

# **BROWN BAG SEMINAR**

**Thursday, August 18, 2016**

(third Thursday of each month)

Noon - 1 p.m.

**No In-Person Attendance This Month**

1 CLE (including .4 ethics)

Presented by Craig Eley

Prehearing Administrative Law Judge

Colorado Division of Workers' Compensation

Sponsored by the Division of Workers' Compensation

**Free**

This outline covers ICAP and appellate decisions issued through August 5, 2016

## **Contents**

### **Industrial Claim Appeals Office decisions**

Clark v. Mac-Make-Up Art Cosmetics	2
Hutchison v. Pine Country, Inc.	8
Munoz Botello v. Evergreen Caissons, Inc.	17
Thibault v. Ronnie's Automotive Services	20

### **Colorado Court of Appeals decisions**

Sanchez v. Industrial Claim Appeals Office (unpublished)	25
Trujillo v. Industrial Claim Appeals Office (unpublished)	38

### **Colorado Supreme Court decision**

Pinnacol Assurance v. Hoff	49
----------------------------	----

### **Presiding Disciplinary Judge decision**

In re Brenner	89
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## INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-858-859-06

IN THE MATTER OF THE CLAIM OF

SEAN F CLARK,

Claimant,

v.

FINAL ORDER

MAC-MAKE-UP ART COSMETICS,

Employer,

and

AMERICAN ZURICH INSURANCE  
COMPANY,

Insurer,  
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated May 3, 2016, that denied the claimant's request to set aside the respondents' Final Admission of Liability awarding benefits predicated upon a determination of permanent impairment provided by a 24 month Division Independent Medical Examination (DIME). We affirm the order of the ALJ.

The claimant sustained an injury to his low back at work on March 5, 2010, while bending over to move some boxes. The claimant was diagnosed as suffering a disc protrusion at the L4-L5 level. In July, 2010, the claimant underwent a lateral discectomy surgery at that level. The respondents arranged for an independent evaluation of the claimant's condition on December 11, 2013, by Dr. Pitzer. The doctor concluded the claimant was at maximum medical improvement (MMI) and provided a 10% permanent impairment rating. The respondent insurer's claims adjuster wrote to the claimant's authorized treating physician, Dr. Bainbridge, on February 13, 2014, asking the doctor if he had placed the claimant at MMI and, if so, to state any permanent impairment rating he calculated. Dr. Bainbridge was requested to respond by February 27, 2014. Dr. Bainbridge declined to provide any response to the letter.

On July 7, 2014, the respondents submitted an application for a DIME noting that the parties had been unable to negotiate an agreed upon physician to perform the DIME. Dr. Hattem was selected to perform the DIME review. In his October 1, 2014, report, Dr.

SEAN F CLARK

W. C. No. 4-858-859-06

Page 2

Hattem summarized the medical records he had available for review. He observed that Dr. Bainbridge placed the claimant at MMI on January 28, 2014, and recommended a permanent impairment rating of 34%. Dr. Hattem agreed with this date of MMI, but determined the degree of permanent impairment was represented by a 15% rating.

At the April 19, 2016, hearing in this matter, the parties stipulated Dr. Bainbridge did not send to either the claimant or the respondents a copy of his January 28, 2014, report of MMI and permanent impairment rating until November 24, 2014.

Dr. Hattem included a separate addendum advising that one week after the completion of his DIME report, he called Dr. Bainbridge to notify him that the claimant had complained to Dr. Hattem of an enuresis condition of five months duration (involuntary discharge of urine). Both physicians agreed this condition was not related to the claimant's work injury. Dr. Bainbridge stated he would arrange an urgent MRI study to rule out a cauda equine nerve injury.

On November 26, 2014, the respondents submitted a Final Admission of Liability (FAL) which adopted the finding by Dr. Hattem of the January 28, 2014, date of MMI. The respondents thereupon ceased the payment of temporary benefits as of the date of MMI and admitted liability for permanent partial disability benefits according to Dr. Hattem's 15% permanent impairment rating.

The claimant requested a hearing and asked the ALJ to strike the DIME report of Dr. Hattem and the November 26, 2014, FAL premised on that report. A hearing was convened on April 19, 2016. The parties submitted documentary exhibits and stipulated Dr. Bainbridge was the authorized treating physician (ATP) and that he did not send to the parties his January 28, 2014, MMI report until November 24, 2014. No testimony was presented.

The claimant asserted the DIME report was to be discarded for the reason that the ATP had determined the claimant was at MMI on a date prior to the request for a DIME, regardless of the fact that neither party was aware of that determination. Because a prerequisite to the request for a 24 month DIME review requires that the ATP has not determined the claimant has reached MMI, the claimant argued the resulting DIME report is invalid. The claimant noted the respondents did receive notice of the ATP's MMI report two days prior to the date they filed their FAL. The claimant also contends the DIME physician breached the statute and rule which prohibited the physician from having contact with the ATP in regard to the completion of the DIME review when he phoned Dr. Bainbridge pertinent to the claimant's enuresis condition.

In his decision of May 3, 2016, the ALJ denied the claimant's request to strike the DIME report. The ALJ found Dr. Bainbridge had been contacted in writing by the respondents in February, 2014, inquiring in regard to the status of MMI. When Dr. Bainbridge failed to respond to the letter, the ALJ ruled the respondents had substantially complied with the requirements of § 8-42-107(8)(b)(II)(A), (B) and (C). Those subparts allow a request for a DIME to be made prior to an ATP's finding of MMI where 24 months have transpired since the date of injury, the ATP has been requested in writing to determine MMI and has not done so. The final prerequisite condition, subpart (D), requires that some physician other than the ATP has determined that MMI has been achieved. The ALJ noted Dr. Pitzer had done so. Accordingly, the ALJ resolved the fact that the ATP had written in his records that the claimant was at MMI, but had not disclosed that finding, would not serve to frustrate the request for a DIME review.

The ALJ then observed that the contact made by Dr. Hattem with Dr. Bainbridge occurred several days subsequent to the completion of Dr. Hattem's DIME report and pertained to a topic unrelated to the work injury. That contact was also deemed by the ALJ insufficient to justify the striking of the DIME report.

The General Assembly first added to the statute a provision to allow a DIME review prior to a finding of MMI by an ATP in 1996. The purpose was to allow an employer and its insurer a mechanism to challenge an over treating or inattentive physician, or an injured employee persisting in unreasonable complaints of disability. However, the legislation was also designed to preclude harassment of injured employees by insurers routinely and unreasonably requesting MMI findings and DIME reviews of MMI refusals. Section 8-42-107(8)(b)(II) therefore imposed the preconditions contained in subparts (A) through (D) prior to a request for a DIME unsupported by an ATP's MMI finding. The DIME request must be preceded by a period of 24 months of treatment (originally 18 months), a second opinion physician must conclude the claimant is at MMI and the ATP must be given a specific opportunity to address the subject of MMI (and a corresponding impairment rating).

In regard to this last prerequisite, the section is clear that the insurer seeking the DIME must ask the ATP in writing if he feels the claimant is at MMI. It is implicit that the absence of a response from the ATP may be considered by the insurer as a decision to not place the claimant at MMI (that is, after all, one of the reasons for this procedure). However, the section provides no time period within which the ATP is to respond. An over eager insurer may submit an application for a DIME review the day following its request to the ATP for an MMI finding. Obviously, that practice would not serve the purpose of allowing the ATP to address MMI when the ATP is inclined to do so. In

many instances featuring the construction of the DIME procedures, details such as deadlines and prerequisites have been recognized as appropriately supplied by the Director's rules. *See, Williams v Kunau*, 147 P.3d 33 (Colo. 2006) (repeat determination of MMI a precondition to a repeat DIME following Director's bulletin); *Montoya v. Industrial Commission*, 203 P.3d 620 (Colo. App. 2008) (Director's rules allow withdrawal of a DIME application in favor of an FAL despite expiration of a 30 day limit); *Exun v. Southwest Memorial Hospital*, W.C. 4-395-163 (January 5, 2001) (Rule IV (N)(5) provides time limit to respond to ATP MMI finding); *Henderson v. Kaiser Hill Co.*, W.C. No. 4-604199 (Aug. 3, 2012) (statutory time to respond is measured by the Director's mailing of a notice accepting a DIME report, not the physician's mailing).

In regard to a request to an ATP to address MMI, W.C. Rule of Procedure 16-7 (E) (1)(d), 7 Code Colo. Reg. 1101-3, directs the ATP to provide a completed form specifying MMI and an impairment rating to the insurer within 14 days from the date of service corresponding to the finding of MMI. A period of 14 days was the time referenced in the claims adjuster's February 13, 2014, letter to Dr. Bainbridge inquiring into a finding of MMI. The doctor did not reply within the 14 days. The claimant points to the doctor's completion of a written MMI finding on January 28, 2014, which he did not send to the parties until November 24, 2014. However, Rule 16-7 (E) (1)(d) directed the doctor to submit a copy of that written finding to the insurer within 14 days. The failure of the ATP to respond to the insurer's written request to the ATP to determine MMI within 14 days thereby establishes the "authorized treating physician has not determined that the employee has reached maximum medical improvement" as required by § 8-42-107(8)(b)(II) (C). Furthermore, the delivery to the insurer of the ATP's MMI report two days prior to the filing of its FAL is not significant. Section 8-42-107(8)(b)(II) pertains to the date of the "request" for the selection of a DIME physician. That date occurred in July, 2014, four months prior to the receipt of the ATP's MMI report. As a result, the respondents were in compliance with the conditions set forth in § 8-42-107(8)(b)(II) (A) through (D) and the ALJ was justified in refusing to strike the DIME's report.

The claimant's opposition to the DIME report also appears to represent a moot point. Section 8-42-107(8)(b)(II) (C) serves a minor function in regard to a DIME without a prior MMI. Subparagraph (II) specifies parts (A) through (D) only apply "if an authorized treating physician has not determined that the employee has reached maximum medical improvement." Part (C) then, is unnecessary and redundant. In addition, if the ATP replies to the insurer's inquiry required by part (B) by stating the claimant is at MMI, then the insurer may still request a DIME review simply by virtue of § 8-42-107.2(2)(b) by submitting a notice and proposal form. Rule 11-5 provides that

only one IME impairment rating per case shall be administered by the Division's IME unit. Consequently, the respondents' receipt of Dr. Bainbridge's MMI report on November 24 would allow them to file a notice and proposal for a DIME, and the DIME physician would again be Dr. Hattem. Given that only a brief time had passed since his October 1, 2014, DIME report, there is little doubt he would provide the same date of MMI and impairment rating. In *Brownson-Rausin v. Industrial Claim Appeals Office*, 131 P.3d 1172 (Colo. App. 2005), this rule specifying a single DIME physician was applied and was found to be consistent with the statute. It also resulted in the DIME physician arriving at the same date of MMI despite the passage of more than seven years between the DIME's original report and his subsequent review.

We also agree Dr. Hattem's phone contact with Dr. Bainbridge on October 8, 2014, did not serve to compromise his DIME report of October 1. As the ALJ observed, the contact was one week subsequent to the completion of the report and the topic of the contact was other than the date of MMI, the impairment rating or even in regard to the work injury. The statute, § 8-42-107.2 (3) (d)(I), prohibits contact with a treating doctor only in regard to the DIME review. Similarly, Rule of Procedure 11-2 (K) limits contact with others insofar as it is necessary to "assure fair and unbiased IME's". The ALJ's conclusion that the contact between Dr. Hattem and Dr. Bainbridge was incidental, unrelated to the DIME review, occurred after the report's conclusion and did not serve to influence the report is supported by the record and we are not compelled to disagree with the ALJ's resolution of that issue.

Accordingly, we do not find cause to disturb the findings and order of the ALJ.

**IT IS THEREFORE ORDERED** that the ALJ's order issued May 3, 2016, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

SEAN F CLARK  
W. C. No. 4-858-859-06  
Page 7

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/3/2016 \_\_\_\_\_ by \_\_\_\_\_ TT \_\_\_\_\_ .

IRWIN & BOESEN, PC, Attn: ROGER FRALEY, JR, ESQ, 6377 S REVERE PARKWAY,  
SUITE 400, CENTENNIAL, CO, 80111 (For Claimant)  
THE KITCH LAW FIRM, Attn: MICHELLE PRINCE, ESQ, 31207 KEATS WAY SUITE 104,  
EVERGREEN, CO, 80439 (For Respondents)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-972-492-01

IN THE MATTER OF THE CLAIM OF

RICHARD HUTCHISON,

Claimant,

v.

PINE COUNTRY, INC., d/b/a PINE  
COUNTRY TRUCK & AUTO,

Employer,

and

PINNACOL ASSURANCE,

Insurer,  
Respondents.

**FINAL ORDER**

The claimant seeks review of an order of Administrative Law Judge Michelle Jones (ALJ) dated February 4, 2016, that found the claimant sustained an occupational disease injury to his bilateral knees, ordered the respondents to pay for the claimant's medical treatment and limited the respondents liability to one third the of the cost of the medical expense. We affirm the decision of the ALJ.

The claimant worked for the employer as a foreman and a trailer mechanic for twenty five years. The duties of the job included jacking up trailers, installing bumpers and beds, and changing tires among other tasks. These activities involved repetitive kneeling, crawling, crouching, squatting, carrying and lifting heavy weights. The claimant began expressing complaints of knee pain in 2009. In 2012, he noted an increase in bilateral knee pain and began treatment. The claimant received a diagnosis of osteoarthritis. He was provided corticosteroid injections and knee braces. X-rays revealed the claimant was afflicted with end stage osteoarthritis. Despite the use of braces, the claimant noted the walking and kneeling at work was causing extensive pain and it was becoming difficult for him to perform his work duties. The claimant reported his knee condition as work related to his employer on October 28, 2014. In December, 2014, the claimant completed MRI studies of both knees. These revealed degenerative tears of the medial meniscus, a chronic partial tear of the anterior cruciate ligament, bursitis, the absence or cartilage in regard to both knees and severe underlying arthritis.

It was recommended the claimant undergo surgery featuring total knee replacements in both legs.

The claimant was evaluated by Dr. Hughes in June, 2015. Dr. Hughes found the claimant suffers from an advanced stage of osteoarthritis. Dr. Hughes found this to be evidence of a genetic component to the diagnosis. Dr. Hughes also remarked on the claimant's weight of 258 pounds in relation to his height of 5' 9" and age of 55. This circumstance of excessive weight was also found to be a factor in the osteoarthritis and the claimant's knee pain. The doctor did not believe the claimant's work activities caused his osteoarthritis but did conclude that the work activities aggravated, accelerated and worsened this preexisting condition. Dr. Hughes' opinion was that work did cause the claimant's need to have total knee replacement surgery at that point in time.

Shortly thereafter, the claimant was examined by Dr. Bernton. The claimant was observed to have arthritis in his knees, hands, back and neck. Dr. Bernton came to the same conclusions as did Dr. Hughes. He described four factors present in the claimant's situation which led him to a disability caused by osteoarthritis. These factors included the claimant's genetic disposition to arthritis, his age, his weight and his long standing work activities. Dr. Bernton was of the opinion that all of these factors operated simultaneously to cause and aggravate the claimant's osteoarthritis and to generate his need for knee replacement surgery. The doctor characterized these preconditions into three groups comprised of genetics, age and weight, and work tasks. He assigned each a 33.3 percentage of responsibility for the claimant's disability and need for surgery. Dr. Bernton advised that the claimant would need knee replacement surgery at some point regardless of whether or not his work required extensive use of his knees.

The ALJ determined Dr. Bernton's opinion to be compelling. She concluded that two thirds of the cause of disability from the claimant's bilateral knee osteoarthritis was due to genetic predisposition and age/weight. The remaining third was represented by the claimant's work for the employer. The ALJ cited to the decision in *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993), to reason that an occupational disease is only compensable, in the case where an occupational exposure is not a necessary precondition to the development of the disease, to the extent the conditions of work contribute to the disability. In this matter the ALJ found the claimant's work activities constituted one third of the cause for the aggravation of the claimant's osteoarthritis injury, the resulting disability, and need for medical treatment. Consequently, the ALJ ordered the respondents liable for the treatment he had received from his treating physician, bilateral total knee replacement surgeries and lost time compensation due to those surgeries to the extent of one third of the expense of those benefits.

On appeal, the claimant contends the *Anderson* case should not be applied for the reason the claimant's work conditions exclusively led to the situation where medical treatment was required and did not aggravate a condition that was previously disabling. The claimant also argues that the 2008 amendment to § 8-42-104(3) prohibits the reduction of temporary disability and medical benefits.

I.

The decision in *Anderson v. Brinkhoff, supra*, dealt with the statutory definition for an occupational disease contained in § 8-41-201(14). The *Anderson* decision noted the standard for a compensable occupational disease requires an element in addition to the standard requirement that a compensable injury 'arise out of and in the course of the employment' found in § 8-41-301(1)(c). An occupational disease must also "not come from a hazard to which the worker would have been equally exposed outside of the employment."

In *Anderson*, the claimant suffered from a congenital disorder of his respiratory system. His immune reaction to dust and other contaminants to his lungs caused the destruction of healthy lung tissue. This degradation led to heart problems and to emphysema. The claimant smoked cigarettes for several years which inflamed his condition. The claimant was employed as a carpenter and the exposure to sawdust had a similar effect on his lungs. The claimant eventually became too disabled to work. The ALJ deemed his disability was due in equal parts to the claimant's carpentry work and to his smoking. Accordingly, because only half the disability was work related, the liability of the respondents was limited to 50% of the medical costs and temporary disability benefits. The Industrial Claim Appeals Office and the Court of Appeals reversed the ALJ's decision and found the claim was not compensable. The Panel surmised that if the disability was caused as much by occupational conditions as it was by non-occupational circumstances, then the statutory standard for a compensable occupational disease had not been achieved and the claim must be denied. The Supreme Court however, reinstated the decision of the ALJ. The Court reasoned the occupational disease definition does not ask that occupational factors be weighed against other conditions of exposure. Rather, it requires that the particular disease be occupational in nature. As a result, that portion of the disability attributed to occupational factors represents the compensable occupational disease:

Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. 859 P.2d at 825.

Here, the ALJ adopted the causation opinion of Dr. Bernton that occupational conditions comprised one third of the circumstances that led to the need for the claimant's knee replacement surgery. Accordingly, only one third of the total disability could be identified as an occupational disease. The remaining two thirds did not arise out of employment and that portion of the disability was not compensable.

The claimant asserts that other physicians evaluating the claimant, particularly Dr. Hughes, were correct in noting the claimant's work activities were the origin of the aggravation that accelerated the claimant's arthritic condition to the point surgery became necessary. Unlike in *Anderson*, the claimant argues the absence of other conditions which caused disability prior to the effect of work activities means the aggravation is 100% due to work. The claimant observes that because the non-occupational conditions were not previously apparent, Dr. Bernton's opinion as to the relative portions of the disability attributable to those conditions is no more than speculation.

However, in *Anderson*, the claimant smoked while he worked as a carpenter. He continued carpentry work after he ceased smoking. Both conditions therefore led to the claimant's cessation from work at the same time. There is also no reason to believe Dr. Hughes' prediction that the work activities accelerated the point at which the claimant required surgery is any less speculative than is Dr. Bernton's view that the surgery was necessitated by three concurrent factors. Dr. Bernton did specify his opinion was based upon a reasonable degree of medical probability. Tr. at 90.

The ALJ found the medical opinion of Dr. Bernton more authoritative than that of Dr. Hughes pertinent to the issue of symptom aggravation. The ALJ's factual determinations must be upheld if supported by substantial evidence and plausible inferences drawn from the record. We have no authority to substitute our judgment for that of the ALJ concerning the credibility of witnesses and we may not reweigh the evidence on appeal. *Id.*; *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *City of Colorado Springs v. Givan*, 897 P.2d 753 (Colo. 1995). The substantial evidence standard requires that we view evidence in the light most favorable to the prevailing party, and defer to the ALJ's assessment of the sufficiency and probative weight of the evidence. Thus, the scope of our review is "exceedingly narrow." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo.App. 2003). This narrow standard of review also requires that we defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wilson v. Industrial Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.d. 1182 (Colo. App. 1990).

Accordingly, the ALJ's reliance on the conclusions of Dr. Bernton regarding the causes of the claimant's aggravation of his osteoarthritis must be accorded deference. Dr. Bernton testified that genetics plays a large role in the development of osteoarthritis. He explained that even an individual working in a sedentary job such as an accountant will develop arthritis if he carries a genetic marker for the condition. Tr. at 77. The doctor also referenced age and weight as factors bearing on the aggravation of arthritis. He calculated the claimant had a body mass index (BMI) of 36.5 which placed him in the class of category 2 obesity, just under that of morbid obesity. Tr. at 72. The third area for aggravation was derived from physical activities. This would include the claimant's duties at work involving lifting and kneeling. Dr. Bernton's opinion as to the causes of the claimant's need for the total knee replacement surgery indicated that 66% to 70% was represented by age, weight, genetics and non-occupational physical activity. Tr. at 78, 90. He characterized these factors as not preexisting, but as ongoing conditions which are aggravating the claimant's knee joints. Tr. at 87. The doctor noted the Director's Medical Treatment Guidelines, Rule 17, Exhibit 6, part (E) (2) (a). That section directs the provider to "establish the occupational relationship by establishing a change in the patient's baseline condition and a relationship to work activities including but not limited to physical activities ..." The section identifies non-occupational factors to include a BMI of 25 or greater, osteoarthritis present in the hand and previous meniscus or ACL damage. This opinion represents substantial evidence to support the ALJ's finding that two thirds of the aggravation of the claimant's osteoarthritis condition was caused by the non-occupational factors of genetic predisposition, his age and his weight, and the remaining third of that aggravation is derived from the claimant's work for the respondent employer.

## II.

Section 8-42-104 regarding the effects on benefits by previous injuries was significantly amended in 2008. In regard to this claim the two most pertinent changes were made to subsections (3) and (4). Subsection (3) was a response to several decided cases which provided for the apportionment or diminishment of benefit awards in the presence of previous injuries to the same body parts. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001), and *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004). See, e.g. Kirksciun, “A Curious Journey: Apportionment in Workers’ Compensation Today”, 38 *Colo. Lawyer* 69 (March, 2009). In contrast, the decision in *Resources One, LLC v. Industrial Claim Appeals Office*, 148 P.3d 287 (Colo. App. 2006) specifically rejected the contrary holding in *Duncan*. As a result, Senate Bill 08-241 added subsection (3) to § 8-42-104 in 2008:

(3) An employee’s temporary total disability, temporary partial disability, or medical benefits shall not be reduced based on a previous injury.

The Senate Bill also specifically referenced *Anderson v. Brinkhoff*, but only in the context of claims involving permanent total disability benefits:

(4) An employee’s recovery of permanent total disability shall not be reduced when the disability is the result of work-related injury or work-related injury combined with genetic, congenital, or similar conditions; except that this subsection (4) shall not apply to reductions in recovery or apportionments allowed pursuant to the Colorado Supreme Court’s decision in the case denominated *Anderson v. Brinkhoff*, 859 P2d 819 (Colo. 1993).

The claimant asserts the addition of subsection (3) serves to prohibit the ALJ’s ruling in this case that the respondents are only liable for one third of the cost of the claimant’s medical expenses (and the advisory direction that they are liable for one third of any future temporary disability benefits). However, the language of subsection (3)

does not allow such a reading. The subsection refers to a “previous injury” and states that reductions which are premised on such a circumstance are prohibited. In this case the occupational disease characterized as the aggravation of osteoarthritis does not involve a previous injury. The decision in *Anderson* did not apportion the claimant’s underlying immune disorder. That disorder did not feature an occupational exposure as a necessary precondition to the development of that disease. Employer liability then, was limited to the extent work activities acted on the disease to create a disability. Accordingly the decision measured the degree of the disability that could be attributed to work activities. In that case, the circumstances constituting the disabling aggravation included smoking and sawdust. Each circumstance was equally involved so only 50% of the disability was due to work related exposure. The disability was not held to include the underlying immune disorder. *See also, Leverenz v. Evangelical Lutheran Good Samaritan*, W.C. No. 4-726-429 (July 7, 2010). The ALJ found here the disabling aggravation was generated by three conditions *i.e.* genetics, weight/age and work duties. The fact the claimant had arthritis already was not counted as a portion of the disability. Work activities were not a necessary precondition to arthritis. The disability was caused by the aggravation, not necessarily the arthritis condition which the claimant may have had long before he experienced any disabling symptoms. There is, therefore, no “previous injury” here which must be present for subsection (3) to apply.

The inclusion of a reference to *Anderson* in subsection (4) pertinent to permanent total disability indicates the General Assembly’s view that the same measuring of factors involved in temporary disability situations, where work conditions in the nature of an occupational disease act on genetic or congenital conditions to cause disability, should be applied in the calculation of liability for permanent total benefits. The reliance on *Anderson* in that context would suggest subsection (3) did not intend to reject the decision relative to temporary and medical benefits to which the *Anderson* decision originally was applied.

We conclude the ALJ did not commit error in limiting the liability of the respondents to one third of the cost of the medical benefits awarded.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued February 4, 2016, is affirmed.

RICHARD HUTCHISON  
W. C. No. 4-972-492-01  
Page 8

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

RICHARD HUTCHISON  
W. C. No. 4-972-492-01  
Page 10

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 7/29/2016 \_\_\_\_\_ by \_\_\_\_\_ TT \_\_\_\_\_ .

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

WITHERS SEIDMAN RICE & MUELLER P.C., Attn: DAVID B. MUELER, ESQ., 101 SOUTH THIRD ST., SUITE 265 P O BOX 3207, GRAND JUNCTION, CO, 81502 (For Claimant)

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

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-962-974-01

IN THE MATTER OF THE CLAIM OF

JENNIFER M. MUNOZ BOTELLO  
and JOSE E. BALQUIER MUNOZ,

Claimants,

JOSE E. BALQUIER,

Decedent,

v.

ORDER

EVERGREEN CAISSONS, INC.,

Employer,

and

TRAVELERS,

Insurer,  
Respondents.

This matter is before us upon the respondents' motion for reconsideration of our June 2, 2016, order. We deny the motion for reconsideration.

Section 8-43-302 (1) (b), allows the panel to issue a corrected order to correct any errors caused by mistake or inadvertence within 30 days. The respondents request that we reconsider the June 2, 2016, order dismissing the respondents' petition to review without prejudice for lack of a final order. The respondents contend that the recent court of appeals opinion in *Trujillo v. ICAO*, 15 CA 1238 (Colo. App. June, 2, 2016) (*not selected for publication*) compels that the issue in this case should be addressed on the merits of the appeal.

The *Trujillo* case however is distinguishable. In *Trujillo*, the court of appeals determined that an order denying compensability was final and appealable because by denying compensability the order effectively denied the claimant's request for benefits.

JENNIFER M. MUNOZ BOTELLO

W. C. No. 4-962-974-01

Page 2

In contrast, in the present case, no benefits have been granted or denied. The ALJ specifically instructed the parties to schedule another hearing to determine the allocation of benefits between the dependents. Accordingly the ALJ's order does not actually award death benefits to the claimant. Under these circumstances the ALJ's order is interlocutory and not currently reviewable. Section 8-43-301(2), C.R.S

**IT IS THEREFORE ORDERED** that the respondents' motion for reconsideration of the June 2, 2016, order is denied.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

JENNIFER M. MUNOZ BOTELLO  
W. C. No. 4-962-974-01  
Page 3

CERTIFICATE OF MAILING

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

6/29/2016 by RP .

MCBRIDE, SCICCHITANO & LEACOX, P.A., Attn: NICHOLAS A. NORDEN, ESQ., 720 S. COLORADO BOULEVARD, PENTHOUSE NORTH, DENVER, CO, 80246 (For Claimant)  
RAY LEGO & ASSOCIATES, Attn: JONATHAN S. ROBBINS, ESQ., 6060 S. WILLOW DR., SUITE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)  
THE FRICKEY LAW FIRM, PC, Attn: JANET FRICKEY, ESQ., 940 WADSWORTH BLVD., SUITE 400, LAKEWOOD, CO, 80214 (Other Party)

**INDUSTRIAL CLAIM APPEALS OFFICE**

W.C. No. 4-970-099-01

IN THE MATTER OF THE CLAIM OF  
MICHAEL THIBAUT,

Claimant,

v.

FINAL ORDER

RONNIE'S AUTOMOTIVE SERVICES,

Employer,

and

TRAVELER'S INSURANCE,

Insurer,  
Respondents.

The respondents seek review of an order of Administrative Law Judge Walsh (ALJ) dated April 15, 2016, that ordered the claim reopened and determined the respondents are liable for the payment of medical treatment provided subsequent to April 8, 2015. We find it unnecessary to reopen the claim and otherwise affirm the order's award of medical benefits.

The claimant worked as a mechanic for the respondent employer. On December 17, 2014, while repairing the starter motor in a customer's automobile, the pneumatically powered ratchet the claimant was using snapped on a bolt and pinned his right hand against the engine's firewall. After finally disconnecting the air pressure hose attached to the ratchet, the claimant noted pain and injury to his right index finger and to the palm of the right hand. The claimant treated with Dr. Devanny. The claimant received corticosteroid injections in his finger and at the location of his carpal tunnel near the wrist. He found his pain was considerably relieved but never entirely resolved. He described to Dr. Devanny how his finger was often locked up and he experienced numbness in his right hand. Nonetheless, the claimant felt he could continue to work with his hand. Dr. Devanny released the claimant to return to work at full duty on February 20, 2015. The claimant was determined to be at maximum medical improvement (MMI) on April 2, 2015, with no permanent impairment. The claimant did not miss more than three days from work. The respondents filed a Final Admission of Liability (FAL) on April 8, 2015, admitting liability for medical treatment but denying

liability for any temporary or permanent disability benefits, or for any further medical benefits. The claimant did not object to the FAL.

The claimant began working in his own automobile repair shop. In June, 2015, he noticed his hand began to become numb again and he would drop things. The claims adjuster for the respondent insurer denied the claimant's request to return to the doctor on the basis that the claim was closed by the FAL. The claimant, at his own expense, returned to Dr. Devanny who sent him to Dr. Finn for an EMG study. The EMG was read as positive for nerve injury to the carpal tunnel and to the forefinger. Dr. Devanny subsequently performed surgery in the form of a carpal tunnel release and a trigger finger release. The claimant noted improvement in pain and a reduction in the numbness as a result of the surgery. Dr. Devanny expressed his opinion the claimant's need for further medical treatment after April 2, 2015, was work related, specifically to his work injury in December, 2014.

The ALJ concluded the claimant had established that his condition had become worse after the filing of the FAL on April 8, 2015. The ALJ also determined the medical treatment the claimant had received from Dr. Devanny and Dr. Finn was reasonable, necessary and related to the December, 2014, work injury.

On appeal, the respondents contend the evidence is insufficient to establish the claimant's condition actually worsened. They argue the effects of the claimant's previous corticosteroid injections simply wore off. The respondents assert the claimant is seeking to reopen his claim solely because he neglected to object to the denial of medical benefits after MMI contained in the respondents' FAL.

The respondents' argument notwithstanding, the claim in this matter was not closed by the FAL and it is not necessary to reopen claim to allow the claimant to receive additional medical benefits. The Supreme Court in *Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014), held that claims which do not feature liability for temporary or permanent indemnity benefits cannot be closed through any procedure which applies a finding of MMI. This would include a FAL. The Court in *Loofbourrow* explained:

"Maximum medical improvement," as a statutory term of art, therefore has no applicability or significance for injuries insufficiently serious to entail disability indemnity compensation in the first place. See §

8-42-107(8) (b) (I). ... as a statutory term of art with consequences for contesting a final admission of liability, reopening a closed claim, or, as in this case, filing a new claim for an injury that has become compensable for the first time, it can logically have applicability only for injuries for which disability indemnity is payable. *Id.* at 331. ... whether or not the division finds it useful for billing and recording purposes to “close” cases based on a determination that no further treatment is likely to improve the employee’s condition, without regard to whether the injury was ever compensable, see, e.g. 7 Colo. Code Regs. 1101-03:16, Rule 16-7(E) - - the statutory consequences of a finding of “maximum medical improvement” can apply only to injuries as to which disability indemnity is payable. *Id.* at 331.

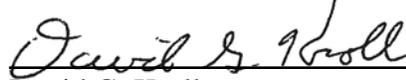
As a consequence, the respondents’ FAL premised on a finding of MMI, and which found that no disability indemnity was payable, does not preclude the claimant from requesting further medical benefits. The claimant is required to establish those medical benefits are reasonable, necessary and related to the work injury. However, he need not prove his condition has changed or that there was a mistake which would justify a reopening pursuant to § 8-43-303. Those issues are not closed and the claimant need not establish grounds for reopening. *Barrera v. ABM Industries, Inc.*, W.C. No. 4-865-048 (June 10, 2016).

Here, the ALJ found the medical care at issue was reasonable, necessary and related to the work injury. The respondents do not challenge that finding on appeal. Accordingly, we find no grounds upon which to attribute error to the ALJ’s order pertinent to additional medical benefits subsequent to April 8, 2015.

**IT IS THEREFORE ORDERED** that the ALJ’s order issued April 15, 2016, is affirmed.

MICHAEL THIBAUT  
W. C. No. 4-970-099-01  
Page 4

INDUSTRIAL CLAIM APPEALS PANEL

  
\_\_\_\_\_

David G. Kroll

  
\_\_\_\_\_

Kris Sanko

MICHAEL THIBAUT  
W. C. No. 4-970-099-01  
Page 6

CERTIFICATE OF MAILING

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

\_\_\_\_\_ 8/2/2016 \_\_\_\_\_ by \_\_\_\_\_ TT \_\_\_\_\_ .

TURNER, ROEPKE, & MUELLER, LLC, Attn: ROYCE W MUELLER, ESQ, 1259 LAKE  
PLAZA DR., SUITE 260, COLORADO SPRINGS, CO, 80906 (For Claimant)

RAY LEGO & ASSOCIATES, Attn: NANCY J WASSERMAN, ESQ, 6060 SOUTH WILLOW  
DRIVE SUITE 100, GREENWOOD VILLAGE, CO, 80111 (For Respondents)

15CA1481 Sanchez v ICAO 03-17-2016

COLORADO COURT OF APPEALS

DATE FILED: March 17, 2016  
CASE NUMBER: 2015CA1481

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Court of Appeals No. 15CA1481  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-952-153

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Keith Sanchez,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Pinnacol Assurance,  
and Honnen Equipment Company,

Respondents.

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ORDER REVERSED AND CASE  
REMANDED WITH DIRECTIONS

Division VI  
Opinion by JUDGE FREYRE  
Navarro and Vogt\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(f)**  
Announced March 17, 2016

---

Mark D. Elliot, Alonit Katzman, The Elliot Law Offices, P.C., Arvada, Colorado,  
for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Harvey D. Flewelling, Denver, Colorado, for Respondents Honnen Equipment  
Company and Pinnacol Assurance

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.  
VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

In this workers' compensation action, claimant, Keith Sanchez, seeks review of a final order of the Industrial Claim Appeals Office (Panel), which affirmed an order denying and dismissing his claim for benefits. An administrative law judge (ALJ) found that claimant had not established that his injury was caused by his work activities. We disagree and set aside the order affirming the ALJ's decision.

## I. Background

Claimant performs general maintenance and in-depth repair to hydraulic crane mechanisms for employer, Honnen Equipment Company. In May 2014, claimant's right knee "pop[ped]" when he stood up from a kneeling position and began "popping and grinding" as he tried to "walk it off." He informed his supervisor of his knee injury and was directed to a clinic for medical attention.

Employer referred claimant to Aviation & Occupational Medicine, where claimant saw Dr. Michael Ladwig. Dr. Ladwig initially diagnosed claimant with a right knee strain and opined there was a 51% chance the injury was work-related. He referred claimant to an orthopedic surgeon, Dr. Mark Failinger, for an MRI. The MRI revealed that claimant suffered a "[s]omewhat complex but

mostly horizontal tear of the body and posterior junctional zone of the medial meniscus.” In addition, the MRI impressions indicated claimant also suffered a “mild MCL sprain and mild posteromedial corner sprains/strains,” and a “mild strain of the popliteus.” Based on these findings, the orthopedic surgeon recommended surgery to repair the tear.

Although Dr. Failinger checked the box indicating that his “objective findings [are] consistent with history and/or work related mechanism of injury/illness,” employer and its insurer contested the claim. A physician retained by employer and its insurer to independently examine claimant, Dr. James Lindberg, concluded that claimant’s injury was not likely work-related because “standing up and feeling the knee pop would not cause an MCL sprain or posterior medial corner sprain and strain.” According to Dr. Lindberg, these findings would be secondary to a much more significant injury, and he opined, “I do not believe that this injury took place standing up at work and feeling a pop.” Dr. Lindberg expounded on his opinion at the hearing, testifying that there was a “ten percent” chance the horizontal meniscus tear would occur as claimant described, and a “zero percent” chance that the corner

sprains/strains could have resulted from mechanism of injury described by claimant.

Although there was no evidence that claimant's knee had exhibited any symptoms prior to the work-related incident, the ALJ found Dr. Lindberg persuasive, crediting his explanation "that the specific tear sustained by [c]laimant is not the type of meniscal tear most commonly associated with acute, work-related injuries." The ALJ also noted Dr. Lindberg's opinion that there "was simply no mechanism of injury described in the medical records that accounted for [c]laimant's injuries." The ALJ concluded that the "temporal proximity" of claimant's symptoms to his work did not establish that claimant suffered a work-related injury. He therefore denied and dismissed claimant's claim.

On review, the Panel affirmed. It rejected claimant's contention that the ALJ had improperly considered testimony concerning his prior drug convictions. The Panel was also unpersuaded by claimant's arguments that the ALJ had misinterpreted Dr. Lindberg's opinion and that the ALJ applied the wrong legal standard when analyzing the cause of his injury. The Panel therefore affirmed the ALJ's order. Claimant now appeals.

## II. Applicable Legal Standard

Claimant contends that the ALJ applied the wrong legal standard in concluding that he had failed to establish a causal link between his injury and his work activities. Claimant argues that because the ALJ did not explicitly find his knee injury attributable to a pre-existing condition, the injury “is compensable as a matter of law under settled case law.” Citing *City of Brighton v. Rodriguez*, 2014 CO 7, claimant reasons that his injury was caused by a “neutral risk” and is compensable because it would not have occurred “but for” his work activities. We agree.

### A. Applicable Law

A work-related injury may be compensable if it arose out of the course and scope of the injured worker’s employment.

§ 8-41-301(1)(b), C.R.S. 2015. “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.*

A pre-existing condition “does not disqualify a claimant from receiving workers’ compensation benefits.” *Duncan v. Indus. Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). A claimant may be compensated if a work-related injury “aggravates, accelerates, or combines with” a worker’s pre-existing infirmity or disease “to produce the disability for which workers’ compensation is sought.” *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Moreover, an otherwise compensable injury does not cease to arise out of a worker’s employment simply because it is partially attributable to the worker’s pre-existing condition. See *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Indus. Comm’n*, 736 P.2d 1262, 1263 (Colo. App. 1986) (“[I]f a disability were 95% attributable to a pre-existing, but stable, condition and 5% attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.”)

Determining whether “an employee’s injuries arose out of an employment relationship depends largely on the facts presented in a particular case.” *In re Question Submitted by the U.S. Court of Appeals for the Tenth Circuit*, 759 P.2d 17, 20 (Colo. 1988). The fact finder must examine the “totality of the circumstances . . . to see whether there is a sufficient nexus between the employment and the injury.” *Id.* (quoting *City & Cty. of Denver Sch. Dist. No. 1 v. Indus. Comm’n*, 196 Colo. 131, 133, 581 P.2d 1162, 1163 (1978)). And, the mere fact that an injury occurred at work does not necessarily make it compensable. *Brighton*, ¶ 29.

In *Brighton*, the Colorado Supreme Court abrogated a line of cases that had barred recovery if the cause of a claimant’s injury, often a fall, was “unexplained.” *Id.* at ¶ 35 n.9. The employer in *Brighton* compensated a worker who had fallen down some stairs, even though the worker could not remember what caused her to fall. The supreme court held that because the claimant’s “fall would not have occurred *but for* the fact that the conditions and obligations of her employment — namely, walking to her office during her work day — placed her on the stairs where she fell, her

injury ‘arose out of’ employment and is compensable.” *Id.* at ¶ 36 (emphasis added).

The supreme court explained that workplace injuries fall into one of three categories: “(1) employment risks, which are directly tied to the work itself; (2) personal risks, [or purely idiopathic injuries] which are inherently personal or private to the employee him- or herself; and (3) neutral risks, which are neither employment related nor personal.” *Id.* at ¶¶ 19, 22. The court placed unexplained falls in this third category, and held that such injuries arise out of employment and are compensable if, under the positional-risk test, it can be shown the injury “would not have occurred *but for* employment.” *Id.* at ¶¶ 24, 25 (emphasis added).

#### B. Claimant’s Injury Fell Under the Neutral Risk Category

Claimant asserts that in the absence of a specific causal finding that his injury was attributable to a pre-existing condition the injury’s cause is essentially unexplained and should have been analyzed under *Brighton*. His argument implies that if an ALJ does not identify the precise cause of an injury, the injury is unexplained and must be analyzed under the neutral risk category. But, *Brighton* states that “[d]emanding more precision about the exact

mechanism of a fall is inconsistent with the spirit of a statute that is designed to compensate workers for workplace accidents regardless of fault.” *Brighton*, ¶ 30. Therefore, we do not read *Brighton* as issuing a mandate either that the precise cause of every claimed workers’ compensation injury must be identified by the ALJ or that an injury automatically falls into the third, or neutral, category, simply because a precise cause is not expressly found. Nevertheless, for the reasons set forth below, we agree that claimant’s injury should have been analyzed as a neutral risk. See *id.* at ¶ 31.

The ALJ implicitly found that claimant’s injury was caused by a pre-existing knee condition. The ALJ was persuaded by Dr. Lindberg, who opined that the “horizontal, internal tear, also known as a ‘shear tear,’” claimant exhibited is generally a chronic condition, not acute. Dr. Lindberg also estimated that there was only a “ten percent” chance that the activity described by claimant caused his meniscal tear. Further, he testified that there was a “zero” percent chance that claimant’s knee sprains could have been caused by kneeling and standing. The ALJ expressly credited these opinions. Thus, the ALJ’s unequivocal finding that the work-related

activity to which claimant attributed his injury did not cause his knee condition also amounted to an implicit finding that claimant's condition was chronic and likely pre-existing. Though not explicitly stated in his order, the ALJ effectively placed claimant's injury in the “*purely idiopathic personal*” risk category, for injuries that ‘are generally not compensable under the Act, unless an exception applies.’ *Brighton*, ¶ 22.

We review de novo whether the ALJ applied the correct legal standard. *See Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 897-98 (Colo. 2008) (“[W]e review de novo whether the district court applied the correct legal standard to its review of the custodian's determination. . . . We review questions of law de novo. . . . Whether a trial court or the court of appeals has applied the correct legal standard to the case under review is a matter of law.”) (citations omitted); *Visible Voices, Inc. v. Indus. Claim Appeals Office*, 2014 COA 63, ¶ 11 (“[W]hether the Panel applied the correct legal standard or legal test raises a question of law that we review de novo.”). Consequently, whether claimant's injury was correctly categorized as resulting from an employment

risk, a personal risk, or a neutral risk is a question of law we review de novo.

It is undisputed that claimant's injury was entirely asymptomatic before he knelt under and arose from working under the crane. Claimant unequivocally stated, and employer does not dispute, that claimant had no knee injuries prior to the May 2014 work-related incident. Indeed, the record is devoid of any medical records or other evidence demonstrating that claimant had any issues whatsoever with his knee before he stood up from kneeling under the crane and feeling it "pop." Claimant consistently conveyed the mechanism and onset of symptoms in testimony and to his various medical treaters and providers.

The evidence establishes that claimant's knee pop occurred at work and while he was engaged in work-related activities. Reviewing claimant's consistent and undisputed explanation of the mechanism of his injury, in our view his knee would not have "popped" *but for* his actions at work. We conclude that this places him in the "neutral risk" category, which should have been analyzed under the positional risk test. *Brighton*, ¶¶ 25-26.

Applying the positional risk test to claimant's injury, we conclude that his injury arose out his employment because it would not have occurred "but for" his kneeling and standing while working on the crane. Working on the crane required him to kneel down and stand up repeatedly and placed him "in the position where he . . . was injured." *Brighton*, ¶ 27.

Accordingly, we conclude that the ALJ applied the wrong legal standard when he determined that claimant's injury was not work-related. Placing claimant's injury in the neutral risk category and applying the positional risk test, we conclude that claimant's injury is compensable.

### III. Claimant's Remaining Arguments

Having concluded that the ALJ applied the incorrect legal standard when analyzing the work-relatedness of claimant's injury, we need not reach claimant's remaining issues. We therefore decline to address whether the ALJ erred in permitting questioning about claimant's past criminal conviction or whether the ALJ misinterpreted the opinion of an orthopedic surgeon under *Hall v. Industrial Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988).

#### IV. Conclusion

The order is set aside and the case is remanded with directions that an order be entered in accordance with this opinion.

JUDGE NAVARRO and JUDGE VOGT concur.

15CA1238 Trujillo v ICAO 06-23-2016

COLORADO COURT OF APPEALS

DATE FILED: June 23, 2016  
CASE NUMBER: 2015CA1238

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Court of Appeals No. 15CA1238  
Industrial Claim Appeals Office of the State of Colorado  
WC No. 4-940-537-02

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Frank Trujillo,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado, Goodrich Corporation,  
and New Hampshire Insurance Company,

Respondents.

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ORDER AFFIRMED

Division A  
Opinion by CHIEF JUDGE LOEB  
Márquez\* and Casebolt\*, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced June 23, 2016

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

No Appearance for Respondent Industrial Claim Appeals Office

Ritsema & Lyon, P.C., Derek T. Frickey, Colorado Springs, Colorado, for  
Respondents Goodrich Corporation and New Hampshire Insurance Company

\*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art.  
VI, § 5(3), and § 24-51-1105, C.R.S. 2015.

In this workers' compensation action, claimant, Frank Trujillo, seeks review of a final order of the Industrial Claim Appeals Office (Panel) affirming the denial and dismissal of his claim for benefits. We affirm.

## I. Background

The relevant facts of this case are undisputed. Claimant has worked for employer, Goodrich Corporation, as a machinist since 1997. In 2013, claimant changed positions from machinist to finisher. Sometime after changing positions, he developed bilateral pain in his thumbs and wrists. He filed a claim for workers' compensation benefits, alleging that he had suffered an occupational disease to his wrists and thumbs as a result of repetitive motion required by his job. A physician retained by employer disagreed that claimant's injury was work-related and opined that claimant suffered from pre-existing bilateral osteoarthritis.

Claimant applied for a hearing, and requested temporary total disability (TTD), temporary partial disability (TPD), and medical benefits commencing on the onset date of his claimed occupational

disease. In its response to the application for hearing, employer acknowledged that TTD, TPD, and medical benefits were at issue.

After conducting a hearing, the transcript of which has not been provided to us and is not part of the record on appeal, the ALJ found that claimant's injuries were not related to his employment and therefore not compensable. The parties both state before us that they "agreed on the record at the hearing to narrow the issues to solely the issue of compensability," but we cannot confirm this assertion because no transcript of the hearing has been provided to us. Regardless, the ALJ's order reflects that the issue to be decided was "Whether the claimant has proven, by a preponderance of the evidence, that he sustained an occupational disease, or injury, arising out of and in the course of his employment with the respondent-employer." However, in his final order, the ALJ expressly ruled that "claimant's claim for benefits . . . is denied and dismissed." The ALJ then advised that any petition to review the order must be filed "within twenty (20) days after mailing or service of the order." By including this language, the ALJ effectively implied that the order was final and appealable.

Claimant sought review with the Panel, arguing that the ALJ's order was not final because it did not deny a specific benefit. If the order was deemed final, he challenged the definition of occupational disease the ALJ cited in his order. Although employer agreed that the ALJ's decision was not final, the Panel held that the order was final and appealable, and further found no error in the ALJ's analysis of claimant's alleged occupational disease. Claimant now appeals.

## II. Finality of ALJ's Order

We first address claimant's assertion that the Panel erred in holding that the ALJ's order was final and appealable. Claimant contends, and employer agrees, that the ALJ's order was not final because it only addressed compensability and did not expressly deny a specific benefit. Relying on "a long line of [Panel] cases interpreting" section 8-43-301(2), C.R.S. 2015, claimant argues that because "no specific benefits were listed in the order as being at issue, the denial of the claim did not deny any specific benefit," thereby rendering the order neither final nor appealable. We are not persuaded that the Panel erred.

Section 8-43-301(2) permits “[a]ny party dissatisfied with an order that requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty [to] file a petition to review with the division.” Thus, to be final and appealable, an ALJ’s order “must grant or deny benefits or penalties.” *Flint Energy Servs., Inc. v. Indus. Claim Appeals Office*, 194 P.3d 448, 449-50 (Colo. App. 2008). An order that does not meet this test is not final and deprives the reviewing court of jurisdiction to consider the appeal. *See Ortiz v. Indus. Claim Appeals Office*, 81 P.3d 1110, 1111 (Colo. App. 2003) (holding that the court of appeals lacked jurisdiction to review an order striking claimant’s request for a division-sponsored independent medical examination because the order “did not, on its face, grant or deny claimant any penalty or benefits”).

Although both parties point out that the only issue identified by the ALJ here was compensability, we agree with the Panel that the order effectively denied claimant’s request for benefits. The ALJ’s finding that the claim was not compensable had the practical effect of denying claimant all benefits. In the past, divisions of this court have treated findings of no compensability as final and reviewable because such decisions necessarily deny a claimant’s

request for benefits. *See, e.g., Kater v. Indus. Comm'n*, 728 P.2d 746, 747 (Colo. App. 1986) (reviewing Commission's finding that claimant's injury was not compensable because it arose out of voluntary horseplay and not a work-related activity).

Moreover, claimant here requested TTD, TPD, and medical benefits in his application for hearing. He reiterated this request in his pre-hearing case information sheet, in which he identified medical, TPD, and TTD benefits as compensation he was seeking from employer. In addition, in his post-hearing position statement, claimant requested that the ALJ order employer to pay his medical treatment provided by Dr. Douglas Scott. Finally, the ALJ's order expressly denied and dismissed claimant's "claim for benefits." We therefore agree with the Panel that in this case specific benefits were requested and denied.

Accordingly, the ALJ's order was final and appealable and both the Panel and this court have jurisdiction to consider the issues raised on their merits.

### III. Legal Standard Applicable to Occupational Diseases

Having determined that we have jurisdiction to consider claimant's appeal, we turn to claimant's contention that the ALJ

applied the incorrect legal standard when he determined that claimant had not suffered an occupational disease. Claimant argues that the ALJ's recitation of the definition of occupational disease adopted by a division of this court – which allegedly incorporated the word “prolonged” into the definition – conflicts with the statutory definition of the term set out in section 8-40-201(14), C.R.S. 2015, which does not use the word “prolonged.” See *Colo. Mental Health Inst. v. Austill*, 940 P.2d 1125, 1128 (Colo. App. 1997) (“An occupational disease arises not from an accident but from a *prolonged exposure* occasioned by the nature of the employment.”) (emphasis added). We discern no error in the ALJ's citation to *Colorado Mental Health Institute* nor do we perceive that the ALJ applied an incorrect legal standard as to the definition of the term “occupational disease.”

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251, 252 (Colo. App. 1999). An occupational disease arises not from an accident but from multiple exposures over time occasioned

by the nature of the employment. § 8-40-201(14); *Colo. Mental Health Inst.*, 940 P.2d at 1128. A claimant must show that his or her disability was caused by an occupational disease that had its origin in work-related functions and was sufficiently related to those functions to be considered part of the employment contract. *Cabela v. Indus. Claim Appeals Office*, 198 P.3d 1277, 1279-80 (Colo. App. 2008).

Claimant contends that the ALJ erred by citing to and relying on *Colorado Mental Health Institute's* definition of occupational disease, which he argues conflicts with the statutory definition.

Section 8-40-201(14) defines occupational disease as

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

The statute does not include the word “prolonged” as did the division in *Colorado Mental Health Institute*.

However, we do not perceive that the use of the words “prolonged exposure” in *Colorado Mental Health Institute* conflicts with the statute. As we read the statutory definition, the General Assembly intended to distinguish “occupational diseases” from acute, accidental, work-related injuries. The statutory definition acknowledges that an occupational disease results from more than one exposure over time to an environment or action at work that by its very repetitiveness causes an illness or injury. Our supreme court expounded on this distinction when it noted that “an ‘accident’ is traceable to a particular time, place and cause, whereas an ‘occupational disease’ is acquired in the usual and ordinary course of employment and is recognized from common experience to be incidental thereto.” *Colo. Fuel & Iron Corp. v. Indus. Comm’n*, 154 Colo. 240, 248, 392 P.2d 174, 179 (1964). “Historically, a distinction has existed between ‘occupational diseases’ and ‘accidents/injuries,’ . . . which has traditionally been justified by the difficulty in determining the cause of the claimed occupational disease.” *Anderson v. Brinkhoff*, 859 P.2d 819, 822 (Colo. 1993) (citations omitted). As the supreme court has interpreted the statutory definition, occupational diseases are necessarily limited

“to those diseases which result from working conditions which are characteristic of the vocation.” *Id.* at 823. And, as a division of this court explained the distinction, “the term ‘accident’ refers to an event traceable to a particular time, place, and cause. . . . An ‘occupational disease,’ on the other hand, is acquired in the ordinary course of employment and is a natural incident of the employment.” *Delta Drywall v. Indus. Claim Appeals Office*, 868 P.2d 1155, 1157 (Colo. App. 1993) (citations omitted); *see also Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993) (“The traditional test for distinguishing between accidental and occupational injuries is whether the injury can be traced to a particular time, place, and cause.”).

In our view, the division in *Colorado Mental Health Institute* was merely attempting to accentuate this distinction when it included the word “prolonged” in its definition of “occupational disease.” Consequently, we perceive no conflict between the statute and the definition set out in *Colorado Mental Health Institute*, and thus, conclude the ALJ did not err by citing to both in his order.

Accordingly, we conclude that the ALJ did not apply an incorrect legal standard when he found that claimant did not suffer

an occupational disease to his bilateral thumbs or wrists. We therefore perceive no basis for setting aside the ALJ's order denying and dismissing claimant's claim for benefits or the Panel's order affirming the ALJ. *See* § 8-43-308, C.R.S. 2015.

The order is affirmed.

JUDGE MÁRQUEZ and JUDGE CASEBOLT concur.

**The Supreme Court of the State of Colorado**  
2 East 14<sup>th</sup> Avenue • Denver, Colorado 80203

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**2016 CO 53**

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**Supreme Court Case No. 15SC87**  
*Certiorari to the Colorado Court of Appeals*  
Court of Appeals Case No. 13CA1798

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**Petitioner:**

Pinnacol Assurance,

v.

**Respondents:**

Norma Patricia Hoff; Hernan Hernandez; Alliance Construction & Restoration, Inc.; MDR Roofing, Inc.; and Industrial Claim Appeals Office of the State of Colorado.

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**Judgment Reversed**

*en banc*

June 27, 2016

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**No appearance by or on behalf of Hernan Hernandez; Alliance Construction & Restoration, Inc.; MDR Roofing, Inc.; and Industrial Claim Appeals Office of the State of Colorado.**

**JUSTICE HOOD** delivered the Opinion of the Court.

**JUSTICE GABRIEL** concurs.

**JUSTICE COATS** dissents, and **CHIEF JUSTICE RICE** and **JUSTICE EID** join in the dissent.

¶1 In this workers' compensation insurance case, we consider whether an insurer had a legal obligation to notify a non-insured holder of a certificate of insurance when the insurance policy evidenced by the certificate was cancelled. Based on the certificate at issue here and the relevant statute, we conclude that the insurer had no such obligation. We therefore reverse the court of appeals' judgment to the contrary.

## I. Facts

¶2 Norma Hoff owns a house that she rents out through a property management agency. When the roof of the house sustained hail damage, Hoff and her husband contracted with Alliance Construction & Restoration, Inc. ("Alliance") to repair it. Without Hoff's knowledge, Alliance subcontracted the roofing job to MDR Roofing, Inc. ("MDR"). MDR employed Hernan Hernandez as a roofer.

¶3 While working on Hoff's roof, Hernandez fell from a ladder and suffered serious injuries. He sought medical and temporary total disability benefits for these work-related injuries, but MDR's insurer, Pinnacol Assurance ("Pinnacol"), denied the claim because MDR's insurance coverage had lapsed. Neither Hoff nor Alliance had workers' compensation insurance. Hernandez then brought an action under the Workers' Compensation Act ("WCA" or "the Act"), §§ 8-40-101 to 8-47-209, 8-55-101 to -105, C.R.S. (2015), seeking benefits against MDR, Alliance, Hoff, and Pinnacol.

¶4 The facts relevant to this claim are best summarized chronologically.

¶5 In July 2010, MDR applied for workers' compensation insurance from Pinnacol through Pinnacol's agent, Bradley Insurance Agency ("Bradley"). Shortly thereafter, Pinnacol issued a policy to MDR.

¶6 In October 2010, before starting the roofing job on Hoff's property, Alliance obtained from Bradley a certificate of insurance<sup>1</sup> which verified that MDR had a workers' compensation insurance policy in effect from July 9, 2010, to July 1, 2011.

¶7 On February 10, 2011, Pinnacol informed MDR by certified letter that MDR's insurance policy would be cancelled if Pinnacol did not receive payment of a past-due premium by March 2, 2011. Pinnacol also mailed a copy of this letter to Bradley. Alliance was not notified of the pending cancellation.

¶8 MDR did not pay the past-due premium, and the policy was therefore cancelled effective March 3, 2011. Pinnacol sent letters to MDR and Bradley advising them of the cancellation, but it did not send a letter to Alliance.

¶9 One week later, on March 10, 2011, Hernandez's injuries occurred.

¶10 On March 11, 2011, MDR's owner went to Bradley's office and asked to reinstate the policy. Bradley personnel informed MDR's owner that the policy could be reinstated only if the owner paid the outstanding premium, paid a reinstatement fee, and signed a "no-loss" letter, which is a statement by an insured certifying that no injuries have occurred since the insured's policy was cancelled. MDR's owner made the necessary payments and, although he knew Hernandez had been injured since the policy's cancellation, signed and submitted the no-loss letter. He did not inform Bradley of Hernandez's accident. That same day, upon receiving the payments and

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<sup>1</sup> This certificate is attached as an appendix ("Appendix") to this opinion. A certificate of insurance is "[a] document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers." Certificate of Insurance, Black's Law Dictionary (10th ed. 2014).

no-loss letter, Pinnacol reinstated MDR's policy retroactively to the March 3 cancellation date.

¶11 On March 16, 2011, MDR's owner returned to Bradley's office to report Hernandez's March 10 injuries. Bradley contacted Pinnacol to advise it of the claim. Pinnacol contested the claim on coverage grounds and later cancelled the policy.

## **II. Procedural History**

¶12 After conducting a hearing on Hernandez's workers' compensation claim, an administrative law judge ("ALJ") determined that Pinnacol's March 3 cancellation of MDR's insurance policy was proper. The ALJ further determined that MDR's owner's failure to disclose Hernandez's injuries when he signed the no-loss letter was a material misrepresentation that rendered void the March 11 reinstatement of the policy. As a result, MDR had no workers' compensation coverage on March 10—the day of Hernandez's injuries—and Pinnacol could not be held liable on the claim.

¶13 The ALJ also concluded that, in addition to MDR, who was Hernandez's direct employer, Hoff and Alliance were Hernandez's statutory employers under sections 8-41-402 and 8-41-401 of the WCA, respectively. Finding that none of these three parties had a workers' compensation insurance policy in effect on March 10, 2011, the ALJ held them jointly liable for Hernandez's benefits.

¶14 On appeal to the Industrial Claim Appeals Office ("ICAO" or "the Panel"), Hoff argued that, under the doctrine of promissory estoppel, Pinnacol should be barred from denying coverage because the certificate of insurance required Pinnacol to notify Alliance that MDR's policy was being cancelled, she and Alliance relied on the

certificate as proof that MDR had insurance, and Pinnacol failed to notify Alliance of the policy's cancellation. The Panel rejected this argument and affirmed the ALJ's order.

¶15 Hoff then appealed the Panel's order to the court of appeals,<sup>2</sup> again asserting a claim of promissory estoppel. In Hoff v. Industrial Claim Appeals Office, 2014 COA 137M, \_\_ P.3d \_\_, a division of the court of appeals reversed, with each of the division's three judges writing separately. Although the division unanimously rejected the Panel's promissory estoppel analysis,<sup>3</sup> id. at ¶¶ 28-30; id. at ¶ 46 (Casebolt, J., concurring in part and dissenting in part); id. at ¶ 69 (Berger, J., concurring in part and dissenting in part), it disagreed as to how the estoppel claim should be resolved.

¶16 The majority (Judges Dailey and Berger) held that the certificate required Pinnacol to notify Alliance if MDR's insurance policy was cancelled and that any contrary disclaimer language<sup>4</sup> in the certificate was void; accordingly, this notice obligation satisfied the "promise" element of Hoff's promissory estoppel claim as a

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<sup>2</sup> Neither Alliance nor MDR joined in this appeal or filed an appeal of its own.

<sup>3</sup> The court also was unanimous in determining that Hoff had standing to bring a claim for promissory estoppel. Hoff, ¶¶ 2 & n.1, 14-24. The issue of Hoff's standing is not before us, and we therefore do not address it further.

<sup>4</sup> The following statement appears at the top of the certificate:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT . . . AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE . . . DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

See Appendix. Later, the certificate also states: "THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES." See id.

matter of law. See id. at ¶¶ 2, 31–43 (majority opinion); id. at ¶ 70 (Berger, J., concurring in part and dissenting in part). Judge Casebolt dissented from this holding, instead finding that the certificate was ambiguous and that “the kind and nature of the promises and disclaimers contained in the certificate present[ed] factual issues that the ALJ should first decide” on remand. See id. at ¶ 51 (Casebolt, J., concurring in part and dissenting in part).

¶17 The majority (Judges Dailey and Casebolt) also held, however, that the question of whether the other elements of promissory estoppel were satisfied was a factual issue best resolved by the ALJ in the first instance and that remand was therefore necessary. Id. at ¶¶ 2, 44 (majority opinion); id. at ¶ 46 (Casebolt, J., concurring in part and dissenting in part). Judge Berger dissented from this holding. In his view, the facts relevant to all elements of Hoff’s promissory estoppel claim were undisputed, and the court therefore should have resolved the claim as a matter of law. Id. at ¶¶ 68–69 (Berger, J., concurring in part and dissenting in part). Applying the law to the facts, Judge Berger would have held that Pinnacol was estopped from denying coverage for Hernandez’s benefits. See id. at ¶¶ 69–76.

¶18 We granted Pinnacol’s petition for certiorari.<sup>5</sup>

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<sup>5</sup> We granted certiorari to review the following issues:

1. Whether the court of appeals erred in holding, contrary to Broderick Inv. Co. v. Strand Nordstrom, 794 P.2d 264 (Colo. App. 1990), and decisions by the Industrial Claim Appeal Office (ICAO) which follow Broderick, that a certificate of insurance evidencing the issuance of a workers’ compensation insurance policy required the insurer to inform the certificate holder of the cancellation of the policy, where the certificate states that notice of cancellation “will be delivered in

### III. Analysis

¶19 We begin our analysis by addressing the appropriate standard of review and rejecting Pinnacol's contention that we should defer to the ICAO's interpretation of the WCA. We then turn to Hoff's promissory estoppel claim and, after summarizing the applicable law, examine whether the court of appeals properly determined that the initial, promise element of Hoff's claim was established as a matter of law.

¶20 In doing so, we first consider the court of appeals' determination that the certificate of insurance promised that the insurer, Pinnacol, would notify the certificate holder, Alliance, of policy cancellation. We conclude that the unambiguous language of the certificate contains no such promise.

¶21 Next, we consider the court of appeals' holding that public policy expressed in sections 8-41-402 and 8-41-404 of the WCA required it to construe the certificate as promising notice to Alliance. We conclude that nothing in the WCA supports imposing such a promise either.

¶22 Pinnacol was therefore under no obligation to notify Alliance of policy cancellation. Because Pinnacol did not promise to provide such notice, Hoff's

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accordance with the policy provisions," and the policy only requires the insurer to provide notice of cancellation to the policy holder.

2. Whether the court of appeals erred in interpreting section 8-41-404, C.R.S. (2014), to create a public policy mandate that invalidates the "disclaimers and exculpatory language" in a certificate of insurance to require that notice of cancellation of a policy be provided to certificate holders where section 8-44-110, C.R.S. (2014), does not require such notice and the certificate of insurance form containing such language was approved by the commissioner of insurance pursuant to section 8-44-102, C.R.S. (2013).

promissory estoppel claim fails for lack of a necessary element. Accordingly, we reverse the judgment of the court of appeals.

### A. Standard of Review

¶23 Pinnacol argues the court of appeals erred in not deferring to the ICAO's interpretation of the WCA. Because the ICAO has not rendered a decision addressing the precise issues before us here, we disagree that deference is owed.

¶24 Judicial review of the Panel's disposition of a workers' compensation claim is governed by the WCA. See Fulton v. King Soopers, 823 P.2d 709, 712-13 (Colo. 1992). Section 8-43-307 allows dissatisfied parties to appeal a Panel order to the court of appeals, see § 8-43-307(1), and several subsequent sections circumscribe the nature and scope of that court's review, see §§ 8-43-308 to -310. Section 8-43-313, in turn, allows a still-dissatisfied party to seek review of the court of appeals' decision in this court. If we grant review, our inquiry is limited "to a summary review of questions of law." § 8-43-313. In evaluating a Panel order under these provisions, appellate courts defer to the agency's factual findings but review its conclusions of law de novo. See City of Brighton v. Rodriguez, 2014 CO 7, ¶¶ 11-12, 318 P.3d 496, 501; Kieckhafer v. Indus. Claim Appeals Office, 2012 COA 124, ¶¶ 8, 12, 284 P.3d 202, 205-06.

¶25 So, the presumptive standard of review is de novo for the questions of law central to this case—i.e., the proper construction of the certificate, the insurance policy, and certain provisions of the WCA. See Specialty Rests. Corp. v. Nelson, 231 P.3d 393, 397 (Colo. 2010) ("Statutory construction is a question of law . . . ."); Meier v. Denver

U.S. Nat'l Bank, 431 P.2d 1019, 1021 (Colo. 1967) (“The construction of a written instrument [is] a question of law . . .”).

¶26 But, as Pinnacol points out, this typically unfettered review is sometimes restricted when it comes to interpreting provisions of the WCA. Although appellate courts ultimately are not bound by the Panel’s legal interpretations, see Rodriguez, ¶ 12, 318 P.3d at 501, or by its earlier decisions, Kieckhafer, ¶ 8, 284 P.3d at 205, courts nonetheless traditionally give deference to the Panel’s reasonable interpretations of WCA provisions, see Specialty Rests., 231 P.3d at 397; Kieckhafer, ¶ 8, 284 P.3d at 205.

¶27 Pinnacol seizes on this deference principle, claiming that the court of appeals’ prior decision in Broderick Investment Co. v. Strand Nordstrom Stailey Parker, Inc., 794 P.2d 264, 266 (Colo. App. 1990), set forth a rule that certificates of insurance create no rights for a certificate holder and that, although Broderick did not involve workers’ compensation, the ICAO has long applied this rule in the workers’ compensation context. As support, Pinnacol cites four prior ICAO decisions, in addition to the Panel’s decision here, and asserts these decisions “implicitly interpret the Act as not creating any contractual duty for the benefit of a certificate holder where, as here, the certificate is specifically limited to an informational document only which is subject to the terms of the policy.” Accordingly, Pinnacol argues the ICAO has interpreted the WCA as not requiring notice to certificate holders, and the court of appeals erred in failing to accord deference to this interpretation.

¶28 None of these ICAO decisions, however, interpreted the statutory provisions on which the court of appeals relied in this case. The ICAO did not examine whether

public policy underlying sections 8-41-402 and 8-41-404 of the WCA required insurers to notify certificate holders about policy cancellations and rendered void any disclaimers that would prevent certificates from serving their intended purpose under the Act.

¶29 In fact, three of the four prior decisions, as well as the decision below, merely applied Broderick as controlling precedent without tying that case or its purported rule to any WCA provision at all. See Hernandez v. MDR Roofing, Inc., W.C. No. 4-850-627-03, 2013 WL 858028, at \*4 (Colo. ICAO Feb. 27, 2013); Lopez-Najera v. Black Roofing, Inc., W.C. No. 4-565-863, 2004 WL 2107582, at \*3 (Colo. ICAO Sept. 13, 2004); Gomez v. Gonzales, W.C. Nos. 4-447-171 & 4-449-330, 2004 WL 348737, at \*8 (Colo. ICAO Feb. 18, 2004); Wilson v. H & S Constr., W.C. No. 4-472-849, 2002 WL 2018806, at \*3 (Colo. ICAO Aug. 30, 2002). And the other prior decision squared Broderick with a statutory provision extraneous to the court of appeals' analysis here. See Suttles v. Sherman, W.C. No. 4-308-510, 1997 WL 730627, at \*4-6 (Colo. ICAO Oct. 31, 1997) (citing § 8-45-112, C.R.S. (1997)). It neither interpreted sections 8-41-402 and 8-41-404 nor considered what those provisions require of insurers vis-à-vis certificate holders. Id.

¶30 Thus, Pinnacol's argument suffers from the false premise that the ICAO has rendered an interpretation of the WCA provisions central to the case at hand. In other words, there is no interpretation to which we or the court of appeals could defer. We therefore apply traditional de novo review.

## **B. Promissory Estoppel Does Not Apply Because There Was No Promise**

¶31 We now turn to Hoff's claim that Pinnacol is estopped from denying coverage for Hernandez's workers' compensation benefits. In order to place the issues on which we granted certiorari in context, we first briefly summarize the law of promissory estoppel. We then consider whether there is a promise here, based on the certificate of insurance or the WCA. We conclude there is not.

### **1. Promissory Estoppel Generally**

¶32 Promissory estoppel is a quasi-contractual cause of action that, under certain circumstances, provides a remedy for a party who relied on a promise made by another party, even though the promise was not contained in an enforceable contract. See Wheat Ridge Urban Renewal Auth. v. Cornerstone Grp. XXII, L.L.C., 176 P.3d 737, 741 (Colo. 2007). A claim for promissory estoppel consists of four elements: (1) a promise; (2) that the promisor reasonably should have expected would induce action or forbearance by the promisee or a third party; (3) on which the promisee or third party reasonably and detrimentally relied; and (4) that must be enforced in order to prevent injustice. See, e.g., Cherokee Metro. Dist. v. Simpson, 148 P.3d 142, 151 (Colo. 2006). Where these elements are present, a promise becomes binding and may be enforced through the normal remedies available under contract law. Bd. of Cty. Comm'rs v. DeLozier, 917 P.2d 714, 716 (Colo. 1996).

¶33 Here, the court of appeals concluded that Hoff qualified as a third party beneficiary of the alleged promise made to Alliance and thus could bring a claim based

on that alleged promise. Hoff, ¶¶ 2 & n.1, 22-24. The court also concluded that, although Bradley issued the certificate, Bradley was acting as Pinnacol's agent when it did so and therefore was an entity legally indistinguishable from Pinnacol for purposes of analyzing Hoff's claim. See id. at ¶¶ 29 & n.5, 38 n.6. Pinnacol does not challenge these conclusions, and we accept them as true for purposes of this appeal.

¶34 In addition, the court of appeals majority declined to decide whether Hoff had established all the elements of a claim for promissory estoppel. Id. at ¶¶ 2, 44. Rather, as to all but the promise element, the majority determined that factual issues remained and therefore remanded the case to the ALJ to address those issues in the first instance. See id. at ¶¶ 2 & nn.2-3, 44. Pinnacol does not challenge this remand decision either. Instead, Pinnacol focuses only on the court's disposition of the promise element.

¶35 The question for us, then, is whether the court of appeals properly determined that the promise element of Hoff's claim was satisfied as a matter of law. We turn to that question now.

## 2. Application

¶36 Based on both the language of the certificate's cancellation provision and perceived public policy underlying certain provisions of the WCA, the majority below construed the certificate as promising that Pinnacol would notify Alliance if MDR's workers' compensation policy was cancelled. See id. at ¶¶ 2, 31-43. The majority also concluded that the same public policy considerations voided the certificate's disclaimers. See id. at ¶¶ 31, 39-43.

¶37 We disagree. Considering each of the majority’s dual rationales in turn, we conclude that Pinnacol was under no obligation to notify Alliance of policy cancellation. We also find it unnecessary to address the validity of the certificate’s disclaimers.<sup>6</sup> Even assuming that, despite the disclaimers, the certificate could have contained enforceable promises, we still would conclude that a promise to give notice of policy cancellation to Alliance was not one of them. It follows that, regardless of the disclaimers’ validity, Hoff’s promissory estoppel claim fails for lack of a promise.

**a. Nothing in the Language of the Certificate Promised  
Notice to Alliance**

¶38 The certificate’s notice provision is unambiguous, and it did not promise notice to Alliance.

¶39 In construing a document, we look to its terms and apply them as written unless they are ambiguous. See USI Props. E., Inc. v. Simpson, 938 P.2d 168, 173 (Colo. 1997). To determine whether an ambiguity exists, we ask whether the document’s plain

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<sup>6</sup> As a result, we need not consider the broader issue of the legal status of certificates of insurance that contain such disclaimers, or the parties’ related contentions concerning Broderick, 794 P.2d 264. We note that courts in other jurisdictions have reached divergent conclusions on the question of whether—and if so, under what circumstances—such certificates can give rise to legal rights, compare, e.g., Criterion Leasing Grp. v. Gulf Coast Plastering & Drywall, 582 So.2d 799, 800–01 (Fla. Dist. Ct. App. 1991) (per curiam) (certificate gave rise to legal rights), Bucon, Inc. v. Pa. Mfg. Ass’n Ins. Co., 547 N.Y.S.2d 925, 927 (N.Y. App. Div. 1989) (same), and Marlin v. Wetzel Cty. Bd. of Educ., 569 S.E.2d 462, 469–73 (W. Va. 2002) (same), with T.H.E. Ins. Co. v. City of Alton, 227 F.3d 802, 805–06 (7th Cir. 2000) (certificate did not give rise to legal rights), W. Am. Ins. Co. v. Meridian Mut. Ins. Co., 583 N.W.2d 548, 550–51 (Mich. Ct. App. 1998) (per curiam) (same), and Bradley Real Estate Tr. v. Plummer & Rowe Ins. Agency, Inc., 609 A.2d 1233, 1234–35 (N.H. 1992) (same), and that Broderick belongs to the latter camp, see 794 P.2d at 265–67. We have not yet weighed in on this larger question, and because this case does not require it, we decline to do so today.

language “is reasonably susceptible on its face to more than one interpretation.” See Allen v. Pacheco, 71 P.3d 375, 378 (Colo. 2003). If the document is unambiguous, we will “neither rewrite [it] nor limit its effect by a strained construction.” Id.

¶40 The certificate here lists MDR as the “insured” and Pinnacol as an “insurer affording coverage.” See Appendix. Below this information, and within a box entitled “coverages,” the certificate lists two types of insurance policies: “general liability” and “workers compensation and employers liability.” Id. Several details, such as the policy number and dates of coverage, are included for each of the policies. Id. Further below still, and within a box entitled “certificate holder,” the certificate lists Alliance. Id. Finally, in a separate, adjacent box entitled “cancellation,” the certificate includes the statement central to this case:

SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE  
CANCELLED BEFORE THE EXPIRATION THEREOF, NOTICE WILL BE  
DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

Id.

¶41 We conclude this language is reasonably subject to only one interpretation and is therefore unambiguous. In its first clause, the provision refers to the cancellation of “ANY OF THE ABOVE DESCRIBED POLICIES.” This language clearly refers to the general liability and workers’ compensation liability policies referenced within the “coverages” box on the certificate. In its second clause, the provision states that, if one of those policies is cancelled, “NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.” Beginning at the end, “the policy,” when read

together with the first clause, refers to whichever of the two above-referenced policies has been cancelled, and “provisions” refers to the provisions of that policy.

¶42 This leaves us with the word “notice.” Again, we find no ambiguity. Aside from specifying that policy cancellation is the event for which notice will be given, the language of the cancellation provision leaves the word “notice” unqualified. Thus, while we agree with the majority’s observation that “[t]he cancellation provision does not specify to whom notice of cancellation must be given by Pinnacol,” Hoff, ¶ 35, we conclude that the parties consigned the entire question of notice, including to whom it must be given, to the provisions of the policy being cancelled.

¶43 Unlike the court of appeals, we do not believe that, “because Pinnacol was already required, by the terms of the policy, to give notice of termination to MDR,” our construction fails to “give reasonable meaning to . . . the certificate.” See id. at ¶ 37. This reasoning simply begs the question: to conclude that the certificate duplicates a notice obligation contained in the policy, one must necessarily assume that the certificate imposes a notice obligation that exists independent of the policy to begin with. We reject the premise and thus reject the conclusion. Likewise, we discern no tacit meaning from the proximity of the box identifying Alliance as the certificate holder to the box containing the cancellation provision.

¶44 Looking to the two “above described” policies available, the one whose cancellation is at issue in this case is MDR’s workers’ compensation policy. The relevant provisions of that policy, in turn, oblige Pinnacol to give notice of cancellation to MDR and stipulate that such notice must comply with certain timing and delivery

specifications. Nothing in these provisions states that notice will be provided to anyone other than MDR.

¶45 Because the plain language of the certificate promises only that notice will be delivered in accordance with the provisions of MDR's insurance policy, and because the provisions of that policy contain no promise to give notice to certificate holders, we conclude that Pinnacol was under no contractual obligation to notify Alliance when it cancelled MDR's policy.

¶46 We next consider whether, as the court of appeals majority determined, the WCA requires us to impose such an obligation anyway.

**b. Nothing in the WCA Requires Insurers to Provide Notice of  
Policy Cancellation to Certificate Holders**

¶47 No provision or public policy contained in the WCA required Pinnacol to notify Alliance if MDR's insurance policy was cancelled.

¶48 Our primary task in construing a statute is to effectuate the intent and purpose of the legislature. See Pulsifer v. Pueblo Prof'l Contractors, Inc., 161 P.3d 656, 658 (Colo. 2007). "We determine legislative intent primarily from the plain language of the statute." Id. We also look to statutory language to determine whether public policy affects our construction of an insurance provision. See Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039, 1045 (Colo. 2011); see also Rocky Mountain Hosp. & Med. Serv. v. Mariani, 916 P.2d 519, 525 (Colo. 1996) ("Statutes by their nature are the most reasonable and common sources for defining public policy."). In interpreting the WCA, we construe its language "so as to give effect and meaning to all its parts." Pulsifer,

161 P.3d at 658. If the statutory language is clear, we apply it as written. See Specialty Rests., 231 P.3d at 397. We construe the legislature’s failure to include particular language not as an oversight, but as a deliberate omission reflecting legislative intent. See id.

¶49 Applying these principles here, we note first that no WCA provision expressly requires that an insurer provide notice to certificate holders when the underlying insurance policy is cancelled. The only WCA provision that addresses notice of cancellation—section 8-44-110—states that a carrier of workers’ compensation insurance “shall notify any employer insured by the carrier . . . and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer’s insurance coverage.” § 8-44-110. The provision does not mention certificates of insurance or certificate holders. Id.

¶50 The ALJ determined, the Panel agreed, and Hoff essentially concedes that the terms of section 8-44-110 required only that Pinnacol notify MDR and Bradley when it cancelled MDR’s policy, and that Pinnacol did so. Hoff does not contend that Alliance was an “employer insured by the carrier,” and for good reason. Even if the term “employer” as used in section 8-44-110 included statutory employers like Alliance, neither applicable law nor the certificate rendered Alliance an “insured” for purposes of that section: Alliance never contracted with Pinnacol for insurance coverage, and neither Hoff nor the court of appeals goes so far as to assert that the certificate itself amounted to an insurance policy or contract of insurance. Cf. Certificate of Insurance,

Black's Law Dictionary (10th ed. 2014) (stating that a certificate of insurance is “a document acknowledging that an insurance policy has been written”).

¶51 Nonetheless, the majority below looked to other provisions of the WCA—namely, sections 8-41-402 and 8-41-404—and concluded based on these provisions that “by legislative mandate, certificates of insurance play a critical role in the workers’ compensation system” and that this role “would be wholly undermined if . . . notices of termination need not be provided to certificate holders.” Hoff, ¶ 40. Consequently, the majority reasoned that “Colorado’s public policy, as described in the Act, requires that courts give effect to the reasonable meaning and purpose of certificates,” which, to the majority, meant that it “must . . . construe the certificate as requiring notice to the certificate holder of termination of coverage.” Id. at ¶ 41.

¶52 We respectfully disagree. Examining sections 8-41-402 and 8-41-404 in the context of the WCA’s insurance and liability scheme, we find nothing that warrants imposing the notice requirement that the court of appeals imposed here. A brief journey through these provisions bears this out.

¶53 The “comprehensive insurance scheme” set forth in the WCA is designed to protect injured workers by ensuring the quick and efficient payment of benefits. See Kelly v. Mile Hi Single Ply, Inc., 890 P.2d 1161, 1163 (Colo. 1995); see also § 8-40-102(1). To that end, any “employer” subject to the Act must “secure compensation for all employees” by maintaining workers’ compensation insurance. § 8-44-101(1)(a)–(d). The WCA embraces a broad conception of the term “employer,” see Finlay v. Storage Tech. Corp., 764 P.2d 62, 64 (Colo. 1988); see also § 8-40-203 (defining “employer”), and

“contains several provisions rendering certain entities who are not ‘direct’ employers of injured persons ‘statutory employers’ within the meaning of the Act,” Krol v. CF&I Steel, 2013 COA 32, ¶ 25, 307 P.3d 1116, 1121.

¶54 Section 8-41-402 is one of these provisions. Section 8-41-402 governs repairs to real property and states that every owner of real property who contracts out work done on that property to “any contractor, subcontractor, or person who hires or uses employees in the doing of such work shall be deemed to be an employer under the [WCA].” § 8-41-402(1). Hoff is Hernandez’s statutory employer under this provision.

¶55 Section 8-41-402(1) further provides that such owner-employers “shall be liable” for workers’ compensation claims resulting from work-related injuries on their property and “shall insure and keep insured all liability” for workers’ compensation imposed under the Act. Id. To offset this financial responsibility, subsection (1) gives such owner-employers the affirmative right to recover the cost of workers’ compensation insurance from the “contractor, subcontractor, or person” that they hire. Id.<sup>7</sup>

¶56 But, as the majority recognized, see Hoff, ¶ 40, section 8-41-402(2) imposes a conditional limitation on such owner-employers’ obligation to pay compensation benefits. Specifically, it provides that, if the “contractor, subcontractor, or person doing

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<sup>7</sup> It is worth noting that this subsection also says the WCA does not apply to “the owner or occupant, or both, of residential real property which meets the definition of a ‘qualified residence’ under [the Internal Revenue Code], who contracts out any work done to the property . . . .” § 8-41-402(1). The applicable section of the Code, in turn, defines “qualified residence” as including a taxpayer’s principal residence. See 26 U.S.C. § 163(h)(4)(A)(i)(I) (2012). Thus, the qualified-residence exception effectively shields an ordinary homeowner from workers’ compensation liability arising from work done to the home in which he or she lives. This exception does not apply here because Hoff uses the house where Hernandez’s injuries occurred as a rental property.

or undertaking to do any work for an [owner-employer] . . . is also an employer in the doing of such work and . . . insures and keeps insured all liability for compensation,” then “neither said contractor, subcontractor, or person nor any employees or insurers thereof shall have any right of contribution or action of any kind” against the owner-employer. § 8-41-402(2) (emphases added).

¶57 Separately, section 8-41-404 addresses workers’ compensation insurance in the specific context of construction work. Section 8-41-404 states in part that “a person who contracts for the performance of construction work on a construction site shall either provide . . . workers’ compensation coverage for, or require proof of workers’ compensation coverage from, every person with whom he or she has a direct contract to perform construction work on the construction site.” § 8-41-404(1)(a) (emphases added). Hoff is “a person who contracts for the performance of construction work on a construction site” for purposes of this provision. See § 8-41-404(5)(a)-(b) (providing broad definitions of “construction site,” in paragraph (a), and “construction work,” in paragraph (b), that encompass the roofing work done at Hoff’s rental house).<sup>8</sup> Critical to the majority’s decision here, the provision defines “proof of workers’ compensation coverage” as including a certificate of insurance. See § 8-41-404(5)(c).

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<sup>8</sup> Like section 8-41-402, section 8-41-404 includes a “qualified residence” exception and therefore does not apply to a homeowner contracting to have work done to the home in which he or she lives. See § 8-41-404(1)(a), (4)(a)(I). But, as noted above, Hoff does not qualify for this exception. Moreover, section 8-41-404 also does not apply to an owner of real property who hires someone “specifically to do routine repair and maintenance” on that property. § 8-41-404(4)(a)(II). Here, the ALJ found that this exception does not apply to Hoff because the roof repair job was not “routine.” Hoff does not challenge this determination, and we therefore accept it for purposes of this appeal.

¶58 Unlike section 8-41-402, section 8-41-404 does not render the persons to whom it applies statutory employers or impose liability for injured workers' benefits. Compare § 8-41-402(1), with § 8-41-404. Rather, persons who fail to provide or obtain proof of insurance as required by section 8-41-404 may be subjected to the administrative fine provisions of section 8-43-409(1)(b) of the WCA. See § 8-41-404(3) ("A violation of subsection (1) of this section is punishable by an administrative fine imposed pursuant to section 8-43-409(1)(b).").<sup>9</sup>

¶59 Reading sections 8-41-402 and 8-41-404 together, the majority below determined that "the Act specifically recognizes certificates of insurance as a mechanism to protect an owner from precisely the types of liabilities [i.e., liability for workers' compensation benefits] imposed on Hoff in this case." Hoff, ¶ 42 (citing §§ 8-41-402, 8-41-404(5)(c)). But we see nothing in the Act that supports this statement.

¶60 Sections 8-41-402 and 8-41-404, though related, impose separate and distinct liabilities: the former imposes liability for workers' compensation benefits, § 8-41-402(1), and the latter imposes liability for administrative fines, § 8-41-404(3). It is only within the framework of section 8-41-404, however, that the legislature has carved out a role for certificates of insurance. As noted above, section 8-41-404 requires that the persons to whom it applies either provide, or obtain proof of, workers' compensation insurance, see § 8-41-404(1)(a), and specifies that a certificate qualifies as such proof, see

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<sup>9</sup> Section 8-43-409(1)(b) imposes fines of either a maximum of \$250, for an initial violation, or a minimum of \$250 and a maximum of \$500, for any subsequent violation, "[f]or every day that the employer fails or has failed to insure or to keep the insurance required by [the WCA]." See § 8-43-409(1)(b)(I)-(II).

§ 8-41-404(5)(c). It then immunizes persons who obtain proof of insurance from liability under its administrative fine provision. See § 8-41-404(1)(c).

¶61 By contrast, section 8-41-402 does not mention certificates or any other proof of insurance. Unlike section 8-41-404, section 8-41-402 does not offer the entities to which it applies the option of obtaining proof of insurance in lieu of supplying insurance. See § 8-41-402(1). Nor does it provide any safe harbor equivalent to section 8-41-404(1)(c). See § 8-41-402. Although it does immunize an owner-employer from contribution and other lawsuits when the entity it employs is insured “and keeps insured,” § 8-41-402(2) (emphasis added), nothing in the statute indicates that this other insurance negates the owner-employer’s independent obligation to secure insurance for itself or that any proof of this other insurance can insulate the owner-employer from liability in the event the other insurance lapses, see § 8-41-402.<sup>10</sup>

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<sup>10</sup> Although this interpretation could, in theory, lead some owner-employers to conclude that their safest bet would be to secure workers’ compensation insurance of their own, we do not see such a result as inevitable. For example, an owner-employer might instead choose to be more proactive in verifying that the coverage identified in a certificate remains in effect on the date work is to be performed. This the owner-employer can do with no trouble at all: at the legislature’s behest, the Division of Workers’ Compensation has created a searchable online database through which anyone can confirm that a given employer has insurance in effect on the date the search is conducted. See Colo. Dep’t of Labor & Emp’t, Insurance Coverage, <https://perma.cc/6FUK-RK22>; see also § 8-47-111(2) (“[T]he division shall develop a procedure for verifying whether or not all employers doing business in . . . Colorado comply with the [insurance] requirements of [the WCA].”). And even where an owner-employer opts to acquire insurance, section 8-41-402 expressly allows it to recover the cost of that insurance from the entity it hires. See § 8-41-402(1). Moreover, to the extent there may be circumstances in which both the owner-employer and its hired entity obtain insurance, we note that this consequence fully comports with the fundamental goal of the WCA: “to assure the quick and efficient delivery of . . . benefits to injured workers at a reasonable cost to employers, without the necessity of any

¶62 Thus, contrary to the court of appeals’ conclusion, nothing in section 8-41-402 or section 8-41-404 states, or even suggests, that the legislature intended for certificates of insurance to shield owner-employers from liability for workers’ compensation benefits. Because the clear language of these provisions, including the absence, in section 8-41-402, of any exception to an owner-employer’s statutory obligations, refutes the majority’s interpretation of them, we reject that interpretation. See Specialty Rests., 231 P.3d at 397.

¶63 Moreover, the role certificates play within section 8-41-404 is not undermined if insurers of the policies evidenced by the certificates do not notify certificate holders in the event those policies are cancelled. Section 8-41-404(1)(c) provides that, if a person who must secure or require proof of workers’ compensation insurance under section 8-41-404(1)(a) “exercises due diligence by . . . requiring proof of workers’ compensation insurance as required by this section,” then that person “shall not be liable” for the administrative fines imposed under section 8-41-404(3). § 8-41-404(1)(c). By its terms, this safe-harbor provision requires only that a person exercise due diligence by obtaining a certificate. See id. Nothing in the provision ties the availability of its

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litigation.” § 8-40-102(1). Not only does encouraging both statutory and direct employers to maintain coverage more adequately protect injured workers, it also ensures that those employers receive the primary benefit that the WCA is designed to give them—namely, immunity from common-law tort liability. See Curtiss v. GSX Corp. of Colo., 774 P.2d 873, 874–75 (Colo. 1989). Indeed, the legislature has expressly declared its belief that “it is in the best interests of the public to assure that all employers who fall under the provisions of [the WCA] have in effect current policies of insurance or self-insurance for workers’ compensation liability.” § 8-47-111(1) (emphasis added).

protections to the continued validity of the insurance policy underlying that certificate.  
Id.

¶64 In sum, we disagree with the majority below regarding the role certificates play under the WCA and find no support for its conclusion that “Colorado’s public policy, as described in the Act,” required it to construe the certificate here as mandating notice of policy cancellation to the certificate holder. Because no provision of the Act expressly imposes this requirement either, we conclude that the WCA did not require Pinnacol to notify Alliance when it cancelled MDR’s policy.

¶65 Requiring notice to all certificate holders may be sensible, but it is not our place to legislate what we perceive as a more sensible result. We cannot simply rewrite the statute. See Dove Valley Bus. Park Assocs., Ltd. v. Bd. of Cty. Comm’rs, 945 P.2d 395, 403 (Colo. 1997).

\* \* \*

¶66 Pinnacol was under no obligation to notify Alliance in the event MDR’s workers’ compensation insurance policy was cancelled. Because Pinnacol did not promise to provide notice, Hoff cannot establish the initial, promise element of her promissory estoppel claim, and her claim must fail. The court of appeals erred in concluding otherwise.

#### **IV. Conclusion**

¶67 Neither the terms of the certificate of insurance nor any provision or public policy contained in the WCA required Pinnacol to notify Alliance in the event MDR’s insurance policy was cancelled. Pinnacol therefore did not “promise” to provide such

notice, and Hoff's claim for promissory estoppel must fail for lack of the requisite promise element. For these reasons, we reverse the judgment of the court of appeals.

**JUSTICE GABRIEL** concurs.

**JUSTICE COATS** dissents, and **CHIEF JUSTICE RICE** and **JUSTICE EID** join in the dissent.



JUSTICE GABRIEL, concurring.

¶168 Because I believe that the majority has correctly set forth the applicable law and has reached the result dictated by that law, I concur in the majority's opinion. I write separately, however, to express my view that the result that I believe the law dictates here is arguably inequitable and warrants legislative action to clarify the purpose and effect of a certificate of insurance, as well as the rights and obligations of those who provide and those who obtain such certificates.

### I. Applicable Statutes

¶169 Like the majority, see maj. op. ¶¶ 47-64, I cannot say that the applicable statutes impose a duty on insurers to give notice of a policy's cancellation to certificate holders.

¶170 Section 8-44-110, C.R.S. (2015), requires every insurance carrier authorized to transact business in Colorado, including Pinnacol Assurance, to notify "any employer insured by the carrier or Pinnacol Assurance, and any agent or representative of such employer, if applicable, by certified mail of any cancellation of such employer's insurance coverage." I see nothing in the applicable definitions of "employer" to suggest to me that the term "employer" as used in this section includes a statutory employer like Hoff here. See § 8-40-203, C.R.S. (2015) (defining the term "employer" for purposes of the Workers' Compensation Act (the "Act")); see also § 8-40-302, C.R.S. (2015) (delineating the scope of the term "employer" under the Act).

¶171 Even if the term "employer" as used in section 8-44-110 did include statutory employers, however, neither applicable law nor the certificate of insurance at issue renders such an employer an "insured" for purposes of that section. The certificate of

insurance is not itself an insurance policy or contract of insurance. Rather, it is “[a] document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers.” Certificate of Insurance, Black’s Law Dictionary (10th ed. 2014).

¶72 Accordingly, in my view, the applicable statutes did not require that notice of cancellation be provided to the certificate holder in this case.

¶73 I am not persuaded otherwise by section 8-41-404, C.R.S. (2015). Subject to certain exceptions not pertinent here, section 8-41-404(1)(a) requires a person who contracts for the performance of construction work on a construction site either to provide workers’ compensation coverage for, or to require proof of workers’ compensation coverage from, every person with whom he or she has directly contracted to perform the construction work. Section 8-41-404(1)(c) then provides that any person who contracts for the performance of such work and who exercises due diligence by either providing workers’ compensation coverage or requiring proof of such coverage from every person with whom he or she has a direct contract “shall not be liable under subsection (3) of this section.” Section 8-41-404(3), in turn, provides for an administrative fine for violating subsection (1).

¶74 I see nothing in section 8-41-404 that renders a certificate holder an insured for purposes of the Act generally or section 8-44-110 in particular. To the contrary, section 8-41-404, on its face, makes clear that a certificate constitutes proof that someone else has obtained workers’ compensation coverage.

¶75 Notwithstanding the foregoing, I acknowledge that section 8-41-404 suggests the importance of certificates of insurance in this context, particularly given that those who contract for the performance of construction work often rely on such certificates and on the insurance coverage reflected thereon. As a result, it may well be sound public policy to require insurers to provide notice of an insurance policy's cancellation to those holding certificates of insurance concerning the subject insurance policy. Such a public policy decision, however, is for the legislature and not the courts to make.

¶76 Accordingly, I would respectfully encourage our General Assembly to consider the public policies implicated by this case, particularly with respect to the purpose and effect of a certificate of insurance and the rights and obligations of those who provide and those who obtain such certificates.

## **II. Certificate of Insurance**

¶77 Having determined that the applicable statutes did not require that notice of cancellation be provided to the certificate holder in this case, I must next consider whether the certificate itself required such notice. This question, in turn, requires me to assess first whether the disclaimers and exculpatory language contained in the certificate are void as against public policy and second whether the certificate is ambiguous.

¶78 The certificate at issue contains a disclaimer that states:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF

INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S)' AUTHORIZED REPRESENTATIVE OR PRODUCER AND THE CERTIFICATE HOLDER.

¶79 The certificate further states, "NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES."

¶80 Because I perceive nothing in the applicable statutes that imposes a duty on insurers to give notice of a policy's cancellation to certificate holders, I cannot say that those statutes render the above-quoted provisions, which merely explain the limits of the certificate, void as against public policy. Accordingly, I proceed to address whether the certificate at issue is ambiguous.

¶81 Whether a written contract is ambiguous is a question of law that we review de novo. Pub. Serv. Co. v. Meadow Island Ditch Co., 132 P.3d 333, 339 (Colo. 2006). "A contract is ambiguous when it is reasonably susceptible to more than one meaning." Id.

¶82 To determine whether a contractual provision is ambiguous, we examine the provision's language and construe that language in harmony with the plain and generally accepted meaning of the words employed. Ad Two, Inc. v. City & Cty. of Denver, 9 P.3d 373, 376 (Colo. 2000). We may also consider "extrinsic evidence regarding the meaning of the written terms, including evidence of local usage and of the circumstances surrounding the making of the contract," but in determining whether

a contract term is ambiguous, we may not consider “the parties’ extrinsic expressions of intent.” Pub. Serv. Co., 132 P.3d at 339.

¶83 Here, Hoff contends that the certificate is ambiguous because the language concerning the notice of cancellation is encompassed in a box including the identity of the certificate holder. She argues that the clear import of the location and language of the notice provision is that it is a message to the certificate holder directly. Her argument may be correct insofar as it goes, but it does not establish any ambiguity as to whether and when notice to the certificate holder is required, which is the issue before us.

¶84 Specifically, although I agree with Hoff that the juxtaposition of the identity of the certificate holder with the notice provision suggests that the notice referred to is notice due the certificate holder, nothing in the juxtaposition of these provisions suggests to me that notice must always be given to the certificate holder. To the contrary, the notice provision states that notice will be delivered “in accordance with the policy provisions,” and Hoff does not suggest any ambiguity as to the meaning of that phrase.

¶85 Accordingly, Hoff has not established that the certificate at issue is ambiguous.

### **III. Conclusion**

¶86 For these reasons, I respectfully concur in the majority’s opinion and the judgment of the court.

JUSTICE COATS, dissenting.

¶87 Because I disagree with the majority's construction of the controlling statutes and would, instead, largely affirm the judgment of the court of appeals, I respectfully dissent. Quite apart from the outcome of this particular case, however, I fear that the majority's myopic, and at various points in the analysis questionable, construction is likely to have unintended, and substantially deleterious, consequences for the protection of both workers and employers. I write separately, therefore, to identify what I consider to be the central flaw in the majority's reasoning and to emphasize the magnitude of its departure from the underlying philosophy of the workers' compensation scheme.

¶88 Unlike the majority, I believe the court of appeals was entirely correct in its assessment that "[t]he Act expressly contemplates that a person or entity in the chain of contract or work on a construction contract may obtain a certificate of workers' compensation insurance to protect itself from the types of liabilities at issue here." However, unlike the court of appeals, which clearly considered its hands tied by our half-century-old opinion in Chevron Oil Co. v. Industrial Commission, 456 P.2d 735 (Colo. 1969), and the structuring of Hoff's assignment of error to circumvent its subsequent interpretation by other panels of that court, and therefore felt compelled to articulate its holding in a roundabout way, in terms of a combination of promissory estoppel principles and the public policy expressed in the Act, I believe this court should cut through the circuitry and simply hold that the certificate issued by Pinnacle made Alliance an insured employer within the contemplation of section 8-44-110, C.R.S.

(2015), and that Pinnacol's failure to provide notice to Alliance as required by that statute therefore resulted in Pinnacol's continued coverage of the injured worker. I think it a relatively straightforward task to distinguish Chevron, which concerned a dispute among three different insurance companies over which would be liable to compensate for a worker's death and, as relevant here, merely stood for two peripheral propositions: first, that an administrative rule of the Industrial Commission could not modify the statutory scheme by adding a requirement to give prior notice of a cancellation to the Commission itself, and second, that in any event, the insurer was not a proper party to complain about non-compliance with that administrative rule, the purpose of which was for the protection of the claimant entitled to compensation. In light of its subsequent broad interpretation by the intermediate appellate court, see First Comp Ins. v. Indus. Claim Appeals Office, 252 P.3d 1221 (Colo. App. 2011), I consider it the duty of this court to clarify this holding of Chevron by express limitation.

¶89 As an aside, I applaud the majority for concluding, at least with regard to the workers' compensation statutes at issue here, that this court is not limited by any prior interpretation of the ICAO. I consider it counterproductive, however, to continue to mouth, as does the majority, confusing (if not deceptive) language to the effect that "courts nonetheless traditionally give deference to the Panel's reasonable interpretations of WCA provisions." Maj. op. ¶ 26. While no great harm can come of our showing deference, in the sense of a respectful consideration for the Commission's views, deference to the Panel's "reasonable interpretations" of WCA provisions implies actual acceptance of the Commission's choice among multiple reasonable

interpretations of ambiguous WCA statutes, more in the vein of modern federal administrative jurisprudence. See generally John H. Reese, Bursting the Chevron Bubble: Clarifying the Scope of Judicial Review in Troubled Times, 73 Fordham L. Rev. 1103 (2004). As we have indicated elsewhere, we have never adopted the federal administrative model, and it remains the obligation of the judiciary to interpret the statutes of this jurisdiction. Mile High Cab, Inc. v. Colo. Pub. Utilities Comm'n, 2013 CO 26, ¶ 12, 302 P.3d 241, 245-46.

¶90 The court of appeals' emphasis on the role given by the General Assembly to certificates of insurance in the workers' compensation scheme derives not only from the Act's specific provision for such certificates in the context of construction work but, more generally, from the fundamental compromise upon which workers' compensation was predicated. The statutory scheme was designed to grant an injured employee compensation from his or her employer without regard to negligence, and in return, the responsible employer would be granted immunity from common-law negligence liability. Frank M. Hall & Co. v. Newsom, 125 P.3d 444, 446 (Colo. 2005) (citing Finlay v. Storage Tech. Corp., 764 P.2d 62, 63 (Colo. 1988)). Our statutory scheme has also long provided an extra layer of protection for the employees of subcontractors by imposing, with some exceptions, employer liability not only on the subcontractors by whom these employees are directly employed, but also on the property owners or companies contracting out work to those subcontractors. Id. (citing San Isabel Elec. Ass'n, Inc. v. Bramer, 510 P.2d 438, 440 (Colo. 1973)). The central mechanism through which this

swift and certain compensation would become possible was to be statutorily required insurance, covering the liability statutorily imposed on each of these employers.

¶191 The scheme therefore imposes a duty on such “statutory employers” to insure and keep insured this broad statutorily created liability, permitting them even to recover the costs of such insurance from their subcontracting employers. By the same token, however, the scheme makes clear that neither subcontractors with employees of their own, who maintain insurance coverage for their employees as required by statute, nor their employees themselves have a right of contribution against their statutory employers. Unless the scheme intends the enrichment of workers’ compensation carriers by requiring that premiums be paid by statutory employers, notwithstanding existing adequate coverage by their subcontracting employers, and forcing subcontracting employers to bear not only the cost of their own coverage but also that of their statutory employers, it necessarily contemplates some means of establishing definitively whether the liability of persons or entities contracting or subcontracting with statutory employers remains adequately covered.

¶192 With regard to construction work in particular, where the phenomenon of subcontracting employers is virtually universal, the statutory scheme actually imposes an administrative fine upon any person who contracts for the performance of construction work and fails to either provide coverage himself or require proof of coverage by every person with whom he has a direct contract. Because the statute expressly exonerates from this administrative fine any person who contracts for the performance of construction work and requires proof of coverage by those with whom

he directly contracts, the majority concludes that proof of coverage has significance only in the context of administrative fines and plays no broader role with regard to the liability of statutory employers. By contrast, I believe proof of coverage provided by an insurance carrier to a statutory employer – a company or property owner who would be liable for injury or death to the employees of its contractors or subcontractors but for adequate coverage by those entities themselves – actually defines the scope of the carrier’s statutory obligation to provide notice before cancelling an insurance policy upon which that statutory employer’s liability is contingent.

¶93 Because the effectiveness of the Workers Compensation Act depends on the maintenance of adequate insurance coverage against the liability of employers for injuries to their employees, the statute requires notice to “any employer insured by the carrier or Pinnacol Assurance” before it will be permitted to cancel that employer’s coverage. See § 8-44-110. The majority accepts without reflection that in order to be an “employer insured by the carrier,” an employer must actually be in privity of contract with the carrier, but this gloss is certainly not implied by the term “insured” itself, and there is every reason to believe it was not intended by the legislature. The statutory phrase “any employer insured by” clearly refers to any employer whose liability for injury to his employees is insured against, rather than simply an employer who has insured his personal well-being. Where the statutory scheme creates multiple levels of liability, in the form of statutorily designated employers, all of whose liability for subcontractor employee injury is statutorily insured against by the policy of any subcontracting employer, the better reading of the phrase “any employer insured by the

carrier or Pinnacol Assurance” includes all of those statutory employers to whom the insurer has certified coverage against their statutorily imposed liability.

¶94 Apart from the majority’s failure to give any serious consideration to the meaning of the notice of cancellation provision, much less to examine it in light of the policy expressed by the scheme as a whole, I believe the majority’s cramped reading of the role that certificates or other proof of insurance play in the workers’ compensation scheme derives in part from its misunderstanding of the relationship between sections 8-41-402 and 404, C.R.S. (2015). Sections 401 and 402 treat of persons, companies, or corporations that lease or contract out any part of the work of their business, or that own any real property or improvements thereon and contract out any work done on that property. Section 404 deals with contracting for a particular kind of work—work on construction sites. Because a person who contracts for the performance of construction work on a construction site can (and almost certainly will) be a person, company, or corporation governed by section 401 or 402, the majority’s suggestion that the administrative fine imposed by section 404 is somehow unrelated to the liability imposed on statutory employers by section 402 is not simply too mechanical, but in fact untenable.

¶95 From section 404’s provision for a fine in the construction site context, and its express exoneration from that fine upon obtaining proof of coverage by a direct employer, the majority concludes not only that proof of coverage serves no purpose other than the exoneration of an employer from administrative fines, but also that the statutory scheme intends for separate coverage to be required of statutory employers,

even in the face of proof of adequate existing coverage by the direct employer. Not only does this interpretation (or more accurately imputation) imply a legislative intent to bestow a windfall on insurance carriers, in the form of double premiums for single coverage, but in addition, it effectively thwarts the fundamental goal of the scheme – to ensure coverage for all injured employees, in lieu of obliging them to seek recovery from uninsured employers. To construe the phrase in section 8-44-110, “shall notify any employer insured by the carrier or Pinnacol Assurance,” as including every employer to whom the insurer has provided proof that the employer’s statutory liability is insured against, would guarantee that each such statutory employer is given an opportunity to exercise its statutory right to renew coverage and pass on the cost, if it chooses, to the contractor, subcontractor, or person with whom it contracts.

¶96 Because our opinion in Chevron actually involved the impact of an administrative rule on the statutory scheme rather than construction of a cancellation provision of the Act, first appearing in 1989, see ch. 69, sec. 1, § 8-44-114, 1989 Colo. Sess. Laws 417, 418, I do not believe our holding in that case presents any impediment to this construction. To the extent it could be read to adversely affect the standing of a statutory employer to challenge the cancellation of a policy upon which its liability is contingent, I would expressly limit or overturn it. To construe the Workers Compensation Act so narrowly as to relieve Pinnacol of any obligation to notify Alliance of its intent to cancel, after certifying to Alliance sufficient coverage to protect it from claims of injury by its statutory employees, flies in the face of the fundamental compromise upon which the Act was predicated. While I therefore agree with the court

of appeals' understanding of the policy supporting the Act, because I believe that in the absence of notice to Alliance, the coverage by Pinnacol remained in existence, I see no need for a remand concerning reliance by Hoff.

¶97 I therefore respectfully dissent.

I am authorized to state that CHIEF JUSTICE RICE and JUSTICE EID join in this dissent.

SUPREME COURT, STATE OF COLORADO  ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE OFFICE OF THE PRESIDING DISCIPLINARY JUDGE 1300 BROADWAY, SUITE 250 DENVER, CO 80203	
<hr/> <b>Petitioner:</b> DONALD ARTHUR BRENNER  <b>Respondent:</b> THE PEOPLE OF THE STATE OF COLORADO	<hr/> Case Number: <b>15PDJ098</b>
<b>OPINION AND DECISION DENYING REINSTATEMENT UNDER C.R.C.P. 251.29(e)</b>	

In 2013, Donald Arthur Brenner (“Petitioner”) was suspended from the practice of law for one year and one day based on his misconduct in two client matters. In this reinstatement proceeding, Petitioner failed to present clear and convincing evidence that he is fit to practice law and has been rehabilitated, so his petition for reinstatement cannot be granted.

**I. PROCEDURAL HISTORY**

Petitioner, through his counsel, Craig L. Truman, filed a “Petition for Reinstatement Pursuant to C.R.C.P. 251.29(c)” on November 6, 2015. Kim E. Ikeler, Office of Attorney Regulation Counsel (“the People”), answered on November 10, 2015, opposing Petitioner’s reinstatement.

On March 16, 2016, a Hearing Board comprising bar member Darla Scranton Specht, citizen member Michael B. Lupton, and Presiding Disciplinary Judge William R. Lucero (“the PDJ”) held a reinstatement hearing under C.R.C.P. 251.29(d) and 251.18. Petitioner appeared with Truman, and Ikeler attended on behalf of the People. Petitioner testified at the hearing but no other witnesses were called, nor were any exhibits admitted.

**II. FINDINGS OF FACT**

The findings of fact here—aside from the sections describing Petitioner’s disciplinary history—are drawn from Petitioner’s testimony at the reinstatement hearing, where not otherwise noted.

Petitioner took the oath of admission and was admitted to the bar of the Colorado Supreme Court on October 16, 1974, under attorney registration number 05692. He is thus

subject to the jurisdiction of the Colorado Supreme Court and the Hearing Board in this reinstatement proceeding.<sup>1</sup>

### **Petitioner's Past Discipline**

Petitioner has an extensive history of prior discipline. Petitioner was suspended for one month in 1988 when he made misrepresentations to clients concerning the services he had performed on their cases, neglected his clients' interests to their detriment, attempted to charge excessive legal fees, and attempted to retain improperly charged fees.<sup>2</sup> In 1991, he was privately admonished three times: once for failing to supervise his staff to ensure that his client's instructions regarding communication were followed, a second time for improperly soliciting clients, and a third time for his unauthorized endorsement and negotiation of an insurance check issued to his client and a third party.<sup>3</sup> In 1993, Petitioner was suspended for one year and one day for verbally abusing and threatening his client, who was shackled in a holding cell, and for giving false testimony to a hearing board.<sup>4</sup> He also received a private admonition in 1994 for threatening a client in a written communication.<sup>5</sup> He was reinstated to the practice of law in 1998 after petitioning for reinstatement from his 1993 suspension.

In 2013, Petitioner entered into a conditional admission of misconduct in case number 13PDJ033, agreeing that he had engaged in misconduct in two client matters—while representing Kenneth Epperson and while representing Juan Carlos Garcia—warranting a suspension of one year and one day.

In 2005, Petitioner defended Epperson in his first-degree murder trial. Petitioner only met with Epperson for a few hours in the months before the trial. During one of Petitioner's visits with Epperson, the two had a verbal altercation. Epperson thereafter wrote a letter to the district court complaining about Petitioner's abusive behavior. Petitioner did not request a hearing before a different judge to determine whether a conflict of interest had arisen between him and Epperson. Instead, the conflict of interest issue was heard by the judge assigned to the case. At the hearing, Epperson testified that Petitioner had told him that he would get life in prison. Epperson also claimed that Petitioner had tried to provoke Epperson into hitting him.

Prior to Epperson's trial, Petitioner failed to file an amended motion for the appointment of an investigator, as directed by the district court, and failed to file motions in limine to exclude testimony that was harmful to Epperson. Petitioner also did not hire an investigator, interviewed only three of the prosecution's thirty witnesses, failed to interview the Colorado Bureau of Investigations agent about Epperson's defense of accidental discharge of a firearm, failed to hire a firearm expert witness, and neglected to interview the

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<sup>1</sup> See C.R.C.P. 251.1(b).

<sup>2</sup> Conditional Admission of Misconduct, case number 13PDJ033 (Aug. 28, 2013) at 9.

<sup>3</sup> Conditional Admission of Misconduct, case number 13PDJ033 (Aug. 28, 2013) at 9.

<sup>4</sup> Conditional Admission of Misconduct, case number 13PDJ033 (Aug. 28, 2013) at 9; see *People v. Brenner*, 852 P.2d 456, 458 (Colo. 1993).

<sup>5</sup> Conditional Admission of Misconduct, case number 13PDJ033 (Aug. 28, 2013) at 10.

prosecution's firearm expert witness. Without Epperson's permission, Petitioner also waived Epperson's right to a jury trial on the charge of possession of a firearm.

On April 12, 2005, Epperson's case proceeded to trial. During the trial, Petitioner did not adequately challenge the prosecution's evidence and called no witnesses other than Epperson. He also failed to request two jury instructions that might have benefitted Epperson. Epperson was found guilty on all counts and was sentenced to life in prison without parole. Through successor counsel, Epperson moved for a new trial based upon Petitioner's ineffective assistance of counsel. The district court ruled in Epperson's favor, finding that Petitioner had failed to adequately prepare for Epperson's trial and had represented Epperson in a manner that was below the standard of representation for defense counsel in a murder case.

In the Epperson matter, Petitioner's conduct violated Colo. RPC 1.1, which requires a lawyer to competently represent a client, and Colo. RPC 1.3, which requires a lawyer to act with reasonable diligence and promptness when representing a client. He also violated Colo. RPC 1.4(b), which requires a lawyer to explain a matter so as to permit the client to make informed decisions about the representation.

In 2010, Petitioner agreed to represent Garcia, who had been charged with unlawful sexual contact with an at-risk adult, a class-three felony, which included a sentence enhancement for Garcia's use of physical force upon the victim. This charge carried a possible indeterminate life sentence. In fall 2010, Garcia paid Petitioner \$8,000.00. On September 29, 2010, Petitioner appeared with Garcia for a preliminary hearing, where Petitioner waived the hearing and forfeited any opportunity to cross-examine prosecution witnesses.

Petitioner did not file any motions in Garcia's case because he anticipated that Garcia would enter a plea bargain. Petitioner also failed to obtain a psychosexual evaluation of Garcia, failed to hire an investigator, and failed to interview witnesses and the victim. During the pretrial conference on April 1, 2011, Petitioner stated that he was not going to call any witnesses and had no theory of defense. Garcia informed the court that he did not want to proceed to trial with Petitioner as his counsel. Petitioner then orally moved to withdraw while assuring the court that he was prepared for trial. Petitioner told the court that Garcia had been evasive, had not paid his attorney's fees, had lied to Petitioner, was a flight risk, was afraid of conviction, and perhaps had mental problems. But after speaking with Petitioner in the hall, Garcia told the court that he was willing to proceed with Petitioner as counsel.

During the jury trial on April 4, 2011, Petitioner's opening statement was brief—perhaps one minute long. The victim's testimony did not establish that Garcia used physical force to restrain her. Petitioner did not cross-examine the victim about Garcia's lack of physical force, however, and Petitioner called no witnesses. The prosecutor proposed a special verdict form that expanded the charge levied against Garcia to include his use of physical force, which was a material change, especially in light of the victim's testimony that Garcia used no physical force. Petitioner did not object to this instruction. The jury found

Garcia guilty of unlawful sexual contact with an at-risk adult and third-degree assault of an at-risk adult.

Garcia's successor counsel moved for a new trial based on Petitioner's ineffective assistance of counsel. The district court found that Petitioner's representation of Garcia was ineffective and granted Garcia a new trial.

In the Garcia case, Petitioner violated Colo. RPC 1.1, Colo. RPC 1.3, and Colo. RPC 1.6, which precludes a lawyer from revealing information relating to the representation of a client unless the client gives informed consent.

### **Petitioner's Personal and Professional Background**

Petitioner grew up in Highland Park, Illinois, and attended law school at the University of Kansas. He earned his law degree in 1973 and was admitted to the Colorado bar in 1974. After law school, Petitioner enlisted in the U.S. Army and was honorably discharged in 1978.

Petitioner then began working as an associate in a law firm specializing in appeals and criminal law. He was employed by the firm for only six months before his position was converted to that of an independent contractor because work "was slow." Petitioner remained an independent contractor there for the next six years. Thereafter, Petitioner went out on his own and shared an office with another lawyer. He focused his practice on criminal and labor law. After the office-share came to an end, Petitioner worked with another firm until his suspension from the practice of law in 1993. Once reinstated in 1998, Petitioner continued as a solo practitioner, practicing criminal and appellate law. He did not employ associate attorneys or staff but occasionally hired investigators for his criminal matters. He remained a solo practitioner until his 2013 suspension.

### **Petitioner's Testimony Regarding His Suspension**

When reflecting on his misconduct in the Garcia and Epperson cases, Petitioner stated that he knows he did not represent these clients well, and he does not dispute any of the facts in his 2013 stipulation. Part of the problem with their representations, he believes, was that he practiced law in isolation, which he feels precluded him from speaking with other attorneys about whether to take those cases. For instance, Petitioner said that Epperson was an eight-time convicted felon whom Petitioner never should have agreed to represent. Additionally, Petitioner said, he never should have worked with underfunded clients because they were unable to pay for all of the work needed to mount a successful defense.

With twenty-twenty hindsight, he knows that he should have been more competent in representing Garcia and Epperson, including by taking better notes and not agreeing in the first instance to take on these cases without assistance. He stated that although he prepared "like crazy" in the Garcia matter, including completing a trial outline and legal research, he had no control over his client. By way of example, Garcia refused to even meet with Petitioner at his office. Despite these difficulties, however, Petitioner realizes that he

never should have revealed client confidences to the court and instead should have advocated for Garcia. He admitted that he “messed up” in this case. He attested that looking back, he understands how he went wrong in these cases, and he assured the Hearing Board that similar conduct would not happen again.

### **Petitioner’s Activities Since His Suspension**

After Petitioner was suspended in 2013, he did some legal research work for other attorneys, though he provided no details about this work at the hearing. He claimed that it has been difficult to obtain other legal employment because he does not wish to reveal his suspension. From September 2013 through May 2015, Petitioner ran a radio show for Mile High Sports. Since retiring from this show, Petitioner has regularly volunteered with many organizations in the Denver area.<sup>6</sup> For instance, he volunteers at Semper Fi, where he works with disabled U.S. Marine veterans at a golf camp. As part of his duties there, he spends three days each summer on a golf course with the veterans, which he described as very intense and heartbreaking.

Petitioner also tutors children weekly for the Denver Bar Association’s (“DBA”) reading partners program. He currently tutors a third-grader and plans to continue his service with this organization indefinitely. After being reinstated to the practice of law, Petitioner desires to start an organization affiliated with the DBA that would partner children with retired attorneys to provide tutoring. This partnership would serve a great need, he believes.

Petitioner has been involved with politics throughout his career and is currently assisting a local district attorney and a state senator with their political campaigns. He would like to work on the forefront of these campaigns but is relegated to the background, which Petitioner believes is because his law license is suspended. A political advisor informed him that it could be detrimental to the candidates’ campaigns if the public learned that these candidates were affiliated with a suspended lawyer. As a result, Petitioner feels as if he is walking on eggshells.

### **Petitioner’s Testimony Regarding His Qualifications for Reinstatement**

Petitioner hopes to regain his law license because he does not want to be known as a suspended lawyer and because he wants to help the public. According to Petitioner, “you are not a popular guy when you are suspended.” He is fearful of telling potential employers and others about his suspension and is very concerned about his reputation in the legal community. Having such a mark on his record is akin to a scarlet letter, he said. Although it is important to Petitioner that he is known as a lawyer in good standing, he said, it is not important for him to practice law. He was adamant, in fact, that he will not take on criminal clients or practice litigation. He never wants to walk into a courtroom again, he said, not even county court. Petitioner said that he fears he would be disbarred if he did.

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<sup>6</sup> See also Petitioner’s Pet. for Reinstatement 2-3 (listing Petitioner’s volunteer work at various organizations). The People did not contest this evidence.

Petitioner testified that he has cured the deficiencies—lack of competence, organization, and diligence—that led to his 2013 suspension and is qualified to practice law again. He averred that his rehabilitation hinges on being aware of his limitations. For instance, he knows that he “messed up” in Garcia’s and Epperson’s cases and, in the future, he will not practice criminal law unless he is assisting another lawyer. Also supporting his rehabilitation, he attested, were the in-depth legal autopsies he performed with his personal counsel on his clients’ cases after his 2013 suspension. During that process, his counsel brought to his attention all of his shortcomings in Garcia’s and Epperson’s cases. As a result, he knows what he should have done to competently represent these clients.

Petitioner said that he has completed numerous continuing legal education (“CLE”) courses since his suspension, as listed in his petition for reinstatement.<sup>7</sup> Many of the CLEs included ethics credits. None, however, addressed trial practice, the Colorado rules of procedure, or criminal law. Taking CLE courses in these subject areas would be futile, he said, because he is not going to practice law.

Despite earning numerous CLE credits during his suspension, Petitioner admitted that he is not fit to practice criminal law or to litigate. He argues, however, that his lack of fitness in these areas should not preclude his reinstatement because he vows to never again practice criminal law or to litigate. Criminal clients can “turn on you,” he said, and he does not want to give them the opportunity to do so. During his long career as a solo practitioner, he said, he must have gotten “jaded” without realizing it, and he does not trust himself to meet alone with a client in a criminal matter. Nor does he want to practice litigation because it would be a “lose-lose situation.” He truly believes, however, that no client would want to retain him because he has been suspended three times.

After being reinstated in 1998, Petitioner did return to practicing criminal law because he loved it, he said. Unlike then, he does not now see himself returning to the legal profession. He assured the Hearing Board that he no longer needs to generate an income from a law practice, as he received a substantial inheritance from his parents. In fact, he can live out his life without ever working again. His current health also limits his ability to practice law, he said. He has prostate issues, diabetes, dental problems, and hearing loss. These issues would preclude him from sitting through lengthy trials. Given his age, he stated, he can no longer withstand the rigors of a criminal or litigation practice.

Hypothetically speaking, if he were to get an “itch” to practice law again, he believes he could satisfy it by volunteering for a judge or for the American Civil Liberties Union (“ACLU”), conducting legal research, working on specific projects, or reviewing cases. If he were to represent clients again, he would hire a “task force” for each case, including a practice monitor and a mentor, whom he could compensate from his own savings. He also vowed never to be the lead attorney on any case.

Petitioner testified that, in essence, he is fit to practice law so long as certain conditions are in place. Petitioner is amenable to the Hearing Board placing formal

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<sup>7</sup> See Petitioner’s Pet. for Reinstatement 3 (outlining Petitioner’s CLE credits).

conditions on his reinstatement, as he would “do anything to get reinstated.” In fact, he testified, conditions placed upon his reinstatement would ensure protection of the public.

### **III. LEGAL ANALYSIS**

To be reinstated to the Colorado bar, an attorney who has been suspended for longer than one year must prove by clear and convincing evidence that the attorney has complied with applicable disciplinary orders and rules, is fit to practice law, and has been rehabilitated.<sup>8</sup> Failure to prove even one requirement is fatal to a petitioner’s reinstatement case.<sup>9</sup>

#### **Compliance with Disciplinary Orders and Rules**

An attorney who petitions for reinstatement must show compliance with disciplinary orders and rules. The People do not contest that Petitioner has complied with C.R.C.P. 251.28 and 251.29. They also agree that he has obeyed the PDJ’s order of discipline in case number 13PDJ033 and paid all costs associated with that matter. Thus, we find that Petitioner has complied with all disciplinary orders and rules.

#### **Fitness to Practice Law**

The People do contest, however, that Petitioner is competent to practice law. Petitioner, in part, agrees. He admitted at the hearing that he has not demonstrated his competence to handle criminal or litigation matters. But his lack of competence is of no moment, according to Petitioner, because he will not practice law if reinstated. To ensure his competence and to protect the public, however, Petitioner suggests that the Hearing Board place an exoskeleton of conditions around him in the event that he represents clients in the future, including requiring a practice monitor and a mentor.

We agree with the People and find that Petitioner has not proved by clear and convincing evidence his fitness to practice law, even with conditions placed upon his reinstatement. Petitioner must affirmatively prove his fitness to practice law and must satisfy us that his reinstatement will not endanger the public. Although he claims to have completed a number of CLE courses, none of those courses addressed the deficiencies leading to his suspension. Further, he did not present testimony, affidavits, or letters from colleagues or supervisors to show that his volunteer positions or past employment have built on and developed legal skills, including competence and diligence.

Most important, Petitioner himself testified that he is not competent to resume the practice of law without the assistance of a team of lawyers and staff, and he thus asked the Hearing Board to place conditions upon his reinstatement. Although we are permitted to condition a lawyer’s reinstatement upon compliance with any additional orders we deem appropriate,<sup>10</sup> the rules do not contemplate that an attorney can be rendered fit to practice

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<sup>8</sup> C.R.C.P. 251.29(b).

<sup>9</sup> See *In re Price*, 18 P.3d 185, 189 (Colo. 2001).

<sup>10</sup> See C.R.C.P. 251.29(e).

law by conditions placed upon him or her after reinstatement. Rather, C.R.C.P. 251.29(b) specifically provides that a petitioner must prove clearly and convincingly that he or she “is fit to practice law.”<sup>11</sup> Thus, we consider it a prerequisite to an attorney’s reinstatement that the attorney is already fit to practice law. Any conditions placed upon an attorney’s reinstatement are merely safeguards to ensure that an attorney continues to remain fit to practice.<sup>12</sup>

In short, the evidence Petitioner presented falls short of demonstrating that he possesses the competence or diligence necessary to practice law at this time. Our finding on this element renders Petitioner ineligible for reinstatement.<sup>13</sup> But we also address the deficiencies in his presentation concerning rehabilitation—deficiencies that leave us no choice but to deny his petition for reinstatement.

### Rehabilitation

The Hearing Board cannot grant reinstatement simply upon a showing that Petitioner has engaged in proper conduct or refrained from further misconduct. Instead, we must look to whether he has experienced an overwhelming change in his state of mind such that he could be said to have undergone a regeneration.<sup>14</sup> In this analysis, we are guided by the leading case of *People v. Klein*, which enumerates several criteria for evaluating whether Petitioner has been rehabilitated.<sup>15</sup> These factors are: character; conduct since the imposition of the original discipline; professional competence; candor and sincerity; recommendations of other witnesses; present business pursuits; community service and personal aspects of Petitioner’s life; and recognition of the seriousness of his previous misconduct.<sup>16</sup> The *Klein* criteria provide a framework to assess the likelihood that Petitioner will repeat his prior misconduct.

We first examine the factors of Petitioner’s present business pursuits and professional competence. If reinstated, Petitioner anticipates that he will continue to assist political candidates with campaigns and will work with the DBA to start a tutoring program

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<sup>11</sup> Emphasis added.

<sup>12</sup> See C.R.C.P. 251.29(b), (c)(3), (c)(5); *In re Sather*, 3 P.3d 403, 417 (Colo. 2000) (“Because Sather’s disciplinary record reflects a history of inappropriate conduct with regard to fees, Sather should demonstrate his fitness to practice before being reinstated.”).

<sup>13</sup> *Price*, 18 P.3d at 189 (“Because the lawyer seeking reinstatement must prove that all three factors exist, a failure of proof on any one factor is fatal to the lawyer’s reinstatement.”).

<sup>14</sup> See *In re Cantrell*, 785 P.2d 312, 313 (Okla. 1989); *In re Sharpe*, 499 P.2d 406, 409 (Okla. 1972).

<sup>15</sup> 756 P.2d 1013, 1015-16 (Colo. 1988) (interpreting language of C.R.C.P. 241.22, which embodied an earlier version of the rule governing reinstatement to the bar).

<sup>16</sup> *Id.* at 1016. We note that the *Klein* decision relies upon an earlier version of the *Lawyers’ Manual on Professional Conduct* (ABA/BNA) 101:3005, which listed the above factors for assessing the rehabilitation of lawyers seeking reinstatement. The current version of the manual sets forth a number of other factors to consider when evaluating a lawyer’s rehabilitation and fitness: the seriousness of the original offense, conduct since being disbarred or suspended, acceptance of responsibility, remorse, how much time has elapsed, restitution for any financial injury, maintenance of requisite legal abilities, and the circumstances of the original misconduct, including the same mitigating factors that were considered the first time around. *Id.* at 101:3013. While some of these newly articulated factors are encompassed in our analysis, we do not explicitly rely on them to establish a framework for our decision.

pairing retired lawyers and students. He also might like to pursue a position with a judge or with the ACLU. Although he was adamant about not wanting to practice law if reinstated, he did not foreclose the possibility of acting as co-counsel or working with a team of lawyers while representing clients. While we adjudge Petitioner to be honest about his plan not to practice law in the foreseeable future, we have no mechanism—save for denial of his petition for reinstatement—to ensure that he does not practice law. Quite possibly he may later wish to begin representing clients, despite his declarations to the contrary, and we do not have confidence that the public would be protected should he decide to travel down this path. As noted above, we are not satisfied that Petitioner has maintained his professional competence during his suspension or that he is fit to practice law going forward, as he has completed very little work within the legal profession since being suspended. Additionally, his post-suspension work, including hosting a radio show and volunteer work, did not appear to permit Petitioner to adequately address his deficits. While he offered testimony about his volunteering with Semper Fi and the DBA reading partners program, he did not describe his duties or tasks or how he has strengthened his diligence or competence to practice law through this work. Further, he offered no testimony from his supervisors at any of the organizations where he volunteers, which might have lent support to Petitioner’s claim of rehabilitation.

We turn next to Petitioner’s personal life, community service, and conduct since his suspension. Petitioner’s testimony about these factors demonstrates some progress toward rehabilitation. Although Petitioner discussed very little about his personal life, his active volunteering during his suspension appears to give him opportunities to contribute to the community and make a positive impact both on himself and on those whom he serves, and we commend him for making these valuable contributions.

Last, we consider together the factors of Petitioner’s character, his candor and sincerity, and his recognition of the seriousness of his misconduct. Our analysis of Petitioner’s character is directed toward determining whether he has addressed his shortcomings, since the imposition of discipline is necessarily predicated upon a finding of some shortcoming, whether it be a personal deficit, professional deficit, or environmental challenge.<sup>17</sup>

In Petitioner’s case, his misconduct stemmed from certain professional deficits—namely, incompetence and lack of diligence while representing clients. Petitioner presented little evidence demonstrating that these professional deficits have been corrected during his suspension, nor did he offer any character witnesses to testify on his behalf. He purports to be rehabilitated because he is aware of the mistakes he made in the Garcia and Epperson cases. He testified that he has learned the importance of competence and diligence after thoroughly reviewing his past case files, but he did not offer any evidence to corroborate his testimony. While he assures us that his misconduct will not reoccur, he relies for support not so much on a change in his character but rather on his decision not to resume the practice of law. That Petitioner looks toward this decision as a deterrent against future misconduct

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<sup>17</sup> See *Tardiff v. State Bar*, 612 P.2d 919, 923 (Cal. 1980) (considering a petitioner’s character in light of the shortcomings that resulted in the imposition of discipline).

gives us little comfort that, should he again feel the “itch” to practice law, he could conform his conduct to the Rules of Professional Conduct and could diligently and competently represent clients.

We do, however, appreciate Petitioner’s candid ruminations about his misconduct and his inability to continue practicing criminal law or litigation. Petitioner was very honest about what he had done and about his limitations going forward. His comments reflect positively on his candor and sincerity, and we find that he has accepted responsibility for his misconduct.

Despite some evidence showing progress toward rehabilitation, the Hearing Board concludes that Petitioner has not proved his full rehabilitation by clear and convincing evidence. We do not see a regeneration of his character or a notable difference in his fitness to practice law. Petitioner appears to have no desire to resume his criminal or litigation practice, but we fear that he may eventually choose to return to this line of work if given the opportunity. We have no confidence that he could diligently and competently represent his clients or that he would be unlikely to repeat his past misconduct if he resumed such work.

#### IV. CONCLUSION

The Hearing Board finds that, taken as a whole, Petitioner has failed to satisfy by clear and convincing evidence his burden of showing that he is fit to practice and that he has undergone a genuine change in character that will ensure protection of the public.

#### V. ORDER

1. The Hearing Board **DENIES** Petitioner’s “Petition for Reinstatement Pursuant to C.R.C.P. 251.29.” Petitioner **DONALD ARTHUR BRENNER**, attorney registration number **05692**, **SHALL NOT BE REINSTATED** to the practice of law.
2. Under C.R.C.P. 251.29(i), Petitioner **SHALL** pay the costs of this proceeding. Petitioner has paid the People a \$500.00 cost deposit. The People **SHALL** submit a statement of costs **on or before May 12, 2016**. Petitioner **MUST** file his response to the People’s statement of costs, if any, **within seven days thereafter**. The PDJ will then issue an order establishing the amount of costs to be paid or refunded and a deadline for the payment or refund.
3. Petitioner **MUST** file any posthearing motion with the Hearing Board **on or before May 19, 2016**. Any response thereto **MUST** be filed **within seven days**.
4. Petitioner has the right to appeal this decision under C.R.C.P. 251.27.
5. Petitioner **SHALL NOT** petition for reinstatement within two years of the date of this order.<sup>18</sup>

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<sup>18</sup> C.R.C.P. 251.29(g).

DATED THIS 28<sup>th</sup> DAY OF APRIL, 2016.

*Originally signed*

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WILLIAM R. LUCERO  
PRESIDING DISCIPLINARY JUDGE

*Originally signed*

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MICHAEL B. LUPTON  
HEARING BOARD MEMBER

*Originally signed*

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DARLA SCRANTON SPECHT  
HEARING BOARD MEMBER

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