

BROWN BAG SEMINAR

Thursday, August 15, 2013

Seminar will be by audio file sent by email only

1 CLE (including .4 ethics)

Presented by

Craig Eley

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

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Free

This outline covers ICAP and appellate decisions issued from
July 12, 2013 through August 9, 2013

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INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-805-955-01

IN THE MATTER OF THE CLAIM OF

SAHAD ALLARAKHIA,

Claimant,

v.

FINAL ORDER

KAISER FOUNDATION HEALTH
PLAN,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Felter (ALJ) dated February 11, 2013, that determined the claimant was permanently and totally disabled and denied the respondent's affirmative defense that the claimant was capable of rehabilitation pursuant to §8-42-111(3), C.R.S. We affirm the ALJ's order.

A hearing was held on the issue of permanent total disability and whether the claimant was capable of rehabilitation pursuant to §8-42-111(3), C.R.S. After hearing the ALJ entered factual findings that for purposes of review can be summarized as follows. The claimant sustained an admitted injury to his cervical spine in September 15, 2009. The claimant underwent two surgeries as a result of this injury. The claimant was placed at maximum medical improvement (MMI) by Dr. Bachman for the physical injuries, on May 15, 2011. Dr. Bachman indicated that the claimant was unable to work because of severe pain and heavy narcotic use. On April 3, 2012, Dr. Furmansky placed the claimant at MMI for his psychiatric condition and concluded that the claimant sustained a 23 percent rating for psychological impairment.

The respondent filed a final admission of liability dated August 24, 2012, admitting for the MMI date and permanent impairment ratings from the treating physicians. The respondent also admitted for maintenance medical benefits.

The respondent subsequently retained Dr. Stieg to review the claimant's medical file. In Dr. Stieg's opinion the claimant was not permanently and totally disabled at this point and he recommended that the claimant undergo a vigorous multidisciplinary pain program. According to Dr. Stieg, the first step for the claimant is to get an assessment, including psychological testing from a pain psychologist, and then, if the assessment indicates it is appropriate, consideration should be given to a multidisciplinary pain management program. The respondent offered Dr. Stieg's recommendations as a plan of rehabilitation for the claimant to obtain a wage earning job. The ALJ rejected Dr. Stieg's opinions as not credible noting that the recommended assessments had not been performed which would indicate whether or not the claimant was actually capable of rehabilitation. Authorized treating physician, Dr. Kawasaki, was asked to review Dr. Stieg's plan. Although Dr. Kawasaki indicated that he agreed with Dr. Stieg's plan he added that he was making the recommendation "with hesitation because it was likely [that the Claimant had a] very poor prognosis..."

At hearing the respondent presented the testimony of vocational rehabilitation counselor, William Hartwick, who testified that the recommendations of Dr. Stieg concerning a successful completion of his pain clinic will make the claimant employable. In his order, however, the ALJ notes that Mr. Hartwick did not conduct an interview of the claimant nor take any steps to determine the employability of the claimant because the claimant had not been evaluated by a pain psychologist or treated under the comprehensive pain management program as outlined in Dr. Stieg's report. Mr. Hartwick conceded at hearing that it was speculation at this point to determine whether the treatment plan suggested by Dr. Stieg would increase the claimant's function such that he could return to work to earn a wage. In contrast, vocational rehabilitation counselor, Gail Pickett, testified that based on her assessment of the claimant, as well as the physician's reports, the claimant is not capable of rehabilitation to a wage earning job. The ALJ found Ms. Pickett's opinion more credible than that of Mr. Hartwick.

The ALJ ruled in the "nature of a motion for directed verdict," that the respondent was unable to show that the claimant was capable of rehabilitation. The ALJ went on to find the claimant permanently and totally disabled and awarded benefits.

On appeal the respondent does not dispute the ALJ's finding that the claimant is permanently and totally disabled. Instead, the respondent renews the contention that the claimant is precluded from receiving permanent total disability benefits under the provisions of §8-42-111(3), C.R.S., and that the ALJ erred in his determination that the claimant is not capable of rehabilitation. The respondent specifically contends that the ALJ misapplied §8-42-111(3), C.R.S., by improperly interpreting the "capable of rehabilitation" requirement to require a guaranty of employability rather than a determination of the claimant's capability to go through a rehabilitation program that

should lead to employability. We disagree with the respondent's reading of the order. As we understand the ALJ's order he determined that the prospect of the claimant even being a candidate for the rehabilitation plan was speculative because the testing recommended by Dr. Stieg that was necessary to determine whether the claimant could benefit from such a program had not yet been completed and therefore, the respondent failed to show that the claimant was capable of rehabilitation. We perceive no reversible error.

Section 8-40-201(16.5)(a), C.R.S., defines permanent total disability as the claimant's inability "to earn any wages in the same or other employment." Under the statute the claimant carries the burden of proof to establish permanent total disability. In determining whether the claimant has sustained his burden of proof, the ALJ may consider a number of "human factors." *Christie v. Coors Transportation Co.*, 933 P.2d 1330 (Colo. 1997). These factors include the claimant's physical condition, mental ability, age, employment history, education and the "availability of work" the claimant can perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550 (Colo. 1998). The overall objective of this standard is to determine whether, in view of all of these factors, employment is "reasonably available to the claimant under his particular circumstances." *Id.*

Section 8-42-111(3), C.R.S., provides that a "disabled employee capable of rehabilitation which would enable the employee to earn any wages" is not entitled to permanent total disability benefits if the employee refuses an "offer of vocational rehabilitation paid for by the employer." The panel has previously held this statute constitutes an affirmative defense to a claim for permanent total disability benefits and is not applicable unless the claimant has established a *prima facie* case of permanent total disability. *Alvarez v. Amcor Precast*, W.C. No. 4-510-350 (December 19, 2003). The burden then shifts to the respondent to prove the claimant is "capable of rehabilitation," and that the respondent has offered vocational services which, if successful, will enable the claimant to earn wages." *Alvarez v. Amcor Precast, supra*; *Robles v. Colorado Museum of Natural History*, W.C. No. 4-205-358 (August 3, 2000).

Whether a claimant is capable of rehabilitation within the meaning of §8-42-111(3), is one of fact for resolution by the ALJ. *See Lobb v. Industrial Claim Appeals Office*, 948 P.2d 115 (Colo. App. 1997). Therefore, we must uphold the ALJ's order if supported by substantial evidence. Section 8-43-301(8), C.R.S. Under the substantial evidence standard, we must defer to the ALJ's credibility determinations, unless the testimony the ALJ credited is so rebutted by hard, certain evidence, that as a matter of law the ALJ erred in crediting the testimony. *Halliburton Services v. Miller*, 720 P.2d 571 (Colo. 1986). Moreover, the ALJ's findings may be based on plausible inferences drawn from circumstantial evidence. *Weld County School District RE-12 v. Bymer, supra.*

Here, the ALJ made a factual determination that the respondent failed to prove the affirmative defense. This determination is amply supported by evidence that the claimant was not capable of rehabilitation. As the ALJ points out, the testing recommended by Dr. Stieg to make the initial determination whether the claimant was even a candidate for the pain program had not been performed. Further, the ALJ's finding is supported by Dr. Kawasaki's report that he did not believe that rehabilitation was likely to succeed. (Respondent Exhibit B at 23). Finally, Ms. Pickett unequivocally testified that in her opinion the claimant was not capable of rehabilitation and Mr. Hartwick conceded that it was premature to testify that the claimant was capable of rehabilitation at this point. (Tr. at 44 and 101).

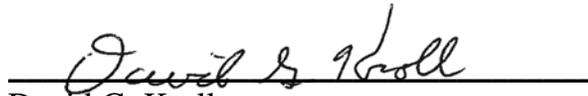
In our view, the ALJ properly evaluated whether the claimant was capable of rehabilitation and his findings are supported by the evidence. Consequently, we are not persuaded by the respondent's arguments and decline to disturb the ALJ's order on review. Section 8-43-301(8), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order dated February 11, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

SAHAD ALLARAKHIA

W. C. No. 4-805-955-01

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CERTIFICATE OF MAILING

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

_____ 8/7/2013 _____ by _____ RP _____ .

SAHAD ALLARAKHIA, 6551 HARLAN STREET, ARVADA, CO, 80003 (Claimant)
KAISER FOUNDATION HEALTH PLAN, Attn: MELANIE CHAVEZ, 10065 E HARVARD
AVE., SUITE 400, DENVER, CO, 80231 (Employer)
HILLYARD, WAHLBERG, KUDLA, SLOANE & WOODRUFF, LLP, Attn: PENELOPE L.
CLOR, ESQ., 4601 DTC BLVD., SUITE 950, DENVER, CO, 80237-2575 (For Claimant)
SEDGWICK CMS, Attn: JASON BOCK, P O BOX 14493, LEXINGTON, KY, 40512-4493
(Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-842-938-03

IN THE MATTER OF THE CLAIM OF

PAUL BARELA,

Claimant,

v.

FINAL ORDER

CMHIP,

Employer,

and

SELF-INSURED,

Insurer,
Respondent.

The respondent seeks review of an order of Administrative Law Judge Walsh (ALJ) dated March 4, 2013, that ordered the respondent to pay permanent partial disability benefits based on a whole person impairment rating. We affirm the order in part, and set aside in part and remand for further proceedings and a new order.

A hearing was held the issue of permanent partial disability, maintenance medical benefits, change of physician and attorney fees. On October 26, 2010, the claimant sustained an admitted injury to his left shoulder during a physical restraint situation while he was working as a psychiatric technician for the respondent. The claimant underwent surgery on December 31, 2010. After the surgery the claimant was recovering at home and on January 18, 2011, went outside to get the newspaper and when he returned to the house he tripped over the entryway and fell. After this fall the claimant continued to complain of shoulder pain and was referred for a second MRI which showed a complete tear of the previously surgically repaired tendon. The claimant underwent a second surgery on May 10, 2011.

The claimant was placed at maximum medical improvement (MMI) after the second surgery and given a 20 percent scheduled rating by Dr. Nanes on October 13, 2011. The respondent filed a final admission of liability admitting for the MMI date and scheduled rating. The claimant requested a Division Independent Medical Examination (DIME) which was performed by Dr. DiNapoli. The DIME physician agreed with the MMI date and increased the claimant's left upper extremity rating to 22 percent. Thirty nine days after the Division of Workers' Compensation mailed a notice of completion, the respondent filed a final admission of liability (FAL) consistent with the DIME

physician's report. The claimant filed a timely application for hearing on the issue of permanent partial disability benefits seeking a conversion to a whole person impairment. The application for hearing also listed permanent total disability benefits, medical benefits, authorized provider, reasonably necessary medical benefits, average weekly wage, maintenance medical benefits and mileage. In response to the application for hearing in the section for "Other issues to be heard" the respondent listed "1. Challenge to DIME: causation and apportionment; rating of impairment. 2. Medical causation (subsequent intervening cause) 3. Apportionment of disability 4. payment of attorney fees pursuant to §8-43-211(2)(d), C.R.S."

The hearing went forward on the issue of permanent partial disability, maintenance medical benefits, change of physician and attorney fees. In the order, the ALJ determined because the respondent filed a final admission of liability admitting for the DIME findings, pursuant to §8-42-107.2(4), C.R.S. he lacked jurisdiction to address the respondent's issues endorsed on the response to application for hearing of overcoming the DIME's finding of causation and apportionment of permanent partial disability benefits. The ALJ further determined that by listing these issues in the response to application for hearing, the respondent raised unripe issues subjecting them to attorney fees pursuant to §8-43-211(2)(d), C.R.S. The ALJ gave the claimant 30 days from the date of the order to submit an affidavit of attorney fees and costs.

The ALJ went on to conclude that the claimant had proven by a preponderance of the evidence that the shoulder rating should be converted to a whole person rating because the claimant had sustained functional impairment outside the schedule of disabilities. The ALJ also denied the claimant's request for change of physician and the respondent's request for attorney fees for the claimant listing permanent total disability as an unripe issue. The ALJ also issued contradictory findings and conclusions relating to maintenance medical benefits.

On appeal, the respondent contends that the ALJ erred by not addressing the issue of overcoming the DIME opinion on causation and apportionment. The respondent further alleges that the ALJ's determination that the claimant sustained a whole person impairment is not supported by substantial evidence. Finally, the respondent contends that the ALJ erred in denying the request for attorney fees for the claimant's endorsement of permanent total disability benefits. Because we agree with the respondent's argument that the ALJ erred in not addressing the issues endorsed in the response for application for hearing, we set aside the ALJ's award of PPD and remand the matter for further proceedings and a new order.

I.

As stated by the ALJ, the Court of Appeals has held that the requirements of §8-42-107.2(4), C.R.S. are jurisdictional and a respondent is bound by a DIME physician's report if they fail to contest the findings. *Leprino Foods Inc. v. Industrial Claim Appeals Office*, 134 P.3d 475 (Colo. App. 2005). Moreover, as a general rule, once an employer admits liability, they are bound by that admission and must pay benefits accordingly. Section 8-43-203(2)(d), C.R.S.; *see, e.g., Cibola Construction v. Industrial Claim Appeals Office*, 971 P.2d 666 (Colo. App. 1998)(employer admitting liability bound by admission and must pay, accordingly). Issues admitted to in a filed FAL are closed unless the claimant timely objects. Section 8-43-203(2)(b)(II)(A), C.R.S.

In this case, however, the claimant objected to the respondent's final admission of liability and filed an application for hearing on the issue of permanent partial disability. As we previously have recognized in *Franco v. Denver Public Schools*, W.C. No. 4-818-579 (April 23, 2013), a respondent may controvert its own admission of liability by timely applying for a hearing or, as here, filing a response to the application for hearing. *See Id.*; *Bauer v. Boulder County*, W.C. No. 4-020-145, (March 22, 1993). The court of appeals in *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990), held that an admission of liability may be contested by either party, and that the “determination of the matter thus placed in issue is subject to determination by the ALJ at the adversary hearing.” *Id.* at 253. The court further stated that the admission is binding only until the controverted issue is determined and the ALJ issues an order. *See Pacesetter v. Collett*, 33 P.3d 1230 (Colo. App. 2001); *see also Rodriguez v. Industrial Claim Appeals Office*, 2012 COA 139.

The claimant here placed permanent partial disability at issue for hearing and, therefore, the respondent was free to challenge the extent of the causal relationship between the permanent impairment and the upper extremity. Section 8-42-107(1)(a) and (2), C.R.S.; *See Public Service Company of Colorado v. Industrial Claim Appeals Office*, 40 P.3d 68 (Colo. App. 2001); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998)(Causation is an inherent part of the rating process). Thus, a claim for permanent partial disability benefits requires the ALJ to determine whether a DIME physician's opinions concern “causation” or “apportionment.” *See Saenz-Rico v. Yellow Freight System Inc.*, W.C. No. 4-320-928 (November 1, 2001); *Nichols v. Denver Publishing Company*, W.C. No. 4-248-693 (September 21, 2000); *Cudo v. Blue Mountain Energy Inc.*, W.C. No. 4-375-278 (October 29, 1999).

In our view, the ALJ in this case erred in his determination that he did not have jurisdiction to address the issues of causation and apportionment listed in the response for application for hearing. The ALJ's award of permanent partial disability must, therefore,

be set aside and the matter remanded for consideration of the respondent's arguments. Section 8-43-301(8), C.R.S. (order set aside if not supported by applicable law).

The respondent also contends that the ALJ erred in determining that the claimant's shoulder injury should be compensated as a whole person impairment. Because of our decision to remand the matter for determination of the respondent's endorsed issues concerning permanent partial disability, it would be premature to address the respondent's contention that the ALJ's award of whole person impairment is not supported by substantial evidence. The ALJ's determination on causation and apportionment may or may not affect his determination of whether the claimant sustained functional impairment outside of the schedule of disabilities and, therefore, we do not review that determination until the ALJ makes his decision on these issues.

For similar reasons we do not address the respondent's contention that the ALJ erred in awarding attorney fees for listing the causation and apportionment issues on the response to application for hearing. We have remanded the matter for the ALJ's consideration of the endorsed issues and, therefore, disagree with the ALJ's conclusion that there was a legal impediment to his consideration of the issues. In any event, the ALJ's order concerning attorney fees awarded to the claimant is interlocutory. *See Cortez v. Minco Manufacturing, Inc.*, W.C. No. 4-596-318, March 20, 2008 (award of attorney fees subject to further proceedings to determine amount deemed interlocutory).

Section 8-43-301(2), C.R.S., provides that any dissatisfied party may file a petition to review "an order which requires any party to pay a penalty or benefits or denies a claimant any benefit or penalty." An order which does not satisfy one of the finality criteria of this statute is interlocutory and not subject to immediate review. *Ortiz v. Industrial Claim Appeals Office*, 81 P.3d 1110 (Colo. App. 2003). Under this statute the order must be one that finally disposes of the issues presented. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999). Furthermore, orders which determine liability for benefits, without determining the amount of benefits, do not award or deny benefits as contemplated by this statute, and consequently, are not subject to review. *Oxford Chemicals, Inc. v. Richardson*, 782 P.2d 843 (Colo. App. 1989). An order may be partially final and reviewable and partially interlocutory). Under these principles our jurisdiction is purely statutory and may not be conferred by waiver, consent, or any other equitable principle. *Gardner v. Friend*, 849 P.2d 817 (Colo. App. 1992). The absence of a final, reviewable order is fatal to our jurisdiction. *Buschmann v. Gallegos Masonry, Inc.* 805 P.2d 1193 (Colo. App. 1991).

Here, the ALJ did not determine an amount of attorney fees owed to the claimant but, instead, ordered further proceedings on the issue. We also note that the record contains a subsequent affidavit from the claimant stating that he is no longer seeking fees.

Therefore, the issue is not a final award and not subject to review and we dismiss the respondent's petition to review of this issue without prejudice. Section 8-43-301(2), C.R.S.; see *Cortez v. Minco Manufacturing, Inc.*, *supra*.

II.

The respondent contends that the ALJ's order concerning maintenance medical benefits should be remanded for clarification. We agree. The ALJ made inconsistent conclusions in paragraphs 7 and 8 of the order concerning whether the claimant met his burden to establish his entitlement to maintenance medical benefits. ALJ order at 7-8 ¶¶ 7 and 8. These findings appear to be entered by mistake. Because there is evidence to support either finding, we are unable to ascertain the ALJ's intent regarding maintenance medical benefits. Therefore, we are unable to conduct a meaningful review of the order and are required to remand it to the ALJ for new findings which accurately reflect the evidence, resolve conflicts, and clarify the ALJ's intent. See *Hall v. Industrial Claim Appeals Office*, 757 P.2d 1132 (Colo. App. 1988).

III.

The respondent also appeals the ALJ's denial of the respondent's request for attorney fees. The respondent alleges that the claimant's endorsement of the issue of permanent total disability was unripe because the claimant was working when he endorsed the issue on the application for hearing. We agree with the ALJ that the fact that the claimant may have been working at the time the application for hearing on permanent total disability was filed does not necessarily constitute a legal impediment to litigating the issue.

Section 8-43-211 (2)(d), C.R.S., provides, "if any person requests a hearing or files a notice to set a hearing on issues which are not ripe for adjudication at the time such request or filing is made, such person shall be assessed the reasonable attorney fees and costs of the opposing party in preparing for such hearing or setting." An issue is not "ripe for adjudication" if, under the statutory scheme, there is a legal impediment to its resolution. See *BCW Enterprises, LTD v. Industrial Claim Appeals Office*, 964 P.2d 533 (Colo. App. 1997). Whether an issue is ripe for review is a legal question that an appellate court reviews de novo. See *Youngs v. Industrial Claim Appeals Office*, 297 P.3d 964 (Colo. App. 2012).

The claimant here contended that after the DIME he received additional restrictions and that he was unsure how those restrictions were going to affect his employment. Moreover, the claimant's ability to secure sheltered or occasional employment does not preclude a determination of permanent total disability. In *Joslins*

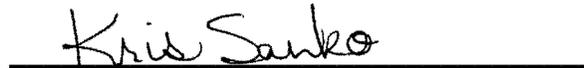
Dry Good Co. v. Industrial Claim Appeals Office, 21 P.3d 866 (Colo. App. 2001), for example, an award of permanent total disability benefits was upheld despite the fact the claimant was working at the time of the hearing, six years after the injury. Consequently, there was no legal impediment to the claimant pursuing the issue of permanent total disability benefits and the ALJ properly denied the respondent's request for attorney fees based on §8-43-211(2)(d), C.R.S.

IT IS THEREFORE ORDERED that the ALJ's order issued March 4, 2013, is set aside and remanded on the issues of permanent partial disability and maintenance medical benefits. We dismiss, without prejudice, the respondent's petition to review of the ALJ's award of attorney fees to the claimant and affirm the denial of the respondent's request for attorney fees.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 7/29/2013 _____ by _____ RP _____ .

PAUL BARELA, 2102 HELLBECK DRIVE, PUEBLO, CO, 81005 (Claimant)
CMHIP, Attn: ANTHONY CORDOVA, C/O: STATE OF COLORADO - PUEBLO
REGIONAL CENTER, 1600 W. 24TH STREET, RM 45A, PUEBLO, CO, 81003 (Employer)
KONCILJA AND KONCILJA, P.C., Attn: ROBERT D. BAUMBERGER, ESQ., 125 WEST
"B" STREET, PUEBLO, CO, 81003 (For Claimant)
RITSEMA & LYON, P.C., Attn: THOMAS L. KANAN, ESQ., 999 18TH STREET, SUITE
3100, DENVER, CO, 80202 (For Respondents)
BROADSPIRE, Attn: WENDY STALKFLEET, P O BOX 14348, LEXINGTON, KY, 40512-
4348 (Other Party)
STATE OF COLORADO, Attn: BRENDA HARDWICK, 1313 SHERMAN, DENVER, CO,
80203 (Other Party 2)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-862-591-03

IN THE MATTER OF THE CLAIM OF

SARA GOMEZ,

Claimant,

v.

ORDER OF REMAND

U.S. EXPRESS,

Employer,

and

LIBERTY MUTUAL,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Walsh (ALJ) dated March 7, 2013, that denied and dismissed her request for temporary disability benefits beyond October 31, 2012, that denied her requests for underpaid and unpaid temporary disability benefits, and that found overpayments of temporary disability benefits. We set aside the ALJ's order and remand for further findings and a new order.

The claimant was injured in an admitted work related injury on July 9, 2011. During various periods, the claimant received temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, or no temporary benefits, as stated in the respondents' general admissions of liability.

The claimant eventually was placed at maximum medical improvement (MMI) on November 1, 2012, by authorized treating physician (ATP), Dr. Hattem. In his report dated November 1, 2012, Dr. Hattem stated that he agreed with Dr. Jenks regarding case closure. He further opined that he would "schedule a functional capacity evaluation to determine permanent work restrictions. . . [w]hen [the claimant] returns, I will assign an impairment rating." The respondents did not file a final admission of liability due to the lack of an impairment rating.

The claimant filed an application for hearing seeking underpaid and unpaid temporary disability benefits for the periods of July 18, 2011, through September 5, 2011, and for January 19, 2012, through May 10, 2012, as well as temporary disability benefits beyond October 31, 2012, and interest. While the respondent insurer continued to pay TPD benefits, it sought to terminate them at the hearing.

A hearing was held on February 13, 2013. At the commencement of the hearing, the ALJ stated that in response to the claimant's application for hearing, the respondents cited a MMI date of September 17, 2012. The claimant's counsel then informed the ALJ that she had not received the respondents' response until January 14, 2013, which rendered the response untimely. The respondents' counsel informed the ALJ that the response was mailed timely in December 2012, and that he was unsure as to why the claimant had not received the response until January. The respondents' counsel further stated that the respondents responded to the claimant's interrogatories at least one month prior to the hearing setting forth their position so that the claimant received adequate notice, and he requested permission to file the response late. The ALJ orally denied the respondents' request to file the response late. He also noted, however, that his decision to deny the respondents' request made no difference because by statute they still could raise the defense that the claimant reached MMI on September 17, 2012, and temporary benefits ceased at that time. Tr. at 4-8.

During the hearing, the claimant submitted Exhibit 11, which was a summary of the benefits paid by the respondents and a summary of what the claimant asserted was underpaid and unpaid temporary benefits. Exhibit 11 stated that the total of temporary benefits owed by the respondent insurer was \$14,894.22, plus interest on all payments not received when due. Exhibit 11 summarized underpaid temporary disability benefits for the period of July 18, 2011, through September 5, 2011, which totaled \$1,525.71. Exhibit 11 also contained the amount of unpaid temporary disability benefits owed for the period of January 19, 2012, through May 10, 2012, which totaled \$8,066.74. The claimant explained that for this time period, temporary disability benefits were owed due to the claimant's failed return to work.

The respondents did not object to Exhibit 11, and stated that there was no dispute with the calculations or amounts that were listed in Exhibit 11. The respondents only disputed the MMI date, which they claimed was September 17, 2012. The respondents' counsel explained that this MMI date would affect the total in Exhibit 11 that actually was owed, but as far as the other information contained in Exhibit 11, the respondents stipulated to that. The ALJ asked whether the respondents agreed the information contained in Exhibit 11 was accurate, and they agreed it was correct. The ALJ then orally ruled that the calculations contained in Exhibit 11 were accepted as a stipulation. Tr. at 8-10.

During the hearing, the claimant testified that she had moved to Kansas on November 3, 2012. She explained that the respondent insurer had made travel arrangements for her the week prior to the hearing for the purpose of returning to her ATP for the assignment of an impairment rating. Tr. at 26.

After hearing, the ALJ found that the claimant was placed at MMI by the ATP on November 1, 2012, and he, therefore, was without jurisdiction to rule on the issue of MMI without an intervening DIME. The ALJ also found that based on Dr. Hattem's finding of MMI on November 1, 2012, the claimant's entitlement to temporary indemnity benefits ended on this date and the respondent insurer was no longer liable for such indemnity payments subsequent to the date of MMI.

The ALJ further found that the claimant was underpaid benefits for the period of July 18, 2011, through September 5, 2011, in the amount of \$1,525.71. Additionally, despite the fact that Exhibit 11 did not assert the claimant had been overpaid temporary benefits for the period of September 6, 2011, through November 8, 2011, the ALJ found an overpayment in the amount of \$1,405.39 for this period of time. The ALJ also found that the claimant was not entitled to temporary benefits for the period of January 19, 2012, through May 10, 2012. The ALJ concluded that there was insufficient evidence to find that the claimant was temporarily totally and/or partially disabled during this period. While the ALJ further found that the respondents were responsible for TPD benefits from August 15, 2012, through October 31, 2012, as specified in their general admission of liability, he also found that there was an overpayment for this period totaling \$1,643.52. This finding was based on the ATP's determination of MMI as of November 1, 2012, and the respondents' total payment of temporary benefits.

The ALJ then put together his own table as to the benefits paid by the respondent insurer. This table differed from the stipulated summary of calculations and amounts entered into evidence by the claimant as Exhibit 11, which was accepted by the ALJ as a stipulation. The ALJ ultimately concluded that the claimant was overpaid temporary benefits in the amount of \$1,643.52.

The claimant has filed a petition to review and brief in support of the ALJ's order. The respondents have not filed a brief in opposition.

I.

On appeal, the claimant argues that MMI was not an endorsed issue for hearing. The claimant asserts that the respondents failed to timely file their response to the application for hearing on the issue of MMI, and the ALJ lacked jurisdiction to determine MMI without the claimant having first been granted the opportunity to seek a DIME review. The claimant further asserts that since the claimant testified at the hearing that she had returned to Colorado the week prior to the hearing for an examination, testing, and completion of a rating, no hearing should have taken place concluding the issue of MMI until the finding of the DIME had been filed with the Division of Workers' Compensation. Under the particular facts in this case, we conclude that the issue of MMI was premature, and the ALJ should not have decided the issue.

MMI exists “when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” Section 8-40-201(11.5), C.R.S. The determination of MMI is governed by §8-42-107(8)(b), C.R.S., which provides that the initial determination of MMI shall be made by the authorized treating physician. If “either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2. . . .” The statute also specifically states that a hearing on this matter shall not take place until the DIME physician’s report has been filed with the Division of Workers’ Compensation. Section 8-42-107(8)(b)(III), C.R.S. (hearing on MMI not permitted until DIME physician's finding is filed with the division); *see also Colorado AFL-CIO v. Donlon*, 914 P.2d 396 (Colo. App. 1995).

Here, as of the date of the hearing, no impairment rating had been assessed by the ATP, no final admission had been filed, and no DIME had taken place. While the ALJ specifically found that he was “without jurisdiction to rule on the issue of MMI without an intervening” DIME, he nevertheless found and determined that the claimant was at MMI on November 1, 2012, and the claimant’s entitlement to temporary indemnity benefits therefore ended on this date. Conclusions of Law at 6 ¶4. We set aside the ALJ’s determination in this regard since we conclude that under the particular circumstances of this case, it was premature for the ALJ to address or determine the issue of MMI. *See* §8-42-107(8)(b)(III), C.R.S.; *see also Ratnecht v. Kettle River Corp.*, W.C. No. 4-547-777 (June 18, 2004).

To the extent the claimant argues that the ALJ erred in terminating temporary benefits as of November 1, 2012, since an impairment rating assessment had not yet been completed by the ATP, we agree. While the ATP placed the claimant at MMI as of November 1, 2012, and temporary benefits normally would terminate on this date, medical impairment benefits also are to begin on the date of MMI. Sections 8-42-105(3)(a)-(d), C.R.S., 8-42-106, C.R.S.; *see also Monfort Transp. v. Industrial Claim Appeals Office*, 942 P.2d 1358, 1360 (Colo. App. 1997); *Osborne v. Jon C. Thomas, P.C.*, W.C. No. 4-452-470 (June 14, 2006). The claimant had not received such medical impairment benefits, however, because she had been returned to the ATP the week prior to the hearing for purposes of obtaining an impairment rating. Tr. at 26. Temporary benefits are to continue until permanent disability is determined. *See Osborne v. Jon C. Thomas, P.C.*, *supra*. Thus, we set aside the ALJ’s order granting the respondent insurer’s request to terminate temporary payments since permanent disability had not yet been determined as of the date of the hearing. We further note that the respondent insurer is to receive a credit against permanent disability benefits for any temporary disability

benefits paid beyond the date of MMI. *See Monfort Transp. v. Industrial Claim Appeals Office of State of Colo., supra.*

II.

The claimant further disputes the ALJ's findings and determinations regarding underpayments and overpayments for several periods of time. The claimant argues that the ALJ erred in finding an overpayment of \$1,405.39 for the period of September 6, 2011, through November 8, 2011. The claimant asserts that during this time period, she returned to work light duty, and was paid an amount in excess of the TTD rate by the respondent employer. The claimant contends she made no claim for temporary disability benefits during this time, and the ALJ therefore erred in granting an overpayment credit against future TTD benefits.

The claimant also contends that the ALJ erred in not awarding unpaid temporary benefits totaling \$8,066.74 for the period of January 19, 2012, through May 10, 2012. The claimant argues that she attempted, on her own, to begin employment with Rocky Mountain Material and Asphalt during this time. The claimant's return to work, however, was unsuccessful and lasted only two days. Thus, the claimant argues she was entitled to TTD benefits for this period, and TPD for the two days she returned to work.

The claimant further argues that the ALJ erred in finding an overpayment of \$1,694.54 for the period of August 15, 2012, through October 31, 2012. The claimant further contends that temporary benefits could not be terminated as of November 1, 2012, absent a medical impairment rating by the ATP. We set aside the ALJ's determinations and remand for further findings and a new order.

Section 8-43-301(8), C.R.S. provides that we may set aside an order where the findings of fact are not sufficient to permit appellate review; that conflicts in the evidence are not resolved in the record; that the findings of fact are not supported by the evidence; that the findings of fact do not support the order; or that the award or denial of benefits is not supported by applicable law.

Here, while it is unclear, it appears as though the ALJ awarded an overpayment or a credit of \$1,405.39 against future TTD benefits for the period of September 6, 2011, through November 8, 2011. Pursuant to Exhibit 11, which the ALJ orally ruled he would accept as a stipulation, it does not appear as though the claimant made a claim for temporary benefits for the period of September 6, 2011, through November 8, 2011. See Tr. at 8-10. In her brief in support, the claimant asserts that she returned to light duty work for the respondent employer during this time and she was paid her preinjury wages. See Ex. 13 at 64-73. There is no statute or case law which would support a determination to grant an overpayment credit against future TTD benefits for a claimant who returns to

work at preinjury wages but does not make a claim for temporary benefits. We therefore set aside the ALJ's findings and determination of an overpayment of \$1,405.39 for this period of time and remand the matter for further findings and a new order to resolve these issues. Section 8-43-301(8), C.R.S.

We further set aside the ALJ's determination that the claimant was not entitled to temporary benefits for the period of January 19, 2012, through May 10, 2012. Again, the ALJ orally ruled that he would accept the calculations contained within Exhibit 11 as a stipulation. Tr. at 8-10. Exhibit 11 contained the amount of temporary indemnity benefits that the claimant stated she was not paid for "January 18, 2012, through May 20, 2012" (sic), which totaled \$8,066.74. Despite the parties' stipulation regarding the calculations in Exhibit 11 being correct, in his order, the ALJ found that the claimant "failed to establish that it is more likely than not that the period of time from 1/19/2012 through 5/10/2012 was a period for which the claimant was entitled to any indemnity benefits." Findings of Fact at 4 ¶23. Due to the parties' stipulation and the ALJ's oral ruling accepting Exhibit 11 as a stipulation, we must set aside the ALJ's order on this issue. Section 8-43-301(8), C.R.S. (findings of fact not supported by evidence). We also note that there is a discrepancy in the dates in Exhibit 11 for this period of time. Exhibit 11 refers to a disruption of time between January 18, 2012, through May 20, 2012. Exhibit 11 at 39. The claimant has admitted in her brief in support that there was an error in Exhibit 11 and that she instead was referring to May 10, 2012. Nevertheless, in the ALJ's order he refers to January 19, 2012, rather than to January 18, 2012, as stated in Exhibit 11. Thus, we remand the matter for the ALJ to enter a new order on these issues. Section 8-43-301(8), C.R.S.

Next, we also set aside the ALJ's order regarding an overpayment of \$1,694.54 for the period of August 15, 2012, through October 31, 2012. It appears as though the ALJ found an overpayment due to the respondent insurer's payment of temporary benefits past the MMI date of November 1, 2012. As determined above, however, the ALJ's order in this regard is premature because as of the date of the hearing, no impairment rating had been assessed by the ATP, no final admission had been filed, and no DIME had taken place. See §8-42-107(8)(b)(III), C.R.S.; see also *Ratnecht v. Kettle River Corp.*, *supra*. We once again note, however, that a respondent insurer is to receive a credit against permanent disability benefits for any temporary disability benefits paid beyond the date of MMI. See *Monfort Transp. v. Industrial Claim Appeals Office of State of Colo.*, *supra*.

To the extent the claimant argues that the ALJ used incorrect numbers for calculating an underpayment of \$1,525.71 for the time period of July 18, 2011, through September 5, 2011, we agree that there was a typographical error in the ALJ's AWW amount. We modify the ALJ's order to reflect the proper AWW of \$475.57. Section 8-43-310, C.R.S. (harmless error to be disregarded). Nevertheless, there was a calculation

error in Exhibit 11 for the time period of July 18, 2011, through September 5, 2011. While Exhibit 11 states the total amount owed for TPD was \$1,525.71, we modify the amount to reflect a total owed of \$1,498.71 (\$3,395.57 - \$1,896.86).

IT IS THEREFORE ORDERED that the ALJ's order dated March 7, 2013, is set aside and the matter is remanded for further findings and a new order consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



Kris Sanko

CERTIFICATE OF MAILING

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

7/30/2013 by RP.

SARA GOMEZ, 16 N ROOSEVELT STREET, COLORADO SPRINGS, CO, 80909
(Claimant)

LIBERTY MUTUAL, Attn: TRACY GARDNER, ADJUSTER, P O BOX 168208, IRVING,
TX, 75016 (Insurer)

STEVEN U. MULLENS, P.C., Attn: PATTIE J. RAGLAND, ESQ., P O BOX 2940,
COLORADO SPRINGS, CO, 80901 (For Claimant)

LAW OFFICES OF CHAD A. ATKINS, Attn: NICOLE CARRERA, ESQ., 5670
GREENWOOD PLAZA BLVD., STE 400, GREENWOOD VILLAGE, CO, 80111 (For
Respondents)

LAW OFFICES OF RICHARD P. MYERS, 1120 LINCOLN STREET, SUITE 1606,
DENVER, CO, 80203 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-892-321-01

IN THE MATTER OF THE CLAIM OF

HANNAH E HANSON,

Claimant,

v.

FINAL ORDER

FAIRFIELD & WOODS PC,

Employer,

and

HARTFORD FIRE INSURANCE
COMPANY,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Felter (ALJ) dated February 12, 2013, that ordered the claim compensable and ordered the respondents to pay for medical treatment and periods of temporary total disability benefits. We reverse.

After the completion of hearings held on November 1, 2012, and February 4, 2013, the ALJ submitted written Findings of Fact Conclusions of Law and Order. The ALJ found the claimant sustained an injury to her head on December 29, 2011. On that date she was involved in a low speed accident in a parking lot near her place of employment with the respondent law firm. The accident occurred when a lawyer with the law firm accidentally backed into the claimant's car. She and the lawyer had been in the process of exchanging a parking pass at the time. The claimant had previously suffered a concussion in the summer of 2010 when she hit her head on the top of her car. She received a second concussion in a car accident occurring in September, 2011. The ALJ determined the claimant had begun recovering to some extent from these previous injuries when the December 29, 2011, accident occurred. Based upon the reports and opinion of the claimant's treating physician, Dr. Bradley Gibson, the ALJ concluded, with record support, the claimant suffered an aggravation of her previous head injury on December 29. The claimant experienced symptoms of vertigo, slurring of her words and short term memory loss. She was required to miss periods of work before being released to resume work by Dr. Gibson on August 3, 2012.

The ALJ concluded the December 29 injury was compensable because the event causing the injury arose out of work and was in the course and scope of the claimant's employment. The claimant worked as a receptionist for the employer. In regard to most of its non-attorney employees, including the claimant, the employer did not provide or pay for parking. The employer did allow employees to pay for their parking costs through pretax earnings. The employer however, did not contribute to the pretax parking dollars. These consisted solely of the employee's earnings and were spent by the employee for whatever parking lot or cost the employee arranged. The claimant rented a parking space at a lot approximately a mile from the employer's office. An attorney at the employer, Mr. Tanner, planned a vacation out of town in December, 2011. The claimant described Tanner as a friend and he was not a supervisor of the claimant. As an attorney at the employer's firm, Tanner was provided a parking pass card. This pass card allowed him to park at no charge in the parking garage adjoining the office building in which the law firm was located. As he had on several occasions in the past, Tanner offered to let the claimant use his parking pass while he was out of town in December. Tanner was under no obligation to do so and the claimant referred to his offer as a kindness.

Tanner returned to the office on December 29. The claimant was scheduled to leave work the next day to accompany another attorney and his family on a trip out of town where she was to function as a babysitter. Tanner spoke with the claimant and stated he wanted to leave the office early that day and they arranged to exchange Tanner's parking pass. Their plan involved the claimant taking her break from work to drive her car out of the parking garage using the pass to avoid the parking charge. Tanner had parked his car in a nearby surface parking lot and had paid the full day parking fee for a spot in that lot. Upon exiting the parking garage, the claimant was to meet Tanner in the surface lot, hand him the parking pass and she would then park her car in the space Tanner had previously rented. When the claimant arrived at the surface lot, Tanner was required by traffic in the lot to back up his car and accidentally backed into the claimant's car before she could park in his space.

The ALJ concluded the December 29 accident and injury to the claimant arose out of and occurred within the course and scope of employment. The ALJ reasoned the 'dual purpose' doctrine applied. Because the circumstances of the accident were to achieve a benefit for both the claimant and for the employer, the accident could be seen to have arisen out of employment. The ALJ found the injury did not occur in the direct course of the claimant's work as a receptionist. However, the claimant benefited because she was able to park closer to work and the employer achieved a benefit because its worker was "happier." The employer was also found to benefit because Tanner retrieved his parking pass and was therefore able to park closer to work.

The difficulty with the application of this dual purpose doctrine in this case lies with the spectral nature of the benefit said to be enjoyed by the employer. The loaning by Tanner of his parking pass to the claimant was described by both parties to be a gesture of kindness between friends. The agreement was that the claimant would return the pass when Tanner returned to the office. Tanner did not receive any benefit, personal or practical, from this act. The record does not show any benefit to the employer through the act on the part of the claimant in returning to Tanner his pass.

The ALJ also determined the employer obtained a benefit by realizing a happier work force. This holding presents a circular analysis. The doctrine uses the word 'dual' because the activity at hand is useful to both the employee and the employer. The ALJ asserts that because the activity here was helpful to the claimant, for that reason the claimant is happier and therefore the employer also achieves an advantage. The activity then, need not have any 'dual' element. The ALJ is reasoning that an activity which is actually of sole benefit to the employee becomes work related because the employer now has a happy employee. This analysis recasts the doctrine as essentially a 'sole' purpose doctrine. If the activity leads to increased happiness for the employee, it is considered to have arisen from work.

Many cases involve compensable injuries that occur while the employee is making use of an employer provided fringe benefit. This is typically the situation where the employer provides a parking facility, *Woodruff World Travel, Inc. v. Industrial Commission*, 38 Colo. App. 92, 554 P.2d 705 (1976), or a break room for use by its employees, *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988). An injury involved through the use of those benefits arises within the course and scope of employment. These fringe benefits serve the employer's interest by helping to ensure general feelings of happiness or comfort among its employees. In those circumstances however, the employer has undertaken to provide the fringe benefit. In this claim the employer has taken no role in the provision of parking for the claimant. Recognizing an employment function in an activity for which the employer has no connection or control would serve to extend potential employer liability well beyond the scope of the Act. It could as easily be found that an injury to an employee while driving to a store to purchase clothes to wear to work was compensable because the clothes would serve to make the employee happier at work. A slip and fall by an employee in a grocery store aisle while shopping for items to include in his lunch for work the next day would similarly be considered compensable on the basis the employee was made happier by his lunch selection. These examples would provide workers' compensation coverage to activities never considered to have been part of the course and scope of employment.

In order for the fringe benefit to be considered a part of employment, there must be shown a substantial nexus between employment and the use of the benefit. The ALJ's

findings do not reveal any role performed by the employer in directing the claimant where to park or even whether to drive her car to arrive at work. The action then, of the claimant in receiving a temporary favor from an attorney in the office to allow her to park for a few days closer to the office is extraneous to any fringe benefit the employer offered to the claimant. In *Zamecnik v. Bradsby Group*, W.C. No. 4-684-646 (April 9, 2007), the claimant injured her ankle walking between a parking garage and the employer's building. The employer did provide the employee a reimbursement benefit for the cost of parking or traveling to work. The employer however, did not specify where the employees needed to park, nor did it indicate the mode of transportation to take to qualify for the reimbursement. This absence of direction by the employer led to the conclusion there was no nexus between the employment and the process of arriving at work.

Here, the ALJ's determination that the employer's payment of a portion of the travel costs did not establish the necessary causal connection between the job and the travel is supported by the record and reasonable inferences therefrom. As the ALJ noted, there was evidence that the form of transportation used was entirely up to each individual employee, and that the employer derived no benefit other than its employees' arrival at work.

...

The ALJ relied upon the facts that the employer did not provide a parking facility, nor was there any special convenience to the employer for the claimant to use the parking garage, other than the employees' mere arrival at work. The ALJ concluded that the claimant's use of the parking garage conferred no benefit on the respondent beyond the claimant's mere arrival at work.

...

Under these circumstances, the ALJ could, and did, find that the claimant had failed to establish the necessary causal connection between the employment and the injury.

Further, this determination supports the denial of benefits. (*Zamecnik*, pg. 2-3).

As indicated in *Zamecnik*, should the only benefit to the employer be the claimant's arrival at work, that is not a benefit that would establish a connection between parking and the terms and conditions of work. The fact that the claimant in *Zamecnik* might have been happier because she was able to park closer to the employer's site was of no consequence. As applied to this case, where the employer does not even reimburse for parking, the similar lack of direction or control by the employer does not allow for the establishment of a sufficiently close nexus between employment and the parking activities of the claimant that led to her injury.

The ALJ cites as authority for the dual purpose doctrine the case of *Berry's Coffee Shop v. Palomba*, 161 Colo. 369, 423 P.2d 2 (1967). In *Berry's Coffee Shop* the employer arranged to have a conference with the claimant regarding dissension at work between the employees. Because the conference could not be held at work due to the chance the discussion would be overheard by other employees, the claimant's supervisor directed the claimant to stay at work until closing and the two would then conduct the conference at her nearby apartment. The claimant fell while exiting her car in her apartment parking lot. The resulting injuries were found compensable because the claimant was in the course of participating in the conference required by her supervisor.

When the employer instructed claimant to remain at her place of employment, under the circumstances here present, she was obviously remaining on the job. To have a result based on whether claimant was on the premises or elsewhere, when the same purpose was to obtain, is creating a distinction which is not realistic.

...

Language not dissimilar is used in the case of *Aetna Casualty & Surety Company et al. v. Industrial Commission et al.*, 110 Colo. 422, 135, P.2d 140, wherein the court cites from other authorities with approval, as follows:

'The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment,** though he is serving at the same time some purpose of his

own * * *.' (423 P.2 5-6)

The case also refers to the dual purpose doctrine set forth in a legal treatise.

As to the 'dual purpose' doctrine asserted in Argument No. 1, supra, the rule is stated in 99 C.J.S. Workmen's Compensation s 221, as follows:

'An injury suffered by an employee while performing an act for the mutual benefit of the employer and the employee is usually compensable, for when some advantage to the employer results from the employee's conduct, his act cannot be regarded as purely personal and wholly unrelated to the employment. Accordingly, an injury resulting from such an act arises out of, and in the course of, the employment; and this rule is applicable, even though the advantage to the employer is slight.' (423 P.2d at 5).

There must however, be an 'advantage' to the employer which is distinct from the advantage to the employee. In *Berry's Coffee Shop*, the employer directed the claimant to drive to her apartment to participate in a personnel conference. The benefit to the claimant was the fact that she was able to travel to her home. In the obverse, participation in a personnel conference was only an advantage to the employer. The activity thus had 'dual' purposes.

Where the activity is for the sole benefit of the claimant, it would not be compensable. Therefore, when the claimant in *Kater v. Industrial Commission*, 728 P.2d 746, (Colo. App. 1986), undertook to teach a co-employee a dance step during a break at work to combat boredom, a resulting injury was not accepted as work related. There was no dual benefit.

To be compensable, an injury must arise out of and in the course of employment. Section 8-52-102(1)(b), C.R.S. (1986 Repl.Vol. 8B). If the acts of an employee at the time of the injury are for the employee's sole benefit, then the injury does not arise out of and in the course of

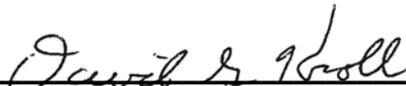
employment. *Brogger v. Kezer*, 626 P.2d 700 (Colo.App.1980). The record demonstrates that the activity of the Claimant at the time of her injury was for her sole benefit. (728 P.d at 747).

Here, the activity of the claimant was found by the ALJ to have not arisen directly from the duties of her job with the employer. The ALJ findings do not reveal any role performed by the employer in directing the claimant where to park or even whether to drive her car to arrive at work. The action then, of the claimant in receiving a temporary favor from an attorney in the office to allow her to park for a few days closer to the office is extraneous to any fringe benefit the employer offered to the claimant. The activities the claimant engaged in to arrange for parking would not qualify as also providing a benefit to the employer. They were for the sole benefit of the claimant. Without finding any distinction between the benefit to the claimant and that to the employer, the ALJ did not adequately identify a 'dual' purpose that would render the claimant's injuries compensable.

As in *Zamecnik*, the decision by the claimant as to which parking facility to use conferred no benefit on the employer. The activity then, of the claimant in taking steps to arrange a closer parking spot to the job site, can be seen as exclusively a benefit to her. There is not present any dual benefit. The factual findings of the ALJ do not support the legal conclusion the claimant was in the course and scope of employment when she was injured on December 29.

IT IS THEREFORE ORDERED that the ALJ's order issued February 12, 2013, is reversed and the claim for benefits is dismissed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Brandee DeFalco-Galvin

CERTIFICATE OF MAILING

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

_____ 7/23/2013 _____ by _____ RP _____ .

HANNAH E HANSON, 5365 S HARLAN WAY, LITTLETON, CO, 80123 (Claimant)
FAIRFIELD & WOODS PC, 1700 LINCOLN ST SUITE 2400, DENVER, CO, 80203
(Employer)

HARTFORD FIRE INSURANCE COMPANY, Attn: CLERICAL SUPERVISOR, C/O: SW
WORKERS' COMP CLAIM CENTER, PO BOX 14474, LEXINGTON, KY, 40512 (Insurer)

MARY EWING ESQ, C/O: EWING & EWING PC, 3601 S PENNSYLVANIA ST,
ENGLEWOOD, CO, 80113 (For Claimant)

BENJAMIN P. KRAMER ESQ., C/O: LAW OFFICES OF SCOTT TESSMER, 7670 S
CHESTER ST SUITE 300, ENGLEWOOD, CO, 80112 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-865-825-04

IN THE MATTER OF THE CLAIM OF

LOREN D KERSTIENS,

Claimant,

v.

ORDER OF REMAND

ALL AMERICAN FOUR WHEEL DRIVE,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer,

Respondents.

The respondents seek review of an order of Administrative Law Judge Cannici (ALJ) dated January 25, 2013, that found the claim to be compensable, determined the average weekly wage and awarded temporary total disability benefits. We affirm the order in part and remand for further findings in regard to the issue of temporary benefits.

The claimant contends he injured his low back while working as an auto mechanic for the employer on June 15, 2008. The respondents disputed the claim based on evidence of previous treatment for the claimant's back, the application of the statute of limitations in § 8-43-103(2) C.R.S., the claimant's responsibility for the loss of his job and the assertion the claimant's participation in automobile drag races was the actual cause of his injury and need for treatment.

A hearing was held on December 6, 2012. At the conclusion of the hearing and after the receipt of post-hearing position statements, the ALJ submitted Findings of Fact, Conclusions of Law and Order. The ALJ found the claimant injured his low back while at work on June 15, 2008. The claimant was bending over an engine when he felt a pop in his back and experienced immediate pain. The claimant continued to work for the employer without missing time from work. He treated with a chiropractor for four treatments but complained his back continued to hurt due to the need to stand at work. In December, 2009, the claimant was diagnosed with renal cancer. He underwent surgery to remove a kidney. The claimant returned to work in 2010, but continued to experience low back pain. The claimant saw Dr. Morfe for back treatment in December, 2010. A subsequent MRI revealed degenerative disc disease and a bulging disc annulus. The

claimant underwent a microdecompression surgery on July 13, 2011, performed by Dr. Prall.

The parties stipulated to the average weekly wage (AWW) and agreed that if the claim was found compensable the claimant's medical providers would be authorized and the claimant could return to see Dr. Morfe to receive a permanent impairment rating.

In his findings of fact and conclusions of law, the ALJ determined the claimant suffered a low back injury at work on June 15, 2008. This was described as a substantial aggravation of a preexisting condition. The ALJ found the injury was further aggravated after that date by continued work activities. The ALJ compared the testimony of Dr. Steinmetz with the report of Dr. Swarsen. The ALJ described the latter as more persuasive. He agreed with Dr. Swarsen's opinion that the June, 2008, injury was an acceleration of a previous back injury. He also concurred with Dr. Swarsen's opinion that drag racing activities were of tangential significance and were not the primary cause of the claimant's low back symptoms.

The ALJ rejected the contention the claim was barred by the statute of limitations. The ALJ reasoned the claimant had not missed any time from work due to his back injury until he underwent surgery in July, 2011. The claimant then, was considered to not have been aware that he had sustained a compensable injury until the he received a recommendation for surgery. The claimant had filed a workers' claim for compensation on September 14, 2011. Section 8-43-103(2) provides a claimant has two years from the injury to file a claim for compensation. Because the two year limitation does not begin to run until the claimant recognizes the nature, seriousness and probable compensable character of his injury, the ALJ resolved the limitation period began in December, 2010. The claim for compensation, then, was found to be filed in a timely fashion.

On appeal, the respondents argue the ALJ committed error when he found the claim compensable, declined to apply the statute of limitations and failed to address the issue of the claimant's liability for the termination of his employment.

I.

The question of whether the claimant proved an injury proximately caused by the employment is one of fact for determination by the ALJ. Consequently, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; *Wal-Mart Stores, Inc. v. Industrial Claims Appeals Office*, 989 P.2d 251 (Colo. App. 1999). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*. Testimony is

not incredible as a matter of law absent extreme circumstances where the testimony is rebutted by such hard, certain evidence that the ALJ would err as a matter of law in crediting it. *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). Nor is testimony incredible as a matter of law merely because it is inconsistent or conflicts with other evidence. *People v. Ramirez*, 30 P.3d 807 (Colo. App. 2001).

The ALJ relied on both the testimony of the claimant and upon the report of Dr. Swarsen. Dr. Swarsen reviewed the medical records concerning the claimant's work injury, both at the point it occurred and during the three years after that date. He also interviewed and examined the claimant. The opinion of Dr. Swarsen, as well as the claimant's testimony comprises substantial evidence that supports the ALJ's conclusion there is a compensable work injury. Section 8-43-301(8), C.R.S. It is the duty of the ALJ to review the conflicting evidence and determine which is most credible. Here, the ALJ weighed the report of Dr. Swarsen against the testimony of Dr. Steinmetz. We cannot say the ALJ erred in attributing more weight to the evidence provided by Dr. Swarsen. We decline to set aside the ALJ's finding of compensability.

II.

The respondents contend the two year statute of limitations specified in §8-43-103(2) began to run on the date of injury. They point to the receipt by the claimant of chiropractic treatment on that date. The respondents characterize this treatment as a "disability benefit." Because the claimant was treated at that time, it is claimed he became aware he had a compensable injury which required the filing of a claim for compensation. When he failed to file this claim within two years, by June 5, 2010, the respondents assert the statute of limitations ran and his claim was time barred. The respondents erroneously predicate that the provision of medical benefits is interchangeable with the receipt of 'disability' benefits.

Section 8-43-103(2), C.R.S., provides that the right to workers' compensation benefits is barred unless a formal claim is filed within two years after the injury. The statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character of his injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). For purposes of the statute of limitations, a "compensable" injury is one which is disabling, and entitles the claimant to compensation in the form of disability benefits. *City of Boulder v. Payne, supra; Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981). Therefore, to recognize the "probable compensable character" of an injury, the claimant must appreciate a causal relationship between the employment and the condition. The claimant must also know that the injury is disabling and may entitle him to disability benefits. Temporary disability benefits are payable if the injury causes the

claimant to miss more than three shifts from work. Section 8-42-103(1)(a), C.R.S. 2000; *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998); *Grant v. Industrial Claim Appeals Office*, 740 P.2d 530 (Colo. App. 1987).

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

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

...

Since no benefits flow to a workman merely because he has been the victim of an Accident and since Injuries must be of sufficient magnitude to prevent him from working for more than [three] days before they are compensable, it follows that the term ‘injury,’ as it is employed in [8-43-103(2)], means Compensable injury. In fact, the statute so states, in slightly different verbiage. It requires notice to be given ‘of an injury, for which compensation and benefits are payable * * * and the furnishing of medical, surgical or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section.’ *Id.* at 350-351.

The fact then, that the claimant received several chiropractic treatments after the time of his accident in 2008, would not necessarily lead to the conclusion he was reasonably to be aware he had a compensable injury which would justify the need to file

a claim for compensation. While knowledge of a compensable claim may also be seen as present when the claimant recognizes he will be required by his injury to miss more than three days from work in the future, *Born v. University of Denver*, 4-337-504 (May 9, 2001), *Ficco v. Owens Brothers Concrete*, 4-546-848 (November 20, 2003), the claimant did not receive that type of medical recommendation until he was actually referred for a surgical consult. That referral occurred in December, 2010, and was within two years of the date he filed his claim.

The determination of when the claimant recognized the probable compensable character of the injury is a question of fact for resolution by the ALJ. Therefore, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S. 2000. Substantial evidence is probative evidence which would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to the existence of contradictory testimony or contrary inferences. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The finding by the ALJ in this claim that the claimant was not aware of the compensable nature of his injury until December, 2010, when he sought treatment with Dr. Morfe is supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.

III.

The respondents complain the ALJ failed to address the issue as to whether the claimant was responsible for termination of his employment and therefore precluded from the receipt of temporary (TTD) benefits after October 10, 2011. The owner of the respondent employer, Mr. Dudden, testified he called the claimant on several occasions asking when he planned to return to work. On October 10, Mr. Dudden stated the claimant appeared at the employer's shop, collected his tools and left. Mr. Dudden understood this to be an unambiguous act of final resignation from the claimant's job.

The ALJ made no findings on this issue. The record included the testimony referenced above, cross-examination on these details by the claimant's counsel, and some rebuttal statements by the claimant. The respondents listed the issue in their Case Information Sheet and presented argument on the issue in their post-hearing position statement.¹

The ALJ specifies in his Order that the parties stipulated to an award of TTD between July 13 and November 29, 2011, in the event the claim was found compensable. The claimant states on appeal that there was such a stipulation but it was not digitally recorded. It indeed was not recorded. At the outset of the hearing, respondents' counsel

¹ The respondents also state the issue was included in their response to the application for a hearing. However, no copy of that response was included in the file received from the Office of Administrative Courts.

states the parties have agreed to two stipulations. The first pertained to the AWW and the second was to agree to accept the treatment of Dr. Morfe and Dr. Prall as authorized. (Tr. 4-5). There is no mention of temporary benefits. The opening comments by claimant's counsel contains the assertion the claimant is seeking TTD from July 13 through November 29. (Tr. 8). He does not indicate this is part of a stipulation. Given these statements in the record, it is apparent the ALJ was mistaken when he considered the issue of TTD to have been part of a stipulation.

The claimant argues in response that this is a harmless error. He points to the absence of any release to return to work from his physician. It is deduced that since none of the conditions listed in § 8-42-105(3) which allow for the termination of TTD are present, (MMI, return to work, medical release or a modified job offer), the claimant is eligible to receive TTD until November 29 regardless of whether he voluntarily resigned.

A determination regarding the claimant's responsibility for the loss of employment is not only a basis for the termination of TTD benefits, it is also a prerequisite to their receipt. This is due to the listing of the requirement in both §§ 8-42-105(4)(a) and in 8-42-103(1)(g). By adding the identical language to §8-42-103 and to §8-42-105, we infer that the legislature intended that the termination from employment be a potential factor both in the threshold entitlement determination and in the termination of temporary total disability benefits once begun. *See Palmer v. Borders Group, Inc.*, W.C. Nos. 4-751-397, 4-723-172 (November 28, 2008).

In *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008), the court of appeals addressed a situation similar to the present case and concluded that the employer's failure to offer the claimant modified employment did not bar the ALJ from denying continuing temporary total disability. The claimant was off work due to medical restrictions. After his injury he failed a drug test and was discharged by the employer. Although the claimant never returned to work, the ALJ denied his request for continuing temporary benefits after the date of his termination. The court reasoned that had the claimant not precipitated his termination from employment, he could have been offered modified work by the employer. The same analysis could apply to the facts alleged by the claimant in the present case. Should the claimant be found responsible for his termination, he would be barred from the receipt of temporary benefits regardless of the absence of the circumstances listed in § 8-42-105(3). *Gutierrez-Delgado v. North Star Foods*, 4-857-384 (December 19, 2012).

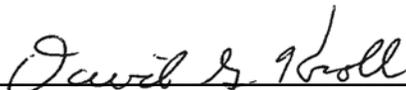
Moreover, the panel previously has applied the termination statutes in cases which the claimant was terminated from employment while receiving temporary total disability benefits. *See, e.g., Palmer v. Borders Group, Inc.*, W.C. Nos. 4-751-397, 4-723-172 (November 28, 2008); *Saenz v. Precious Source Inc.*, W.C. No. 4-676-721 (December 6,

2006); *Moreno v. Aspen Living Center*, W.C. No. 4-676-020 (November 16, 2006); *George v. T & M, Inc.*, W.C. No. 4-609-400 (July 20, 2006) *aff'd* *George v. Industrial Claim Appeals Office* No. 06CA1627 (Colo. App. October 25, 2007)(not selected for publication). Accordingly, the issue of the claimant's ability to receive TTD benefits is not a moot issue and the ALJ's failure to make findings and a decision on the issue is not harmless error.

Because the ALJ mistakenly inferred the issue of TTD benefits was disposed of by stipulation, the claim must be remanded to the ALJ to review the issue and make appropriate findings of fact and an order in that regard. The ALJ should inquire of the parties whether an additional hearing is necessary to resolve the contest. Otherwise, the order of the ALJ is affirmed.

IT IS THEREFORE ORDERED that the ALJ's order dated January 25, 2013 is affirmed as to the issue of compensability, the average weekly wage and the statute of limitations, but set aside as to the award of TTD benefits, and the matter is remanded for the ALJ to review the issue of termination for cause and make appropriate findings of fact and an order consistent with the views expressed herein.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

CERTIFICATE OF MAILING

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

_____ 8/1/2013 _____ by _____ RP _____ .

LOREN D KERSTIENS, 7913 SOUTH OTIS COURT, LITTLETON, CO, 80128 (Claimant)
TRUCK INSURANCE EXCHANGE, Attn: ELIZABETH NEU, C/O: WORKERS'
COMPENSATION BCO - DENVER, P O BOX 108843, OKLAHOMA CITY, OK, 73101-8843
(Insurer)
FLOYD YOUNGBLOOD PC, Attn: FLOYD M. YOUNGBLOOD, ESQ., 8400 EAST
CRESCENT PARKWAY SUITE 600, GREENWOOD VILLAGE, CO, 80111 (For Claimant)
HUNTER & ASSOCIATES, Attn: JOE M. ESPINOSA, ESQ., 1801 BROADWAY, SUITE
1300, DENVER, CO, 80202-3878 (For Respondents)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-861-379-01

IN THE MATTER OF THE CLAIM OF

PAMELA MATTORANO,

Claimant,

v.

FINAL ORDER

UNITED AIRLINES,

Employer,

and

SELF INSURED,

Insurer,
Respondents.

The claimant seeks review of an order of Administrative Law Judge Cannici (ALJ) dated March 20, 2013, that ordered the claimant to repay to the respondent an overpayment of \$2,122.60. We affirm.

The claimant appeals the decision of the ALJ in this matter which held she was required to repay an overpayment of permanent partial disability benefits. The overpayment occurred when a Division Independent Medical Exam (DIME) physician assigned the claimant a permanent impairment rating lower than that previously determined by her treating doctor.

The parties presented this case to the ALJ for decision upon stipulated facts. The stipulation recited that the claimant sustained an admitted work injury to her left ankle on February 8, 2010. The authorized treating physician, Dr. Hattem, placed the claimant at MMI on January 23, 2012. He assigned a permanent impairment rating of 16% of the lower extremity. The respondent filed a Final Admission of Liability (FAL) on January 30, 2012, which accepted the impairment rating and awarded the claimant \$8,490.73 in permanent partial disability (PPD) benefits. This award was paid in full to the claimant. The claimant disputed the FAL and requested a DIME review. Dr. Lindenbaum performed the DIME on May 16, 2012. He agreed with the date of MMI but calculated an impairment rating of 12% of the lower extremity. The respondent filed an amended FAL adopting the DIME rating and reducing the award of PPD benefits to \$6,368.05. The respondent then filed an application for a hearing seeking an order that the claimant repay the resulting \$2,122.60 overpayment of PPD benefits.

The claimant argued before the ALJ that the respondents were limited to enforcing the overpayment against future indemnity benefits. The respondent relied on the definition of ‘overpayment’ in § 8-40-201(15), C.R.S. and contended they are entitled to an order that the claimant actually repay the excess PPD benefits.

The ALJ concluded the claimant should be ordered to repay the overpaid benefits. He relied on the 1997 amendments to § 8-43-303(1) and (2)(a) and the definition of overpayment in § 8-40-201(15). He also cited to case authority represented by *Haney v. Shaw, Stone & Webster*, W.C. No. 4-796-763 (July 28, 2011), and *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009).

On appeal the claimant argues there is no ‘overpayment’. She contends that because the payment of the PPD funds by the respondent were made at a point where they were required by law, instead of made by mistake, they cannot be characterized as an overpayment as described by § 8-40-201(15). As authority, she cites to *Rocky Mountain Cardiology v. Industrial Claim Appeals Office*, 94 P.3d 1182 (Colo. App. 2004), and *United Airlines v. Industrial Claim Appeals Office*, ___ P.3d ___, (Colo. App. 2013)(No. 12CA1443, March 28, 2013) *cert. pending*.

Those cases do not support the claimant’s contention. *Rocky Mountain Cardiology, supra*, held that in the context of a *suspension* of temporary benefits due to a failure of the claimant to attend a rescheduled medical appointment, the respondents are obligated to reinstate temporary benefits once the claimant returns to see his treating physician. The respondents had contended that after their suspension of benefits pursuant to § 8-42-105(2)(c), a hearing was conducted and an ALJ found the claimant did not prove she had a work related injury. The Court however, held that because the respondents had filed an admission of liability awarding temporary benefits prior to the ALJ’s decision, they were required to pay temporary benefits up to the date of the ALJ’s order. They could not unilaterally stop temporary benefits in anticipation of an ALJ ruling in their favor. The Court found the ALJ’s order only operated prospectively. The eligibility for benefits prior to the date of the ALJ’s order was controlled, not by the order, but by the respondent’s admission of liability extant at the time. The difficulty with applying the *Rocky Mountain Cardiology* decision to the circumstances in this case lies in the acknowledgement by the Court that “... the record here shows that employer sought relief only as of the date of hearing and did not seek retroactive relief.” The ALJ and the Court then, were not asked to determine if any of the previously admitted and paid temporary benefits would constitute an ‘overpayment’ pursuant to § 8-40-201(15). That is the issue presented to the ALJ here and was not addressed by the *Rocky Mountain Cardiology* decision.

Similarly, the decision in *United Airlines v. Industrial Claim Appeals Office*, *supra*, dealt with circumstances distinct from those featured here. In *United Airlines*, the Court was asked to determine if temporary benefits received in excess of the \$75,000 cap for combined temporary and permanent partial benefits referenced in § 8-42-107.5, could be seen as an overpayment subject to recovery by the respondents. The Court ruled that temporary benefits in that category were not an overpayment. This was based on the conclusion that the benefits cap is generally a limitation on PPD benefits and not on temporary benefits. The Court pointed out that § 8-42-105(3) is written to insist that temporary benefits “shall” be paid until one of the conditions to stop benefits is present (*i.e.* attainment of MMI, a return to work, an offer of employment or a release to regular employment). The terms of the cap however, only apply to *combined* temporary and PPD benefits. It applies then, only to the eligibility for benefits, of either kind, after MMI is attained. In *United Airlines* then, the claimant’s receipt of temporary benefits prior to the date of MMI was never affected by the benefits cap. Those benefits were not an overpayment when received, are still are not an overpayment at this point, and will never be an overpayment in the future.

In this case, the benefits in question consist entirely of PPD benefits. Section 8-42-107.2(4) and § 8-43-203(b)(II)(A) provide that when a report from a DIME is received, the respondents shall file a FAL based on that report or else request a hearing. Absent a hearing challenging the impairment rating of the DIME, PPD benefits are controlled by the DIME’s impairment rating. There is no other statutory section which justifies payment of a greater amount of PPD benefits to the claimant. Unlike in *United Airlines*, there is no tension between discrete sections of the statute.

In *Haney v. Shaw, Stone & Webster*, W.C. No. 4-790-763 (July 28, 2011), involving similar circumstances, it was determined that the overpayment of temporary benefits was subject to recovery from the claimant as an overpayment. In *Haney*, the claimant was terminated from work by the employer based on his failure to pass a drug test. The respondents had previously filed an admission for ongoing temporary benefits. After a hearing conducted several months after the claimant’s termination from work, an ALJ found the claimant was responsible for the loss of his job pursuant to § 8-42-105(4)(a). The order by the ALJ requiring the claimant to repay to the respondents the temporary benefits paid between the date of the termination and the date of his order was affirmed. The order affirming was premised on the Court of Appeal’s analysis in *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d in part on unrelated grounds*, 232 P.3d 777 (Colo. 2010). In *Simpson* the Court pointed to the 1997 statutory amendments to § 8-43-303(1) & (2)(a) and to the definition of ‘overpayment’ in § 8-40-201(15.5). The amendment to § 8-43-303(1) and (2)(a) stated that upon a showing the claimant received overpayments, an award could be reopened

“and repayment shall be ordered”. The term ‘overpayment’ is defined in § 8-40-201(15.5):

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

The Court found the amendments pertaining to reopening allowed for the retroactive recovery of an overpayment. This was due to the statement in that statute specifying that a reopening would not affect an earlier award as to money already paid “except in cases of overpayment.” The definition provision was held to refer to three distinct types of overpayments connected as they were by the disjunctive use of the word “or”. One of those categories was for money received that a claimant was not entitled to receive. The definition also is explicit that an ‘overpayment’ could be found even when there would not have been an overpayment “at the time the claimant received ... benefits.” In *Simpson*, the respondents were allowed to recover a past overpayment by reducing the payment to the claimant of a lump sum award. The *Simpson* analysis however, was consistent with the ALJ’s and the Panel’s determination in *Haney* that temporary benefits paid pursuant to a general admission could be ordered retroactively repaid to the respondents.

The posture of the present case is similar to that in *Haney* and unlike the circumstances in *United Airlines*. As noted, the statute pertaining to PPD benefits provides they are to be awarded according to the impairment rating assigned by the DIME. That rating has resulted in an overpayment of PPD benefits because it is lower than the previous impairment rating determined by the treating doctor. The claimant did receive the higher award pursuant to an earlier Final Admission, but an ‘overpayment’ may result even though it did not “exist at the time the claimant received disability or death benefits under said articles.” That is the case here. Pursuant to § 8-43-303(1) an ALJ may reopen an award “and repayment shall be ordered”. In *United Airlines* the Court found there was no overpayment. That is not the case here. According to the statutes governing PPD awards, the claimant has been overpaid. The ALJ then, committed no error in ordering the excess PPD benefits to be repaid to the respondent.

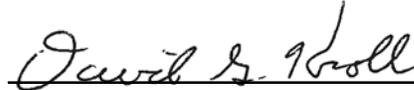
PAMELA MATTORANO

W. C. No. 4-861-379

Page 5

IT IS THEREFORE ORDERED that the ALJ's order issued March 20, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



David G. Kroll



Kris Sanko

PAMELA MATTORANO

W. C. No. 4-861-379

Page 7

CERTIFICATE OF MAILING

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

_____ 7/25/2013 _____ by _____ RP _____ .

PAMELA MATTORANO, 9156 FLINT WAY, BROOMFIELD, CO, 80020 (Claimant)
UNITED AIRLINES, C/O: CONCOURSE B, 8900 PENA BLVD, DENVER, CO, 80249
(Employer)

ROBERT W. TURNER ESQ., C/O: ROBERT W. TURNER LLC, 8400 E CRESCENT PKWY
SUITE 600, GREENWOOD VILLAGE, CO, 80111 (For Claimant)

LYNN P. LYON ESQ., C/O: RITSEMA & LYON PC, 999 - 18TH ST SUITE 3100, DENVER,
CO, 80202 (For Respondents)

GALLAGHER BASSETT SERVICES INC, Attn: JENNIFER GREEN, PO BOX 4068,
ENGLEWOOD, CO, 80155 (Other Party)

INDUSTRIAL CLAIM APPEALS OFFICE

W.C. No. 4-877-091

IN THE MATTER OF THE CLAIM OF

SCOTT SIMPSON,

Claimant,

v.

FINAL ORDER

SAFEWORKS, LLC,

Employer,

and

INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

Insurer,
Respondents.

The respondents seek review of an order of Administrative Law Judge Stuber (ALJ) dated March 11, 2013, that ordered them to pay temporary total disability benefits. We affirm.

A hearing was held on the issues of average weekly wage and the claimant's entitlement to temporary total disability benefits. After hearing the ALJ made factual findings that for purposes of review can be summarized as follows. The claimant was employed by the respondent employer as a rigger in San Francisco when he sustained a lifting injury to his right inguinal area on January 11, 2012. The claimant received treatment, including surgery, and was given work restrictions of no lifting over 10 pounds or doing any excessive bending. The claimant returned to modified duty for the respondent employer. The claimant was eventually released to full duty employment on March 15, 2012. The claimant continued to perform his full duty job duties through April 25, 2012. On April 26, 2012, the claimant resigned his job with the employer and returned to his home in Pueblo, CO.

Dr. Dallenbach became the claimant's authorized treating physician in Colorado. On July 25, 2012, Dr. Dallenbach reported that the claimant had tried to continue in full duty work but was unable to "because of the pain." Dr. Dallenbach imposed restrictions against lifting over 10 pounds or one pound repetitively, crawling, kneeling, squatting or climbing. The employer has not offered any modified duty job to the claimant.

Based on these findings the ALJ determined that the claimant proved that he was disabled and unable to perform his regular job duties. The ALJ further found that the claimant was responsible for the termination of his employment when he voluntarily resigned on April 26, 2012. The ALJ went on to conclude that the medical records indicated that the claimant's condition was progressively worsening and that as of July 25, 2012, the claimant's condition had worsened such that he was not able to perform regular duty work. The ALJ, therefore, concluded that the claimant demonstrated that his wage loss effective July 25, 2012 was due to his injury rather than to his voluntary resignation of his employment. The ALJ ordered the respondents to pay temporary total disability as of this date and continuing until terminated by law.

On appeal the respondents contend that the ALJ incorrectly applied the law in *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). The respondents do not dispute that the claimant's condition worsened after his voluntarily resignation, but instead argue that *Anderson* does not apply because the employer would have accommodated the increased restrictions had the claimant not resigned his employment. We are not persuaded that the ALJ erred.

Under the termination statutes, §§8-42-103(1)(g), C.R.S. and 8-42-105(4), C.R.S., a claimant who is responsible for the termination of regular or modified employment is not entitled to temporary disability benefits. *See Id.* The Supreme Court in *Anderson* determined that the bar to receipt of temporary disability benefits is not permanent. The court concluded that the termination statutes applied only to wage loss claims subsequent to voluntary or for-cause terminations of employment that do not involve a worsened condition. Therefore, the supreme court in *Anderson* held that "section 8-42-105(4) bars TTD wage loss claims when the voluntary or for-cause termination of the modified employment causes the wage loss, but not when the worsening of a prior work-related injury incurred during that employment causes the wage loss." *Anderson*, 102 P.3d at 326. *See Grisbaum v. Industrial Claim Appeals Office*, 109 P.3d 1054 (Colo. App. 2005).

The burden of proof to establish a subsequent worsening of condition and consequent wage loss is on a claimant who has been found responsible for a termination. In this case the respondents do not dispute that the claimant sustained a worsening of condition as of July 25, 2012, but instead contend that the wage loss was due to the claimant's termination because they would have accommodated the increased restrictions as a result of the worsened condition had the claimant not left his employment in April of 2012.

We, however, agree with the ALJ that the ruling in *Anderson* supports the determination that the claimant is entitled to temporary disability benefits because of a

worsening condition. As the court noted in *Anderson* the termination statutes were only intended to “weed out wage loss claims subsequent to voluntary or for-cause termination of modified employment that do not involve a worsened condition.” *Anderson*, 102 P.3d at 330. Based upon the supreme court's restrictive interpretation of the termination statutes, we have previously determined that *Anderson* should not be read as holding that the original basis under §8-42-105(4), C.R.S. for termination of the claimant's temporary disability is “revived” after the claimant's physical restrictions return to those in effect prior to the time the claimant was responsible for his termination from employment. See *Caraveo v. David J. Joseph Co.*, W.C. No. 4-358-465 (September 24, 2008); *Fantin v. King Soopers*, W.C. No. 4-465-221 (February 15, 2007). Rather, where the intervening worsening of the claimant's compensable condition provides the basis to award additional temporary disability benefits, the claimant is entitled to temporary disability benefits until terminated under one of the conditions set forth in §8-42-105(3), C.R.S. The fact that the respondents contend that they would have accommodated the claimant's work restrictions after July 25, 2012, does not provide a sufficient basis to terminate temporary disability benefits under the circumstances of this case. See *Speer v. National Mentor Holdings*, W.C. No. 4-680-959 (April 15, 2009); *Stokes v. Nordstrom*, W.C. No. 4-782-170 (July 23, 2010).

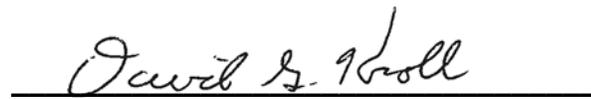
Here, the ALJ found with record support that no such event in §8-42-105(3) C.R.S., was alleged or proven at hearing. The respondents conceded that it did not offer the claimant a written offer of modified employment. Tr. at 7 and 31. Nor did the respondents provide evidence to show that an attending physician released the claimant to return to regular employment or that the claimant reached maximum medical improvement. In our view, the ALJ's order is consistent with applicable law and his findings are supported by substantial evidence. Consequently, we perceive no basis to disturb the ALJ's order.

IT IS THEREFORE ORDERED that the ALJ's order dated March 11, 2013, is affirmed.

INDUSTRIAL CLAIM APPEALS PANEL



Brandee DeFalco-Galvin



David G. Kroll

CERTIFICATE OF MAILING

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

_____ 7/25/2013 _____ by _____ RP _____ .

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

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

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

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

12CA2652 Ross v ICAO 08-01-2013

COLORADO COURT OF APPEALS

Court of Appeals No. 12CA2652
Industrial Claim Appeals Office of the State of Colorado
WC No. 4-836-203

Charles Ross,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado; Colorado Cab
Company, d/b/a Yellow Cab of Denver; and Old Republic Insurance Company,

Respondents.

ORDER AFFIRMED

Division II
Opinion by JUDGE MÁRQUEZ*
Loeb and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced August 1, 2013

Bachus & Schanker, LLC, James W. Olsen, Denver, Colorado for Petitioner

No Appearance for Respondent Industrial Claim Appeals Office

Moseley, Busser & Appleton, P.C., Scott M. Busser, Denver, Colorado, for
Respondent Colorado Cab Company

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

Charles Ross (claimant) seeks review of the final order issued by the Industrial Claim Appeals Office (Panel) upholding the determination that Old Republic Insurance Company, the insurance carrier for claimant's employer, Colorado Cab Company, doing business as Yellow Cab of Denver, is entitled to a \$108,000 offset against claimant's third-party settlement. We affirm.

I. Background

Claimant sustained injuries during the course and scope of his employment. He filed both a claim for workers' compensation and a third-party civil action against the parties he believed were responsible for his accident.

Claimant settled his civil claim for \$175,000. The insurance carrier, which had paid claimant approximately \$67,000 in benefits, accepted \$59,206.82 to extinguish its subrogation lien against the settlement proceeds. That reduced claimant's recovery from the third party to \$108,000.

In a subsequent workers' compensation hearing, the insurance carrier claimed an offset against the remaining \$108,000 of claimant's settlement for future benefits. The administrative law

judge (ALJ) noted claimant's testimony that he had received a check from the attorney representing him in the civil action for \$19,000, and that the remainder of the settlement proceeds were used to satisfy liens and attorney fees and costs. However, the ALJ found that claimant "offered no credible evidence as to the amount of attorneys fees and costs in the civil case that might be subject to apportionment." The ALJ also found that, because claimant did not request and secure the insurance carrier's written approval to the settlement as required by section 8-41-203(2), C.R.S. 2012, he was not entitled to any reduction in the offset for attorneys fees and costs. The ALJ, therefore, awarded the insurance carrier an offset of \$108,000 against any future benefits it was obligated to provide.

The Panel affirmed the ALJ's order on review.

II. Offset Amount

Claimant contends that the ALJ erred by granting the insurance carrier an offset greater than the \$19,000 in settlement proceeds he testified he received from his attorney in the civil action. We disagree.

A. Subrogation Under § 8-41-203, C.R.S. 2012

The payment of workers' compensation benefits to an injured employee operates as an assignment to the workers' compensation insurer of the employee's cause of action against a third-party tortfeasor responsible for the employee's injuries to the extent of the benefits for which the insurer is liable, including past and future benefits. § 8-41-203(1)(b), (c), C.R.S. 2012; *Colo. Comp. Ins. Auth. v. Jones*, 131 P.3d 1074, 1077 (Colo. App. 2005). The subrogation right extends to "all moneys collected from the third party causing the injury" for all economic damages and physical impairment and disfigurement damages that are paid or payable in the future. § 8-42-203(1)(d)(I), C.R.S. 2012. It does not apply to a claimant's recovery of noneconomic damages. § 8-41-203(d)(II), C.R.S. 2012; *Colo. Comp. Ins. Auth. v. Jorgensen*, 992 P.2d 1156, 1164 (Colo. 2000). Further, section 8-41-203(1)(e), C.R.S. 2012, requires (in cases such as the one here, where the insurer has not intervened in the civil matter or pursued the third party independently) that the injured employee's reasonable attorney fees and costs paid in

pursuing and collecting the third-party recovery be deducted from the subrogated amount.

The subrogation provisions in section 8-41-203 prevent an injured employee from receiving a duplicate recovery. *Hertz Corp. v. Indus. Claim Appeals Office*, 2012 COA 155, ¶14. Thus, when a settlement is reached with the third-party tortfeasor, the insurer's subrogation interest extends to the settlement proceeds. *Reliance Ins. Co. v. Blackford*, 100 P.3d 578, 580 (Colo. App. 2004).

B. Standard of Review

As required by section 8-43-308, C.R.S. 2012, we review an ALJ's findings of fact to determine whether they are supported by substantial evidence, in which case, we are bound by them.

However, we review de novo questions of law or the application of law to undisputed facts. *Hertz*, ¶ 12.

As a threshold matter, claimant urges that the issue he raises involves whether the ALJ and Panel correctly applied the subrogation statute, and, therefore requires de novo review.

However, the ALJ declined to reduce the offset for attorney fees and costs because of a lack of proof. Therefore, we conclude the proper

standard of review is section 8-43-308 (whether they are supported by substantial evidence). We also note claimant has not provided a transcript of the hearing before the ALJ.

C. Analysis

The Panel correctly determined that the ALJ improperly denied an attorney fee and cost reduction under section 8-41-203(2) for the failure to obtain the insurance carrier's approval. As the Panel found, claimant's settlement exceeded the compensation benefits paid, leaving no deficiency for which the insurance carrier was liable, which meant that claimant did not need the insurance carrier's written approval. *See Kennedy v. Indus. Comm'n*, 735 P.2d 891, 893 (Colo. App. 1986).

However, contrary to claimant's argument, section 8-41-203(2)'s exception to the attorney fee and cost reduction does not present the only circumstance in which a full offset may be awarded. Here, as in *Jordan v. Fonken & Stevens P.C.*, 914 P.2d 394 (Colo. App. 1996), on which the Panel also relied, the settlement proceeds were not apportioned between economic and noneconomic losses in the civil case nor pursuant to a separate

agreement, and the division held that the ALJ and Panel had no jurisdiction to determine such apportionment. *Id.* at 395.

Consequently, the division determined that the ALJ did not err by awarding a full offset without any apportionment. *Id.*

Claimant's remark that the remainder of the \$175,000 settlement after the \$19,000 payment to him was used to satisfy liens, attorneys fees, and costs, the only indication in the record of how the settlement proceeds were distributed, did not distinguish between economic and noneconomic damages or specify the amount of attorney fees and costs paid for the third-party recovery.

Claimant's failure to provide a transcript requires not only that we presume that substantial evidence supports the ALJ's factual findings, but also that the ALJ accurately described claimant's testimony. *See Nova v. Indus. Claim Appeals Office*, 754 P.2d 800, 801 (Colo. App. 1988). The ALJ's order also shows that the ALJ considered claimant's testimony despite claimant's assertion to the contrary.

Therefore, although section 8-41-203(2) did not apply, the ALJ lacked any ability to determine from claimant's remark whether and

to what extent he may have been entitled to a reduction in the offset for attorney fees and costs under section 8-41-203(1)(e). Under these circumstances, where no evidence supported apportionment, the ALJ, like the ALJ in *Jordan*, appropriately permitted an offset for the entire settlement amount.

III. Other Arguments

Claimant nonetheless maintains that any offset was limited under the plain language of the statute to the amount claimant “actually received.” However, the particular language in section 8-41-203(1)(b) refers to the “amount of the recovery . . . actually collected,” and it has been interpreted to mean that “the . . . carrier is entitled to subrogation credit for the amount of the monetary recovery, irrespective of whether the money is paid to the claimant directly or to an individual or legal entity designated to receive the proceeds.” *See Rocky Mountain Gen. v. Simon*, 827 P.2d 629, 632 (Colo. App. 1992). Therefore, the phrase “actually collected” does not preclude a full offset.

Similarly, granting a full offset in this case did not allow the insurance carrier to receive a double recovery. Although claimant

now argues that the remainder of the settlement proceeds were used to pay medical liens, nothing in the record indicated the type of liens that may have been satisfied. Moreover, the insurance carrier's offset functions as a credit only against benefits it becomes responsible for in the future. Thus, the payment of any medical liens would have had no effect on the insurance carrier's future liability.

IV. Conclusion

We conclude that the ALJ properly granted the insurance carrier a full offset against claimant's settlement proceeds.

The order is affirmed.

JUDGE LOEB and JUDGE TERRY concur.