COLORADO
Department of
Labor and Employment

Division of Workers' Compensation
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# April Case Law Update

**Presented by Judge David Gallivan and Judge John Sandberg**

**This update covers ICAO and COA decisions issued between March 15, 2018 to April 2, 2018**

## Decisions



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

COLORADO COURT OF APPEALS

DATE FILED: March 22, 2018
CASE NUMBER: 2017CA1469

Court of Appeals No. 17CA1469
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-999-129

Vincent Cruz,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Sacramento Drilling, and Travelers Property Casualty Company of America,

Respondents.

ORDER AFFIRMED

Division IV
Opinion by JUDGE RICHMAN
Hawthorne and J. Jones, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced March 22, 2018

Michael W. Seckar, P.C., Lawrence D. Saunders, Pueblo, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Ray Lego Associates, Michael J. Buchanan, Gregory W. Plank, Jonathan Robbins, Greenwood Village, Colorado, for Respondents Sacramento Drilling and Travelers Property Casualty Company of America

¶ 1 In this workers' compensation action, claimant, Vincent Cruz, contends that employer, Sacramento Drilling, Inc., and its insurer, Travelers Property Casualty Company of America (collectively employer), improperly terminated his temporary total disability (TTD) benefits. Employer stopped claimant's TTD benefits after claimant failed to appear for modified work which employer had offered to him. Claimant maintains that employer's modified job offer failed to meet the basic legal requirements of an offer and was consequently ineffective. We agree with the Industrial Claim Appeals Office (Panel) and the administrative law judge (ALJ) that employer's modified employment offer fulfilled the necessary elements of an offer, and therefore affirm.

## I. Background

¶ 2 The underlying facts of this case are undisputed. Claimant sustained an admitted, work-related injury in October 2015. In March 2016, he became temporarily totally disabled as a result of his injury. Employer states, and claimant does not appear to dispute, that claimant "was released to modified duty on April 27, 2016. Employer could not initially accommodate light duty work as . . . [e]mployer's job in Colorado had concluded."

¶ 3 In early August 2016, employer obtained claimant's physician's certification that he could perform work required for a modified duty position. On August 10, 2016, employer sent claimant a letter advising him that "the position [he was] being offered is: Facility Assistant" at Habitat for Humanity Restore. Claimant was instructed to report to Habitat for Humanity Restore for an "initial meeting date and time" on August 16, 2016, "at 10:30 AM," and that "the modified duty job will begin on Friday, August 19, 2016 9:00 AM." Claimant was to be paid "$16.80 per hour" for the work. The letter also advised claimant that "[t]he start date is tentative and depends upon completion [of] application and background check – can take up to 48 hours to clear." The parties agree that claimant did not appear for the background check and did not commence the modified employment. Employer then ceased paying claimant's TTD benefits.

¶ 4 In response, claimant filed an application for hearing, seeking penalties on the ground that employer improperly ceased TTD payments. Claimant alleged that employer unlawfully terminated his TTD benefits because the documents attached to employer's general admission of liability (GAL) included only a "'tentative' job

offer, and that an actual offer would only be made after the Claimant cleared a background check. . . . Furthermore, the job offer was not with [employer] but with a third-party." Claimant also sought penalties because he alleged that employer's GAL was not timely filed, and that he was consequently not promptly notified of employer's cessation of his TTD benefits. He asserted that employer's delayed GAL violated W.C.R.P. 5-5(C)(1). *See* Dep't of Labor & Emp't. Rule 5-5(C)(1), 7 Code Colo. Regs. 1101-3.

¶ 5 Because only legal questions were disputed, the parties agreed to vacate the hearing and submit position statements to the ALJ. The ALJ found claimant's contention that the required background check nullified employer's offer of modified employment "uncompelling." First, the ALJ found that in order to accept the offer, claimant had to meet with the third party employer on August 16, 2016 to complete an application and a background check, and because of the background check the start date was "tentative." The ALJ did not find that the job was tentative. Second, the ALJ disagreed with claimant's inference that the background check had to be successfully passed in order for claimant to commence work: "The ALJ finds and concludes that the letter provides only that the

offer was dependent upon [c]laimant's completion of an application and background check, not that he had to pass said background check." The ALJ next noted that background checks "are routinely requested," and that, under claimant's reasoning, any "tentative" job offer that required a claimant to complete an application, an I-9, or a W-2 — all of which request personal information — would fail to satisfy section 8-42-105(3)(d)(I), C.R.S. 2017, of the Workers' Compensation Act (Act). The ALJ went on to note,

> Because all that was required by statute and rule to constitute a modified job "offer" was properly contained in the August 10, 2016 letter and properly conveyed to [c]laimant, [employer was] within [its] rights to terminate [c]laimant's TTD when he failed to complete an application and otherwise refused to submit to a background check.

The ALJ therefore denied the claim for penalties on this basis.

¶ 6 The ALJ also rejected claimant's demand for penalties based on the alleged untimeliness of employer's GAL because the claim was not stated with sufficient specificity.

¶ 7 The Panel affirmed on review, holding that a background check "is not the type of contingency that negates an offer of

employment." The Panel noted that claimant was "guaranteed a job following the verification of a background check."

¶ 8 The Panel also rejected claimant's argument that employer should have been penalized for filing its GAL late. The Panel noted that claimant offered no evidence other than employer's GAL to establish when or how much his TTD payments were reduced or when they ceased. Contrary to claimant's premise, the Panel noted, a GAL "is only a statement by the respondents that they are awarding the claimant benefits calculated as stated in that admission. It is not a record of payments actually made."

¶ 9 Claimant now challenges these rulings.

## II. Validity of Offer of Modified Employment

¶ 10 As he did before the ALJ and the Panel, claimant contends that the employer's offer of modified employment failed to meet the criteria of an offer. He argues that, contrary to the ALJ's analysis, it is commonly understood that a mandated background check must be passed for an offer of employment to become firm. He further argues that because the offer was conditional on passing a background check, it did not meet the Restatement (Second) of Contracts' definition of an offer. To be valid, he claims, an offer

must be able to be accepted by the offeree; in contrast, he was "powerless to accept the alleged offer as it was left to the decision of a third-party." Because employer's offer of modified employment did not meet the Restatement's definition of an offer, claimant contends that employer violated section 8-42-105(3)(d)(I) by unilaterally discontinuing his TTD benefits, and that he was entitled to penalties for employer's alleged violation of the Act. We are not persuaded.

A. Standard of Review for Penalties

¶ 11 To succeed on his penalties claims, claimant had to show that employer (1) violated a provision of the Act; (2) committed an act prohibited by the Act; "(3) faile[d] or refuse[d] to perform any duty lawfully mandated within the time prescribed by the director or the Panel; or (4) fail[ed], neglect[ed], or refuse[d] to obey any lawful order of the director or the Panel." *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84, 87 (Colo. App. 2004); *see also* § 8-43-304(1), C.R.S. 2017. He also had to show that, by terminating his TTD benefits, employer failed to take an action that a reasonable insurer would have taken in similar circumstances. *See Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 435 (Colo. App.

2010) (employer violated the Act by submitting a final admission of liability that did not comply with section 8-43-203(2)(b)(II), C.R.S. 2017). Any alleged wrongdoing precipitating penalties must be "measured by an objective standard of reasonableness." *Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965, 967 (Colo. App. 2003). Thus, employer's actions were reasonable if they were predicated on a rational argument based in law or fact. *Id.*

¶ 12 Whether employer's conduct was reasonable is a question of fact for determination by the ALJ. *Pioneers Hosp. v. Indus. Claim Appeals Office*, 114 P.3d 97, 99 (Colo. App. 2005). We are therefore bound by the ALJ's factual determinations if they are supported by substantial evidence in the record. § 8-43-308, C.R.S. 2017; *Christie v. Coors Transp. Co.*, 919 P.2d 857, 860 (Colo. App. 1995), *aff'd*, 933 P.2d 1330 (Colo. 1997).

B. Employer's Offer Did Not Violate the Act

¶ 13 The Act permits an employer to cease paying TTD if one of the enumerated conditions is met. As pertinent here, employer could discontinue claimant's TTD payments if claimant's "attending physician [gave] the employee a written release to return to modified employment, such employment [was] offered to the employee in

writing, and the employee fail[ed] to begin such employment." § 8-42-105(3)(d)(I). Employer maintains that it satisfied these requirements with its written offer of modified employment to claimant.

¶ 14 Claimant maintains that employer's actions here did not fit the Restatement's definition of an offer. The Restatement provides that "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) of Contracts § 24, (quoted with approval in *Sumerel v. Goodyear Tire & Rubber Co.*, 232 P.3d 128, 133 (Colo. App. 2009)). A division of this court has defined "offer" as "a manifestation by one party of a willingness to enter into a bargain." *Indus. Prods. Int'l, Inc. v. Emo Trans, Inc.*, 962 P.2d 983, 988 (Colo. App. 1997). "Offer" has also been defined as "[t]he act or instance of presenting something for acceptance." *Soto v. Progressive Mountain Ins. Co.*, 181 P.3d 297, 302 (Colo. App. 2007) (quoting *Black's Law Dictionary* 1112 (8th ed. 2004)). And, in the employment context, the Colorado Supreme Court has explained that an offer to an employee is made if "the employer manifested his willingness to

enter into a bargain in such a way as to justify the employee in understanding that his assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain." *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987).

¶ 15 Citing to the Restatement provision, claimant maintains that an offer of employment in Colorado cannot be conditional. But, he offers very little support for this contention. He relies on *Sumerel* for the proposition that an offer contingent on other events does "not constitute an offer that was properly capable of acceptance." 232 P.3d at 133. Quoting the Restatement, *Sumerel* observed that "there is no offer properly capable of acceptance where the purported offeree 'knows or has reason to know that the person making [the purported offer] does not intend to conclude a bargain until he has made a further manifestation of assent.'" *Id.* (quoting Restatement (Second) of Contracts § 26).

¶ 16 But, *Sumerel* is distinguishable from this case. In *Sumerel*, Goodyear sent documentation to the plaintiffs' counsel as part of on-going settlement discussions. Goodyear later learned that the documents contained an error in plaintiffs' favor, but plaintiffs tried

to hold Goodyear to its "offer" nonetheless. *Id.* at 130-32. A division of this court noted that in the exchange between Goodyear and plaintiffs' counsel, Goodyear did not make "an offer capable of acceptance." *Id.* at 134. Rather, the parties "were beginning to exchange mathematical calculations based on the agreed accrual dates, while simultaneously attempting to identify the six-figure discrepancy in those calculations," and that Goodyear's counsel "did not solicit an acceptance but rather solicited a return call." *Id.*

¶ 17 Here, in contrast, employer provided claimant with a specific date, time, location, and wage for the proposed modified employment. Nothing about the employer's modified job proposal invited negotiation as in *Sumerel*. Thus, *Sumerel* — the only case claimant relies on to support his position — is factually distinguishable from this case. Unlike the bargaining parties in *Sumerel*, claimant was offered a specific time, place, and wage, which he could have accepted by appearing for the modified work.

¶ 18 Moreover, contrary to claimant's premise, section 8-42-105(3)(d)(I) does not specify whether the offer of modified employment must be a "firm" offer. The statute simply states that TTD benefits may terminate if modified employment "is offered to

the employee in writing." § 8-42-105(3)(d)(I). Claimant offers us no case law or authority indicating that the Act prohibits the kind of offer made by employer here. And, those cases in which it was determined that no employment relationship existed reached that conclusion because no promise of employment had been made. *See Younger v. City & Cty. of Denver*, 810 P.2d 647, 653 (Colo. 1991) (even if police applicant had successfully completed the physical agility test, she would have to pass multiple additional tests "merely to qualify for the pool of candidates from which the final selection of police officers would be made," and no candidates in the pool were guaranteed employment offers).

¶ 19 And in reaching its decision, the Panel cited to one of its earlier decisions in which it held that an offer of employment had been extended even though the claimant's background check and federal I-9 form had not been completed. The Panel explained that the worker's employment was subsequently terminated, but made clear that even though completion of items remained outstanding, the claimant had an employment relationship with the employer until her termination. *See Gutierrez-Delgado v. N. Star Foods, LLC*,

W.C. No. 4-857-384-03, 2012 WL 6680126, at *1 (Colo. I.C.A.O. June 15, 2012).

¶ 20 In addition, although the record contains a dearth of underlying facts, it is undisputed that claimant did not appear for work at the time and place designated in employer's offer letter. Had he done so, employer would not have been able to discontinue his TTD payments unilaterally because claimant would have "begun" the offered modified employment under section 8-42-105(3)(d)(I). In that circumstance, if claimant had failed the requested background check, employer would have had to prove to an ALJ that claimant was at fault for the termination of his employment to discontinue benefits. *See Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1133 (Colo. App. 2008) (injured worker was responsible for his termination from employment because he failed drug test and therefore was not entitled to TTD benefits after date of his termination). But, because claimant did not appear for the offered work, employer was within its statutory authority to unilaterally terminate his TTD benefits.

¶ 21 Accordingly, we conclude that employer did not violate section 8-42-105 by stopping claimant's TTD benefits. In the absence of

any violation, claimant was not entitled to penalties on this ground. *See* § 8-43-304(1); *Pena*, 117 P.3d at 87.

III. Filing of GAL

¶ 22 Claimant next contends that he was entitled to penalties for employer's alleged untimely filing of its GAL, in violation of W.C.R.P. 5-5(C)(1). That rule provides as follows:

> (C) Upon termination or reduction in the amount of compensation, a new admission shall be filed with supporting documentation prior to the next scheduled date of payment, regardless of the reason for the termination or reduction. An admission shall be filed within 30 days of any resumption or increase of benefits.
>
> (1) Following any order (except for orders which only involve disfigurement) becoming final which alters benefits being paid under the workers compensation act, an admission consistent with the order shall be timely filed.

¶ 23 As we understand claimant's argument, he contends that the September 6, 2016 GAL indicated that TTD benefits were paid through August 18, 2016. Assuming that claimant's last TTD benefit check was issued on August 18, 2016, and that benefits checks are paid every two weeks, claimant argues, employer should have filed its GAL within two weeks of the last TTD benefit payment,

"and the time between August 19th and September 6th is greater than two weeks, then we know [employer] violated the rule."

¶ 24 But, claimant's argument fails for lack of proof. As the Panel noted, claimant never introduced any evidence establishing when or how much he received in TTD benefits. As he did before the ALJ and the Panel, claimant asks us to *assume* that the last check was issued on August 18, 2016. However, without a check, other documentation, or claimant's sworn statement detailing when he received his payments, we are left with nothing but an assumption based on the GAL.

¶ 25 Importantly, a GAL is not evidence of payment; it is merely a summary of the basis for and amount of benefits to put the claimant on notice of his or her legal rights and benefits. *See Smith v. Myron Stratton Home*, 676 P.2d 1196, 1200 (Colo. 1984) ("[A] notice of admission or contest of liability serves to make the injured worker aware that he is involved in a situation with legal ramifications."); *Paint Connection Plus*, 240 P.3d at 432 (Colo. App. 2010) ("[O]ne purpose of the [admission of liability] is to put the claimant on notice of the exact basis of the admitted or denied

liability so that the claimant can make an informed decision whether to accept or contest the final admission.").

¶ 26 It may be accurate that employer paid claimant his last TTD check on August 18, 2016. But, it is also possible — indeed likely — that employer continued paying TTD benefits until September 6, 2016, after which it would claim and possibly seek reimbursement of an overpayment. In fact, the very GAL on which claimant bases his contention expressly states that "TTD [was] overpaid by $967.43."

¶ 27 We therefore perceive no error in the Panel's conclusion that claimant failed to establish that employer violated W.C.R.P. 5-5(C)(1). In the absence of any violation, claimant was not entitled to penalties on this ground, either. *See* § 8-43-304(1); *Pena*, 117 P.3d at 87. [1]

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1 Claimant also alleged that the ALJ mistakenly dismissed his claim for penalties on the ground that the claim lacked the requisite specificity. The record contains claimant's position statement and exhibits attached thereto. Claimant's application for hearing with an attached advisement sheet sets forth the grounds on which he sought penalties, and includes the allegation that employer "violated Rule 5-5(C)(1) by failing to file a [GAL] within the time requirements of a reduction in the amount of TTD benefits." In our view, this was sufficient to place employer on notice of the basis for this penalty claim. Regardless, given that we have determined that

## IV. Conclusion

¶ 28 The order is affirmed.

JUDGE HAWTHORNE and JUDGE J. JONES concur.

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employer did not violate W.C.R.P. 5-5(C)(1), we need not address this contention.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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COLORADO COURT OF APPEALS

DATE FILED: March 22, 2018
CASE NUMBER: 2017CA1356

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Court of Appeals No. 17CA1356
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-832-507

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City of Colorado Springs, Colorado,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and David Vitwar,

Respondents.

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ORDER AFFIRMED

Division III
Opinion by JUDGE WEBB
Terry and Tow, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced March 22, 2018

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Ritsema & Lyon, P.C., Susan K. Reeves, David R. Bennett, Colorado Springs, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Law Office of O'Toole and Sbarbaro, P.C., Neil D. O'Toole, Denver, Colorado, for Respondent David Vitwar

¶ 1 This workers' compensation case raises the question whether, if evidence demonstrates that a firefighter's nonoccupational risks of contracting cancer outweigh the risks posed by firefighting, must the claim be denied? Employer, the City of Colorado Springs, challenges the final order of the Industrial Claim Appeals Office (Panel) affirming the ALJ's finding that it failed to overcome the presumption that David Vitwar's (claimant) melanoma was compensable. The City contends that once it established other causes that were more likely to have led to Vitwar's melanoma, he should not have been awarded benefits. Because the sufficiency of the evidence needed to overcome the presumption of compensability created by section 8-41-209, C.R.S. 2017, is a question of fact for determination by an administrative law judge (ALJ), we answer this question "no." And, because we conclude that in this case substantial evidence supports the ALJ's factual findings, we affirm the Panel's decision.

## I. Background and Procedural History

¶ 2 Vitwar has worked for the City's fire department for more than twenty years. In 2009, he was diagnosed with melanoma. He filed

a claim for benefits under section 8-41-209 of the Workers' Compensation Act (Act).

¶ 3 Section 8-41-209 was enacted in 2007 to make it easier for firefighters to obtain workers' compensation coverage for certain cancers. The provision presumes that firefighters' brain, skin, digestive, hematological, or genitourinary cancers are compensable if the stricken firefighter meets certain criteria. *See* § 8-41-209 (1), (2)(a).

¶ 4 The legislature did not impose strict liability for these cancers on fire departments, however. An employer may overcome the presumption by showing that a firefighter's cancer "did not occur on the job." § 8-41-209(2)(b).

¶ 5 The City challenged Vitwar's workers' compensation claim. It sought to show that Vitwar's cancer was more likely caused by non-work-related factors. To overcome the statutory presumption of compensability, the City retained a medical expert, Dr. Ragini Kudchadkar. Dr. Kudchadkar testified that claimant's Scottish and Irish heritage made him "almost two times more likely" to contract melanoma than the general population; his risk of melanoma was "about two times" higher than the average population because of

his blonde hair and light eye color; "about three, three and a half times greater than the general population" because he had several moles; and, "at minimum three times" and as much as "six times the increased risk" of developing melanoma because of his abnormal moles (dysplastic nevi). Dr. Kudchadkar indicated that the general population's risk of contracting melanoma is about 1 in 50. She placed the increased risk for firefighters at 1 in 45. But, because of his multiple, non-work-related risk factors, Dr. Kudchadkar placed claimant's personal risk of contracting melanoma at 1 in 10. In sum, Dr. Kudchadkar opined that "the cause of [claimant's] melanoma is more likely than not due to these other risk factors and the sun exposure" rather than firefighting.

¶ 6 Claimant offered his own retained medical expert, Dr. Annyce Mayer, to refute Dr. Kudchadkar's opinions. Dr. Mayer testified that risk is not the same as cause and advanced the theory of a "synergistic relationship if any between firefighting and the development of melanoma," a theory which she acknowledged cannot be scientifically proven because "it's never been studied." She cited three studies which put the increased risk of a firefighter

contracting melanoma at 32% (LeMasters study); 73% (Howe & Birch study); and 50% (Bates study).

¶ 7 Still, corroborating Dr. Kudchadkar, Dr. Mayer acknowledged that claimant's increased risk based on non-work-related factors was higher than the risks reported in these studies. For example, she testified that claimant had a 96% increased risk of melanoma because of his phenotype (blonde & blue-eyed); a 47% increased risk because of the number of moles he had; a 74% increased risk because his grandmother developed melanoma at age seventy; and up to a 439% increased risk because he had "at least four dysplastic nevi." Even so, she explained that these nonoccupational factors did not guarantee that claimant would have developed cancer; rather, she suggested that any exposure he may have had while fighting fires had an "effect modification" that increased his likelihood of contracting melanoma at the relatively young age of forty-four.

¶ 8 Weighing all of the evidence, the ALJ awarded claimant benefits. The ALJ found Dr. Mayer's opinions and testimony "more persuasive than medical opinions in the record to the contrary." The ALJ agreed that claimant had multiple non-work-related risk

factors for melanoma, but concluded that "the increased risk of melanoma from relative risk factors does not diminish firefighting's causal role in the development of the disease."

¶ 9 The Panel affirmed, holding that it could not substitute its judgment for the ALJ's, and, because substantial evidence supported the ALJ's findings and conclusion, it was bound by the ALJ's findings. The Panel observed that "the ALJ clearly resolved any conflicts in the medical evidence by crediting Dr. Mayer's opinions and testimony that the risk of contracting melanoma is significantly greater for firefighters."

## II. The City's Contentions

¶ 10 The City contends that the ALJ misapplied the law by holding it to a strict liability standard. The City argues that the risk factor evidence heavily weighed against the conclusion that Vitwar contracted melanoma from firefighting, yet the ALJ found that it had failed to overcome the presumption of compensability. In the City's view, the ALJ improperly and "illogically" disregarded evidence corroborated by Dr. Mayer that Vitwar's "occupational risk for melanoma was at most 1 in 45 and his non-occupational risk was at least 1 in 15." It argues that under the burden the ALJ

imposed, "the City could *not* have proven that [Vitwar's] melanoma did not occur on the job — because any risk from firefighting, no matter how minute, would necessarily entail causation — except where the City proved a specific alternative cause."

## III. Relevant Statute

¶ 11 The Act's firefighter cancer presumption statute provides as follows:

> 1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system, hematological system, or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and
>
> (b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance

> of the medical evidence that such condition or impairment did not occur on the job.

§ 8-41-209. The City concedes that Vitwar met the statutory criteria in subsection (2)(a) triggering the presumption.

## IV. Governing Law

¶ 12 In 2016, the Colorado Supreme Court addressed the burden the statute places on employers to overcome the presumption. The supreme court held:

> [W]e conclude that an employer can meet its burden under section 8-41-209(2)(b) to show that a firefighter's condition or impairment "did not occur on the job" by establishing, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer where, for example, the claimant firefighter was not exposed to the substance or substances that are known to cause the firefighter's condition or impairment, *or the medical evidence renders it more probable that the cause of the claimant's condition or impairment was not job-related*.

*City of Littleton v. Indus. Claim Appeals Office*, 2016 CO 25, ¶ 49 (emphasis added). The supreme court then explained in *Industrial Claim Appeals Office v. Town of Castle Rock*, 2016 CO 26, that an employer can meet this burden by introducing "risk factor" evidence

showing why a firefighter's cancer more likely arose from a cause outside of firefighting. The court added:

> We hold that an employer can seek to meet its burden under section 8-41-209(2)(b) to show a firefighter's cancer "did not occur on the job" by presenting particularized risk-factor evidence indicating that it is more probable that the claimant firefighter's cancer arose from some source other than the firefighter's employment. To meet its burden of proof, the employer is not required to prove a specific alternate cause of the firefighter's cancer. Rather, the employer need only establish, by a preponderance of the medical evidence, that the firefighter's employment did not cause the firefighter's cancer because the firefighter's particular risk factors render it more probable that the firefighter's cancer arose from a source outside the workplace.

*Id.* at ¶ 17.

¶ 13 Despite this guidance, whether an employer has met this burden remains a question of fact for the ALJ to determine. Because the ALJ is the "sole arbiter of conflicting medical evidence . . . the ALJ's factual findings are binding on appeal if they are supported by substantial evidence or plausible inferences from the record." *City of Littleton*, ¶ 51.

## V. Did The City Overcome the Presumption?

¶ 14 The City's contention rests on the premise that the lopsided nature of the risk evidence can lead only to the rational conclusion that Vitwar's cancer was more likely caused by non-work-related exposures. The City maintains that if the ALJ had properly applied the standards set out in *City of Littleton* and *Town of Castle Rock*, he would have concluded that it overcame the statutory presumption. We reject this contention.

### A. Did the ALJ Misapply the Law?

¶ 15 To begin, a review of the ALJ's order reveals that the ALJ accurately summarized the governing law. The ALJ set out the test articulated in *City of Littleton* and *Town of Castle Rock*. And, he expressly noted that the City addressed "both general and specific causation" by focusing "on the relative risk factors such as [Vitwar's] familial history, ancestry, history of dysplastic nevi and sun exposure compared to the risk associated with firefighting." The ALJ then quoted *Town of Castle Rock*'s admonition that the City was not "required to prove a specific alternate cause of the firefighter's cancer." *See Town of Castle Rock*, ¶ 17.

¶ 16 Despite these statements, the City argues that the ALJ's ultimate conclusion in Vitwar's favor — despite undisputed evidence that Vitwar's nonoccupational risks outweighed his risk of contracting melanoma from firefighting — shows that the ALJ misapplied the law by improperly burdening it with a strict liability standard. To the contrary, the ALJ weighed the evidence and concluded that even though the risk factor evidence may have tilted in the City's favor, he was more persuaded by Dr. Mayer's opinion that firefighting was causally linked to Vitwar's melanoma. In other words, risk is not causation.

¶ 17 To hold — as the City urges — would effectively be a categorical rule that an employer overcomes the presumption whenever the employer presents evidence that other potential causes outweigh the risks from firefighting. But such a rule would deprive ALJs of the discretion granted them by the supreme court to consider and weigh the evidence offered by both sides. Thus, the City's interpretation would skew the balance too far in employers' favor. *See City of Littleton v. Indus. Claim Appeals Office*, 2012 COA 187, ¶ 91 (in the absence of specific evidence, the fire department's

evidence was insufficient to rebut the presumption), *rev'd*, 2016 CO 25.

B. Does Substantial Evidence Support the ALJ's Findings?

¶ 18 True enough, there must be a tipping point beyond which the evidence is so irrefutable that to rule against it would amount to an abuse of that discretion. This record, in which Dr. Mayer identified firefighting as a likely cause of Vitwar's cancer, is not such a case. To be sure, the ALJ could have weighed the evidence in the City's favor; but, contrary to the City's position, the evidence did not mandate an outcome in its favor.

¶ 19 Although *City of Littleton* and *Town of Castle Rock* granted employers the freedom to rely on risk-based evidence to overcome the presumption of compensability, those opinions do not guarantee that employers who introduce such evidence will successfully challenge a cancer claim. The supreme court only said that risk-based evidence like that introduced by the City here *can* be used to rebut the presumption; it did not say that once such evidence is introduced the presumption is rebutted as a matter of law. Indeed, the supreme court repeated the word "can" when it adopted the legal standards for the firefighter cancer presumption

statute. *See City of Littleton*, 2016 CO ¶ 49 ("an employer *can* meet its burden under section 8-41-209(2)(b) to show that a firefighter's condition or impairment 'did not occur on the job'") (emphasis added); *Town of Castle Rock*, ¶ 17 ("an employer *can* seek to meet its burden under section 8-41-209(2)(b) to show a firefighter's cancer 'did not occur on the job'") (emphasis added); *City of Englewood v. Harrell*, 2016 CO 27, ¶ 2 ("Specifically, an employer *can* show, by a preponderance of the medical evidence. . . .") (emphasis added).

¶ 20 More importantly, the supreme court bestowed ALJs with the authority to determine whether the presumption has been overcome. *City of Littleton*, ¶ 51. Thus, the question remains one of fact for the ALJ to decide, and we are bound by the ALJ's factual findings if they are supported by substantial evidence in the record. *Id.* at ¶¶ 51-52.

¶ 21 Based on Dr. Mayer's concession that her theory had not been scientifically tested, we might well have reached a different conclusion. But that is not the test. *See, e.g., Rael v. People*, 2017 CO 67, ¶ 15) ("[W]e may not substitute our own judgment for that of the trial court merely because we would have reached a different

conclusion."). As well, the City did not challenge the admissibility of Dr. Mayer's testimony on this basis. *See People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001). And once the evidence had been admitted, weighing it was up to the ALJ. *See Crews v. Yenter*, 352 P.2d 295, 298, 143 Colo. 102, 109 (1960) ("[O]nce admitted[,] [evidence] must be weighed and used and cannot be ignored.").

¶ 22 Here, Dr. Mayer did not dispute that Vitwar's ethnic heritage, phenotype, family background, and history of moles put him at risk for developing melanoma. Her point, however, was that these risk factors do not constitute an absolute cause. Rather, she noted, "there are a lot of Scottish people who don't get melanoma." From this observation, she extrapolated that the distinguishing factor between Vitwar and others who possess similar risk profiles — such as Vitwar's brother who shares his nonoccupational risk factors but has not developed melanoma — is firefighting, and emphasized that "relative risk does not establish causation." This evidence sufficiently supports the ALJ's conclusion that firefighting had a "causal role" in Vitwar's melanoma. We, like the Panel, are therefore bound by this factual determination. *City of Littleton*, ¶ 51-52

¶ 23 Moreover, in reaching this conclusion, the ALJ expressly found Dr. Mayer's opinions more persuasive than those of the City's medical experts. "We must . . . defer to the ALJ's credibility determinations and resolution of conflicts in the evidence, including the medical evidence." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006). As in all workers' compensation cases, the weight to be given the experts' testimony "is a matter exclusively within the discretion of the [ALJ] as fact-finder." *Rockwell Int'l v. Turnbull*, 802 P.2d 1182, 1183 (Colo. App. 1990). "Further, we may not interfere with the ALJ's credibility determinations except in the extreme circumstance where the evidence credited is so overwhelmingly rebutted by hard, certain evidence that the ALJ would err as a matter of law in crediting it." *Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000).

¶ 24 Because the weight to be given expert medical testimony is within the sound discretion of the ALJ, the ALJ acted well within his authority in crediting Dr. Mayer's opinions over Dr. Kudchadkar's contrary opinions. *Rockwell Int'l*, 802 P.2d at 1183. Consequently, we may not disturb the ALJ's determination that Dr.

Mayer's opinions were credible and persuasive. *See Youngs v. Indus. Claim Appeals Office*, 2012 COA 85M, ¶ 46; *Arenas*, 8 P.3d at 561; *Rockwell Int'l*, 802 P.2d at 1183.

## VI. Conclusion

¶ 25 In the end, because substantial evidence supports the ALJ's factual finding that firefighting played a causal role in Vitwar's cancer, the Panel did not err in affirming the ALJ's decision. *See City of Littleton*, ¶¶ 51-52.

¶ 26 The order is affirmed.

JUDGE TERRY and JUDGE TOW concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

## NOTICE CONCERNING ISSUANCE OF THE MANDATE

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Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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COLORADO COURT OF APPEALS

DATE FILED: March 29, 2018
CASE NUMBER: 2017CA1438

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Court of Appeals No. 17CA1438
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-993-361

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Holly LaGasse,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Xtreme Drilling and Coil Service; and New Hampshire Insurance Company,

Respondents.

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ORDER AFFIRMED

Division VII
Opinion by JUDGE FREYRE
Bernard and Berger, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**
Announced March 29, 2018

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Kaplan Morrell, Britton J. Morrell, Greeley, Colorado, for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Lee & Brown, LLC, Denver, Colorado, for Respondents Xtreme Drilling and Coil Service and New Hampshire Insurance Company

¶ 1 In this workers' compensation action, claimant, Holly LaGasse, seeks to set aside a decision of the Industrial Claim Appeals Office (Panel) that affirmed the denial and dismissal of her claim for death benefits. We conclude that substantial evidence supported the finding that the accident fell within the "going to and from" rule, and therefore affirm.

## I. Background

¶ 2 Mrs. LaGasse's husband, Jason LaGasse, worked as a derrick hand for employer, Xtreme Drilling and Coil Service. Because Xtreme's drilling operations ran twenty-four hours, employees, including Mr. LaGasse, worked seven days in a row, from either 6:00 a.m. to 6:00 p.m., or 6:00 p.m. to 6:00 a.m. After a seven-day shift, workers had seven days off, and then worked another seven-day shift, but switched from days to nights or vice versa. Workers sometimes volunteered to work extra shifts during their off week if they so desired.

¶ 3 Employees were responsible for getting themselves to drilling sites, and many drove themselves. However, most workers, including derrick hands like Mr. LaGasse, were not required to have a driver's license. Still, Mr. LaGasse usually drove to work in his

own vehicle. When drilling operations moved to a different location, a contractor moved the equipment. But, as with their commute to and from work, employees were responsible for getting themselves to the new drilling location. Workers without their own vehicles could catch a ride with another employee, or be driven to the new site by a supervisor, if no other means of transportation was available.

¶ 4 In late December 2013, Mr. LaGasse worked the following days:

| | |
|---|---|
| December 19 | 6:00 a.m. to 6:00 p.m. |
| December 20 | Off |
| December 21 | 6:00 a.m. to 6:00 p.m. |
| December 22 | Off |
| December 23 | 6:00 a.m. to 6:00 p.m. |
| December 24 | 6:00 p.m. to December 25, 6:00 a.m. |
| December 25 | 6:00 p.m. to December 26, 6:00 a.m. |

On December 26, about thirty minutes after leaving work and about thirty miles from his job site, Mr. LaGasse was killed in a single-car motor vehicle accident.

¶ 5 Mrs. LaGasse filed a claim for workers' compensation death benefits. Xtreme and its insurer, New Hampshire Insurance Company (collectively employer), contested the claim. Employer

argued that the claim was not compensable because Mr. LaGasse was traveling home from work and was outside the course and scope of his employment at the time of the fatal accident. Mrs. LaGasse conceded that injuries sustained while a worker is traveling to or from work are noncompensable. But, she countered, her husband's accident fell within a "special circumstance" that made the claim compensable — having his personal vehicle at work conferred a benefit on Xtreme because he was able to transport other Xtreme employees to the drilling site when those locations changed.

¶ 6 The administrative law judge (ALJ) rejected these contentions, however. Instead, he found that Xtreme did not require its employees to have a vehicle at the job site, or even to be licensed drivers. The ALJ also rejected Mrs. LaGasse's contention that Xtreme benefited from Mr. LaGasse's driving to and from work. He found that Xtreme simply required its employees to arrive at work without specifying a means of transportation; consequently, Xtreme "did not receive a benefit beyond [Mr. LaGasse's] mere arrival at work."

¶ 7 The Panel concluded that evidence in the record supported the ALJ's findings. The Panel therefore affirmed the order denying and dismissing the claim.

## II. Special Circumstances Exception to "Going to and From" Rule

¶ 8 On appeal, Mrs. LaGasse first contends that the ALJ and the Panel erred in finding that no "special circumstances" existed to remove the claim from under the rubric of the "going to and from" rule. She argues that Xtreme's practices "implicitly contemplated travel due to the unpredictable shifting of the work site to remote locations that are inaccessible by alternative means of transportation." She further argues that Xtreme benefited when employees like Mr. LaGasse drove themselves to work, because without the availability of employees' private vehicles, Xtreme "would have had to transport employees from drill site to drill site." Finally, Mrs. LaGasse argues that Xtreme also benefited from employees' use of personal vehicles because it enabled employees to bring their work uniforms home for washing. We are not persuaded by these arguments.

A. Governing Law

¶ 9 A work-related injury may be compensable if it arises out of the course and scope of the injured worker's employment. § 8-41-301(1)(b), C.R.S. 2017. "For an injury to occur 'in the course of' employment, the claimant must demonstrate that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions." *Madden v. Mountain W. Fabricators*, 977 P.2d 861, 863 (Colo. 1999). To establish that an injury arose out of an employee's employment, "the claimant must show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract." *Id.*

¶ 10 "In general, a claimant who is injured while going to or coming from work does not qualify for recovery because such travel is not considered to be performance of services arising out of and in the course of employment." *Id.* This doctrine is commonly called the "going to and from" rule. *Id.* at 864.

¶ 11 As *Madden* noted, however, exceptions to the rule abound. *Madden* held that

> the proper approach is to consider a number of variables when determining whether special circumstances warrant recovery under the Act.
>
> These variables include but are not limited to: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer's premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a "zone of special danger" out of which the injury arose.

*Id.* at 864 (citation omitted).

¶ 12 The supreme court further explained that the third variable, which Mrs. LaGasse contends applies here, is satisfied when

> such travel is a substantial part of the service to the employer. These examples can be summarized as follows: (a) when a particular journey is assigned or directed by the employer, (b) when the employee's travel is at the employer's express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee's arrival at work, and (c) when travel is singled out for special treatment as an inducement to employment.

*Id.* at 865.

B. Standard of Review

¶ 13 Applying the above factors is a "fact-specific analysis." *Id.* at 864. Consequently, whether an employee's commute falls within a "special circumstance" exempting it from the "going to and from" rule is a question of fact for determination by the ALJ. *See Staff Adm'rs, Inc. v. Indus. Claim Appeals Office*, 958 P.2d 509, 511 (Colo. App. 1997), *aff'd sub nom. Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866 (Colo. 1999). Like the Panel, we therefore cannot set aside an ALJ's findings on this issue if those findings are supported by substantial evidence in the record. *See* § 8-43-308, C.R.S. 2017; *Staff Adm'rs, Inc.*, 977 P.2d at 868 (substantial evidence supported ALJ's finding that travel was contemplated by the claimant's employment contract). Contrary to Mrs. LaGasse's contention, then, our review is not de novo.

C. Substantial Evidence Supports the ALJ's Factual Findings

¶ 14 Here, the ALJ found that although Mr. LaGasse drove himself to new drilling sites, having his vehicle at the job site did not confer any particular benefit on Xtreme. Specifically, he found, with record support, that

> Decedent merely had to get to the job site to work each day. The record reveals that Decedent's travel was not contemplated by the employment contract. Specifically, Employer did not require Decedent to use his automobile in order to work. Decedent's vehicle was not used to perform job duties and thus did not confer a benefit to Employer beyond his mere arrival at work. [A supervisor] credibly detailed that Decedent was not required to have a driver's license or bring a personal vehicle to a drilling location. Decedent was simply required to arrive at work for his assigned shift. He was also not required to bring personal tools to a drilling location because they were available on the oil rig. During oil rig moves, employees are ultimately responsible for transporting themselves to the job site and new location. Employees are not reimbursed for gas, travel or associated expenses for transportation to and from jobsites. Moreover, [a rig manager] explained that employees were not required to have a driver's license to work for Employer. In fact, there were employees who did not possess driver's licenses.

The ALJ's findings were supported by the testimony of Xtreme's field superintendent for United States operations and a rig manager. They testified that

- Xtreme never required derrick hands such as Mr. LaGasse to have a driver's license;
- several employees did not have driver's licenses;

- employees generally drove themselves from one drilling site to another, but those lacking their own vehicle could get a ride;
- if needed, a supervisor could drive workers to the new site; and,
- Xtreme did not require its employees to bring their own vehicles to job sites.

¶ 15 The ALJ found the testimony of these Xtreme employees credible and persuasive. We must defer to these determinations because "[t]he credibility of witnesses and the weight to be accorded their testimony lies within the province of the agency as trier of the facts." *City of Loveland Police Dep't v. Indus. Claim Appeals Office*, 141 P.3d 943, 950 (Colo. App. 2006); *see also Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995) (reviewing court must defer to the ALJ's credibility determinations and resolution of conflicts in the evidence and may not substitute its judgment for that of the ALJ). Moreover, we may not set aside a ruling dependent on witness credibility where the testimony has not been rebutted by other evidence. *See Arenas v. Indus. Claim Appeals Office*, 8 P.3d 558, 561 (Colo. App. 2000) ("[W]e may not

interfere with the ALJ's credibility determinations" unless the evidence is "overwhelmingly rebutted by hard, certain evidence" to the contrary.).

¶ 16 In our view, this evidence amply supports the ALJ's findings that Xtreme neither mandated nor contemplated its employees' travel. Although Xtreme may have enjoyed *a* benefit from Mr. LaGasse having his car at work, any benefit conferred was merely incidental and insufficient to elevate it beyond Mr. LaGasse's timely appearance at the job site. *See Madden*, 977 P.2d at 865. The evidence showed that although workers generally drove themselves from one job site to another, Xtreme did not require them to do so, did not reimburse the expense of doing so, and provided transportation when other travel options were unavailable. Because the ALJ's findings on this issue are amply supported by evidence in the record, we may not set aside those findings. *See id.* at 864; *Staff Adm'rs, Inc.*, 977 P.2d at 868.

¶ 17 Additionally, we do not perceive any conflict in the ALJ's found facts. While some evidence may have weighed in Mrs. LaGasse's favor, as the ALJ noted, other evidence favored Xtreme. The ALJ is tasked with resolving conflicts in the evidence, and the mere fact

that the ALJ made some findings that could have supported Mrs. LaGasse's position does not alter the fact that, on balance, the ALJ determined the facts ultimately weighed in Xtreme's favor. *See Metro Moving & Storage*, 914 P.2d at 415. Indeed, such findings confirm that the ALJ carefully weighed all the evidence presented to him.

¶ 18 With respect to Mrs. LaGasse's assertion that Xtreme benefited when Mr. LaGasse drove his uniform home for laundering, we note that, although she raised this issue, the ALJ did not enter any findings regarding the benefits of Xtreme employees laundering their uniforms at home. Nevertheless, the ALJ expressly noted that he had "not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive."

¶ 19 The record supports the ALJ's implicit rejection of this contention. Xtreme's superintendent testified that "in 2013, . . . [Xtreme was] using a cleaning company." Employees "had the opportunity [to] hand [their uniforms] in at the end of their hitch and we would take their dirties" for cleaning. A "C container in the yard" served as the collection site "where the clean ones were

dropped off once a week and the dirty ones were shipped out." Thus, credible evidence in the record contradicts Mrs. LaGasse's assertion that Xtreme required its employees to take their uniforms home for laundering.

¶ 20 Moreover, as noted above, the ALJ expressly found the superintendent's testimony credible and persuasive. And, we perceive no basis for setting aside this credibility determination. *Arenas*, 8 P.3d at 561. Because the superintendent's testimony supports the ALJ's implicit rejection of Mrs. LaGasse's assertion that personal vehicles benefited Xtreme by enabling employees to take their uniforms home for laundering, the finding may not be set aside. *See Madden*, 977 P.2d at 864; *Staff Adm'rs, Inc.*, 977 P.2d at 868.

¶ 21 Accordingly, the Panel did not err when it affirmed the ALJ's findings that Mrs. LaGasse's claim did not fall within the special circumstances exception to the "going to and from" rule. *See Madden*, 977 P.2d at 864.

III. ALJ Did Not Abuse Discretion by Rejecting Rebuttal Evidence

¶ 22 Mrs. LaGasse next contends that the ALJ erred by excluding rebuttal evidence intended to contradict Xtreme's assertion that its

employees were not required to have driver's licenses. Specifically, she offered Xtreme's webpage which purported to list a driver's license requirement for certain positions. She argues that the evidence was relevant and should have been admitted because parties are afforded "significant leeway" to introduce rebuttal evidence. We perceive no abuse of discretion on the ALJ's part.

A. Standard of Review

¶ 23 "Evidentiary decisions are firmly within an ALJ's discretion, and will not be disturbed absent a showing of abuse of that discretion." *Youngs v. Indus. Claim Appeals Office*, 2013 COA 54, ¶ 40; *see also* § 8-43-207(1)(c), C.R.S. 2017 (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).

¶ 24 "An ALJ abuses his or her discretion only if the evidentiary ruling 'exceeds the bounds of reason.'" *Kilpatrick v. Indus. Claim Appeals Office*, 2015 COA 30, ¶ 18 (quoting *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850, 856 (Colo. 1993)); *see also Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220, 222 (Colo. App. 2008). Thus,

the party challenging an ALJ's evidentiary ruling bears the burden of establishing "that the alleged abuse 'exceeds the bounds of reason.'" *Coates, Reid & Waldron*, 856 P.2d at 856 (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. No. 1*, 710 P.2d 1095, 1098-99 (Colo. 1985)).

B. Evidence Was Properly Excluded

¶ 25 Here, Mrs. LaGasse's counsel argued that Xtreme's website contradicted its claim that employees were not required to have driver's licenses. Counsel maintained that Xtreme's late disclosure of its argument that driver's licenses were not required for derrick hands warranted the admission of the webpage as rebuttal evidence. The ALJ found the webpage irrelevant and excluded it.

¶ 26 A review of the exchange reveals that Mrs. LaGasse's counsel offered the webpage in existence on the day of the hearing in 2016, nearly three years after Mr. LaGasse's death. Moreover, he referenced jobs on the website for a "motorhand," a "driller," and a "floor hand," all of which required a driver's license. However, Mr. LaGasse was a derrick hand, and, thus, the webpage did not contradict Xtreme's argument that it did not require Mr. LaGasse to have a driver's license.

¶ 27 Although parties may be afforded leeway to "introduce any competent evidence to explain, refute, counteract, or disprove the proof of the other party," *People v. Lewis*, 180 Colo. 423, 428, 506 P.2d 125, 127 (1973), the admission of such evidence is still soundly within the ALJ's discretion. *See People v. Welsh*, 80 P.3d 296, 304 (Colo. 2003) ("Rebuttal evidence is admitted at the trial court's discretion."). Here, because the webpage did not show a driver's license requirement for derrick hands in 2013, we cannot say that the ALJ abused his discretion by excluding the webpage on relevance grounds. *Youngs*, ¶ 40. We therefore find that the ALJ's evidentiary ruling did not exceed the bounds of reason and affirm it. *Coates, Reid & Waldron*, 856 P.2d at 856; *Kilpatrick*, ¶ 18.

## IV. Conclusion

¶ 28 The order is affirmed.

JUDGE BERNARD and JUDGE BERGER concur.

# Court of Appeals

**STATE OF COLORADO**
**2 East 14th Avenue**
**Denver, CO 80203**
**(720) 625-5150**

**PAULINE BROCK**
**CLERK OF THE COURT**

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BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-962-740-06

IN THE MATTER OF THE CLAIM OF:

SUSAN BURREN,

Claimant,

v.

FINAL ORDER

DESTINATION MATERNITY,

Employer,

and

LIBERTY MUTUAL INSURANCE CO.,

Insurer,
Respondents.

The claimant seeks review of a supplemental order of Administrative Law Judge Turnbow (ALJ) dated November 22, 2017, that determined the respondents overcame the opinions of the twenty-four month Division sponsored independent medical examination (DIME) physician as it pertains to maximum medical improvement (MMI), permanent partial disability (PPD) benefits, and relatedness of her cervical spine treatment. We affirm.

This matter went to hearing on overcoming the opinions of the twenty-four month DIME physician, Dr. Henke, as it pertained to MMI, PPD, and relatedness of the claimant's cervical spine treatment. After the hearing, the ALJ found that on September 25 and 26, 2014, the claimant sustained admitted work injuries to her neck, right arm, and right shoulder. On September 25, 2014, the claimant was standing on a ladder holding a steel and Plexiglas shelf over her head on the palm of her right hand. On September 26, 2014, the claimant reported she was installing a shelf on a ladder approximately 12' in the air. When she first sought treatment on September 27, 2014, the claimant complained of right arm and shoulder pain. X-rays of the claimant's right shoulder revealed no acute fracture or dislocation, mild degenerative arthritis of her acromioclavicular joint, and osteopenia. The claimant's provider diagnosed a right shoulder sprain and right elbow neuropathy.

Level II accredited physician, Dr. Horner, primarily treated the claimant's neck and shoulder, and Dr. Johnson primarily treated the claimant's shoulder and arm.

The claimant's complaints evolved over time. On December 12, 2014, Dr. Miller noted that the claimant's chief complaints were right elbow pain, weakness, and numbness. The claimant exhibited full range of motion and Dr. Miller ruled out cervical radiculopathy and other cervical spine injuries as the claimant's EMG and MRI studies and her physical examination did not support any diagnosis. On January 13, 2015, Dr. Kreutter noted that the claimant's cervical spine was very sensitive to light touch.

The claimant's mental health status was identified as a potential or actual cause of her symptoms by her treatment providers.

At the request of the respondents, on June 24, 2015, the claimant presented to Level II accredited physician, Dr. Fall, for an independent medical examination (IME). The claimant stated that neck pain was her chief complaint, followed by right shoulder and right elbow pain. Dr. Fall noted that the claimant exhibited significant pain behaviors rendering the examination nearly impossible. Dr. Fall's assessment included "Rule out somatoform disorder, conversion disorder, factitious disorder, or other psychological issues playing a role in her presentation and perceived disability." Dr. Fall recommended that the claimant undergo a psychological evaluation.

On March 14, 2016, Dr. Johnson wrote that the claimant's primary concern was her neck injury and that her shoulder was a minor concern. On June 6, 2016, Dr. Horner noted the claimant may be at MMI depending on her reaction to Botox injections which he was administering that day. He stated that if the claimant "does not respond to the Botox treatment done at today's visit, then she will be at maximum medical improvement." The claimant subsequently had a serious negative reaction to the injections.

On June 28, 2016, Dr. Horner answered a letter authored by the respondents. He opined that the claimant was at MMI for her cervical spine, but she was not at MMI for any other injury for which he had treatment appointments scheduled. Thus, neither Dr. Horner nor Dr. Johnson had placed the claimant at MMI for her right arm and right shoulder injuries after 24 months of treatment.

On August 9, 2016, Dr. Fall performed a follow-up IME. The claimant reported to Dr. Fall that her pain was alleviated by "nothing." Dr. Fall reported that the claimant was at MMI without impairment, and that there was no work-related injury to the claimant's

cervical spine. Dr. Fall supported her conclusion by detailing the mechanism of injury and the initial complaints by the claimant at the emergency room. Dr. Fall opined that despite nearly three years of extensive treatment, the claimant's function had not improved and her pain had worsened. Dr. Fall opined that the objective findings on the MRIs, EMGs, and x-ray reports do not support the claimant's subjective pain complaints.

Thereafter, the respondents applied for a twenty-four month DIME pursuant to §8-42-107(8)(b)(II), C.R.S. The respondents requested that the DIME physician address MMI and permanent impairment of the right shoulder and right upper extremity.

Dr. Henke performed the claimant's DIME evaluation on December 27, 2017. The claimant reported to Dr. Henke that medications, rest, physical therapy, and injections had not provided any relief. Dr. Henke was instructed to examine and evaluate the claimant's right shoulder and right upper extremity, and to address the issues of MMI, impairment rating, and whether any further medical treatment would be necessary. In his DIME report, Dr. Henke ultimately determined that the claimant was not at MMI for her work-related neck and right upper extremity injuries.

The ALJ subsequently entered her supplemental order concluding that the respondents had overcome the DIME physician's opinions as it pertained to MMI, impairment, and relatedness of the cervical condition by clear and convincing evidence. She found the respondents had produced evidence contradicting the DIME which she found unmistakable and free from serious or substantial doubt showing it highly probable the DIME physician was incorrect. The ALJ essentially adopted the opinions of Dr. Fall, and found that not only was the claimant at MMI for all of her industrial injuries without impairment, but that there was no work-related injury to the claimant's spine. The ALJ found Dr. Henke only reviewed a portion of the claimant's medical records and failed to consider Dr. Fall's second IME report. She also found that Dr. Henke failed to provide any details or analysis as to why the claimant was not at MMI, or what needed to be done for the claimant to reach MMI. In particular, while Dr. Henke recommended that the claimant should follow-up with Dr. Johnson for further orthopedic evaluation and treatment recommendations, he did not identify what body part the claimant should follow up with, what type of orthopedic evaluation the claimant needed, or why further orthopedic evaluation was necessary, despite nearly three years of treatment without any perceived benefit. The ALJ also determined that Dr. Henke did not rate any impairment, which she found was a required step in the DIME process. The ALJ ordered that the claimant reached MMI on June 28, 2016, without impairment.

On appeal, the claimant argues the ALJ erred in finding she reached MMI on June 28, 2016. The claimant reasons that since each component of her industrial injury had not yet been determined to be at MMI by an ATP or the DIME physician, the ALJ cannot place her at MMI. Namely, she argues that her right shoulder and arm have not been placed at MMI. The claimant contends that Colorado appellate courts have long held there is no partial MMI under Colorado's Workers' Compensation Law. Thus, the claimant contends the ALJ's supplemental order must be set aside. We perceive no error.

Section 8-42-107(8)(b)(II) and (III), C.R.S. provide as follows regarding the twenty-four month DIME procedure:

> (II) If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2; except that, if an authorized treating physician has not determined that the employee has reached maximum medical improvement, the employer or insurer may only request the selection of an independent medical examiner if all of the following conditions are met:
> (A) At least twenty-four months have passed since the date of injury;
> (B) A party has requested in writing that an authorized treating physician determine whether the employee has reached maximum medical improvement;
> (C) Such authorized treating physician has not determined that the employee has reached maximum medical improvement; and
> (D) A physician other than such authorized treating physician has determined that the employee has reached maximum medical improvement.
> (III) Notwithstanding paragraph (c) of this subsection (8), if the independent medical examiner selected pursuant to subparagraph (II) of this paragraph (b) finds that the injured worker has reached maximum medical improvement, the independent medical examiner shall also determine the injured worker's permanent medical impairment rating. *The finding regarding maximum medical improvement and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence. A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division*. (Emphasis added.)

Consequently, pursuant to §8-42-107(8)(b)(II) and (III), C.R.S, once a twenty-four month DIME physician reaches a finding regarding MMI and permanent impairment and the finding has been filed with the Division of Workers' Compensation, a hearing may take place. The twenty-four month DIME physician's finding on MMI and permanent impairment is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *York v. Manpower International, Inc.*, W.C. No. 4-837-612-04 (May 4, 2016), *aff'd* 16CA0877 (Jan. 26, 2017)(NSOP). "Clear and convincing" evidence has been defined as evidence which demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). The question of whether a party has overcome the DIME by clear and convincing evidence is one of fact for the ALJ's determination. *Id*. The standard of review is whether the ALJ's findings of fact are supported by substantial evidence in the record. Section 8-43-301(8), C.R.S; *Metro Moving & Storage Co. v. Gussert, supra*.

Moreover, we previously have held that once an ALJ determines the DIME physician's opinion on MMI and permanent impairment have been overcome, the question of the claimant's correct MMI date and permanent impairment becomes a question of fact for the ALJ. *York v. Manpower International, Inc., supra; Nixon v. City and County of Denver*, W.C. No. 4-770-139 (Oct. 24, 2011)(after finding DIME physician's opinion of no MMI had been overcome, ALJ determined claimant attained MMI as of July 23, 2010); *see also Solis v. Sunshine Building Maintenance*, W.C. No. 4-726-043 (June 12, 2009)(after finding DIME physician's determination of no MMI had been overcome, ALJ determined claimant attained MMI on September 5, 2007); *Lee v. J. Garlin Commercial Furnishings*, W.C. No. 4-421-442 (December 17, 2001) (once ALJ determines DIME physician's permanent impairment rating has been overcome, claimant's correct medical impairment rating becomes question of fact for ALJ); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001) (same). The only limitation is that the ALJ's findings must be supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. This is a narrow standard of review which requires us to defer to the ALJ's credibility determinations, resolution of conflicts in the evidence, and plausible inferences drawn from the record. *Metro Moving and Storage Co. v. Gussert, supra*.

Here, we perceive no error in the ALJ's determination that the claimant reached MMI for her industrial injuries as of June 28, 2016. It is true, as the claimant argues, that MMI is not divisible and cannot be parceled out among the various components of a multi-faceted industrial injury. *Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). But, that is not what the ALJ did here. Instead,

as detailed above, here, the respondents sought a 24-month DIME because an ATP had placed the claimant at MMI only for her cervical injury and no other industrial injury, the DIME determined the claimant was not at MMI for any of her industrial injuries, and the ALJ concluded the respondents overcame the DIME physician's opinion pertaining to MMI and relatedness of her cervical condition by clear and convincing evidence. The ALJ essentially adopted the opinions of the Level II physicians, Dr. Fall and Dr. Horner, that the claimant reached MMI for all of her industrial injuries as of June 28, 2016, and that her cervical condition was not related to the work injury. The respondents' request for the twenty-four month DIME, their request for the hearing, and the ALJ's determination regarding the DIME and MMI are consistent with §8-42-107(8)(b)(II) and (III), C.R.S, and the case law interpreting the twenty-four month DIME statute. Similarly, since the ALJ's finding regarding the MMI date is supported by substantial evidence, namely the opinions of Dr. Fall and Dr. Horner, we have no basis to set aside the ALJ's supplemental order on this ground. Section 8-43-301(8), C.R.S.

The claimant appears to argue that the situation here is different because a 24-month DIME was involved, and neither the ATP nor the 24-month DIME had placed the claimant at MMI for all of her industrial injuries. However, the 24-month DIME process was enacted by the General Assembly to allow a DIME review prior to a finding of MMI by an ATP. The statute's purpose was, in part, to allow an employer and its insurer a mechanism to challenge a physician who continues to treat for an extended period of time. Section 8-42-107(8)(b)(II), C.R.S.; *see Clark v. Mac-Make-Up Art Cosmetics*, W.C. No. 4-858-859-06 (Aug. 3, 2016). As noted above, we have long held that once the ALJ determined the DIME physician's MMI opinion was overcome by clear and convincing evidence, then the ALJ was required to determine the claimant's MMI date as a matter of fact. *See Nixon v. City and County of Denver, supra; Solis v. Sunshine Building Maintenance, supr*a. Consequently, we reject the claimant's argument that the ALJ was precluded from determining the MMI date once she decided the DIME physician's opinion on MMI had been overcome by clear and convincing evidence. Section 8-43-301(8), C.R.S.

Similarly, to the extent the claimant also argues the ALJ erred in making a finding of no permanent impairment, we disagree. As explained above, once an ALJ determines that the DIME physician's opinions on permanent impairment has been overcome by clear and convincing evidence, then the issue of permanent impairment becomes a question of fact for the ALJ. *Lee v. J. Garlin Commercial Furnishings*, *supra*; *Garlets v. Memorial Hospital*, *supra*. Again, relying upon the opinions of Dr. Fall, the ALJ here found that the claimant was at MMI for all her industrial injuries on June 28, 2016, with no impairment. Section 8-43-301(8), C.R.S. Moreover, the claimant's argument

notwithstanding, the ALJ did not err in concluding that Dr. Henke should have provided a provisional impairment rating even though he found the claimant was not at MMI. Contrary to the claimant's argument, Desk Aid #11- Impairment Rating Tips, does, in fact, provide that if the party requesting the DIME has asked that impairment be addressed and the DIME physician finds the claimant not at MMI, then he nevertheless should provide a rating for the injury:

> 4. Impairment when "Not at MMI": Remember that a DIME is a legal/medical proceeding and you are being asked to provide specific information. If the party requesting the DIME has asked that impairment be addressed, and if you find the patient not at MMI for that work-related injury, you should nevertheless provide a rating for that injury. This information can be used by the parties for negotiations, settlement, or to help assess further treatment needs.

Consequently, we have no basis to disturb the ALJ's supplemental order on these grounds. Section 8-43-301(8), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's supplemental order dated November 22, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

**NOTICE**

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

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

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

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

**Office of the Attorney General**
State Services Section
Ralph L. Carr Colorado Judicial Center
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Denver, CO 80203

CERTIFICATE OF MAILING

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

3/15/18 by TT .

IRWIN CARMICKLE FRALEY LLP, Attn: ROGER FRALEY JR ESQ, 6377 S REVERE PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: MICHELE STARK ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-796-185-03

IN THE MATTER OF THE CLAIM OF:

JOSEPH COTTER,

Claimant,

v.

FINAL ORDER

BUSK CONSTRUCTION, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Spencer (ALJ) dated October 12, 2017, that granted the respondents' motion for summary judgment. We affirm the ALJ's order.

The claimant alleged that he sustained injuries in the course and scope of his employment as a carpenter with Busk Construction, Inc. The claimant originally claimed he injured his lumbar spine in an acute event while lifting a saw on June 29, 2009. The matter went to hearing on October 2009, and in an order dated January 20, 2010, an ALJ determined that the claimant did not prove a compensable injury and denied his request for medical benefits. The ALJ also included a clause in the order reserving jurisdiction over all issues not decided.

The claimant filed another application for hearing on December 4, 2015, and in orders dated January 13, 2016, and January 21, 2016, an ALJ struck the application for hearing because it was outside the six-year statute of limitations. On appeal the panel remanded the matter to address issues that had not been closed by the 2010 order. An ALJ held a hearing on September 16, 2016, on the issues of compensability TTD, TPD, PPD, PTD, medical benefits and the claimant's petition to reopen medical benefits for the period of June to October 2009. Rather than testify at hearing, the claimant submitted the transcripts from the 2009 hearing. In an order dated October 24, 2016, the ALJ

determined that the claimant was not a credible witness and that there was support for the ALJ's findings in the 2010 order. The ALJ denied the petition to reopen and held that the claimant failed to "prove by a preponderance of the evidence that he suffered a compensable injury arising out of and in the scope of his employment on June 18, 2009." The ALJ dismissed all of the claimant's claims and did not preserve any issues for future determination. The order was affirmed by the panel on February 17, 2017, and neither party appealed.

The claimant filed another application for hearing on July 7, 2017, endorsing the issues of compensability, average weekly wage, authorized provider, medical benefits, TTD, TPD, PTD and petition to reopen and occupational disease. The claimant also listed a 1994 claim against Viele Construction and Liberty Mutual in W.C. No. 3-116-120 (Liberty claim). The claims were consolidated for hearing. Because the claims were resolved without a hearing, the appeals are now being separately addressed.

Pinnacol filed a motion for summary judgment arguing that the claim was barred by the doctrine of claim preclusion. The respondents stated that the issues in the claimant's July 2017, application for hearing were addressed by the ALJ's October 24, 2016 order. The respondents also pointed out that the claimant's petition to reopen was filed outside of the six-year statute of limitations. In response, the claimant contended that Pinnacol Assurance denied his due process rights and that an IME examination performed by Dr. Brodie was not supported by the evidence.

The ALJ agreed with the respondents that the claimant was precluded from re-litigating the issues because his claim of an occupational disease was barred by the doctrine of claim preclusion. The ALJ also determined that the claimant's petition to reopen was barred by the statute of limitation in §8-43-303, C.R.S.

The claimant appealed as *pro se* and filed an "opening brief." Although the claimant is now represented by counsel in this case, we have not received a brief from counsel. On appeal, the claimant appears to renew the contentions he made in his response to the motion for summary judgement. We are not persuaded that the ALJ committed reversible error.

It is well-established that OACRP Rule 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. *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d

848 (Colo. App. 1995); *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). We note that 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). And 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). However, pursuant to § 8-43-301(8), C.R.S., we have authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law. Here, the question on review is generally whether applicable law supports the ALJ's grant of summary judgment on the ground that the claimant was barred by preclusive principles from re-litigation of the issues in his July 2017, application for hearing. We conclude that the law supports the ALJ's order.

The ALJ here determined that the claimant's claim for benefits based on an occupational disease theory of liability is barred by claim preclusion because it could have been, but was not, tried at either of the two previous hearings involving the same parties. Claim preclusion works to bar the re-litigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not. *Argus Real Estate, Inc. v. E-470 Pub. Highway Auth.*, 109 P.3d 604 (Colo. 2005). Claim preclusion protects "litigants from the burden of re-litigating an identical issue with the same party or his privy and … promote[s] judicial economy by preventing needless litigation." *Lobato v. Taylor*, 70 P.3d 1152, 1165-66 (Colo. 2003). For a claim in a second proceeding to be precluded by a previous judgment, there must exist: (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity of or privity between parties to the actions. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999).

Relying upon *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.3d 795 (Colo. App. 2006), the ALJ noted that in analyzing whether there is an identity of claims for relief, the focus is not on the specific claim asserted or the name given to the claim. Instead, the same claim or cause of action requirement is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. Quoting from *Holnam*, the ALJ further noted that claim preclusion bars re-litigation not only of all claims actually decided, but of all claims that might have been decided if the claims are tied by the same injury. The ALJ found that the claimant was alleging an occupational disease to his back caused by his work for the employer in 2009. In the previous two hearings the claimant argued that his back condition was caused by a specific injury on June 29, 2009. Applying the holding in *Holnam* the ALJ found that there were not two separate injuries because in both claims, the injury for which compensation was sought was the lumbar condition. Therefore, under *Holnam* the ALJ found the claimant was precluded from re-litigating his back condition based on an occupational disease theory. The ALJ correctly applied the holding in *Holnam* and we are therefore bound to affirm. Section 8-43-301(8), C.R.S.

To the extent the claimant argues that he is entitled to a reopening based on mistake, the ALJ correctly held that reopening is barred by the statute of limitation because the claimant's date of injury was June 18, 2009, and the six-year statute of limitations for reopening would have expired on June 18, 2015, more than two years before the claimant's July 7, 2017, application for hearing. Section 8-43-303, C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated October 12, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

**NOTICE**

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PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 E LOWRY BLVD, DENVER, CO, 80230 (Insurer)
IRWIN CARMICKLE & FRALEY LLP, Attn: BRAD R IRWIN, 6377 S REVERE PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: KEVIN CARLOCK, ESQ, 1401 17TH ST SUITE 900, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 3-116-120-04

IN THE MATTER OF THE CLAIM OF:

JOSEPH P. COTTER,

Claimant,

v.

FINAL ORDER

JL VIELE CONSTRUCTION, INC.,

Employer,

and

LIBERTY MUTUAL,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Spencer (ALJ) dated October 13, 2017, that granted the respondents' motion for summary judgment. We affirm the ALJ's order.

This matter was originally consolidated with W.C. No. 4-796-185 for hearing. The claims were resolved without a hearing and the appeals are now being separately addressed. In this claim the claimant sustained an admitted industrial injury on October 24, 1994. He was using a hammer drill tool when he drilled into rebar and the bit stuck resulting in injuries to the claimant's back, neck and arm. Radiographic imaging in March of 1995 showed compression fractures in the thoracic spine and the claimant was also diagnosed with a lumbosacral strain. The claimant received medical and indemnity benefits and eventually settled the claim on a full and final basis on August 27, 1997, for $20,000.00

The Division of Workers' Compensation file was destroyed on July 10, 2006, and neither party has a copy of the settlement documents. The Division's electronic chronological history shows a "full" settlement was approved on August 27, 1997, for $20,000. No medical or indemnity payments were made to the claimant after September 3, 1997. There was no action to prosecute this claim until the claimant filed an application for hearing on July 7, 2017.

In 2008, the claimant filed a claim against Buck Construction and Pinnacol Assurance (the Pinnacol claim) for an alleged low back injury on July 18, 2009. In the Pinnacol claim the claimant alleged that he injured his back while lifting a saw. The claimant underwent an MRI which showed chronic, mild, multi-level degenerative changes including endplate edema at L2-3.

The claimant's July 7, 2017, application for hearing listed this claim and the 2009 Pinnacol claim and endorsed the issues of compensability, average weekly wage, petition to reopen and "occupational disease." Liberty filed a motion for summary judgment contending that the statute of limitations precludes the claimant's petition to reopen based on change of condition and that the claimant did not allege fraud or a "mutual" mistake of fact that would serve as a basis to reopen the 1997 settlement. In the claimant's response he alleged that Liberty's internal file mistakenly described the injury as a "ruptured vertebrae."

The ALJ agreed with the respondents and found that the claimant provided no evidence to show the parties were operating under a mutual mistake of material fact when they executed the full and final settlement. The ALJ determined that the only mistake the claimant specifically identified in this claim was Liberty's electronic description of the claimant's injury, but the claimant admits that he did not share this mistake. The ALJ concluded, at most, the claimant pointed to a unilateral mistake by Liberty which is insufficient to reopen a claim.

The ALJ also rejected the claimant's assertion that Liberty's internal characterization of the injury as a vertebrae rupture misled the Division regarding the nature of his injury. The ALJ said, even assuming that was correct, the Division was not a party to the settlement and this would not create a mutual mistake to justify reopening the claim. The ALJ, therefore, granted the respondents' motion for summary judgment and denied the claimant's request to reopen the claim and dismissed the application for hearing.

We note initially that the claimant, who was previously *pro se*, is now represented by counsel, and filed his own petition to review and brief in addition to the claimant's counsel's reply brief. Although the rules do not provide for a reply brief we have considered all of the pleadings filed in this claim. *Cf.* §8-43-301(4), C.R.S. (no provision for filing reply brief). On appeal, the claimant renews his contention that the Division approved the settlement based upon Liberty's mistaken electronic description of the injury as a vertebrae rupture instead of a degenerative condition. We are not persuaded 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 ground that the claimant has failed to show that there was mutual mistake to reopen the settlement agreement pursuant to § 8-43-303, C.R.S. We conclude that it does.

Section 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 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* (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). 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 is the belief that Liberty's internal characterization of his back condition as a ruptured vertebrae rather than a degenerative condition caused them to incorrectly value the condition for settlement and mislead the Division in the approval of that settlement. However, as the ALJ found, the claimant does not allege that he was mistaken about the injury. Moreover, the characterization of the injury to the Division was inconsequential because a "mutual mistake" in §8-43-303, C.R.S. necessary to reopen a claim is a mistake by both of the parties to the settlement and not the Division. Consequently, the ALJ did not err in finding that as a matter of law the claimant could not establish the mutuality of a mistake.

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 October 13, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

Kris Sanko

**NOTICE**

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

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Denver, CO 80203

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

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

CERTIFICATE OF MAILING

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

3/23/18 by TT .

IRWIN CARMICKLE & FRALEY LLP, Attn: BRAD R IRWIN ESQ, 6377 S REVER PARKWAY SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)
LAW OFFICES OF SKRABO & ATKINS, Attn: MARCUS J ZARLENGO ESQ, 5670 GREENWOOD PLAZA BLVD SUITE 400, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 5-034-047-01

IN THE MATTER OF THE CLAIM OF:

JAMES JONES,

Claimant,

v.

FINAL ORDER

THE MITRE CORPORATION,

Employer,

and

AMERICAN CASUALTY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Lamphere (ALJ) dated September 25, 2017, that denied the claimant's request for reimbursement of medical expenses but found the claimant did sustain a compensable injury in the form of tinnitus in his ears and an injury to his neck. The respondents appeal the finding there was a neck injury. We affirm the order of the ALJ.

The claimant asserted he suffered injuries on October 6, 2016, when he sought to destroy some left over computer hard drives containing classified information. These hard drives represented the remains of data used for the employer's work on government research projects. The claimant explained he had requested security staff to properly dispose of the hard drives. However, when they declined he determined he would shatter them so as to render them unusable. He stated he secured five pounds of the metallic hard drives in a plastic bag and hurled them from overhead into an empty metal dumpster. The shattering of the hard drives resulted in an extremely loud blast of sound, which knocked the claimant backwards and caused immediate pain in his ears.

The claimant testified at a July 26, 2017, hearing that as he drove home from work the afternoon of October 6 he noted some constriction in his ability to turn his neck. However, his primary complaint involved the pain and ringing in his ears. Using his health insurance, he arranged an appointment with Dr. Yohanan, an ear, nose and throat specialist. In his first appointment with Dr. Yohanan on November 3, 2016, he described

an injury he had experienced at home on October 1 when he hit his head on a door, injured his nose and caused what the claimant diagnosed as a concussion. The claimant indicated he also described for the doctor the October 6 blast of noise involving the shattering of the hard drives. Dr. Yohanan concluded the claimant was displaying muscle tightness in his neck behind the ears. He believed this tightness was leading to the ear pain. The doctor recommended ibuprofen and physical therapy. The claimant attended a follow up appointment with Dr. Yohanan on February 16, 2017. In his report of that date, the doctor noted it had not been clear to him earlier that the claimant was describing two distinct incidents causing injury: one being the October 1 collision with the door, and the other the October 6 blast of noise. In response to the claimant's concern over hearing damage, Dr. Yohanan referred to his earlier audiogram, which did not reveal any hearing loss. The claimant's predominant complaint was related to ringing, or tinnitus, in his ears. The claimant reported his neck condition had greatly improved and this corresponded to a reduction in the volume and incidence of the ringing. Dr. Yohanan concluded the claimant had injured his neck on October 1 at home. However, he felt the "muscle tension of the head and neck injury aggravated by his hypersensitivity to sound from his concussion led to the onset of the tinnitus." The doctor concluded "[g]iven the situation above and the temporal relationship and possibly the relationship of hypersensitivity of his ears and cochlear to sound after a concussion, the work-related noise exposure both temporally and theoretically played a role in his symptoms." He recommended the claimant finish his regime of physical therapy and observed it was likely the claimant's symptoms would resolve over time.

The claimant submitted to the employer on November 29, 2016, a report of his October 6 work injury pertinent to destroying the hard drives. The employer then gave to the claimant a list of four medical providers from whom he could choose to receive treatment. The claimant however, treated solely with Dr. Yohanan and with his physical therapist at Cornerstone Physical Therapy. The respondents filed a Notice of Contest disputing the claim on January 11, 2017.

The claimant, proceeding without attorney representation, filed an application for a hearing endorsing as issues compensability and medical benefits. The claimant sought reimbursement for the $1,690 he had paid out of pocket for physical therapy sessions between November 2016, and March 1, 2017. The respondents presented the report and deposition testimony of Dr. Reiner. Dr. Reiner was of the impression the claimant's tinnitus symptoms were more likely the result of his October 1 concussion at home than of the sonic blast from the dumpster at work. He noted the ear pain might be related to "musculosketetal cervical issues, treated well with physical therapy and ibuprofen."

At the July 26 hearing, the claimant was represented by his son, who was not an attorney. *See*, § 8-43-211(1)(c), C.R.S., *Bustos v. Howell Construction*, W.C. No. 4-482-509 (Feb. 7, 2003). The claimant testified the injury for which he sought treatment was the ringing in his ears and the accompanying pain. The respondents disputed the relation of that condition to work, asserted the medical treatment was performed by unauthorized professionals, and requested a penalty pursuant to § 8-43-102(1)(a), C.R.S. due to the claimant's late reporting of his injury. Following the hearing, the ALJ issued his order of September 25, 2017. The ALJ found the respondents had timely served the claimant with a list of medical providers as required by § 8-43-404(5)(a)(1)(A), C.R.S. The ALJ held that because the claimant elected to treat with Dr. Yohanan and with Cornerstone Physical Therapy before he even reported his injury to the employer, the right to select a treating physician had not passed to the claimant, his treaters were not authorized, and the respondents were therefore not liable for the expenses incurred through their treatment. The ALJ noted the claimant did not endorse the issue of temporary disability benefits. Because there could be no ruling pertinent to temporary disability benefits, the ALJ determined to defer to a later point any ruling on the respondents' request for a penalty.

The ALJ ruled the claimant did not establish a claim for hearing loss. However, the ALJ found he had proven a compensable injury "to the neck and for tinnitus."

The claimant did not appeal. The respondents have appealed the ruling that the claimant established an injury to his neck. The respondents argue the ALJ incorrectly reasoned the loud report from throwing the hard drives into the dumpster led to the claimant's neck injury as a secondary symptom principally caused by the claimant's tinnitus. The respondents also contend they did not receive adequate notice prior to the July 26 hearing that the claimant was asserting he had a neck injury due to his October 6 shattering of the hard drives.

I.

While the respondents are not disputing an order directing them to pay a particular benefit, they contend their appeal may be heard pursuant to § 8-43-301(2), C.R.S. They submit that section provides "*Any* party dissatisfied with an order which … denies a claimant any benefit …" may appeal. They point out that because the ALJ denied the claimant a medical benefit, regardless of whether their dissatisfaction concerns that portion of the order, their appeal may be entertained by the Panel. While the respondents do not cite to case authority, because the Court of Appeals has ruled that in such a circumstance an appeal is ripe for review, we concur with the respondents' position.

In *BCW Enterprises v. Industrial Claim Appeals Office*, 964 P. 2d 533 (Colo. App. 1997), the respondents sought to appeal an ALJ's denial of their request for a penalty against the claimant. Because § 8-43-301(2) allows an appeal of a denial of a penalty only when the penalty is denied to the claimant, the respondents were unable to immediately appeal the ALJ's decision. Following the ALJ's order denying the respondents a penalty, the claimant pursued her own claim for a penalty against the respondents. When that penalty was denied by the ALJ, the respondents submitted their appeal of the ALJ's previous denial of the respondents' penalty claim. The respondents argued that because the ALJ's order denying the claimant a penalty was subject to review pursuant to § 8-43-301(2), the respondents' appeal had therefore become reviewable as a part of that order. The Court agreed reasoning:

> … it remains that an interlocutory order becomes reviewable when appealed incident to or in conjunction with an otherwise final order. *See American Express v. Industrial Commission, supra* … Thus, we read § 8-43-301(2) not to preclude any review of the denial of a penalty to an employer or insurer, but merely to classify such order as interlocutory. Although such classification may delay review of that order, appellate review is still afforded. *BCW Enterprises v. Industrial Claim Appeals Office, 964 P.2d at 537.*

In *American Express v. Industrial Commission*, 712 P.2d 1132 (Colo. App. 1985), the respondent endeavored to appeal a discovery order of a referee ordering it liable for the expenses of the claimant's counsel to travel out of state to attend witness depositions sought by the respondents. The Commission determined the order was interlocutory and not subject to appeal on the basis that if no deposition were conducted no liability for expenses would be incurred. Six months later, in June, the referee found the claim compensable and ordered the respondents to pay some medical charges. The Court deemed the order concerning the deposition expenses did become subject to review following the June order directing payment of benefits:

> While we conclude that the December 8 order [regarding deposition expenses] was not final when entered, we hold that it was reviewable as incident to the June 14 order.
>
> …

> … the order of June 14, 1984, was, as we have held, a final order. The December 8, 1983 order concerned proceedings incident to the June order, and it was therefore reviewable simultaneously with the June order. [§ 8-43-301(2)]. *Id. at 1134-35*.

The circumstances in this matter are sufficiently similar to those in *BCW Enterprises* and *American Express* to conclude the respondents' issue is reviewable. The ALJ did deny the claimant a medical benefit when his request for reimbursement was rejected. The respondents' dispute may therefore be reviewed "as incident" to the ALJ's order.

II.

The respondents point to the ALJ's statement in Findings of Fact 29, which decided: "While Claimant's exposure to a loud gunshot like sound probably did not cause a primary injury to the neck, the ALJ is persuaded that his ear pain and tinnitus indirectly caused the need for neck treatment." The respondents complain that while treatment for the neck might possibly be necessary to mitigate the symptoms from the tinnitus injury, such a finding does not justify the ALJ's determination the respondents are liable for a neck "injury." However, that sentence from the order is not the basis for the ALJ's finding of a compensable neck injury. Rather, in Conclusion of Law (G) the ALJ relies on case law stating "any aggravation of a pre-existing condition (neck pain) or susceptibility to injury (tinnitus) does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990)." Accordingly, the ALJ resolved:

> … the undersigned ALJ interprets the opinions from Dr. Yohanan to indicate that the conditions of Claimant's employment, i.e. slamming the hard drives into the metal dumpster acted upon an individual hypersensitivity to cause Claimant to develop tinnitus and worsened neck pain after being sensitized to the same by the October 1, 2016 concussion.

The ALJ findings indicate his determination the tinnitus originated through the exposure to the loud blast from the dumpster, and the preexisting neck injury was

aggravated by that noise. The ALJ's logic therefore, is not as characterized by the respondents. The ALJ is not stating that because muscle tightness in the neck is a condition contributing to the tinnitus, that condition is part of the work injury. Rather, the ALJ is finding the noise from the dumpster actually made the neck's muscle constrictions worse. He thereby placed the neck in the category of work 'injury.' We determine this is a plausible inference supported by the evidence in the record and do not find it represents error on the part of the ALJ.

III.

The respondents assert the claimant did not provide advance notice that he was claiming not only a tinnitus injury, but also a neck injury. They point to the claimant's responses to interrogatories, which do not specify such an injury. While both the respondents and the claimant submit copies of the interrogatory responses, neither include the question being answered by the responses. We are therefore, unable to discern whether the respondents were seeking a specification of the body part claimed to be affected or simply requesting the claimant to explain the work conditions which led him to file a claim. The interrogatory responses do note the claimant is receiving treatment for his injury described as "massage therapy of my neck and ears."

The fundamental requirements of due process are notice and an opportunity to be heard. Due process contemplates that the parties will be apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of their positions. *See Hendricks v. Industrial Claim Appeals* Office, 809 P.2d 1076, 1077 (Colo. App. 1990); *Marcelli v. Echostar Dish Network*, W.C. No. 4-776-535 (March 2, 2010).

However, the complaint that there was an absence of notice is belied by the findings of the ALJ. The ALJ relied on the medical records of Dr. Yohanan to conclude the claimant had a work related aggravation of his neck injury. Those records of Dr. Yohanan were supplied by the respondents as part of their documentary evidence presented to the ALJ at the hearing. Because that evidence was provided by the respondents, and not exclusively by the claimant, it is difficult to conclude the respondents were without adequate notice.

In the respondents' exhibit C, Dr. Yohanan's February 16, 2017, report, the doctor surmised "I do think the muscle tension of the head and neck injury [was] aggravated by his hypersensitivity to sound from his concussion …." The doctor concludes this

aggravated head and neck muscle tension "led to the onset of the tinnitus." Dr. Yohanan then described the effect the noise from the dumpster had on his neck muscles. "Given the situation above … the work-related noise exposure both temporally and theoretically played a role in his symptoms." The ALJ then explained in Conclusion of Law (G) he interpreted this opinion to indicate that because the conditions of the claimant's employment, including the sound emanating from the dumpster, acted to cause symptoms of worsened neck pain, as well as tinnitus, after being sensitized by the claimant's earlier concussion. This statement noting aggravation of the neck injury by Dr. Yohanan was known to the respondents prior to the hearing. Section 8-43-210, C.R.S. provides all medical reports submitted at hearing are to be exchanged at least 20 days prior to the hearing date. Therefore, the basis for the ALJ's finding the claimant sustained a neck injury through an aggravation caused by the noise from the dumpster was derived from and based upon information available to the respondents prior to the hearing. Accordingly, we find their complaint of a lack of notice to be of no avail.

**IT IS THEREFORE ORDERED** that the ALJ's order issued September 25, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

David G. Kroll

Kris Sanko

**NOTICE**

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State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway 6th Floor
Denver, CO 80203

CERTIFICATE OF MAILING

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

3/19/18 by TT .

JAMES JONES, 645 FERNGLEN CT, COLORADO SPRINGS, CO, 80906 (Claimant)
RITSEMA & LYON PC, Attn: DAVID BENNETT ESQ, 111 S TEJON STREET SUITE 500, COLORADO SPRINGS, CO, 80903 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-740-062-01

IN THE MATTER OF THE CLAIM OF:

DAVID MATUS,

Claimant,

v.

FINAL ORDER

DAVID MATUS,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Goldman (ALJ) dated November 27, 2017, that denied the claimant's request to reopen his claim. We affirm the ALJ's order.

This matter went to hearing on the claimant's petition to reopen his settlement based on fraud or mutual mistake of fact. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained a compensable injury to his right knee while working for the employer which led to ACL reconstruction and medial and lateral meniscal tear debridement. The claimant has a prior medical history of a severe right leg injury requiring multiple leg surgeries and Parkinson's disease.

The claimant was placed at maximum medical improvement (MMI) for his workers' compensation injury on June 28, 2010, by Dr. Obermiller. A DIME physician agreed and assigned a 32 percent impairment rating for the right lower extremity. Pinnacol filed a final admission of liability on January 27, 2011, admitting for the 32 percent rating and maintenance medical care. At the time the claimant was represented by an attorney who reached a settlement agreement with Pinnacol on March 23, 2011, contingent upon Centers for Medicare and Medicaid Services (CMS) approval of the Medicare Set-Aside (MSA) funding. Pinnacol submitted the agreed upon MSA proposal to CMS on May 5, 2011. Pinnacol proposed MSA funding of $110,011.00 which

included, but was not limited to, yearly physician visits, yearly orthopedic visits, 24 total physical therapy visits and 60 hydrocodone/acetaminophen per month for life. The MSA did not include funding for a knee replacement surgery or topical cream. The MSA proposal was sent to the claimant's attorney at the same time it was sent to CMS.

The medical records submitted to CMS included a November 9, 2010, IME report from orthopedic surgeon, Dr. Coville. Dr. Coville's report stated that no specific further orthopedic surgery was indicated or needed at that point. Dr. Coville also noted that there was a possibility that the claimant's arthritic condition would progress and that a knee replacement procedure might be needed in 15-25 years. Dr. Kahn's report dated February 15, 2011, was also included in the medical records sent to CMS. This report stated that the claimant's medications had been reduced and that "we will decrease his medications to OTC only."

The claimant personally wrote letters to CMS disputing the MSA proposal on July 26, 2011, August 12, 2011, August 22, 2011 and August 28, 2011. The claimant's July 26, 2011, letter disputed the MSA proposal for inadequate funding, claiming that the topical cream should have been included, pain medication should be funded at 120 per month, primary care visits should be monthly, physical therapy should be provided three times per week and total knee replacement surgeries should be included. The claimant requested that CMS require $4.5-5 million for the MSA.

CMS issued an approval letter on November 14, 2011, which determined that an MSA of $90,357 would adequately consider Medicare's interests. The differences in the proposed MSA and the approved MSA were the findings for additional physician visits at 12 per year, for one year and then four per year for 23 years and lower pricing for hydrocodone/acetaminophen. The claimant and his attorney were both copied on the CMS approval letter. The claimant agreed to settle his workers' compensation claim and waive his right to future medical benefits for $29,477, plus the funding of an MSA in the amount of $90,357. The parties entered into a settlement agreement which was signed by the claimant on December 19, 2011, and approved by the Division of Workers' Compensation on December 30, 2011. The funding terms of the CMS approval letter were attached to the settlement agreement. The settlement agreement specifically stated that as consideration for the amount paid under the terms of the settlement agreement, the claimant was giving up the right to claim all compensation and benefits to which the claimant might be entitled – including medical benefits. Paragraph four of the agreement stated that the "parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact."

After settlement, CMS issued an updated approval letter dated January 28, 2015, and requested additional funding of the MSA. Pinnacol responded by letter dated February 6, 2015, that the MSA was funded according to the November 14, 2011, CMS approval letter and was now final and could not be modified. CMS responded to Pinnacol in a letter dated March 18, 2015, stating that they agreed that the MSA was final and could not be modified. CMS rescinded their January 28, 2015 updated approval letter stating that a "re-review request cannot be considered once a court approves a settlement," nor can any changes be made to a WCMSA.

The claimant, now *pro se*, argued at hearing that the MSA proposal submitted to CMS contained several errors and, therefore, his claim should be reopened. The claimant alleged that Pinnacol incorrectly lowered the amount of medication and omitted the total knee replacement surgery from the MSA proposal. The claimant also contended that the amount of physical therapy was misstated and wrongly omitted topical cream. The ALJ however, found that the MSA submitted to CMS was supported by medical documentation and even if the alleged errors were true, do not amount to fraud. The ALJ determined that the claimant did not prove that Pinnacol was aware of the falsity of their alleged errors or omission or that the claimant relied upon any of these alleged errors or omissions when he entering into the settlement agreement. The ALJ found that the claimant had full knowledge of what was included in the MSA proposal and of the funding CMS was requiring in their November 14, 2011, approval letter.

The ALJ also rejected the claimant's assertion that the settlement should be reopened based on a mutual mistake of a material fact. The ALJ found that the errors in the MSA alleged by the claimant are not mutual mistakes of material fact. Although the claimant alleges that certain items and additional funding should have been included in the MSA, the ALJ determined that the claimant understood that it was not included when he entered into the settlement agreement. The final amount of the MSA was material to the settlement and both parties understood what the final funding amount of the MSA would be at the time of the settlement and agreed to it. The ALJ, therefore, denied the claimant's request to reopen the settlement agreement.

On appeal the claimant maintains his argument that there is fraud or mutual mistake of material fact because the MSA is underfunded and that his due process rights were violated because he was unaware of the "re-review" process when he entered into the settlement agreement. We disagree that the ALJ committed reversible error.

Once a settlement is approved through either an order of the Director or that of an ALJ, the claim is closed pursuant to the terms of the settlement agreement. The

settlement agreement may only be reopened upon a showing of fraud or mutual mistake of material fact. §8-43-204(1) and § 8-43-303(2)(a) & (b) C.R.S. The determination to reopen a settlement is left to the sound discretion of the ALJ and we may not interfere with that decision unless there is an abuse of discretion. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 190 (Colo. App. 2002); *Renz v. Larimer County School District R-1*, 924 P.2d 1177 (Colo. App. 1996). An abuse of discretion is not shown 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. *Coates, Reid Waldron v. Vigil,* 856 P.2d 850 (Colo. 1993).

We note initially that the MSA, and the CMS approval, by rule, is not part of the settlement agreement. In 2011, W.C. Rule 7-2(A)(1), Code Colo. Reg. 1101-2, provided that paragraph 9(B) of the prescribed settlement document form is left blank and is to be used by the parties to refer to other agreements negotiated by the parties. These types of agreements included MSA agreements as well as stipulations concerning other topics. The rule specified "these other written agreements attached to a settlement agreement shall not be reviewed and approval of the settlement agreement does not constitute approval of any written agreement attached to a settlement agreement." The MSA here is mentioned solely in paragraph 9(B). We have previously held the failure to abide by an agreement referenced in paragraph 9(B) does not subject a party to a penalty since such an agreement does not represent any part of an order of the Director or an ALJ approving the settlement. *Pankratz v. Hancock Fabrics*, W.C. No. 4-653-869 (March 25, 2011). We have similarly held an ALJ has no jurisdiction to "construe or to amend" an MSA agreement. *Savidge v. Air Wisconsin*, W.C. No. 4-620-669-14 (December 29, 2014). The current workers' compensation rules correspond to the 2011 version. Rule 9-9(C) and (D) allow for the attachment of exhibits to the settlement document including MSA agreements, agreements involving continued employment or the waiver of bad faith claims. However, Rule 9-9(E) states: "Approval of the settlement agreement does not constitute approval of any attachments to the settlement agreement." The following paragraph (F) prohibits "the monetary amount of the settlement as reflected in the written agreement" from including "any agreements which fall outside the jurisdiction of the division of workers' compensation."

The implication for this matter is that an instance of fraud or mutual mistake involving the negotiation of the amounts of an MSA agreement do not represent a 'material fact,' 'action taken due to the false representation resulting in damage,' or 'a fact going to the basis of the contract.' These are prerequisite findings to any reopening of a settlement. *England v. Amerigas, Propane*, 395 P.3d 766, 770 (Colo. 2017); *Arczynski v. Club Mediterranean* W.C. No. 4-156-147 (December 15, 2005). Because

the claimant is pursuing a motion to reopen his settlement agreement premised entirely on the details of the MSA agreement, his motion will not justify any request for relief. This is the case regardless of whether he can establish a mutual mistake or fraud pertinent to those MSA details.

Even assuming that the circumstances of the MSA could be construed as part of the workers' compensation agreement in this case, we must uphold the ALJ's factual findings if supported by substantial evidence in the record. §8-43-301(8), C.R.S. Where, as here, the appealing party fails to procure transcripts of the relevant hearing we must presume the pertinent findings of fact are supported by substantial evidence. *Nova v. Industrial Claim Appeals Office*, 754 P.2d 800 (Colo. App. 1988). Further, the appealing party bears the responsibility to produce a record sufficient to demonstrate error. *Fleet v. Zwick*, 944 P.2d 480 (Colo. App. 1999). The absence of a transcript precludes us from determining that any error occurred in the ALJ's evidentiary rulings.

To reopen a 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). The ALJ findings here 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 allegation that Pinnacol misstated the claimant's medical treatment needs to CMS. The ALJ, however, disagreed based upon the medical records of Dr. Coville and Dr. Kahn discussing the claimant's need for future treatment and medications. The claimant's assertions notwithstanding, the claimant was aware of the final MSA funding approval letter when he signed the settlement documents, regardless of whether a "re-review" would be conducted.

Nor do we find error in the ALJ's determination that the claimant failed to prove a mutual mistake of material fact. A mutual mistake is one which relates to the nature of a known injury, not a prediction about the course or effects of the injury in the future. *England v. Amerigas Propane, supra; Gleason v. Guzman*, 623 P.2d 378, 385 (Colo. App. 1981). A material fact is one which relates to a basic assumption on which the contract was made. 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 England v. Amerigas, supra, 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). The ALJ here found that the claimant

understood that the MSA did not include certain treatment for funding that the claimant wanted it to have when he entered into the settlement agreement. The ALJ also found that both parties understood the final funding amount of the MSA at the time of settlement and agreed to it.

We are not persuaded by the claimant's assertion that his due process rights were violated because a re-review of the MSA was not conducted. As found by the ALJ, the claimant, who was represented at the time, agreed to waive future medical benefits in exchange for a payment and funding of the MSA as it was approved by the CMS in November of 2011. The fact that the claimant was not aware of the possibility of a "re-review" process at the time the settlement was entered into, does not change this result.

**IT IS THEREFORE ORDERED** that the ALJ's order dated November 27, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

**NOTICE**

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

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**Colorado Court of Appeals**
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Denver, CO 80203

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

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

CERTIFICATE OF MAILING

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

3/20/18 by TT .

DAVID M MATUS, 2307 CARISBROOKE LOOP, COLLEGE STATION, TX, 77845 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING ESQ, 7501 E LOWRY BLVD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: THOMAS M STERN ESQ, 1401 SEVENTEENTH STREET SUITE 900, DENVER, CO, 80202 (For Respondents)

# INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-937-396-01

IN THE MATTER OF THE CLAIM OF:

BARBARA McGLOTHLEN,

Claimant,

v.

FINAL ORDER

KARMAN, INC.,

Employer,

and

PINNACOL ASSURANCE,

Insurer,
Respondents.

The *pro* se claimant seeks review of an order of Administrative Law Judge Felter (ALJ) dated October 30, 2017, that granted the respondents' Motion for Summary Judgment and dismissed, with prejudice, the claimant's claim for benefits. We affirm.

The respondents filed a Motion for Summary Judgment contending that the claimant had not filed a claim for compensation within the two year period outlined in § 8-43-103(2), C.R.S. The ALJ granted the respondent's motion entering factual findings based on the respondents' motion and documentation. The claimant alleged that she sustained a compensable occupational exposure resulting in lung and dermatologic conditions. The employer filed a "First Report of Injury" on December 4, 2013. According to the First Report of Injury the claimant informed the employer that she allegedly sustained respiratory disorders of the lung while using cloth during a desk activity. The First Report of Injury notes that the time of occurrence could not be determined but, uses April 9, 2013, as the date of onset and the date reported.

Pinnacol Assurance filed a Notice of Contest on December 24, 2013. The Division of Workers' Compensation then sent the claimant a letter dated December 26, 2013, stating that it had received the Notice of Contest from the respondents and notified the claimant that she had the right to file an application for hearing to pursue her claim. The letter also stated, "[i]f you have not filed a Workers' Claim for Compensation, you may wish to do so."

The claimant filed an application for hearing on September 6, 2017, on the issues of compensability, medical and indemnity benefits and penalties, for the alleged work-related occupational disease of "occupational asthmas and contact dermatitis." The claimant's application for hearing was accompanied by 61 pages of argument and exhibits.

The respondents filed a Motion for Summary Judgment seeking dismissal of the claim based on the claimant's failure to file a workers' claim within two years pursuant to §8-43-103(2), C.R.S. The respondents alleged that the claimant knew the nature, seriousness and probable compensable character of her condition, at the latest, as of December 4, 2013. In response to the motion, the claimant repeatedly referred to the employer's First Report of Injury as a fraudulently filed Workers' Claim for Compensation and sought penalties against the respondents. The claimant also set forth argument about her medical condition. The claimant did not dispute when she became aware of the nature, seriousness and probable compensable character of her condition.

The ALJ granted the motion for summary judgment. There is no dispute that this is not a claim for disability or death resulting from exposure to radioactive materials, substances or machines or to fissionable materials or any type of malignancy caused thereby or from a poisoning by uranium or its compounds or from asbestos, silicosis or anthracosis. Thus, the two year statute of limitation in §8-43-103(2), C.R.S. is applicable here. The ALJ determined that the respondents established that there was no genuine issue of material fact upon which the claimant can avoid the application of the statute of limitation. The ALJ found that it was undisputed that the claimant knew or should have known the nature, seriousness and probable compensable character of her condition as far back as 2012, or at the latest, by December 4, 2013. The claimant, however, did not file the application for hearing that she was construing as a claim for compensation until September 7, 2017, which was more than three years after she reasonably knew that she had a workers' compensation claim. The ALJ, therefore, denied and dismissed the claimant's claim for workers' compensation benefits.

The claimant renews her arguments on appeal contending that the employer fraudulently filed a First Report of Injury and provides argument and documentation supporting her claim for compensability. We perceive no reversible error and affirm the ALJ's order.

The claimant filed a "2nd Brief in Response to Respondents 'Brief in opposition.'" However, there is no provision in the statute or rules for a reply brief or other similar

pleading. Section 8-43-301(4), C.R.S. Although we may have discretionary authority to permit the filing of a reply brief, we see no need for such a brief in this case. The issues are sufficiently defined by the claimant's opening brief and the respondents answer brief.

OACRP Rule 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); *Morphew v. Ridge Crane Service, Inc.*, 902 P.2d 848 (Colo. App. 1995); *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). We note that 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). And 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). However, pursuant to § 8-43-301(8), C.R.S., we have authority to set aside an ALJ's order only where the findings of fact are not sufficient to permit appellate review, conflicts in the evidence are not resolved, the findings of fact are not supported by the evidence, the findings of fact do not support the order, or the award or denial of benefits is not supported by applicable law. Here, the question on review is generally whether applicable law supports the ALJ's grant of summary judgment on the ground that the claimant was barred by the applicable statute of limitations outlined. We conclude that the law supports the ALJ's order.

Section 8-43-103(2), C.R.S. provides that the right to workers' compensation is barred unless a formal claim is filed within two years of the injury, three years if a reasonable excuse exists. The statute of limitations begins when the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable

compensable character of his injury," *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The statute of limitations is tolled, however, where the employer fails to report the injury to the division as required by § 8-43-101(1), C.R.S. *See City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998*); Grant v. Industrial Claim Appeals Office,* 740 P.2d 530 (Colo. App. 1987).

Section 8-43-103(2) further states,

> [I]n all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles [the Workers' Compensation Act], this statute of limitations shall not begin to run against the claim of the injured employee… until the required report has been filed with the division.

The employer's duty to "report said injury" to the division refers to the employer's statutory duties under § 8-43-101. *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987). Section 8-43-101(1), requires that "within ten days after notice or knowledge that an employee has contracted an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee," the employer must report the injury to the Division. A "lost-time injury" is defined as one which causes the claimant to miss more than three work shifts or three calendar days of work. *Grant v. Industrial Claim Appeals Office, supra*. An employer is deemed to have "notice" of an injury when the employer has "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Jones v. Adolph Coors Co*. 689 P.2d 681, 684 (Colo. App. 1984).

The employer here filed a First Report of Injury on December 4, 2013. The claimant continues on appeal to mistakenly refer to the employer's First Report of Injury as a fraudulently filed workers' compensation claim on her behalf. The First Report of Injury is, however, different from a Workers' Claim for Compensation and does not control the date the statute of limitations begins to run. Section 8-43-101(1) requires the employer to file a first report of injury where the employer has notice the claimant has contracted an occupational disease, has permanent impairment or has sustained lost time from work. Nothing in § 8-43-101(1) allows the employer's First Report of Injury to substitute for a notice of claim. *Baca v. Interwest Medical Equipment*, W.C. No. 4-457-313 (November 19, 2001). To the contrary, if the filing of a First Report of Injury satisfied the claimant's duty to file a claim for compensation, § 8-43-

103(2) would provide that the claim is barred unless the claimant files a claim *or* the employer files a first report of injury within two years of the injury. However, the statute does not contain any such language and we have no authority to read such a provision into the statute. *See Arenas v. Industrial Claim Appeals Office*, 8 P.3d. 558 (Colo. App. 2000). Rather, as the ALJ found here, with undisputed record support, the claimant was aware of the nature and seriousness of her alleged exposure as early as 2012, but no later than December 2013. The claimant's arguments on appeal do not dispute the ALJ's relevant findings on this issue.

The claimant also requests that her claim be reopened on appeal pursuant to §8-43-303, C.R.S. Although we do not agree with the respondents' general assertion that the reopening provisions in §8-43-303, C.R.S. could never be used in a denied claim based on error or mistake, (*Industrial Commission v. Cutshall*, 164 Colo. 240, 433 P.2d 765 (1967); *Cotter v. Busk Construction, Inc*. W.C. No. 4-796-188-02 (May 25, 2016)(*but cf. Amin v. Schneider National Carriers*, W.C. No. 4-881-225-06 (November 9, 2017) (non-compensable claim cannot be reopened based on a change of condition)), the reopening provisions are not applicable here. Because the claimant did not timely initiate a workers' compensation claim, there is no claim to reopen.

The claimant does not contend on appeal that the ALJ's relevant findings as to when she knew the nature, seriousness and probable compensable nature of her claim are disputed. The claimant's argument on appeal is limited to the claimant's misunderstanding of the purpose of the employer's First Report of Injury and does not necessarily affect when the statute of limitations begins to run. We conclude that the ALJ properly determined, based on the undisputed evidenc,e that the claimant failed to file a claim within the two year statute of limitations provided for in § 8-43-103(2), C.R.S.

**IT IS THEREFORE ORDERED** that the ALJ's order dated October 30, 2017, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL

Brandee DeFalco-Galvin

David G. Kroll

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Denver, CO 80203

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4/2/18 by TT .

BARBARA MCGLOTHLEN, 4314 W 4TH STREET ROAD, GREELEY, CO, 80634 (Claimant)
PINNACOL ASSURANCE, Attn: HARVEY D FLEWELLING, 7501 EAST LOWRY BOULEVARD, DENVER, CO, 80230 (Insurer)
RUEGSEGGER SIMONS SMITH & STERN LLC, Attn: KATHERINE HR MACKEY ESQ, 1401 17TH ST #900, DENVER, CO, 80202 (For Respondents)