upper extremity, consistent with Dr. Douthit's DIME opinion.

Prior to hearing in his matter, the claimant requested discovery of Dr. Woo's and Ms. Horning's personnel files. The respondent objected to the production of any parts of

these personnel files on the basis of relevancy and Dr. Woo's and Ms. Horning's rights to privacy. Findings of Fact at 16-17 ¶21.

Thereafter, a hearing was held over several days. During the course of the June 11 hearing, the ALJ did an *in camera* inspection of Dr. Woo's and Ms. Horning's personnel files. The respondent argued that the personnel files were subject to Ms. Horning's and Dr. Woo's rights of privacy, *in toto*, and no parts should be furnished to the claimant. After the first day of the hearing on June 11, 2012, the ALJ issued an order pertaining to interim motions and controlling the course of the continuation hearing. The ALJ ordered the respondent's counsel to make suggested redactions and then furnish him with both the redacted and the un-redacted personnel files. Tr. (6/11/12) at 108-172.

After redacting portions of the personnel files of Dr. Woo and Ms. Horning and furnishing them to the ALJ, the ALJ found that the respondent's counsel redacted most meaningful information, leaving innocuous personnel files. The ALJ found that the redactions concerned, among other items, exact amounts of bonuses paid to Dr. Woo and workers' compensation-related performance criteria for Ms. Horning. The ALJ found that bonuses would create an appearance of conflict and undue influence if related to containing workers' compensation costs for the respondent employer, specifically, in light of the fact that Dr. Woo changed his opinion in December 2004 to an opinion that the claimant's work-related injury was only a temporary sprain from which the claimant fully recovered as of December 2004. The ALJ found that the claimant could find specific information useful for cross-examination. The ALJ ruled that without it, the claimant is hamstrung in her ability to cross-examine Dr. Woo and Ms. Horning. The ALJ ruled that the potential consequences of not disclosing the personnel files were to strike Dr. Woo's opinions, or simply weigh them in light of an appearance of conflict, whereby adverse inferences could be drawn based on not disclosing such files to the claimant in order to permit meaningful and effective cross-examination. The ALJ then ordered the parties to file "interim briefs" on the issue.

The parties filed their briefs with the respondent taking the position that no parts of Dr. Woo's or Ms. Horning's personnel files were discoverable. On June 21, 2012, the ALJ then ordered that the respondent was not required to "release" the personnel files of Dr. Woo and Ms. Horning to the claimant. The ALJ also ruled, however, that he "may draw adverse inferences on the appearance of conflict of interests issue and the consequences thereof." Amended Omnibus Order at 2-4.

The continuation hearing was held over additional days, after which the ALJ issued his order determining that the claimant was permanently and totally disabled. In his order, the ALJ found that Ms. Horning had discussions with Dr. Woo about the claimant's case. Based on Ms. Horning's testimony, the ALJ found she exerted a subtle

appearance of influence on Dr. Woo to change his opinion to zero permanent impairment and no permanent restrictions. The ALJ noted that he did not even need to draw an adverse inference from Ms. Horning's decision not to produce her personnel file to the claimant since all the facts concerning her conversations with Dr. Woo would harbor doubts as to the lack of taint and an appearance of impropriety in Dr. Woo changing his opinion to zero permanent impairment and no permanent restrictions. August 16, 2012, Order, Findings of Fact at 12 ¶13.

The ALJ also found that Dr. Woo changed his original opinion of permanent restrictions and a 12% right upper extremity permanent impairment rating to an opinion that the claimant had zero permanent impairment with no medical restrictions because of inferred undue influence by Ms. Horning and a realization that he should be containing workers' compensation costs for his employer, or the respondent employer in this case. The ALJ found that Dr. Woo's "total about face" could be partially explained by his dual and conflicting position as part of the management of the respondent's Occupational Medicine Department and he was the claimant's ATP. August 16, 2012, Order, Findings of Fact at 13-14, 16-17 ¶¶17, 21, 24. Consequently, the ALJ found that the personnel files of Dr. Woo and Ms. Horning supported a conflict of interest, or an appearance of conflict, which undermined the credibility of Dr. Woo's changed opinion. August 16, 2012, Order, Findings of Fact at 16-17 ¶21.

The ALJ further found that because the claimant could not discover Dr. Woo's and Ms. Horning's personnel files, her counsel could not conduct a fully effective cross-examination of Dr. Woo and Ms. Horning, both of whom were listed as adverse witnesses to be called in the claimant's case-in-chief. The ALJ found that the claimant could have found specific information in the personnel files that was not available elsewhere and which would be useful for cross-examination. The ALJ found that without such information the claimant was hamstrung in her ability to cross-examine. Nevertheless, the ALJ ruled that he would not violate the privacy rights of Dr. Woo or Ms. Horning and would not require the production of such personnel files. Instead, the ALJ ruled that he would draw an adverse inference on the content of the personnel files as it affected the conflict of interest/appearance of conflict/ bias on Dr. Woo's changed opinion that the claimant's admitted compensable injuries were only a temporary phenomena and the claimant had no sequelae after September 3, 2003. The ALJ drew the adverse inference that the personnel files of Dr. Woo and Ms. Horning supported a conflict of interest/appearance of conflict which undermined Dr. Woo's changed opinion. The ALJ also found that Dr. Woo's salary and bonuses are paid by the respondent employer, and that one factor forming the basis of the bonuses is workers' compensation cost containment/cost effectiveness. The ALJ found that Dr. Woo's appearance of conflict of interest/bias would cause a reasonable person to harbor concerns or doubts about obtaining an appropriate assessment from a physician with

divided loyalties between the patient and employer. The ALJ found this conflict undermined Dr. Woo's changed opinion. Thus, the ALJ accorded no weight to Dr. Woo's changed opinion and instead found that his first opinion of 12% impairment was more reliable and was accorded some weight. August 16, 2012, Order at 2-4, 11-12, 17-20, 28-37.

The ALJ also found that 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, and the claimant's present human factors contributed significantly to her PTD. The ALJ credited the opinions of Ms. Shriver over those of Ms. Montoya, that the claimant is not capable of earning wages because she has a limited vocational history and her physical limitations of the right upper extremity 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 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 also found that based on Dr. Woo's original, restrictive restrictions of the right upper extremity, and the credible vocational opinions of the claimant's vocational expert, Ms. Shriver, as well as those of Ms. Wonn, that 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 on July 14, 2004. As such, the ALJ determined that the claimant was permanently and totally disabled. August 16, 2012, Order, Findings of Fact at 25 ¶44.

The respondent then filed its petition to review and brief in support, arguing that the ALJ improperly drew an adverse inference from the respondent's "non-production" of Dr. Woo's and Ms. Horning's personnel files. The respondent argued that the adverse inference made the ALJ biased generally against the respondent as a whole which tainted the outcome of the hearing. The respondent further argued that the ALJ relied upon this adverse inference as an integral part of his PTD finding.

The ALJ subsequently entered his supplemental order addressing the respondent's argument that he was biased generally against the respondent. The ALJ found that the respondent had cited to no persuasive authority in support of its argument. The ALJ found that if the respondent believed that the ALJ became biased, thus tainting the entire proceedings, then it should have moved to disqualify the ALJ when he announced that he would draw an adverse inference if Dr. Woo and Ms. Horning's personnel files were not voluntarily produced instead of waiting until the conclusion of the hearing at which time the respondent realized that it had not prevailed. The ALJ also stated that a review of the transcripts of the three sessions of the hearing demonstrated that the prejudgment allegation was a speculative conclusion without foundation. In virtually all other respects, the ALJ's supplemental order was identical to his original order. Supplemental

Order at 6. The ALJ also entered a general award of medical benefits, ordering the respondent to pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the claimant's right upper extremity. Supplemental Order at 43.

I.

The respondent initially argues that the ALJ erred by engaging in the following alleged conduct: (1) reviewing protected information that prehearing ALJ (PALJ) Eley indicated was not relevant to the hearing issues; (2) after reviewing the protected information, he determined that the respondent did not have to produce the information to the claimant; (3) drawing an adverse inference from the respondent's nonproduction of the alleged confidential records; and (4) relying upon the adverse inference as an integral part of his PTD finding. The respondent also contends that the adverse inference made the ALJ biased against the respondent and tainted the outcome of the hearing.

A. *In camera* review of Dr. Woo's and Ms. Horning's personnel files which the respondent argues PALJ Eley indicated was irrelevant

The respondent argues that the ALJ's *in camera* review was improper and not supported by applicable law. The respondent contends that the ALJ was bound by PALJ Eley's ruling that Dr. Woo's and Ms. Horning's personnel files were not discoverable. We perceive no error.

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. *Id.*

Neither party disputes that PALJ Eley previously ruled that Dr. Woo's and Ms. Horning's personnel files were not discoverable. Regardless of this ruling, however, nothing in §8-43-207.5(3), C.R.S. prevented the ALJ from reconsidering PALJ Eley's discovery determination, conducting his own *in camera* inspection of the requested personnel files, and then issuing his own decision regarding the discoverability of such files. We further note that during the hearing, counsel for the respondent stated that he understood the ALJ was not bound by PALJ Eley's prior order. Tr. (6/11/12) at 112. As such, we are not persuaded to disturb the ALJ's order on this basis.

B. Drawing an adverse inference from the respondent's "non-production" of Dr. Woo's and Ms. Horning's personnel files

The respondent argues that the ALJ erred in drawing an adverse inference from the respondent's "non-production" of Dr. Woo's and Ms. Horning's personnel files. The respondent contends that it did not violate an order of the court since there was no order compelling production. Thus, the respondent argues that the punitive rationale does not support the sanction. We agree.

The conduct of discovery is a matter committed to the discretion of the ALJ. Section 8-43-207(1)(e), C.R.S. provides that an ALJ may rule on discovery matters and impose the sanctions provided in the rules of civil procedure in the district courts for willful failure to comply with permitted discovery. Additionally, W.C. Rule 9-1(E), 7 CCR 1101-3 provides that "[i]f 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." Whether to impose sanctions and the nature of the sanctions to be imposed are matters within the fact finder's discretion. *Shafer Commercial Seating, Inc. v. Industrial Claim Appeals Office*, 85 P.3d 619 (Colo. App. 2003).

An ALJ's exercise of discretion in determining the appropriate discovery sanction is broad, and is binding in the absence of an abuse of discretion. *Sheid v. Hewlett Packard*, 826 P.2d 396 (Colo. App. 1991). An abuse of that discretion is only shown where the order "exceeds the bounds of reason," such as where it is not in accordance with applicable law, or not supported by substantial evidence in the record. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *Rosenberg v. Board of Education of School District #1*, 710 P.2d 1095 (Colo. 1985).

We find the Colorado Court of Appeals' holding in *O'Reilly v. Physicians Mut. Ins. Co.*, 992 P.2d 644 (Colo. App. 1999) to be instructive on the ALJ's determination to draw an adverse inference. In *O'Reilly*, counsel for Physicians Mutual Insurance Co. (PMIC), James J. Frost (Frost), contended that the trial court erred in imposing sanctions against him personally, pursuant C.R.C.P. 37(b), after finding that he had failed to produce tapes, without substantial justification, that contained information that was responsive to a discovery request made by O'Reilly. Frost argued that the trial court could not impose sanctions under C.R.C.P. 37(b)(2) where there was no violation of a court order. The Court agreed with Frost stating in pertinent part as follows:

The relevant portion of C.R.C.P. 37(b)(2), entitled, "Failure to Comply with Order," provides:

If a party ... fails to obey an order to provide or permit discovery ... the court in which the action is pending may make such orders in regard to the failure as are just .... (emphasis added)

*Id.* at 648. The Court therefore concluded that sanctions were appropriate under C.R.C.P. 37(b) if, and only if, a discovery order had been violated. The record revealed, however, that no court order had been requested or issued compelling either production of the tapes or further response to O'Reilly's discovery requests. The Court held that absence of a prior order compelling discovery precluded C.R.C.P. 37(b) sanctions against Frost for any alleged violation. Accordingly, the Court reversed the trial court's order imposing sanctions against Frost.

We initially address the claimant's argument that the respondent's invoking its right to privacy in Dr. Woo's and Ms. Horning's personnel files is akin to a party invoking the Fifth Amendment right against self-incrimination in a civil action wherein drawing an adverse inference is appropriate. *See Asplin v. Mueller*, 687 P.2d 1329 (Colo. App.1984). The claimant also argues that the ALJ's adverse inference is not a sanction. We are not persuaded by these arguments, however. Based on the determinations made in the ALJ's supplemental order, we perceive the ALJ's decision to draw an adverse inference as a discovery sanction. In his supplemental order, the ALJ specifically determined that "there must be due process consequences for not producing discovery evidence. . ." Supplemental Order at 38 ¶p. The ALJ then concluded that the appropriate consequence was to draw an adverse inference from the failure to produce the personnel files and to accord no weight or credibility to Dr. Woo's changed opinion. *Id.*

Next, we set aside the ALJ's order which drew an adverse inference due to the "non-production" of Dr. Woo's and Ms. Horning's personnel files. As noted above, § 8-43-207(1)(e), C.R.S. provides that an ALJ may rule on discovery matters and impose the sanctions for the willful failure to comply with permitted discovery. Further, W.C. Rule 9-1(E) provides that if any party fails to comply with the provisions of the discovery rules, then an ALJ may impose sanctions upon such party. Similar to *O'Reilly*, however, the ALJ did not find that the respondent willfully failed to comply with permitted discovery or failed to comply with any of the provisions of W.C. Rule 9-1 regarding discovery matters or any action governed by it. In fact, quite the contrary was true. In his Supplemental Order, the ALJ determined that he would not violate the privacy rights of Dr. Woo or Ms. Horning by ordering the respondent to produce their personnel files for the claimant to review. The ALJ specifically determined as follows in his Supplemental Order:

Nonetheless, the ALJ will not violate the privacy rights of Dr. Woo, if Dr. Woo chooses not to voluntarily produce his personnel file, a right which he could have waived. The same is true for Michelle Horning's personnel file. If Dr. Woo and Michelle Horning assert their privacy rights in toto, and do not voluntarily waive produce (sic) of their personnel files, the

question is ‘what is it that they wish to conceal?’ Under the circumstances, the ALJ draws adverse inferences concerning an appearance of conflict of interest affecting Dr. Woo’s changed opinion, after maximum medical improvement (MMI) [that the Claimant’s work-related injury was only a temporary phenomenon, and the Claimant had fully recovered without restrictions, from the admitted injury], contrary to his earlier opinion. Also, the Claimant would be hamstrung in cross-examining Michelle Horning and how her conversations with Dr. Woo factored into the 180 degree reversal in Dr. Woo’s opinions. Without the Respondent voluntarily making Dr. Woo’s and Michelle Horning’s personnel files available to the Claimant, the ALJ draws adverse inferences against the testimony of both individuals, in weighing their credibility, specifically, that information in their personnel files would support a conflict of interest and/or appearance of conflict of interest, thus, tainting Dr. Woo’s changed opinion. Supplemental Order at 3; see also Supplemental Order at 18 ¶21.

The absence of a finding that that the respondent willfully failed to comply with permitted discovery or failed to comply with any of the provisions of the discovery rule, however, precluded the ALJ from imposing any sanctions or drawing an adverse inference for the “non-production” of Dr. Woo’s and Ms. Horning’s personnel files. *See O’Reilly v. Physicians Mut. Ins. Co., supra*; § 8-43-207(1)(e), C.R.S.; W.C. Rule 9-1(E). Consequently, we set the ALJ’s adverse inference aside.

The respondent further argues that the ALJ’s adverse inference affected his determination to declare the claimant permanently and totally disabled. While the claimant argues that any alleged error was harmless, we are unable to conclude as such. In his supplemental order, the ALJ makes extensive findings regarding the changed opinions of Dr. Woo, and the adverse inference drawn against the credibility of Dr. Woo and Ms. Horning. This evidence was repeatedly emphasized by the ALJ throughout his order. While in one part of his supplemental order the ALJ made a finding of PTD based 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, the present human factors, Dr. Woo’s original restrictions, and the vocational opinions of Ms. Shriver and Ms. Wonn, we are unable to say that the adverse inference he drew throughout his order did not impact his PTD determination. *See* Supplemental Order at 2-4; at 28 ¶49; at 38 ¶p. Consequently, we are unable to conclude that the adverse inference drawn by the ALJ was harmless error and, as such, we also must set aside the ALJ’s PTD determination and remand the matter for further findings and a new order on this issue.

### C. Alleged bias of ALJ

The respondent also argues that the ALJ's review of Dr. Woo's and Ms. Horning's personnel files tainted the entire litigation process and resulted in the ALJ being biased generally against the respondent. The respondent requests that the matter be remanded to a new ALJ. We perceive no error.

We presume an ALJ to be competent, impartial, and unbiased "until the contrary is shown." *Wecker v. TBL Excavating, Inc.*, 908 P.2d 1186, 1189 (Colo. App. 1995). To establish that a court was biased, a party must show that the court had "a substantial bent of mind against him or her. Speculative statements and conclusions are insufficient to satisfy the burden of proof." *People v. James*, 40 P.3d 36, 44 (Colo. App. 2001).

Here, we decline to remand the matter to a new ALJ on the grounds of the ALJ's impartiality. Our review of the record does not demonstrate that the ALJ showed prejudice or bias against the respondent. Rather, the claimant's argument notwithstanding, the ALJ gave the respondent the opportunity to state its case and to provide evidence and supporting documentation. The mere fact that the ALJ performed an *in camera* inspection and drew an adverse inference regarding the non-production of Dr. Woo's and Ms. Horning's personnel files is insufficient to show the ALJ's alleged bias or prejudice. *See Watson v. Cal-Three, LLC*, 254 P.3d 1189 (Colo. App. 2011)(a judge is not recusable for bias or prejudice that is based on facts and circumstances of case, even where, upon completion of the evidence, the court is exceedingly ill disposed toward a party); *Kiewit Western, Inc. v. Patterson*, 768 P.2d 1272, 1274 (Colo. App. 1989). As such, we will not disturb the ALJ's order on this basis.

## II.

The respondent contends that the ALJ erred in awarding medical benefits and/or reserving post-MMI medical treatment for the claimant's right upper extremity. The respondent argues that medical benefits were not an issue endorsed for hearing. The ALJ's order and supplemental order on the issue of medical benefits are not final orders subject to review pursuant to § 8-43-301(2), C.R.S.

Under § 8-43-301(2), C.R.S., a party dissatisfied with an order "that requires any party to pay a penalty or benefits or denies a claimant any 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 BCW Enterprises, Ltd. v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997).

Further, the Panel previously has held that orders determining compensability and containing only a general award of medical benefits are interlocutory, unless the record

reveals that specific medical benefits were at issue. *See Harley v. Life Care Centers*, W.C. No. 4-810-998 (May 20, 2011); *Gonzales v. Public Service Co. of Colorado*, W.C. No. 4-131-978 (May 14, 1996). Under these principles, our jurisdiction is purely statutory. *See Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992). The absence of a final, reviewable order is fatal to our jurisdiction. *See Buschmann v. Gallegos Masonry, Inc.*, 805 P.2d 1193 (Colo. App. 1991).

Here, as noted above, the ALJ merely has ordered the respondent to pay the costs of all authorized, causally related and reasonably necessary medical care and treatment for the claimant's right upper extremity. Supplemental Order at 43. Since this portion of the ALJ's order does not determine the amount of benefits, and does not award any specific benefits as contemplated by statute, it is not subject to review. Under such circumstances this part of the ALJ's order is not final and reviewable. Thus, we are without jurisdiction to resolve the issue raised by the respondent on review. Section 8-43-301(2), C.R.S.; *see also Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989) (order may be partially final and reviewable and partially interlocutory). We further note that the ALJ expressly reserved post-MMI medical benefits for future decision. Supplemental Order at 44 ¶D. *Hire Quest, LLC v. Industrial Claim Appeals Office*, 264 P.3d 632 (Colo. App. 2011)(right to future medical benefits may be waived if not requested at the time permanent disability is heard, but claim may be litigated without reopening if ALJ's award of benefits expressly reserves other issues for future determination).

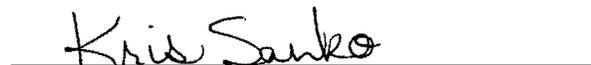
Based upon our determinations above, we need not address the remaining allegations of error raised by the respondent.

**IT IS THEREFORE ORDERED** that the ALJ's order and supplemental order dated August 16, 2012, and December 19, 2012, respectively, are set aside regarding his determination to draw an adverse inference and his determination that the claimant is permanently and totally disabled and the matter is remanded for further findings and a new order consistent with the views expressed herein.

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

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
Kris Sanko

CERTIFICATE OF MAILING

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

3/25/2013 by RP .

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CO, 80033 (Employer)  
SEDGWICK CLAIMS MGMT SERVICES, INC, Attn: LORI HASTING, PO BOX 5107,  
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LEE & KINDER, LLC, Attn: JOSEPH W. GREN, ESQ./KATHERINE MARKHEIM LEE,  
ESQ., 3801 EAST FLORIDA AVE., SUITE 210, DENVER, CO, 80210 (For Respondents)  
THOMAS POLLART & MILLER LLC, Attn: BRAD MILLER, ESQ., 5600 SOUTH QUEBEC  
ST., SUITE 220A, GREENWOOD VILLAGE, CO, 80111 (Other Party)  
BROADSPIRE, P O BOX 14348, LEXINGTON, KY, 40512-4348 (Other Party 2)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-865-300

IN THE MATTER OF THE CLAIM OF

MARIA C MURILLO,

Claimant,

v.

FINAL ORDER

OLD COUNTRY BUFFET,

Employer,

and

ACE AMERICAN INSURANCE COMPANY,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated November 21, 2012, that determined the claimant's injuries did not arise out of her employment and denied her claim for benefits. We affirm.

The ALJ found the claimant fell at work on August 17, 2011. The claimant worked in the employer's restaurant preparing salads, placing them on the buffet serving tables. The claimant testified at the hearing she fell because the kitchen floor was wet which caused her to slip and injure her back and head. The ALJ did not find this testimony credible. The ALJ relied instead, on statements the claimant made to health care providers and others near the date of the injury. These included a statement to a physician's assistant at a Concentra Clinic on August 19, stating she felt dizzy on August 17 and then found herself on the floor, an emergency room statement on the same day wherein she said she passed out and fell to the ground, and a statement at her chiropractor's office on August 26 asserting she fainted and woke up laying with her arm underneath her. The ALJ also cited the testimony of the employer's restaurant manager which recounted that the claimant had told him she fell because she felt light headed.

The ALJ noted the claimant had arrived at work on August 17, complaining of illness. The claimant was then found to have fallen due to dizziness or fainting. The injuries she claimed resulted from this fall were determined to not have arisen out of the claimant's employment. The ALJ characterized the incident as an "unexplained fall" which was not established as having arisen out of the course or conditions of her employment. The claimant's request for temporary disability and medical benefits was denied and dismissed.

The claimant appeals on the grounds that the ALJ relied exclusively on hearsay evidence to reach his conclusions and that the evidence showed the claimant was injured due to slipping and falling on a wet floor which was a condition and circumstance of her job.<sup>1</sup>

I.

The claimant argues the ALJ's order should be reversed for the reason it is based entirely on hearsay evidence. The claimant complains the ALJ relied on statements appearing in the medical records and the employer's report of the injury to determine the claimant's fall was due to fainting and not to a wet floor. As the respondents point out, the claimant's objections to these statements have been waived. All of the disputed statements contained in the medical records were included in documents put into evidence by the claimant. These were received without objection. The record does not reflect any objections at the hearing to either exhibits or to testimony based on hearsay. Because the claimant did not object to the evidence as hearsay at hearing, she may not do so now on appeal. Under the Colorado Rules of Evidence, before error may be predicated on an allegedly erroneous ruling admitting evidence, it must be shown that a contemporaneous objection was made which stated the specific ground of the objection. CRE 103(a)(1); *see also*, § 8-43-210, C.R.S. (rules of evidence apply in workers' compensation proceedings); *Gallegos v. B & M Roofing*, W.C. 3-962-465 (January 25, 1991). Such inaction may be viewed as a waiver of any objection to the admission of statements later relied upon by the ALJ.

Moreover, a review of the record reveals the ALJ does not rely on hearsay evidence. The ALJ refers to statements of the claimant appearing in medical records, given to the restaurant manager, and contained in the claimant's responses to interrogatories. Colorado Rule of Evidence 801(d)(1) provides a statement is not hearsay in the event the declarant testifies at the hearing, is subject to cross examination concerning the statement, and the statement is inconsistent with his testimony. This is a fair description of the statements to which the claimant objects. The statements are in medical records or the employer's records. The claimant testified and was cross examined at the hearing. The ALJ's reliance then, on these records is not subject to objection on the basis of hearsay evidence.

The claimant's position is closer to one of a denial that the statements relied upon by the ALJ were actually accurate recordings of things she said. She states that because

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<sup>1</sup> The claimant's Brief in Support of the Petition to Review was not originally included in the file maintained by the Office of Administrative Courts. A copy was later submitted by the OAC. The copy bears a certificate of mailing showing timely service and an earlier stamp showing receipt by the OAC. The respondents' counsel received a copy and refers to it in the respondents' brief. The claimant's brief therefore, was considered in regard to this order.

she knows little English, these statements are translations that are not reliable. An interpreter serves as a language conduit for the declarant. Hence, admission of translated testimony is appropriate when the circumstances assure its reliability. Relevant factors include: (1) whether actions after the translated conversation were consistent with the translated statements; (2) whether the interpreter had qualifications to interpret and language skill; (3) whether the interpreter had any motive to mislead or distort; and (4) which party supplied the interpreter. *People v. Gutierrez*, 916 P.2d 598 (Colo.App.1995). The application of these factors to the evidence is a task for the ALJ. Here the record supports the ALJ's reliance on the prior statements. It is implicit the ALJ found the circumstances of the translations to be reliable. The claimant complained at the Concentra clinic of breathing irregularities and chest pain. The complaints were noted and were the basis for a referral from Concentra to the St. Joseph's Hospital emergency room. The ALJ recited that at St. Joseph's, the same symptoms were recorded. The actions of the claimant to seek treatment at the emergency room for the same complaints were consistent with the translated statements. The claimant complains about the language skills of the translator but this is based on her later claim at the hearing that she was misquoted. There is no evidence the interpreters had a motive to mislead or distort. To the contrary, the ALJ states the declarations of the claimant were in medical documents and the interpreters were medical personnel. The interpreters were not provided by either party. By implication, the ALJ did not believe there would have been any motive to mislead or distort. These translators knew their accurate translations of the claimant's statements were critical to the appropriate treatment of the claimant. There are substantial reasons evident in the record to allow the ALJ to find the translations reliable.

## II.

The Claimant next argues the claimant was injured when she encountered a special hazard of employment that combined with her preexisting condition to cause her injuries. She contends that the kitchen floor was wet at the time she felt dizzy and fainted. The presence of the wet floor is argued to be a special hazard of employment that increased the likelihood the claimant would sustain injuries as she did.

Where the precipitating cause of the injury is a pre-existing condition which the claimant brings to the workplace, the injury is not compensable unless a "special hazard" of the employment combines with the pre-existing condition to cause the injury. *See National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 763 (Colo. App. 1992); *Gaskins v. Golden Automotive Group, L.L.C.*, W.C. No. 4-374-591 (August 6, 1999) (injury when pre-existing condition caused the claimant to stumble on concrete stairs not compensable because stairs were ubiquitous condition). This principle is known as the "special hazard" rule. *Ramsdell v. Horn*, 781 P.2d 150(Colo. App. 1989). The rationale for this rule is that unless a special hazard of employment increases the risk

or extent of injury, an injury due to the claimant's pre-existing condition does not bear sufficient causal relationship to the employment to "arise out of" the employment. *Gates Rubber Co. v. Industrial Commission*, 705 P.2d 6 (Colo. App. 1985). In *Gates*, the court held that a claimant who was injured by falling onto a concrete floor after an idiopathic seizure did not suffer a compensable injury in the absence of proof that the concrete surface was a special risk of the employment.

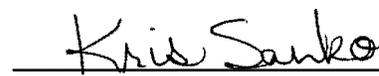
Here however, the ALJ found the claimant's statement that the floor was wet was not credible. The ALJ pointed out that this condition was not included in any of the claimant's descriptions of her fall until months later. He therefore discounted the reliability of her evidence on that point. The ALJ's determination is supported by substantial evidence in the record. The presence of a wet floor is not mentioned in the claimant's statement at the Concentra Clinic or at St. Joseph's Hospital when she first sought treatment. There is no reference to a wet floor in the history given to her chiropractor nor does it appear in either of the employer's reports concerning her fall. The ALJ determined the first reference to a wet floor appears in a report of another chiropractor on November 22, 2011. That report was written three months after the claimant's fall. This evidence supports the ALJ's finding that a wet floor played no part in the claimant's fall of August 17, 2011. This is not a case then, which features a "special hazard" of employment.

We must uphold the ALJ's finding that the claimant's injuries were caused by a non-occupational or idiopathic fainting spell if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. In applying the substantial evidence test, we are required to defer to the ALJ's resolution of conflicts in the evidence, his credibility determinations, and the plausible inferences he drew from the evidence. *Monfort, Inc. v. Rangel*, P.2d (Colo. App. No. 92CE0006, August 26, 1993); *Martinez v. Regional Transportation District*, 832 P.2d 1060 (Colo. App. 1992).

**IT IS THEREFORE ORDERED** that the ALJ's order issued November 21, 2012, 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

4/3/2013 by RP.

MARIA C MURILLO, 2833 FOREST STREET, DENVER, CO, 80207 (Claimant)  
OLD COUNTRY BUFFET, Attn: MARY MEANS, 1020 DISCOVERY ROAD, SUITE 100,  
EAGAN, MN, 55121 (Employer)  
ACE AMERICAN INSURANCE COMPANY, Attn: ELLEN SAPP, C/O: %GALLAGHER  
BASSETT SERVICES, INC., P O BOX 4068, ENGLEWOOD, CO, 80155-4068 (Insurer)  
CIMINO & BENHAM, LLC, Attn: JOHN A. CIMINO, ESQ., 925 EAST 17TH AVENUE,  
DENVER, CO, 80218 (For Claimant)  
RITSEMA & LYON, P.C., Attn: TAMA L. LEVINE, ESQ., 999 EIGHTEENTH STREET,  
SUITE 3100, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-779-040 & 4-844-545

IN THE MATTER OF THE CLAIM OF

JAMES TENNAPEL,

Claimant,

v.

ORDER OF REMAND

BOWIE RESOURCES, LLC, and  
OXBOW MINING,

Employer,

and

NEW HAMPSHIRE INSURANCE  
COMPANY, and PINNACOL  
ASSURANCE

Insurer,  
Respondents.

The claimant and respondents, Bowie Resources and New Hampshire Insurance (Bowie), seek review of an order of Administrative Law Judge Mottram (ALJ) dated November 2, 2012, that ordered Bowie to reimburse Oxbow Mining and Pinnacol Assurance (Oxbow) for 60 percent of the medical and temporary disability benefits Oxbow paid in the claimant's workers' compensation claim. We set aside the ALJ's order and remand for further findings.

The case was previously before us. In his initial order, the ALJ found that the claimant sustained an admitted injury to his cervical spine on November 23, 2008, while employed by Bowie. The claimant was involved in an explosion that caused him to hit his head on the roof of a mine. The claimant was placed at maximum medical improvement (MMI) for this injury on April 28, 2009, and given a 10 percent whole person rating. Bowie filed a final admission of liability consistent with the MMI date and impairment rating. The claimant's treating physician recommended follow up care noting that the claimant could need surgical treatment at some time in the future.

The claimant testified that he quit working for Bowie and began working for a separate employer loading trucks. The client testified that this position required the claimant to lift up to 70 pounds. During this period of time, between being placed at MMI and beginning to work for Oxbow, the claimant did not receive treatment for his cervical spine condition.

On July 13, 2010, the claimant began working as a laborer for Oxbow, performing strenuous tasks such as lifting and carrying up to 100 pounds. The claimant testified that on January 3, 2011, he worked a particularly rough shift. On that day the claimant was sent into an area of the mine that was heavily heaved to the point that the ceiling of the mine was less than 5 feet. As he was working he struck his head at least twice on roof bolts and one time was knocked to the ground. The claimant testified that after his shift his neck was pulsating and he was taken by ambulance to the emergency room. The claimant underwent cervical surgery on January 19, 2011.

On July 21, 2011, Dr. Fall performed an independent medical examination of the claimant. Dr. Fall stated that she would consider the Oxbow incident a new injury and she also opined that the claimant's need for surgery could be related to his original injury in November 2008. Dr. Fall provided an opinion on apportionment in which she apportioned 40 percent of the claimant's current condition to his employment with Oxbow and 60 percent to the November 2008 injury with Bowie. The ALJ found Dr. Fall's opinions credible and persuasive on the issue of causation.

Based on these findings the ALJ determined that the claimant sustained a compensable new injury on January 3, 2011, and ordered Oxbow to pay temporary disability and medical benefits. The ALJ declined to apportion these benefits concluding, that the 2008 amendments to §8-42-104, C.R.S., precluded apportionment of temporary disability and medical benefits. The ALJ also denied the petition to reopen the November 23, 2008, injury based on change of condition. Oxbow appealed the ALJ's order and argued that the ALJ erred in failing to apportion temporary disability and medical benefits based on the contribution of the November 2008 injury. In an order dated April 9, 2012, we agreed with Oxbow's argument that the ALJ erred in failing to consider the evidence of apportionment between the industrial injuries pursuant to §8-42-104(6), C.R.S., and remanded the matter for the ALJ to consider evidence which might justify apportionment of temporary disability and medical benefits.

On remand the ALJ allowed the parties to make oral arguments on the issue. After completion of the parties' arguments the ALJ entered an order specifically crediting Dr. Fall's opinion for apportioning 40 percent of the claimant's current condition to his injury with Oxbow and 60 percent of the claimant's current condition to his injury with Bowie. The ALJ then concluded that even though he denied the claimant's petition to reopen the Bowie claim in the original order and the claim remained closed, he could order Bowie to reimburse Oxbow 60 percent of the claimant's medical and temporary disability benefits pursuant to §8-42-104(6), C.R.S.

On appeal Bowie argues that the ALJ erred in ordering it to reimburse Oxbow for the apportioned temporary disability and medical benefits because the claim was closed.

Specifically, Bowie contends that because the ALJ denied the claimant's petition to reopen against Bowie, the ALJ did not have authority or jurisdiction to order the reimbursement to Oxbow under §8-42-104(6), C.R.S. Bowie further maintains that the reimbursement is not permitted by law and contrary to the purposes of the Workers' Compensation Act. The claimant petitions to review the order separately on the grounds that apportionment of temporary and medical benefits is not permitted under §8-42-104(3), C.R.S., and that the ALJ's apportionment determination is unsupported by the evidence because he sustained a new compensable injury that is 100 percent attributable to Oxbow.

Initially, we reject Oxbow's contention that the claimant does not have standing to appeal the ALJ's order. Oxbow asserts that because the ALJ's order does not reduce or otherwise affect the claimant's receipt of benefits, the claimant lacks standing. We are not persuaded. Standing to challenge the order of an adjudicative tribunal is a jurisdictional prerequisite to appeal that order. *See O'Bryant v. Public Utilities Commission*, 778 P.2d 648 (Colo. 1989); *In re Trust of Malone*, 658 P.2d 284 Colo. App. 1982). In the context of agency action, the injury-in-fact element of standing does not require that a party undergo actual injury, as long as the party can demonstrate that the administrative action threatens to cause an injury. *Public Service Co. of Colorado v. Trigen Nations Energy Co.*, 982 P.2d 316 (Colo. 1999). Under these principles we conclude the claimant has standing.

Turning to apportionment, we do, however, agree with Oxbow's summary of the state of the law on this issue. Prior to 2008, there were no statutory provisions that addressed whether or to what extent liability for temporary disability or medical benefits could be apportioned. Rather, the concept of apportionment of temporary disability and medical benefits based on allocation of causation was governed exclusively by appellate case law. *See Curt Kriksciun, A Curious Journey: Apportionment in Workers' Compensation Today*, 38 Colo. Law 69 (March 2009). In *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001), and *State Compensation Insurance Fund v. Industrial Commission*, 697 P.2d 807 (Colo. App. 1985), the court of appeals upheld the apportionment of liability for temporary disability and medical benefits between two employers and their insurers where the claimants suffered successive industrial injuries.

Then in *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004), the court relied on *University Park Care Center* and *State Compensation Insurance Fund* to affirm apportionment of medical benefits where the ALJ determined that the need for the claimant's surgery was caused by the combination of a preexisting condition caused by a 1977 industrial injury and the natural aging process and a 2002 industrial injury. The court affirmed the apportionment even though the 1977 claim was

closed and the statute of limitations precluded the claim from being reopened. The result was that the claimant did not receive the portion of the benefits that had been attributed to the 1977 injury.

Senate Bill 08-241 made significant changes to the apportionment statute for claims with a date of injury on or after July 1, 2008. One of the changes was to preclude apportionment that resulted in a reduction of medical and temporary disability benefits to the claimant. This amendment legislatively overruled the harsh outcome of apportionment in the *Duncan* case. Section 8-42-104(3), C.R.S. Therefore, under the current version of the apportionment statute there cannot be any apportionment that results in less than 100 percent of the temporary disability and medical benefits being paid to the claimant.

However, Senate Bill 08-241 did not rule out the possibility of some form of apportionment altogether. Senate Bill 08-241 also added subsection (6), which expressly allows employers or insurers to seek contribution or reimbursement, “*as permitted by law,*” from other employers or insurers for benefits paid to or for an injured employee as long as the employee's benefits are not reduced or otherwise affected by such contribution or reimbursement.” (Emphasis added), *See* Ch. 3257, §2, 2008 *Colo. Sess. Laws* 1677. When it passed Senate Bill 08-241 in 2008, the General Assembly was presumably aware of the apportionment principles set forth in existing case law. *See Specialty Restaurants Corp. v. Nelson*, 231 P.3d 393 (Colo. 2010)(General Assembly is presumed to be aware of judicial precedent in an area of law when it legislates in that area). However, instead of precluding apportionment between employers and insurers, the General Assembly explicitly provided for apportionment, albeit in a limited form, in subsection (6) of §8-42-104, C.R.S. Therefore, as we stated in our prior order, §8-42-104(6), C.R.S., permits apportionment between current and past employers and insurers, so long as it does not result in any reduction in the benefits paid to the claimant.

The actual issue here, however, is whether under §8-42-104(6), C.R.S., an employer or insurer can be ordered to provide reimbursement or contribution for apportionment in a closed claim. Relying on *Duncan v. Industrial Claims Appeals Office*, *supra*, the ALJ here determined that he could order Bowie to reimburse Oxbow even though the Bowie claim was closed. The ALJ’s reliance on *Duncan* is misplaced. As stated above, in *Duncan*, the claimant did not receive the benefits that were apportioned to the closed claim. This particular outcome of apportionment is now specifically precluded under §8-42-104(3), C.R.S., and we do not see anything in *Duncan* that would otherwise provide support for the ALJ’s order of reimbursement in a closed claim.

Oxbow contends the ALJ correctly ordered reimbursement from Bowie even

though the claim was closed because, according to Oxbow, §8-42-104(6), C.R.S. creates a separate, independent legal right for a subsequent employer to seek reimbursement from a past employer and the closure of the claimant's claim therefore, does not deprive an ALJ of authority or jurisdiction to order a past employer to reimburse a current employer. In contrast, Bowie argues that the right to seek contribution or reimbursement from a prior employer in §8-42-104(6) is limited to only open claims. We agree with Bowie.

Section 8-42-104(6), C.R.S., has not been explicitly addressed in case law. In interpreting this provision, we apply the ordinary rules of statutory construction. The purpose of statutory construction is to affect the legislative intent. Because the best indicator of legislative intent is the language of the statute, words and phrases in a statute should be given their plain and ordinary meanings. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

We conclude that under the plain language of the statute, §8-42-104(6), C.R.S., does not permit an ALJ to enter an order requiring an employer or insurer to reimburse a portion of medical or temporary disability benefits in a closed claim. Section 8-42-104(6), provides, in pertinent part,

Nothing in this section shall be construed to preclude employers or insurers from seeking contribution or reimbursement, *as permitted by law*, from other employers or insurers for benefits paid to or for an injured employee... (Emphasis added).

The General Assembly specifically chose to add the phrase, "*as permitted by law*," which qualifies the right of an employer or insurer to seek contribution or reimbursement. Thus, contribution or reimbursement for apportionment of benefits must be in accordance with the existing law. *See People v. Drennon*, 860 P.2d 589 (Colo. App. 1993) (it is presumed that the general assembly intended every part of a statute to be effective); *See Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350 (Colo. App. 1996)(it is presumed that every clause and sentence has a purpose and a use that cannot be ignored).

An order requiring reimbursement in a closed claim is not "*permitted by law*." It is well settled that a claim may be closed by a final award resulting from an admission or order after a contested hearing. *See Burke v. Industrial Claim Appeals Office*, 905 P.2d 1 (Colo. App. 1994). Under §8-43-303, C.R.S., no further benefits may be awarded after a claim is closed unless there is an order reopening the claim on the grounds of error, mistake, or change of condition. *See Brown & Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991). Here, there appears to be no dispute that the Bowie claim was closed by an unobjected final admission of liability on August 13, 2009.

Therefore, absent the granting of a petition to reopen, Bowie could not be ordered to pay further benefits. Thus, the ALJ erred in ordering Bowie to pay without first reopening the claim.

Our prior order of remand did not mandate that the ALJ find apportionment based on Dr. Fall's opinion. Rather, the order of remand directed the ALJ to consider the possibility of apportionment pursuant to §8-42-104(6), C.R.S., in light of all of the evidence. The ALJ's order on remand, however, does not resolve the pertinent conflicting findings concerning causation for the issues of reopening and apportionment. We, therefore, remand the matter to resolve the conflicting findings. Section 8-43-301(8), C.R.S.

Initially, we disagree with the ALJ's statement that the Bowie claim is closed as a matter of law because the claimant did not appeal the denial of the petition to reopen in the first order. The issue of reopening and apportionment, in this instance, are necessarily intertwined given the fact that both depend on the ALJ's resolution of causation. In any event, Oxbow preserved the reopening issue in its Brief in Support of Petition to Review the ALJ's original order. Oxbow Brief in Support, January 23, 2012 at 2. ("The findings also do not support the ALJ's order denying claimant's request to reopen his claim...").

We are unable to reconcile the ALJ's findings on reopening with his determination to apportion causation to both Bowie and Oxbow. In his order the ALJ states, "the ALJ rejected Claimant's Petition to Reopen his claim relying on the factual findings that Claimant did not receive medical treatment after being placed at MMI and before his new injury, and therefore, Claimant did not suffer a worsening of his condition related to his prior injury, but instead suffered an aggravation of his pre-existing condition related to a new injury." ALJ Order at 6 ¶24. See § 8-43-303, C.R.S., 2002).

While the ALJ appears to have rejected the idea that the Bowie claim was causally related to a change of condition for the purposes of reopening, the ALJ simultaneously adopted Dr. Fall's causation analysis for apportionment that the claimant's need for treatment and temporary disability was 60 percent causally connected to the injury with Bowie. ALJ Order at 5 ¶ 18. The fact that the ALJ credited this evidence suggests that it was established that additional medical and temporary disability benefits from the Bowie claim were warranted and the petition to reopen should have been granted. See *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008) ("change in condition," refers either to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition which can be causally connected to the original compensable injury); see also *Dorman v. B&W Const. Co.*, 765 P.2d 1033

(Colo. App. 1988) (worsening of condition may be established by showing that additional medical and temporary disability are warranted).

As the claimant points out in his appeal, this finding is in direct conflict with the ALJ's other findings in paragraph 24 of the order, which suggest that the need for medical treatment and temporary disability benefits is attributable only to the Oxbow injury and upon which the ALJ based his determination to deny the petition to reopen the Bowie claim. Because the underlying issue of both reopening and apportionment is the ALJ's causation determination, the findings are inextricably linked and it is inconsistent to find that the claimant's current condition is 60 percent due to the Bowie injury but his condition did not worsen so as to allow reopening as the ALJ found here.

In view of the contradictory findings, we set aside the order and remand for the ALJ to resolve the conflicts in the evidence. Section 8-43-301(8), C.R.S. On remand the ALJ shall determine whether the claimant's need for medical treatment and entitlement to temporary disability benefits was caused solely by the new injury, in which case it would be appropriate to deny the petition to reopen the Bowie claim and apportionment, or whether the need for medical treatment and temporary disability was caused by a combination of both injuries as suggested by Dr. Fall, in which case it would be appropriate to grant the petition to reopen the Bowie claim and allow for apportionment under §8-42-104(6), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order issued November 2, 2012, is set aside and remanded for entry of a new order consistent with views expressed herein.

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

\_\_\_\_\_ 4/5/13 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JAMES TENNAPEL, 24504 TIMOTHY ROAD, CEDAREEDGE, CO, 81413 (Claimant)  
BOWIE RESOURCES, LLC, Attn: LOU GRAKO, P O BOX 1488, PAONIA, CO, 81428-1488  
(Employer)  
NEW HAMPSHIRE INSURANCE COMPANY, 70 PINE STREET, NEW YORK, NY, 10270-  
0094 (Insurer)  
WITHERS SEIDEMAN RICE & MUELLER P.C., Attn: DAVID B. MUELLER, ESQ., 101  
SOUTH THIRD STREET, SUITE 265, GRAND JUNCTION, CO, 81502 (For Claimant)  
TREECE ALFREY MUSAT & BOSWORTH, PC, Attn: MATTHEW C. HAILEY, ESQ., 999  
18TH STREET, SUITE 1600, DENVER, CO, 80202 (For Respondents)  
OXBOW MINING, INC., Attn: STEVE LEWIS, P O BOX 535, SOMERSET, CO, 81434  
(Other Party)  
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY  
BLVD., DENVER, CO, 80230 (Other Party 2)  
RITSEMA & LYON, P.C., Attn: PAUL FELD, ESQ./ALANA S. MCKENNA, ESQ., 999 18<sup>TH</sup>  
STREET, SUITE 3100, DENVER, CO 80202  
WELLS FARGO DISABILITY MANAGEMENT, Attn; PAT FORAN, 353 FALLS DRIVE,  
ABINGTON, VA 24210

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-811-126 &  
4-849-503-03

IN THE MATTER OF THE CLAIM OF

JOHN WOODMANSEE, III,

Claimant,

v.

FINAL ORDER

FINBRO CONSTRUCTION,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated November 14, 2012, that granted the respondents' motion for summary judgment to strike the claimant's application for hearing seeking to reopen the settlement agreement on the basis of fraud or mutual mistake of fact. We affirm the ALJ's order.

This case has previously been before the panel. In a prior order, the ALJ found that Finbro Construction (Finbro) was the general contractor of work performed at a condominium complex. Finbro, in turn, hired Global Wrap, LLC, (Global Wrap) to perform work at the complex. On September 18, 2009, the claimant was performing work for Global Wrap when he sustained an industrial injury. At the time of the claimant's injury, Global Wrap did not have workers' compensation insurance coverage for the claimant. Finbro, however, was insured by Pinnacol Assurance on the date of the claimant's injury. On December 8, 2011, the claimant entered into a full and final settlement with Finbro and Pinnacol Assurance for the injuries that he sustained in the industrial accident. The settlement was approved by the Division of Workers' Compensation (Division) on December 13, 2011.

Subsequently, the claimant filed an application for hearing listing Global Wrap as the respondent employer. Global Wrap filed a summary judgment motion, arguing that since it was undisputed that Finbro was the insured general contractor, that Global Wrap

was the uninsured subcontractor, and that the claimant entered into a settlement agreement with Finbro and Pinnacol Assurance for his industrial injuries, Global Wrap was not liable for the claimant's workers' compensation benefits. The ALJ agreed with Global Wrap and granted the summary judgment motion. Citing to §8-41-401(1)(a), C.R.S., the ALJ concluded that since Global Wrap did not have workers' compensation insurance coverage for the claimant on the date of his injury, this operated to impose liability for workers' compensation benefits on Finbro, the entity that contracted out the work, or the statutory employer. The ALJ concluded that under *Herriott v. Stevenson*, 172 Colo. 379, 473 P.2d 720 (1970), the uninsured subcontractor became an employee, as a matter of law, and the entity that contracted out the work is the only employer contemplated under the Act. Thus, the ALJ concluded that the claimant was precluded from pursuing a claim for the same type of workers' compensation benefits against Global Wrap. In an order dated July 31, 2012, we affirmed the ALJ's dismissal of Global Wrap.

The claimant then filed an application for hearing, which is the subject of this appeal, seeking to rescind the settlement agreement between the respondents Finbro and Pinnacol Assurance and the claimant on the grounds of fraud and mutual mistake of fact. The claimant asserted that it was either fraud or mutual mistake of fact because the parties believed that the claimant would be able to pursue his claim against Global Wrap even with the settlement agreement. The respondents filed a motion for summary judgment and argued that the terms of the settlement agreement were clear, unambiguous and contained no representation, either express or implied, concerning the claimant's right of action against Global Wrap and the claimant could not show fraud or mutual mistake of fact. The claimant responded that had he known that settlement with Finbro and Pinnacol Assurance would have extinguished his ability to pursue additional benefits from Global Wrap, he never would have agreed to the settlement agreement.

In granting the respondents' motion for summary judgment, the ALJ found that the settlement agreement was not ambiguous and, therefore, the claimant could not submit extraneous evidence as to the parties' intent. The ALJ further found that the claimant did not set forth any facts that would constitute mutual mistake or fraud on the part of respondents in reaching the settlement agreement. The ALJ concluded that because the claimant failed to show fraud or mutual mistake of fact, the claim remained closed by the settlement agreement between the respondents and the claimant.

On appeal, the claimant argues that the terms of the settlement agreement were ambiguous and that because the settlement agreement affected the claimant's right to seek benefits from Global Wrap, the ALJ erred in his determination that there was not a

mutual mistake of fact or fraud. We are not persuaded that the ALJ committed 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., however, 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 question on review is whether applicable law supports the ALJ's grant of summary judgment on the grounds that the claimant has failed to show that there was fraud or mutual mistake to reopen the settlement agreement pursuant to §8-43-303, C.R.S. We conclude that it does.

The settlement provision at issue is paragraph 9(A)(4) which states:

This settlement pertains only to claims which claimant may have against respondents Finbro Construction, LLC and Pinnacol Assurance.

Claimant's rights to pursue claims against any other potentially liable party are not extinguished by this settlement agreement.

The ALJ found no ambiguity in the agreement and determined the settlement contained the entire agreement of the parties and, therefore, must be enforced because it expresses the intent of the parties. *Cary v. Chevron U.S.A., Inc.*, 867 P.2d 117 (Colo. App. 1993); *Resolution Trust Corp. v. Avon Center Holdings*, 832 P.2d 1073 (Colo. App. 1992)(a settlement agreement is in the nature of a written contract which must be interpreted in accordance with the general rules which apply to the construction of contracts). The general rules of contract interpretation provide that where the contract terms are clear and unambiguous the contract must be enforced as written. *Cary v. Chevron U.S.A., Inc.*, *supra*. In determining whether the settlement is ambiguous "the instrument's language must be examined and construed in harmony with the plain and generally accepted meaning of the words used, and reference must be made to all the agreement's provisions." *Fibreglas Fabricators, Inc. v. Kylberg*, 799 P.2d 371 (Colo. 1990). Evidence the parties ascribe different meanings to a contract term does not compel the conclusion the contract is ambiguous. *See Dorman v. Petrol Aspen Inc.*, 914 P.2d 909 (Colo. 1996).

We agree with the ALJ's determination that the settlement agreement is not ambiguous and should be enforced as written. As written, the settlement agreement does not contain any language referencing the settlement being conditioned on the claimant's right of action against Global Wrap.

Moreover, although §8-43-303(1), C.R.S., provides that a settlement may be reopened at any time on the ground of fraud or mutual mistake of material fact, the party seeking to reopen an award bears the burden of proof to establish the appropriate grounds to reopen. We also agree with the ALJ's determination that the claimant failed to meet that burden here. Reopening based on mistake is left to the sound discretion of the ALJ, and we may not interfere with the ALJ's decision unless an abuse of discretion shown. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). An abuse of discretion does not exist unless the order is beyond the bounds of reason, as where it is contrary to law or not supported by substantial evidence in the record. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

A mutual mistake of material fact is one in which the parties share a common misconception concerning a material term or condition of the agreement. It must have a material effect on the agreed upon exchange, and the mistake must not be one concerning which the party seeking relief bears the risk. *See Davis v. Critter's Meat Factory*, W.C. No. 3-063-709 (August 29, 1996), citing *Masias v. Colorado*

*Compensation Insurance Authority*, (Colo. App. No. 94CA0989, July 20, 1995) (not selected for publication) (relying on *Restatement of Contracts (Second)* §152); *Cary v. Chevron U.S.A., Inc.*, *supra*. The misconception must pertain to an existing fact rather than an opinion or prophecy about the future. *Gleason v. Guzman*, 623 P.2d 378, 383 (Colo. 1981).

As we understand the claimant's argument, the mistake being alleged by the claimant is the belief that despite entering into a settlement agreement with Finbro and Pinnacol Assurance, the parties entered into the settlement under the assumption that the claimant would be able to pursue a claim against Global Wrap. However, as the ALJ found, the settlement agreement does not reflect that they entered the settlement agreement based on the assumption that the claimant would be able to proceed against Global Wrap. Moreover, the claimant bore the risk of whether or not the potential claim against Global Wrap was viable and, therefore, there was no mutual mistake of fact. Consequently, the ALJ did not err in finding that as a matter of law the claimant could not establish the mutuality of a mistake concerning the claimant's ability to pursue a claim against Global Wrap. Thus, we cannot say that the ALJ's determination exceeds the bounds of reason.

The claimant alternatively asserts that if the respondents knew that the very act of settlement would extinguish the claimant's right to pursue his claim against any other potentially liable party like Global Wrap, they never told the claimant and this false agreement induced the claimant to sign a settlement agreement he otherwise never would have signed. Claimant Brief in Support at 12.

To reopen the claim on grounds of "fraud," the claimant must prove that the respondents made false representations which the claimant relied upon to settle the claim. Section 8-43-303(1), C.R.S., *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (Colo. 1937); *See Allee v. King Soopers*, W.C. No. 3-640-815, 3-729-182, 3-703-172 (May 10, 2002).

Here, the ALJ findings support the conclusion that the claimant failed to sustain his burden to prove that the settlement should be reopened on grounds of fraud. The claimant's argument is premised on the fact that paragraph 9(A)(4) of the settlement agreement contains a "false statement" by stating that the "claimant's right to pursue claims against any other potentially liable party are not extinguished by the settlement agreement." The claimant's assertions notwithstanding, it is not the actual settlement agreement that foreclosed a claim against Global Wrap, but rather, it was the operation of law under §8-41-401, C.R.S., that served to preclude the claimant's right of action against Global Wrap. As recognized by the ALJ, in *Herriott v. Stevenson*, *supra*, the Colorado Supreme Court held that the statutory employer sections contemplate that there is but one

employer liable under the Workers' Compensation Act and when a subcontractor is insured under the Act, the entity that contracted out the work is not liable for workers' compensation benefits. Conversely, when the entity that contracted out the work is insured under the Act and the subcontractor is uninsured, then the uninsured subcontractor is not liable for compensation. Under these circumstances, the ALJ did not err in finding that as a matter of law the claimant could not establish the settlement was predicated on fraud and the claimant failed to prove grounds to reopen the settlement agreement.

The claimant points to a sentence in our prior order stating, "Since it is undisputed that the claimant entered into a settlement agreement with his statutory employer, or Finbro, for his workers' compensation benefits, we conclude that the claimant is precluded from also pursuing a claim for workers' compensation benefits against Global Wrap." The claimant then, asserts it is the settlement with Finbro which prevented him from pursuing a claim from benefits against Global Wrap. He then concludes the statement in the settlement document that the claimant's rights against any other potentially liable party "are not extinguished by this settlement agreement" is a false statement and constitutes fraud. The claimant however, has taken the sentence in the Final Order out of context and misinterpreted its significance. The reference in both the summary judgment order, and in the Final Order reviewing the summary judgment, was to indicate there was no factual dispute that Finbro had insurance coverage. As indicated above, the claimant's ability to pursue a claim against Global Wrap was extinguished, not by the settlement agreement, but by the application of the statute and the case law. The clause in the settlement agreement cannot then be seen as a false statement. It is actually an accurate statement.

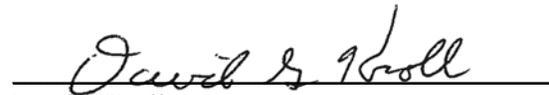
The claimant further argues that it was the settlement agreement that necessarily prevented him from pursuing his claim against Global Wrap because there was no finding that the claimant was an employee rather than an independent contractor and there was no finding that Finbro was the statutory employer. However, as mentioned in our prior order, this argument is without merit as the claimant thus far has not disputed that Finbro was the statutory employer pursuant to §8-41-401, C.R.S. or that he was an employee of Global Wrap. Nor did the claimant raise this as an issue of disputed material fact in the response to the respondents' motion for summary judgment. *See Brown v. Teitelbaum*, 830 P.2d 1081 (Colo. App. 1991)(in response to a motion for summary judgment, an adverse party must by affidavit or otherwise set forth specific facts showing there is a genuine issue for trial); *see also Snook v. Joyce Homes, Inc.*, 215 P.3d 1210 (Colo. App. 2009)(unless opposing party demonstrates true factual controversy summary judgment is proper).

We are unpersuaded by the claimant's remaining arguments and conclude that the law supports the ALJ's order granting the motion for summary judgment.

**IT IS THEREFORE ORDERED** that the ALJ's order dated November 14, 2012, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

  
Brandee DeFalco-Galvin

  
David Kroll

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 4/1/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

JOHN WOODMANSEE, III, 2301 KITTY HAWK DRIVE, PLANO, TX, 75025 (Claimant)  
FINBRO CONSTRUCTION, Attn: WERNER CATSMAN, P O BOX 3251, TELLURIDE, CO,  
81435 (Employer)  
PINNACOL ASSURANCE, Attn: HARVEY D. FLEWELLING, ESQ., 7501 E. LOWRY  
BLVD., DENVER, CO, 80230 (Insurer)  
LAW OFFICE OF ROGER FRALEY, JR., Attn: ROGER FRALEY, JR., ESQ., 1601 BLAKE  
STREET, SUITE 500, DENVER, CO, 80202 (For Claimant)  
RITSEMA & LYON, P.C., Attn: KELLY KRUEGEL, ESQ., 999 EIGHTEENTH STREET,  
SUITE 3100, DENVER, CO, 80202 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-879-893

IN THE MATTER OF THE CLAIM OF

COLBY ZECH,

Claimant,

v.

**FINAL ORDER**

LVI ENVIRONMENTAL SERVICES, INC.,

Employer,

and

NEW HAMPSHIRE INSURANCE CO % CHARTIS,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Allegretti (ALJ) dated November 16, 2012, that ordered a 50% reduction of the claimant's compensation pursuant to §8-42-112(1)(b), C.R.S. for the willful violation of a reasonable safety rule. We affirm.

The ALJ found that on January 24, 2012, the claimant was working as a laborer for the respondent employer. The employer was in the process of demolishing a middle school in Aurora. The school contained asbestos, and the employer specializes in handling hazardous waste.

The employer's site superintendent was Mr. Estrada. On the morning of January 24, 2012, Mr. Estrada held a safety meeting with the crew members, including the claimant. Prior to the work on the second floor of the building, Mr. Estrada trained the crew, including the claimant in the use of a chute and the procedure for going from the second floor down to the dumpster on the first floor via a ladder, which had to be tied off for stabilization.

The crew had saw-cut a hole in the concrete floor of the second floor of the school. Underneath the hole, known as a chute, the crew had positioned a 30-yard dumpster into which the crew dumped debris, including drywall and carpet. The dumpster was filled with hazardous waste.

Around the chute on the second floor, the crew strung red danger tape to keep workers away from the hole since it presented a danger of falling. If a worker was

required to work inside the danger tape, the worker was required to be tied off to a retractable lanyard which is a fall protection device. The retractable lanyard consists of a spool with a retractable cable which is approximately 20 feet long. The retractor has a brake which senses when the cable is being pulled quickly, as if a worker has fallen, and then locks. The respondent employer prohibits jumping at job sites, and violations of safety rules result in discipline, up to termination.

After lunch break on January 24, 2012, the claimant asked the employer's site superintendent, Mr. Estrada, for new filters for his respirator. Mr. Estrada stated that while the company had plenty of personal protective equipment, he did not want it wasted. Mr. Estrada stated that the filters last for up to two weeks, and it was his impression that the claimant was wasting materials, taking extra time, and acting as though he had some privileges. Mr. Estrada referenced sending the claimant back to the company's office after which the claimant walked away.

Shortly thereafter, Mr. Estrada received a call on the radio saying that someone had been hurt at the chute. Mr. Estrada saw the claimant on top of the dumpster, and he said that he was in a lot of pain. Mr. Estrada asked the claimant what happened and the claimant answered that he had jumped down into the dumpster. When Mr. Estrada asked the claimant why he had jumped, the claimant answered that he thought he would land on the debris before the lanyard locked up. The claimant ultimately was diagnosed as suffering three transverse process fractures at L1, L2, and L3.

Later in the day on January 24, 2012, Mr. Estrada and Mr. Garcia visited the claimant in the hospital. Mr. Baumgartner and the claimant's father, the safety manager for the respondent employer, also were present in the hospital. When asked what happened, the claimant admitted that he had jumped on purpose. The claimant explained that he was mad at Mr. Estrada for fighting with him about the filters. The claimant then apologized to Mr. Estrada saying, "Sorry, boss."

The respondents filed a general admission of liability. On May 17, 2012, the respondents filed a petition to modify the claimant's compensation, alleging that the claimant willfully failed to obey a reasonable safety rule.

After hearing, the ALJ determined that the claimant willfully failed to obey a reasonable safety rule adopted for the safety of the employees. Consequently, the ALJ ordered that the respondents were entitled to a 50% reduction in indemnity benefits. The ALJ determined that the claimant was aware of the employer's policy against jumping, and that the claimant had been instructed on the morning of his injury regarding the specific procedure to safely descend into the dumpster. The ALJ discredited the claimant's testimony that he did not jump into the dumpster, but, instead, slowly lowered himself into the dumpster backwards. The ALJ found that the claimant's testimony was

in conflict with all of the other witnesses who testified that the claimant specifically told them that he had jumped into the dumpster. The ALJ also credited the testimony of Dr. Ramaswamy, an expert in occupational medicine. Dr. Ramaswamy testified that the force necessary to cause a fracture of the L1, L2, and L3 bones, particularly in a young, healthy individual, such as the claimant, would be very significant. Dr. Ramaswamy further testified that by jumping, the lanyard would sense the quick movement of the cable and lock up, arresting the fall. He explained that the claimant would then be suspended and a swing would develop in a pendulum fashion resulting in a force-vector which would cause the claimant to swing backwards into the side of the chute. Dr. Ramaswamy opined that this mechanism of injury would be sufficient to cause the type of fractures that the claimant actually suffered.

On review, the claimant raises a number of arguments. The claimant first appears to argue that the safety rule he is charged with violating cannot be considered a safety rule. The claimant explains that having employees get into a dumpster with cancer causing materials cannot be considered for the safety of employees. The claimant also argues that §13-21-301, C.R.S. barred any use of the claimant's statements that he jumped into the dumpster. We are not persuaded by the claimant's arguments.

Under § 8-42-112(1)(b), C.R.S., it is the respondents' burden to prove every element justifying a reduction in compensation for willful failure to obey a reasonable safety rule. *Triplett v. Evergreen Builders, Inc.*, W. C. No. 4-576-463 (May 11, 2004). The question of whether the respondents met their burden to prove a willful safety rule violation is generally one of fact for determination by the ALJ. *Lori's Family Dining, Inc. v. Industrial Claim Appeals Office*, 907 P.2d 715 (Colo. App. 1995). Because the issue is factual in nature we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). 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*, 914 P.2d 411 (Colo. App. 1995).

Here, there is substantial evidence supporting the ALJ's determination that a safety rule of the employer was violated. Section 8-43-301(8), C.R.S. Mr. Estrada testified that the claimant's jumping into the dumpster was a safety violation. He explained that it was a significant violation because the claimant was putting himself in jeopardy. Tr. (10/9/12) at 97-98. Additionally, Mr. McKay, the project manager and

estimator for the respondent employer, testified that jumping into a debris pile is a violation of the employer's policy and it is not considered appropriate. Tr. (10/29/12) at 28. Similarly, Mr. Dominguez, an employee of the respondent employer, also testified that the employer prohibits jumping. Tr. (10/29/12) at 60. Mr. Garcia, a supervisor and crew chief at the school on the date of the incident, testified that the employer has a rule that prohibits jumping from a second floor into a dumpster. He testified that the claimant's jumping into the dumpster was a violation of the employer's safety policy. Tr. (10/29/12) at 79, 82-83. Based on these circumstances, therefore, we are not persuaded to disturb the ALJ's order on this basis.

The claimant also argues that §13-21-301(2), C.R.S. barred use of his statements that he jumped into the dumpster. We are not persuaded.

Section 13-21-301(2), C.R.S. provides as follows:

(1) If a person is injured as a result of an occurrence which might give rise to liability and said person is a patient under the care of a practitioner of the healing arts or is hospitalized, no person or agent of any person whose interest is adverse to the injured person shall:

(a) Within thirty days after the date of the occurrence causing the injury, negotiate or attempt to negotiate a settlement with the injured patient;

(b) Within thirty days after the date of the occurrence causing the injury, obtain or attempt to obtain a general release of liability from the injured patient; or

(c) Within fifteen days after the date of the occurrence causing the injury, obtain or attempt to obtain any statement, either written, oral, recorded, or otherwise, from the injured patient for use in negotiating a settlement or obtaining a release except as provided by the Colorado rules of civil procedure.

(2) Any settlement agreement entered into or any general release of liability given by the injured patient in violation of this section shall be void. *Any statement, written, oral, recorded, or otherwise, which is given by the injured party in violation of this section may not be used in evidence against the interest of the injured party in any civil action relating to the injury.* (emphasis added)

Here, we agree with the ALJ that §13-21-301, C.R.S. is inapplicable in this action. Tr. (10/29/12) at 13-17. First, the ALJ found that immediately after the claimant was injured on January 24, 2012, Mr. Estrada asked the claimant at the work site what

happened and the claimant answered that he had jumped down into the dumpster. Findings of Fact at 7 ¶16. The claimant does not argue that he was under the care of a medical practitioner or was hospitalized at this time. Additionally, there is no evidence demonstrating that when the claimant gave such statements to his supervisors or co-workers that he did so while in violation of the statute. Namely, the claimant did not give such statements while negotiating or attempting to negotiate a settlement, or during an attempt to obtain a general release of liability. Consequently, we are not persuaded to disturb the ALJ's order on this basis.

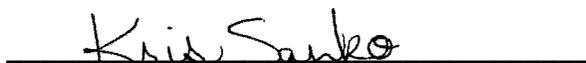
The claimant makes additional conclusory arguments on appeal. Brief In Support at 8. Many of the conclusory arguments raised, however, have no bearing on whether the claimant violated a safety rule of the respondent employer and, therefore, we decline to address such arguments. To the extent that the claimant again argues that he did not jump into the dumpster but, rather, attempted to lower and then "drop" himself into the dumpster through the worksite hole with the help of the safety approved retractable lanyard, the ALJ expressly discredited the claimant's version of events. Findings of Fact at 10 ¶30. Since the ALJ's finding is supported by substantial evidence in the record, we may not disturb her order. Tr. (10/9/12) at 67-68, 97; Tr. (10/29/12) at 21, 25, 82, 84; Ex. H at 16; Ex. I at 18. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated November 16, 2012, 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

\_\_\_\_\_ 3/21/2013 \_\_\_\_\_ by \_\_\_\_\_ RP \_\_\_\_\_ .

COLBY ZECH, 6705 SOUTH FIELD STREET #801, LITTLETON, CO, 80128 (Claimant)

LVI ENVIRONMENTAL SERVICES, INC., Attn: KENDRA SHELTON, 1201 S. CHILDERS ROAD, ORANGE, TX, 77630 (Employer)

NEW HAMPSHIRE INSURANCE CO % CHARTIS, Attn: JENNIFER HELD, P O BOX 25971, SHAWNEE MISSION, KS, 66225 (Insurer)

LAW OFFICE OF JACK KINTZELE, Attn: JACK KINTZELE, ESQ., 1317 DELAWARE STREET, DENVER, CO, 80204 (For Claimant)

MCCREA & BUCK, LLC, Attn: JAMES BUCK, ESQ., 600 GRANT STREET #825, DENVER, CO, 80203 (For Respondents)

12CA1346 Martin v. ICAO 04-11-2013

COLORADO COURT OF APPEALS

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Court of Appeals No. 12CA1346  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 3-979-487

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Ronald Martin,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, El Paso School District  
No. 11, and Pinnacol Assurance,

Respondents.

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ORDER AFFIRMED

Division I  
Opinion by JUDGE TAUBMAN  
Graham and Roy\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**

Announced April 11, 2013

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Steven U. Mullens, P.C., Steven U. Mullens, Colorado Springs, Colorado, for  
Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents El Paso School  
District No. 11, and Pinnacol Assurance

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.  
VI, § 5(3), and § 24-51-1105, C.R.S. 2012.

In this workers' compensation action, claimant, Ronald Martin, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed the decision of an administrative law judge (ALJ) denying Martin's request for attorney fees and costs. We affirm.

### I. Background

Martin sustained an admitted, work-related injury to his knee in 1989. The medication prescribed to relieve his knee pain, Indocin, a non-steroidal anti-inflammatory drug (NSAID), caused claimant to experience intestinal distress. He was diagnosed with ulcerative colitis and underwent six gastrointestinal surgeries. He was also prescribed steroids to relieve the intestinal inflammation. However, the steroids led to aseptic necrosis of both hips, necessitating a left hip replacement and right hip surgery. Employer paid for all of these surgeries.

In 1998, Martin settled his workers' compensation claim with employer, El Paso School District No. 11 (with its insurer, Pinnacle Assurance, collectively employer). The settlement was approved by an ALJ. Employer agreed Martin's injuries to his "right knee,

bilateral hips, gastrointestinal tract, and psychological sequelae” were compensable and that Martin would continue “to receive authorized medical treatment as provided for in the Colorado Workers’ Compensation Act (Act).” However, the parties further agreed that “[n]othing in this settlement shall be construed to be a waiver of [employer’s] right to contest any treatment or the payment of any medical bills.”

Twelve years later, employer asked a physician who specializes in medical causation and impairment to assess whether Martin’s gastrointestinal treatment was causally related to his work injury. Employer’s medical expert opined that Martin suffered from Crohn’s disease, which the expert described as a “permanent inherent immunologic disease of unknown etiology,” rather than from medication-induced ulcerative colitis. More particularly, he found it medically probable that the NSAIDs prescribed to Martin exacerbated and worsened his pre-existing Crohn’s disease.

Employer subsequently filed an application for hearing challenging Martin’s entitlement to future medical benefits.

Employer summarized the issues to be heard as follows:

“Termination of medical benefits; causation; natural progression of non-occupational condition; temporary exacerbation; idiopathic condition; efficient intervening cause; [and] apportionment of benefits.”

Martin responded to the application for hearing by seeking his attorney fees and costs on the ground that employer had endorsed an unripe issue in violation of sections 8-42-101(5) and 8-43-211(2)(d), C.R.S. 2012. He argued that the settlement agreement precluded employer from challenging relatedness and causation, and created a legal impediment to pursuing those issues at hearing.

Although employer subsequently withdrew its challenge to continuing medical benefits for claimant’s gastrointestinal injuries, Martin declined to abandon his request for fees and costs. Because Martin’s medical benefits were no longer contested, though, the only issue addressed at hearing was Martin’s request for attorney fees and costs. The ALJ concluded that the issue endorsed by employer was ripe for adjudication because the “settlement specifically [kept] open the issue of medical benefits”; he also noted that the merits of the medical benefits issue were inconsequential to

its ripeness. The ALJ therefore denied and dismissed Martin's request for attorney fees and costs. The Panel agreed and affirmed the ALJ's order. This appeal followed.

## II. Medical Benefits Issue Ripe Under Settlement Agreement

As he argued before the ALJ and the Panel, Martin contends that the settlement agreement impeded employer's medical benefits challenge. He claims that because the parties agreed that (1) he sustained "compensable injuries" to his "gastrointestinal tract," and (2) the diagnoses made by physicians in this case "may be incorrect or subject to change," employer waived its right to challenge the cause of Martin's gastrointestinal condition. He further argues that this legal impediment created by the settlement agreement rendered employer's challenge to his gastrointestinal treatment unripe, mandating an award of his attorney fees and costs under the Act. We are not persuaded.

Section 8-43-211(2)(d) requires an award of attorney fees and costs for the endorsement of an unripe issue:

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.

An issue is ripe for hearing when it “is real, immediate, and fit for adjudication.” *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006). Conversely, an issue is not ripe and “adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury which may never occur.” *Id.* “Whether an issue is ripe for review is a legal question that we review de novo.” *Youngs v. Indus. Claim Appeals Office*, 2012 COA 85, ¶ 16.

Martin argues that employer’s medical benefits challenge was unripe because the settlement agreement contractually precluded employer from contesting his need for gastrointestinal treatment. He characterizes the issue endorsed by employer as, in reality, a challenge to causation, not a challenge to a specific medical benefit. He argues that, by claiming he suffered from Crohn’s disease rather than ulcerative colitis, employer was, in effect, challenging the root cause of his gastrointestinal illnesses. In other words, Martin reasons that by admitting compensability in the settlement

agreement, employer is barred from contesting the cause of his gastrointestinal injuries.

Employer maintains, to the contrary, that it was only challenging the relatedness of future medical benefits. It maintains that the settlement agreement expressly left open medical benefits, permitting it “to contest any treatment or the payment of any medical bills.” Because it was contractually and legally permitted to contest medical benefits, employer contends, the issue it raised was ripe for adjudication and the ALJ properly denied and dismissed Martin’s request for attorney fees and costs.

We conclude that employer was authorized to challenge causation, rather than a challenge to a specific medical benefit, under the settlement agreement’s provision allowing it “to contest any treatment or the payment of any medical bills.”

We reach this conclusion based on the decisions of two divisions of this court. In *Hanna v. Print Expeditors Inc.*, 77 P.3d 863, 866 (Colo. App. 2003), the division held that an employee’s entitlement to a general award of future medical benefits is “subject to the employer’s right to contest compensability, reasonableness,

or necessity.” Similarly, in *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997), the division held that

in a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the on-the-job injury and the need for medical treatment.

We recognize that in *Grover v. Industrial Commission*, 759 P.2d 705, 712 (Colo. 1988), the supreme court stressed the difference between challenging continued medical benefits and moving to reopen a workers’ compensation proceeding, noting that the latter procedure would apply when “because of an error, mistake or change in the injured worker’s condition, further review of a previously entered award is necessary in the interest of basic fairness.” Accordingly, while the language quoted above in *Hanna* and *Snyder* may have extended beyond the supreme court’s analysis in *Grover*, nevertheless, employer was entitled to rely on those decisions.

Thus, employer’s contractual authority to contest medical

benefits necessarily incorporated a right to challenge the relatedness of Martin's need for treatment of his gastrointestinal condition to his work injury, notwithstanding the language in the settlement agreement that the original physician's diagnoses "may be incorrect or subject to change." Further, employer never asserted that Martin did not sustain a compensable injury or challenge his need for continued medical treatment for his other related injuries, including hip surgery and psychological treatment; it challenged the relatedness of future medical benefits for his gastrointestinal injuries only. *See Kieckhafer v. Indus. Claim Appeals Office*, 2012 COA 124, ¶ 9 ("To receive benefits, an injured worker bears the threshold burden of establishing, by a preponderance of the evidence, that he or she has sustained a compensable injury proximately caused by his or her employment.").

We consequently perceive no error in the ALJ's conclusion that employer had asserted an issue ripe for adjudication and did not violate section 8-43-211(2)(d). The ALJ therefore properly denied Martin's request for attorney fees and costs on that basis. *See*

*Olivas-Soto*, 143 P.3d at 1180 (affirming denial of attorney fees and costs where issue endorsed was found to be ripe for adjudication).

### III. Reopening Requirement

Martin next asserts that employer should have filed a petition to reopen in order to contest medical benefits. He argues that employer was barred by the settlement agreement from contesting compensability of his gastrointestinal disorder. Because compensability was closed by the settlement agreement, he asserts employer should have petitioned to reopen the claim on one of the two available grounds, fraud or mutual mistake. The absence of a petition to reopen, he claims, created “a legal impediment to the . . . endorsement of the issue of compensability . . . rendering the matter unripe for adjudication and warranting sanctions pursuant to section 8-43-211(2)(d).” We disagree.

As we have discussed above, both *Hanna* and *Snyder* permitted employer’s challenge to causation as properly within the scope of its challenge to Martin’s right to continued medical benefits. Thus, neither the Panel nor the ALJ erred in determining that a petition to reopen was not necessary for employer to

challenge the relatedness of Martin's gastrointestinal treatment.

#### IV. Request for Additional Attorney Fees and Costs

Having determined that Martin was not entitled to an award of attorney fees and costs for responding to employer's application for hearing, we decline his request for additional fees and costs incurred in his appeals of the ALJ's and the Panel's decisions.

The order is affirmed.

JUDGE GRAHAM and JUDGE ROY concur.

Court of Appeals No. 12CA1443  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-733-270

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United Airlines,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Angela Jones,

Respondents.

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ORDER AFFIRMED

Division IV  
Opinion by JUDGE WEBB  
Lichtenstein and Fox, JJ., concur

Announced March 28, 2013

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Ritsema & Lyon, P.C., Lynn P. Lyon, Michael M. Maglieri, Denver, Colorado, for  
Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Alvarado, LaForett & Martinez Tenreiro, LLC, Elsa Martinez Tenreiro, Denver,  
Colorado, for Respondent Angela Jones

¶ 1 In this workers' compensation action, self-insured employer, United Airlines (employer), seeks review of a final order of the Industrial Claim Appeals Office (Panel), affirming the order of an administrative law judge (ALJ) that denied employer's request for reimbursement of temporary total disability (TTD) benefits in excess of the \$75,000 statutory cap. We conclude that the cap does not apply to benefits paid before a worker reaches maximum medical improvement (MMI) or is released to work. Therefore, we affirm.

### I. Background

¶ 2 All dispositive facts are undisputed. After claimant, Angela Jones, sustained a compensable injury in 2007, employer admitted liability for TTD benefits. Claimant's TTD benefits ceased when she was released to return to work in May 2011, by which time she had been paid \$99,483.14. Shortly thereafter, a physician performed a division-sponsored independent medical examination and placed claimant at MMI with a permanent impairment of five percent of the whole person.

¶ 3 Relying on section 8-42-107.5, C.R.S. 2012, which caps combined TTD and permanent disability benefits at \$75,000 for a

claimant whose impairment rating is twenty-five percent or less of the whole person, employer sought to recover the \$24,483.14 it had paid in excess of the cap as an overpayment. Claimant responded that she had not received an overpayment because under section 8-42-105(3), C.R.S. 2012, employer was required to continue paying TTD benefits until she was released to work.

¶ 4 The ALJ concluded that the cap did not apply so long as claimant was entitled to receive TTD benefits. Consequently, because claimant had not received an overpayment, she was not required to repay employer the amount she had received above the cap. The Panel agreed.

## II. Law

¶ 5 This case presents only an issue of statutory interpretation.

### A. Scope of Review

¶ 6 If a provision of the Workers' Compensation Act (Act) is clear, "we interpret the statute according to its plain and ordinary meaning." *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). In addition, "when examining a statute's plain language, we give effect to every word and render none superfluous

. . . because “[w]e do not presume that the legislature used language idly and with no intent that meaning should be given to its language.” *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (quoting *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003)).

¶ 7 This court is not bound by the Panel’s interpretation, *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006), and we review statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff’d*, 145 P.3d 661 (Colo. 2006). However, we give deference to the Panel’s reasonable interpretations of the statute it administers. *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006); *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App. 2005), *aff’d*, 134 P.3d 407 (Colo. 2006). Thus, the Panel’s interpretation will be set aside only “if it is inconsistent with the clear language of the statute or with the legislative intent.” *Support, Inc. v. Indus. Claim Appeals Office*, 968 P.2d 174, 175 (Colo. App. 1998).

#### B. Relevant Provisions of the Act

¶ 8 The Act limits the total disability benefits that a claimant

whose permanent impairment rating is less than twenty-six percent may receive:

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

§ 8-42-107.5.

¶ 9 The Act does not provide that a claimant's benefits cease when that ceiling is reached. To the contrary, it specifies that benefits must continue until one of the following conditions is met:

- (3) Temporary total disability benefits shall continue until the first occurrence of any one of the following:
  - (a) The employee reaches maximum medical improvement;
  - (b) The employee returns to regular or modified employment;
  - (c) The attending physician gives the employee a written release to return to regular employment; or
  - (d)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment.

§ 8-42-105(3).

¶ 10 Under the Act:

“Overpayment” means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

§ 8-40-201(15.5), C.R.S. 2012.

### III. Applicability of the Cap

¶ 11 Employer first contends the ALJ misinterpreted the Act in concluding that claimant had not been overpaid. Employer concedes that the Act does not permit discontinuing TTD benefits before one of the conditions in section 8-42-105(3) is met, but argues that to avoid a conflict with the cap, benefits paid in excess of the cap still must be repaid once the claimant’s entitlement to TTD benefits has ended. We consider these arguments separately and reject them both.

#### A. Claimant Did Not Receive an Overpayment of Benefits

¶ 12 Although claimant received benefits exceeding the cap, the circumstances do not satisfy other elements of the definition of

overpayment. The relevant phrase -- “money received” -- limits overpayment to sums exceeding “the amount that *should have been paid.*” § 8-40-201(15.5) (emphasis added). Here, because claimant received only benefits to which she was entitled, the \$24,483.14 she received above the cap did not constitute an overpayment. See *Cooper v. Indus. Claim Appeals Office*, 109 P.3d 1056, 1059 (Colo. App. 2005) (once authorized lump sum had been paid as “required by statute . . . it ‘became a vested right’” (quoting *McBride v. Indus. Comm’n*, 97 Colo. 166, 172, 49 P.2d 386, 389 (1935))); *Rocky Mountain Cardiology v. Indus. Claim Appeals Office*, 94 P.3d 1182, 1186 (Colo. App. 2004) (because temporary disability was owing as a matter of law until ALJ granted prospective relief, disputed payment did not constitute overpayment).

¶ 13 This interpretation is consistent with the absence of any reference to the cap among the conditions that terminate TTD benefits under section 8-42-105(3). See *Henderson v. City of Fort Morgan*, 277 P.3d 853, 855 (Colo. App. 2011) (“Had the legislature intended to prescribe a voting procedure . . . it could have said so plainly.”); see also *Bd. of Educ. v. Spurlin*, 141 Colo. 508, 522, 349

P.2d 357, 364 (1960) (“the express mention of a person or thing . . . impliedly excludes other persons or things not mentioned”). It is also consistent with the absence of a cross-reference in section 8-42-107.5 to section 8-42-105(3). See *Nededog v. Colo. Dep’t of Health Care Policy & Fin.*, 98 P.3d 960, 964 (Colo. App. 2004) (noting absence of cross-reference).

¶ 14 In addition, section 8-42-107.5 caps “combined” temporary and permanent payments at \$75,000. The legislature’s use of “combined” suggests that, to reach the cap, a claimant must have received both temporary and permanent benefits. Here, the benefits claimant received were solely for her temporary disability; because she exceeded the cap before an award of permanent benefits was made, none of the benefits paid to her was compensation for permanent impairment. Thus, she never received combined permanent and temporary benefits exceeding the cap.

¶ 15 Employer’s citation of *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995), and *Rogan v. Industrial Claim Appeals Office*, 91 P.3d 414 (Colo. App. 2003), does not require a different outcome. In *Donald B. Murphy*,

the employer was permitted to offset permanent partial disability (PPD) benefits that had already been paid to the claimant, up to the statutory cap, against TTD benefits that he might receive after his claim was reopened. Similarly, in *Rogan*, the claimant was denied additional TTD benefits because he had already received both TTD and PPD benefits. Thus, unlike the pending case, each claimant's combined PPD and TTD benefits had reached the cap when the claimant sought additional TTD benefits. Neither case addresses whether the claimants would be entitled to additional TTD benefits if, as here, those benefits, when calculated exclusive of their permanent benefits, reached the statutory cap.

#### B. Claimant Need Not Repay Benefits Exceeding the Cap

¶ 16 Urging that a conflict can be avoided between section 8-42-105(3) and the cap by requiring repayment of excess benefits, employer points out that, if the legislature had intended to permit claimants to keep payments in excess of the cap, it would have said so in the Act. Even if this argument is not precluded by the foregoing interpretation of section 8-42-105(3), it also fails for the following three reasons.

¶ 17 First, although the legislature did not include a provision expressly allowing claimants who receive TTD benefits of more than \$75,000 to keep the excess, it also did not specify that such benefits must be repaid. Nor did it list the repayment sought by employer among the types of recoverable overpayments addressed in section 8-42-113.5, C.R.S. 2012. We decline to read such a provision into the Act. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (“We have uniformly held that a court should not read nonexistent provisions into the . . . Act.”).

¶ 18 Second, the mandate that TTD benefits continue until one of several conditions is satisfied uses language (“shall”) stronger than the wording of section 8-42-107.5: “no claimant” whose impairment rating is less than twenty six percent “may receive” combined permanent and temporary benefits in excess of \$75,000. *Cf. Danielson v. Castle Meadows, Inc.*, 791 P.2d 1106, 1113 (Colo. 1990) (unless legislative purpose requires otherwise, “may” is permissive and “shall” is mandatory).

¶ 19 Third, divisions of this court have held that the cap cannot be applied until a claimant has reached MMI or is released to work.

*Donald B. Murphy*, 916 P.2d at 613 (“Therefore, only after (1) the claimant reaches maximum medical improvement and (2) his medical impairment rating is established can the applicability of [section] 8-42-107.5 be determined.”); *Rogan*, 91 P.3d at 415 (“[T]he cap established by [section] 8-42-107.5 cannot take effect before a claimant attains MMI.”). While so delaying application of the cap may, as here, result in payments exceeding the cap, “we have no authority to remedy that problem.” *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 480 (Colo. App. 2005).

¶ 20 Since *Donald B. Murphy Contractors* was decided, the General Assembly has not changed the relevant language, despite having amended the statute in 2005, 2009, and 2010.<sup>1</sup> Presumably, the General Assembly was aware of the problem but chose not to remedy it. See *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004) (“[W]hen it chooses to legislate in a particular area, the General Assembly is presumed to be aware of existing case law precedent.”). Therefore, it remains “clear that the General Assembly intended to

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<sup>1</sup> See Ch. 323, sec. 1, § 8-42-107.5, 2005 Colo. Sess. Laws 1505; Ch. 269, sec. 4, § 8-42-107.5, 2009 Colo. Sess. Laws 1223; Ch. 310, sec. 7, § 8-42-107.5, 2010 Colo. Sess. Laws 1459.

require employers to continue paying benefits without application of the cap until such time as a claimant reaches MMI.” *Leprino Foods*, 134 P.3d at 480.

### C. Public Policy Does Not Require a Different Interpretation

¶ 21 Employer’s assertion that the interpretation by the ALJ and the Panel affords claimants who receive benefits in excess of the cap a windfall in violation of public policy, which also creates “an incentive for injured workers to delay their recovery,” is unpersuasive.

¶ 22 Employer has not cited a Colorado case, nor have we found one, in which a statutory interpretation based on plain language in the Act has been rejected as against public policy. In any event, we are not persuaded that the scenarios described by employer either create a windfall or encourage malingering.

¶ 23 Claimant only received benefits to which she was entitled for the temporary period when she was unable to work. Requiring her to repay some of those benefits could adversely affect her financial independence, thereby eroding the beneficent purpose of the Act. *See Davison*, 84 P.3d at 1029 (the Act “is intended to be ‘remedial

and beneficent in purpose, and should be liberally construed' in order to accomplish these goals" (quoting *Colo. Counties, Inc. v. Davis*, 801 P.2d 10, 11 (Colo. App. 1990), *aff'd sub nom. Cnty. Workers Comp. Pool v. Davis*, 817 P.2d 521 (Colo. 1991))).

¶ 24 Because, in most circumstances, employers select the physicians who release employees to work and determine MMI, employees on temporary disability status have little opportunity to malingering. And any risk of malingering is counterbalanced by the long-term health consequences to an employee who returns to work prematurely because of the risk of an overpayment claim. Such competing public policy considerations should be resolved by the legislature. *See, e.g., Town of Telluride v. Lot Thirty-Four Ventures, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000) ("It is not up to the court to make policy or to weigh policy.").

¶ 25 In sum, we conclude that claimant did not receive an overpayment and the cap does not obligate her to repay employer for benefits to which she was entitled.

#### IV. Equal Protection

¶ 26 Employer's contention that construing these statutes to permit

claimant to keep more than \$75,000 in TTD benefits violates equal protection is also unpersuasive.

A. The Constitutional Issue is Preserved

¶ 27 Most cases hold that because neither an ALJ nor the Panel is authorized to address constitutional challenges to the Act, such challenges can be raised for the first time on appeal. *See, e.g., Indus. Comm'n v. Bd. of Cnty. Comm'rs*, 690 P.2d 839, 844 n.6 (Colo. 1984) (“[I]t is doubtful that the Commission has authority to decide constitutional questions. Therefore, these issues must be raised for the first time on appeal to the court of appeals.”); *Montezuma Well Serv., Inc. v. Indus. Claim Appeals Office*, 928 P.2d 796, 798 (Colo. App. 1996) (“[T]he fact that petitioners did not raise [the constitutional issue] before the ALJ and Panel does not preclude them from raising the issue here.”).

¶ 28 Nevertheless, claimant asserts that employer’s equal protection challenge is unpreserved because the challenge is as applied, rather than facial, and employer failed to raise it before either the ALJ or the Panel. *Williams v. Indus. Claim Appeals Office*, 128 P.3d 335, 339 (Colo. App. 2006), *rev’d sub nom. Williams v.*

*Kunau*, 147 P.3d 33 (Colo. 2006), supports this as applied distinction.<sup>2</sup>

¶ 29 We decline to apply *Williams* because the case on which it relied, *Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1198-99 (Colo. 1993), is less definitive on whether an administrative agency may consider an as applied challenge, nor does *Horrell* say that the agency must consider the as applied challenge for the issue to be preserved. Instead, *Horrell* distinguished the facial challenge before it from an earlier “similar claim” presented to the State Personnel Board on the grounds that the prior case “raised issues that were independent from the constitutional concerns.” *Id.* at 1199 (citing *Colo. Ass'n of Pub. Emp. v. Dep't of Highways*, 809 P.2d 988 (Colo. 1991)). But here, unlike in *Williams*, the undisputed facts left no need for the ALJ to make factual determinations that may inform an as applied challenge.<sup>3</sup>

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<sup>2</sup> In reversing *Williams*, the supreme court did not address the distinction between as applied and facial challenges.

<sup>3</sup> Compare *Malecon Tobacco, LLC v. State*, 59 P.3d 474, 477 (Nev. 2002) (requiring exhaustion of administrative remedies where as applied challenge involved factual evaluation), with *Mem'l Hosp. v. Dep't of Revenue*, 770 P.2d 223, 226 (Wyo. 1989) (no need to exhaust administrative remedies where parties stipulated to facts

¶ 30 Moreover, as the division explained in *Pepper v. Indus. Claim Appeals Office*, 131 P.3d 1137, 1139 (Colo. App. 2005), *aff'd on other grounds sub nom. City of Florence v. Pepper*, 145 P.3d 654 (Colo. 2006):

The distinction between a “facial” and an “as applied” equal protection challenge is not always clear cut. A facial challenge is supported where the law by its own terms classifies persons for different treatment. In contrast, a statute, even if facially benign, may be unconstitutional as applied where it is shown that the governmental officials who administer the law apply it with different degrees of severity to different groups of persons who are described by some suspect trait.

*See also W. Metal Lath v. Acoustical & Constr. Supply, Inc.*, 851 P.2d 875, 880 n.7 (Colo. 1993) (a classification “on its face” means that the law “by its own terms classifies persons for different treatment,” while in “application” cases the law “either shows no classification on its face or else indicates a classification which seems to be legitimate, but those challenging the legislation claim that the governmental officials who administer the law are applying it with different degrees of severity to different groups of persons” (quoting

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relevant to as applied equal protection challenge).

John E. Nowak et al., *Constitutional Law* 600 (2d ed. 1983))).

¶ 31 Here, the statutory requirement that TTD benefits continue without reference to the cap identifies a class of claimants whose benefits may exceed the cap before the benefits cease upon one of the enumerated conditions. Employer does not assert a classification arising solely from the conduct of the ALJ and the Panel. Hence, employer presents a facial challenge that need not have been raised below.

#### B. The Statute Does Not Deny Equal Protection

¶ 32 Equal protection guarantees that similarly situated persons will receive like treatment under the law. *Harris v. The Ark*, 810 P.2d 226, 229 (Colo. 1991). Where, as here, the challenged statute does not affect a fundamental right or adversely impact a suspect class, a “traditional or rational basis standard of review” applies. *Id.* at 230. Under this test, “a statute that treats classes of persons differently will be upheld so long as the classification has a reasonable basis in fact -- that is, the classification is based on differences that are real and not illusory -- and is reasonably related to a legitimate governmental interest.” *Id.* Such a statute “does not

violate the equal protection guarantee because its classifications are imperfect.” *Buckley Powder Co. v. State*, 70 P.3d 547, 562 (Colo. App. 2002).

¶ 33 Employer asserts that failing to require claimants who have received TTD benefits exceeding the cap to repay the excess after their benefits cease creates two classes of claimants under section 8-42-105(3): those whose benefits will be capped because their benefits had not exceeded the cap when they reached MMI or were released to work, and those whose benefits exceeded the cap before they reached MMI or were released to work. While this characterization reflects the Panel’s interpretation, employer’s argument that this disparity violates equal protection fails, for two reasons.

¶ 34 First, the two classes that employer identifies are not similarly situated. Even if two claimants suffer comparable injuries, they will not necessarily recover at the same rate. Hence, one such claimant’s TTD benefits may exceed the statutory cap because that claimant took longer to attain MMI or be released to work. Such a claimant would need income until he or she was well enough to

return to work. Thus, the outcome is different because the classes are different: a claimant who has attained MMI or been released to work before TTD benefits reached the cap may not need further economic assistance, and thus would be subject to the cap.

¶ 35 Second, even if both classes of claimants are similarly situated, requiring a claimant to pay back benefits to which the claimant was entitled -- and presumably needed -- could create a hardship at odds with the beneficent purpose of the Act. Also, proceedings by employers to recover excess payments could burden the administrative process, contrary to the Act's objective of creating an efficient system for distributing benefits. These considerations rationally justify the resulting difference in treatment. *Cf. Bellendir v. Kezer*, 648 P.2d 645, 647 (Colo. 1982) (“An expeditious method of compensating disabled workers is a legitimate governmental objective . . . to which the formula of fixed awards for permanent disability is rationally related. Therefore, we conclude that the compensation formula violates neither due process nor equal protection.”).

¶ 36 Accordingly, we conclude that the operation of section 8-42-

105(3) in conjunction with section 8-42-107.5 does not violate equal protection.

¶ 37 The order is affirmed.

JUDGE LICHTENSTEIN and JUDGE FOX concur.

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Court of Appeals No. 12CA0257  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-648-693

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Patrick Youngs,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; White Moving and  
Storage, Inc.; and Pinnacol Assurance,

Respondents.

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ORDER AFFIRMED

Division VII  
Opinion by JUDGE HAWTHORNE  
Miller and Fox, JJ., concur

Announced April 11, 2013

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Chris Forsyth Law Office, LLC, Chris Forsyth, Denver, Colorado, for Petitioner

John W. Suthers, Attorney General, Alice Q. Hosley, Assistant Attorney  
General, Denver, Colorado, for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents White Moving and  
Storage, Inc. and Pinnacol Assurance

¶ 1 In this workers' compensation action, claimant, Patrick Youngs, seeks review of a final order of the Industrial Claim Appeals Office (Panel) that (1) considered a June 27, 2011 order issued by administrative law judge (ALJ) Cain granting partial summary judgment to employer, White Moving and Storage, Inc., and dismissing claimant's petition to reopen based on fraud; and (2) reviewed a July 18, 2011 order issued by ALJ Jones denying and dismissing claimant's petition to reopen based on worsening condition. The Panel held that it lacked jurisdiction to review ALJ Cain's order because it was an interlocutory order and claimant failed to file his petition to review that order within the applicable twenty-day statutory time period after ALJ Jones's final order entered. It affirmed ALJ Jones's order, rejecting claimant's evidentiary and due process challenges. We affirm.

### I. Procedural History

¶ 2 This is claimant's third appeal arising from his 2005 workers' compensation claim. *See Youngs v. Indus. Claim Appeals Office*, 2012 COA 85; *Youngs v. Indus. Claim Appeals Office*, (Colo. App. No. 08CA2209, Nov. 19, 2009) (not published pursuant to C.A.R. 35(f)).

¶ 3 Claimant sustained an admitted, work-related injury to his left shoulder in 2005. His authorized treating physician (ATP) placed him at maximum medical improvement (MMI) in 2006.

¶ 4 In March 2011, claimant filed a petition to reopen his claim based on worsening condition (pain in his right arm allegedly caused by its overuse after the injury to his left arm) and fraud (employer failed to disclose its insurer's financial relationship with the medical group retained to perform the division-sponsored independent medical examination (DIME)).

¶ 5 Employer and its insurer, Pinnacol (collectively employer), sought an order dismissing the fraud claim. Employer argued that claimant could not establish the requisite fraud elements to support his request to reopen on that basis. ALJ Cain agreed and dismissed claimant's fraud claim.

¶ 6 A hearing was later conducted by ALJ Jones on claimant's worsening condition claim. After receiving testimony from claimant and employer's retained independent medical examination (IME) physician, ALJ Jones found the IME physician credible and persuasive and discredited claimant's testimony as "implausible, inconsistent, and unsupported by the medical records." She

concluded that claimant had not established that his right arm pain was causally connected with his left arm injury, and therefore denied and dismissed his petition to reopen based on worsening condition.

¶ 7 Claimant filed his petition to review ALJ Cain's order on July 15, 2011. He filed his petition to review ALJ Jones's order on July 18, 2011. The Panel affirmed ALJ Jones's order, but determined that it lacked jurisdiction to review ALJ Cain's order. This appeal followed.

## II. ALJ Cain's Order

¶ 8 Claimant contends that the Panel improperly determined that it lacked jurisdiction to review ALJ Cain's order. He argues that his petition to review was filed timely and therefore the order should have been reviewed and ultimately set aside. We disagree.

### A. Pertinent Facts

¶ 9 Claimant filed his petition to review ALJ Cain's order before ALJ Jones issued her final order. After ALJ Jones issued her final order, claimant filed a second petition to review that order. Claimant did not mention ALJ Cain's earlier order in the second petition.

¶ 10 The Panel dismissed claimant’s appeal of ALJ Cain’s order, holding that the order was interlocutory and claimant had failed to file his petition to review it within the applicable twenty-day statutory time period *after* it became final. The following chronology illustrates the basis of the Panel’s holding.

DATE	ACTION
June 24, 2011	ALJ Cain issues order granting partial summary judgment to employer dismissing claimant’s petition to review based on fraud, but allowing remaining claim to proceed to hearing (interlocutory order)
June 27, 2011	ALJ Cain’s order is mailed to the parties
June 29, 2011	Hearing is held before ALJ Jones
July 15, 2011	Claimant submits his petition to review ALJ Cain’s order
July 15, 2011	ALJ Jones issues order denying and dismissing claimant’s petition to review based on worsening condition (final order)
July 18, 2011	ALJ Jones’s order is mailed to the parties
July 18, 2011	Claimant submits petition to review only ALJ Jones’s order

#### B. Governing Law

¶ 11 Pursuant to section 8-43-301(2), C.R.S. 2012, a petition to review an order of an ALJ “shall be filed within twenty days *after* the date of the certificate of mailing of the order.” (Emphasis added.) But review by the Panel and this court is limited to orders that require “any party to pay a penalty or benefits or den[y] a claimant

any benefit or penalty.” *Id.* “The term ‘final order’ has ‘traditionally been interpreted as including only those orders that grant or deny benefits or penalties.’” *Jefferson Cnty. Pub. Sch. v. Indus. Claim Appeals Office*, 181 P.3d 1199, 1200 (Colo. App. 2008) (quoting *Ortiz v. Indus. Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003)).

¶ 12 “Where an order neither awards nor denies benefits, it is merely interlocutory and is ‘not ripe for appellate review.’” *Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d 448, 450 (Colo. App. 2008) (quoting *U.S. Fid. & Guar., Inc. v. Kourlis*, 868 P.2d 1158, 1163 (Colo. App. 1994)). However, “an interlocutory order becomes reviewable when appealed incident to or in conjunction with an otherwise final order.” *BCW Enters., Ltd. v. Indus. Claim Appeals Office*, 964 P.2d 533, 537 (Colo. App. 1997).

¶ 13 A party that misses the twenty-day statutory time limit for filing a petition for review is jurisdictionally barred from obtaining further review of the order. *See Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 24 P.3d 1, 2 (Colo. App. 2000) (“The statutory time limits governing appellate review of workers’ compensation decisions are jurisdictional.”); *Buschmann v. Gallegos Masonry, Inc.*,

805 P.2d 1193, 1194 (Colo. App. 1991) (“The timely filing of a petition to review is a jurisdictional requirement . . . .”). “[A]bsent the filing of a timely petition to review, the Panel lacks jurisdiction to review the ALJ’s order.” *Brodeur v. Indus. Claim Appeals Office*, 159 P.3d 810, 812 (Colo. App. 2007). Moreover, “[b]ecause filing requirements are jurisdictional, such statutory provisions must be strictly construed.” *Schneider Nat’l Carriers, Inc. v. Indus. Claim Appeals Office*, 969 P.2d 817, 818 (Colo. App. 1998).

### C. Claimant Must File a Petition to Review

¶ 14 Claimant first contends that the Panel erred in holding that it did not have jurisdiction to review ALJ Cain’s order. He argues that (1) because ALJ Cain’s order was an interlocutory order, it was not final for purposes of appeal and therefore a petition to review it was not required, and (2) his timely appeal of ALJ Jones’s final order included ALJ Cain’s order. To the extent claimant argues that he was entitled to automatic review of ALJ Cain’s order when he filed a timely petition for review of ALJ Jones’s order, we disagree.

¶ 15 We know of no authority, and claimant cites none, that relieves a party from filing a timely written petition to review that identifies the alleged errors in the order or orders of which the party

seeks review. To the contrary, a party petitioning for review of an ALJ's order must make the request in writing and "shall set forth in detail the particular errors and objections of the petitioner." § 8-43-301(2); *see also* *Martinez v. Indus. Comm'n*, 709 P.2d 49, 50 (Colo. App. 1985) (petition to review was sufficient because it was in writing, "set forth the claimant's particular objections and claims of error," and identified the order sought to be reviewed).

¶ 16 Here, claimant's timely petition to review ALJ Jones's final order neither listed ALJ Cain's order nor identified errors in that order that the Panel should review. The petition was therefore inadequate to appeal ALJ Cain's order because it did not "set forth in detail" any errors or objections to be considered.

¶ 17 Accordingly, the Panel was deprived of jurisdiction to review ALJ Cain's order. *See Brodeur*, 159 P.3d at 812.

#### D. Premature Petition to Review

¶ 18 Although claimant's first contention above concedes that ALJ Cain's order was interlocutory, he next contends that if it "w[as] final and reviewable, a petition to review was timely filed." He argues that his petition to review ALJ Cain's order was timely filed after the order was issued because the petition was mailed within

twenty days of that order. We disagree.

¶ 19 On July 15, 2011, claimant filed his petition to review ALJ Cain’s order within twenty days of the order. However, this filing did not satisfy section 8-43-301(2)’s requirements.

¶ 20 The current version of section 8-43-301(2), which was in effect when claimant submitted his petitions to review, mandates that such petitions be filed “*within* twenty days *after* the date of the certificate of mailing” of the final, appealable order. § 8-43-301(2) (emphasis added). The use of “after” was a change from the legislature’s prior use of the phrase “within twenty days *from* the date of the certificate of mailing.” The amendment was enacted in 2009. Ch. 49, sec. 3, § 8-43-301(2), 2009 Colo. Sess. Laws 176.

¶ 21 We review statutory construction de novo. *Ray v. Indus. Claim Appeals Office*, 124 P.3d 891, 893 (Colo. App. 2005), *aff’d*, 145 P.3d 661 (Colo. 2006). And, we interpret a Workers’ Compensation Act statute “according to its plain and ordinary meaning” if its language is clear. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). In addition, “when examining a statute’s plain language, we give effect to every word and render none superfluous because “[w]e do not presume that the legislature used language

‘dly and with no intent that meaning should be given to its language.’” *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005) (citation omitted) (quoting *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003)).

¶ 22 The substitution of the word “after” for the word “from” in the statute was part of an amendment intended to clarify procedures governing workers’ compensation cases. The amendment, S.B. 09-070, was titled “An Act Concerning Clarifications to Workers’ Compensation Procedures.” Ch. 49, 2009 Colo. Sess. Laws 175. “After” was substituted throughout the amendment in conjunction with several temporal deadlines. In this context, “after” has only one meaning: “subsequent to in time or order.” *Webster’s Ninth New Collegiate Dictionary* 63 (1989). Other dictionaries have defined “after” almost identically: (a) “following in time or place,” *Webster’s Third New International Dictionary* 38 (1969); (b) “behind in place or position; following the completion of; in succession to,” *Random House Webster’s Collegiate Dictionary* 24 (1991); (c) “following in time, place, or order,” <http://dictionary.cambridge.org>. We know of no definition of “after” that would ascribe to it a use meaning “preceding” an event.

¶ 23 The use of the word “within” in the phrase “within twenty days after the date of the certificate of mailing” is also significant. The phrase identifies two dates: (1) the date of the certificate of mailing and (2) the twentieth day after that date. The statute requires that the petition be filed “within” the time period encompassed by those two dates. This fact also excludes the possibility that a petition may be filed before the twenty-day period begins to run.

¶ 24 Claimant cites the Panel’s decision in *Fischer-Muck v. Interim Healthcare*, WC Nos. 4-113-829 and 4-387-127 (Jan. 31, 2000), for the proposition that premature appeals are acceptable. The decision is inapposite and does not persuade us to reach a different conclusion. First, although we give deference to the Panel’s reasonable interpretations of the statute it administers, we are not bound by the Panel’s interpretation of the Act or by its earlier decisions. See *Sanco Indus. v. Stefanski*, 147 P.3d 5, 8 (Colo. 2006); *Olivas-Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1180 (Colo. App. 2006); *Dillard v. Indus. Claim Appeals Office*, 121 P.3d 301, 304 (Colo. App. 2005), *aff’d*, 134 P.3d 407 (Colo. 2006).

¶ 25 Second, *Fischer-Muck* was issued before the legislature changed “from” to “after” in the statute. At the time *Fischer-Muck*

was announced, the more ambiguous word “from” appeared in the statute.

¶ 26 Third, *Fischer-Muck* is factually distinguishable from this case. In *Fischer-Muck*, an ALJ mailed an order in February 1999, but the parties did not receive actual notice that the order had been issued until April 1999. Within a week of that actual notice, one party filed a petition to review and requested that the certificate of service be amended. The ALJ issued a new certificate of service in June 1999. Thus, although the party’s petition to review preceded the amended certificate of service, it succeeded the order’s finality.

¶ 27 Further, the cases on which the Panel relied in *Fischer-Muck* are similarly distinguishable and do not support claimant’s argument. In *Haynes v. Troxel*, 670 P.2d 812, 813 (Colo. App. 1983), the applicable civil procedure rule provided that a motion for new trial must be filed “*not later than fifteen days after the entry of the judgment.*” No language in the rule limited the time for filing to the period *after* an order was issued. Consequently, the plaintiff’s motion filed after trial but before the trial court issued its written judgment was deemed timely.

¶ 28 Likewise, none of the other cases cited by the Panel in *Fischer-*

*Muck* leads us to a different conclusion. See *Rendon v. United Airlines*, 881 P.2d 482, 484 (Colo. App. 1994) (claimant who sent cover letter with petition to reopen rather than certificate of mailing substantially complied with section 8-43-301(2) and petition to review was therefore timely filed); *Cook v. TLC Staff Builders, Inc.*, W.C. No. 4-277-752 (May 6, 1998) (interpreting section 8-43-301(2), which at the time required filing of petition to review “within twenty days from the date of the certificate of mailing,” as only prohibiting late filing); *Tindell v. Adolph Coors Co.*, W.C. No. 3-988-873 (Sept. 9, 1991) (no jurisdictional defect in petition to review filed before final order, relying on *Haynes*, 670 P.2d at 813).

¶ 29 Thus, under section 8-43-301(2)’s plain meaning, claimant was required to submit his petition to review ALJ Cain’s order *after* ALJ Jones issued her final order. Filing a petition to review before ALJ Cain’s interlocutory order became final and appealable did not fulfill this statutory requirement, and that filing did not fall within the statute’s twenty-day filing period. See *In re Marriage of Hoffner*, 778 P.2d 702, 703 (Colo. App. 1989) (dismissing premature appeal for lack of finality). Consequently, because no petition to review ALJ Cain’s order was filed within twenty days after that order

became final, the Panel lost jurisdiction to review it. *See Brodeur*, 159 P.3d at 812.

E. Employer Was Not Required to Appeal Jurisdictional Issue

¶ 30 Claimant contends that the jurisdictional issue on which the Panel declined to review ALJ Cain's order was not properly before the Panel. He argues that because employer did not file a petition to review ALJ Cain's subsequent order finding his petition to review timely, "ALJ Cain's determination that [claimant's] petition to review was timely filed stands." We disagree.

¶ 31 Employer moved to dismiss claimant's petition to review ALJ Cain's order. On September 13, 2011, ALJ Cain denied the motion to dismiss, ruling that although claimant's petition to review was prematurely submitted three days before ALJ Jones sent out her order, it was filed "within the jurisdictional time limit" and was timely. Employer did not file a petition to review this order. Nevertheless, on review, the Panel determined that it lacked jurisdiction to review ALJ Cain's order, effectively setting aside ALJ Cain's September 13, 2011 order.

¶ 32 Claimant asserts that because employer failed to file a petition to review the September 13, 2011 order, the Panel and this court

are barred from reviewing the jurisdictional question. However, the Panel had authority to address the timeliness of claimant's petition to review ALJ Cain's partial summary judgment order because jurisdictional issues may be raised at any time. *See Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009) ("Because a lack of subject matter jurisdiction means that a court has no power to hear a case or enter a judgment, it is an issue that may be raised at any time . . . ."); *Hillen v. Colo. Comp. Ins. Auth.*, 883 P.2d 586, 588 (Colo. App. 1994) ("[T]he issue of jurisdiction can be raised at any time during the proceedings . . . ."). Thus, employer was not obligated to submit a petition to review ALJ Cain's order denying its motion to dismiss to preserve the jurisdictional issue for review.

¶ 33 We also reject claimant's assertion that the lack of a petition to review ALJ Cain's September 13, 2011, order harmed his interests and deprived him of the opportunity to state his position on the jurisdictional question. The record reflects that claimant fully briefed the issue in his response to employer's motion to dismiss. Although he may not have briefed it to the Panel, his response to the motion to dismiss was in the record before the Panel and consequently his position was available for the Panel's

consideration.

¶ 34 In addition, the jurisdictional issue was fully briefed and argued by both parties here. After having considered the arguments' merits and providing claimant ample opportunity to respond to employer's contentions, we have concluded the Panel lacked jurisdiction to review ALJ Cain's order. Therefore, claimant has failed to establish any prejudice he may have suffered from any insufficiency in his opportunity to argue the jurisdictional issue before the Panel.

#### F. Review of Order Dismissing Fraud Claim

¶ 35 Finally, claimant challenges the merits of ALJ Cain's order dismissing his petition to reopen based on fraud. Having determined that the Panel lacked jurisdiction to review the order, we need not address its merits. *See Ortiz*, 81 P.3d at 1112 (declining to consider claimant's assertions because court lacked jurisdiction to review order).

#### III. ALJ Jones's Order

¶ 36 Claimant also appeals ALJ Jones's order of July 18, 2011, denying and dismissing his petition to reopen based on worsening condition. Claimant maintained that his right arm and shoulder

pain was caused by overuse of that arm secondary to his inability to use his left arm. Therefore, he sought to have the treatment and care of his right arm and shoulder covered under his workers' compensation claim. ALJ Jones found that claimant failed to establish that his right shoulder pain was related to and caused by his work-related injury to his left shoulder.

¶ 37 ALJ Jones was persuaded by the testimony of employer's retained IME physicians and claimant's ATP, all of whom opined that claimant's right arm and shoulder symptomology was unrelated to his work-related left arm injury. Finding no causal connection between the right arm and shoulder condition and claimant's work-related injury, she denied and dismissed the petition to reopen.

¶ 38 Claimant contends that ALJ Jones committed numerous evidentiary errors while conducting the hearing on his petition to reopen. In particular, he claims that the ALJ abused her discretion by (1) refusing to touch his right shoulder and sustaining employer's objection to his request that employer's retained IME physician examine his shoulder during the hearing; (2) rejecting his attempt to cross-examine the retained IME physician about articles

he claimed undermined the physician's credibility; (3) sustaining employer's objection to his questioning of the retained IME physician about the report of another retained IME physician; and (4) exhibiting partiality toward employer. We reject each contention.

#### A. Examining Claimant's Right Shoulder During Hearing

¶ 39 Claimant contends that ALJ Jones abused her discretion and violated his due process rights by refusing to feel the "popping and crepitation" in his right shoulder, and by refusing to require employer's retained IME physician to examine his shoulder during the hearing. He argues that feeling and examining the shoulder were relevant to his presenting his case because it would have assisted him in demonstrating injury. Moreover, he claims that because the ALJ's examining his shoulder was relevant to his case-in-chief, her refusal to do so constituted an abuse of discretion.

¶ 40 Evidentiary decisions are firmly within an ALJ's discretion, and will not be disturbed absent a showing of abuse of that discretion. See § 8-43-207(1)(c), C.R.S. 2012 (ALJ is "empowered to . . . [m]ake evidentiary rulings"); *IPMC Transp. Co. v. Indus. Claim Appeals Office*, 753 P.2d 803, 804 (Colo. App. 1988) (ALJ has wide

discretion to control the course of a hearing and to make evidentiary rulings). “An abuse of discretion occurs when the ALJ’s order is beyond the bounds of reason, as where it is unsupported by the evidence or contrary to law.” *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008).

¶ 41 Here, the ALJ ruled that feeling and examining claimant’s shoulder were not relevant to the hearing’s issues. We perceive no error or abuse of discretion in this ruling. Evidence is relevant if it has any tendency to make the existence of a consequential fact more or less probable. CRE 401. “The ALJ has discretion to determine the relevancy of evidence.” *Aviado v. Indus. Claim Appeals Office*, 228 P.3d 177, 179 (Colo. App. 2009).

¶ 42 Causation was at issue at the hearing: specifically, whether claimant’s right shoulder condition was causally connected to his work-related left shoulder injury. Employer and its experts did not dispute that claimant was experiencing pain and discomfort pathology in his right shoulder. Feeling and examining claimant’s shoulder during the hearing may have established that he had a popping sensation there, but there was no offer of proof that those actions could show that his left and right shoulder symptomology

were related. Moreover, even if popping or grinding in claimant's shoulder may have enhanced claimant's credibility, causation was at issue and claimant's credibility concerning pain was irrelevant.

¶ 43 Therefore, we conclude that because examining the shoulder was not relevant to causation, the ALJ did not abuse her discretion by refusing to, or refusing to require the IME physician to, examine claimant's shoulder during the hearing.

#### B. Cross-Examination of IME Physician

¶ 44 Claimant next contends that ALJ Jones abused her discretion by limiting his questioning of employer's retained IME physician and thus improperly impaired his due process right to cross-examine the physician concerning (1) medical literature addressing overuse injuries in the "good" arm of patients who have sustained injuries to the "other" arm; and (2) the physician's efforts, if any, to obtain a copy of a report prepared by another retained IME physician. We are not persuaded.

¶ 45 An ALJ's discretionary authority to control the proceedings and to make evidentiary decisions extends to rulings limiting cross-examination. *See Rice v. Dep't of Corr.*, 950 P.2d 676, 681 (Colo. App. 1997) ("The admission of rebuttal testimony is within the

sound discretion of the ALJ and will not be disturbed absent an abuse of that discretion.”). Although a party in a workers’ compensation hearing has a fundamental right to cross-examination, that right “may be restricted.” *Denver Symphony Ass’n v. Indus. Comm’n*, 34 Colo. App. 343, 346-47, 526 P.2d 685, 687 (1974). Indeed, “[o]nly where the restriction is severe enough to constitute a denial of the right will limitation of cross-examination in an administrative hearing be overturned as an abuse of discretion.” *Ward v. Indus. Comm’n*, 699 P.2d 960, 969 (Colo. 1985); accord *Denver Symphony Ass’n*, 34 Colo. App. at 346-47, 526 P.2d at 687.

¶ 46 Here, claimant sought to use articles from medical literature to undermine the employer’s IME physician’s position that there was a paucity of “good solid medical literature” showing “one arm being used more often because the other arm is injured.” However, none of the articles concerned an injury identical to that sustained by claimant. Rather, the four articles respectively addressed (1) overuse syndrome; (2) cumulative trauma disorders of the upper extremity; (3) occupational therapy intervention for overuse syndrome; and (4) problems occurring in the remaining arm of

unilateral upper limb amputees. Given the differences between the injuries discussed in the articles and the work-related injury to claimant's left arm and shoulder, we cannot conclude that ALJ Jones abused her discretion in ruling that the articles were not relevant. *See Aviado*, 228 P.3d at 179.

¶ 47 Moreover, despite her ruling, ALJ Jones admitted the four articles into evidence. The articles thus were available for her to consider, and she could determine whether they impeached the IME physician's testimony. We are not persuaded otherwise by claimant's conclusory assertion that admitting the articles "did not rectify the fact that the [ALJ] held that questioning [employer's] expert regarding those four articles . . . was not relevant." In our view, whatever harm may have resulted from ALJ Jones's refusal to permit claimant to question the physician about the articles, if any, was ameliorated by admitting them.

¶ 48 Nor did ALJ Jones abuse her discretion when she sustained employer's objection to the following question claimant posed to the physician:

Q: You received a report from Doctor Lindberg before you wrote your report, is that correct?

A: I believe so, yes. I cited it in my medical review.

Q: Did you request that report?

Claimant made no offer of proof demonstrating the relevance or necessity of this particular question. *See Aviado*, 228 P.3d at 180 (finding no abuse of discretion in ALJ’s ruling limiting questioning because claimant failed to make an adequate offer of proof at hearing). Similarly, he does not articulate in his briefs the importance of this particular question to his cross-examination. Absent such a showing, we cannot say that the ruling was “severe enough to constitute a denial of the right” to cross-examine or an abuse of discretion. *Ward*, 699 P.2d at 969; *Denver Symphony Ass’n*, 34 Colo. App. at 346-47, 526 P.2d at 687.

¶ 49 We therefore conclude that ALJ Jones did not abuse her discretion or violate claimant’s right to due process by limiting claimant’s cross-examination of employer’s retained IME physician.

### C. Impartiality of ALJ

¶ 50 Finally, claimant asserts that ALJ Jones was biased against him and his attorney and therefore did not provide him a fair and impartial hearing. He claims that she was “ill-tempered”; chastised his counsel for “ponderous looks”; included in her ruling factual findings about attorney fees that had been at issue in other

hearings; allegedly caused portions of the hearing transcript to mysteriously disappear and then reappear; and made statements in the hearing indicating “irritation and a rush to judgment.”

¶ 51 We conclude that claimant’s motion to recuse ALJ Jones was untimely. At no point during the hearing did claimant request that ALJ Jones withdraw because of personal bias. Rather, he waited three months – until well *after* she had issued her ruling – to file a motion for recusal. A motion for recusal must be made timely to be considered. § 24-4-105(3), C.R.S. 2012. In our view, a motion filed months after the hearing occurred and the order issued is not timely. *See People in Interest of A.G.*, 262 P.3d 646, 653 (Colo. 2011) (motion for disqualification must be timely filed so judge has the 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 an opportunity to disqualify himself).

¶ 52 Under these circumstances, we conclude that claimant failed to show ALJ Jones abused her discretion by denying his motion for recusal.

¶ 53 Finally, we do not address claimant’s argument, made for the

first time in his reply brief and at oral arguments, that he was denied a fair hearing because “the ICAO was a direct advocate against [him] at the same time it was determining the opinion below.” We do not address issues raised for the first time in a reply brief. *Colorado Korean Ass’n v. Korean Senior Ass’n*, 151 P.3d 626, 629 (Colo. App. 2006).

¶ 54 The Panel’s order is affirmed.

JUDGE MILLER and JUDGE FOX concur.